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Zimbabwe

1 Introduction

The Republic of Zimbabwe is the country that used to be called Rhodesia. In 1923, the area was named Southern Rhodesia by the United Kingdom of which it was a colony. In 1965, the leader of Southern Rhodesia, Ian Smith, unilaterally declared independence of the country which became Rhodesia. The act of independence was immediately declared illegal by the United Kingdom. In the late 1960s and during the 1970s, armed liberation movements launched an internal guerrilla war of liberation. In 1979, Ian Smith's government was forced to the negotiating table at Lancaster House, where an agreement was reached on a democratic constitution.

Robert Mugabe was the first democratically elected leader of Zimbabwe. He was removed from power and as leader of the ruling Zanu-PF party in a quasi-military coup d'état on 19th November 2017. The same day, Mugabe's wife, Grace, whom some viewed as his natural successor, was expelled from Zanu-PF¹ along with 20 of her associates. On 20th November 2017, it was announced that Vice-President Emmerson Mnangagwa would return to Zimbabwe to enter into talks with Robert Mugabe concerning succession to the leadership of both Zanu-PF and the country. That same day, a motion to impeach and hold a no-confidence vote against Robert Mugabe was drafted, Mugabe eventually resigned as president on 20th November 2017. The Mugabes were granted immunity from prosecution on 23rd November 2017. Emmerson Mnangagwa was officially appointed president of Zimbabwe on 24th November 2017 and secured his first full term as president in the 2018 national elections.² It should be noted that the United States State Department's 2019 Human Rights Report on Zimbabwe states that, despite some improvements from previous elections, both domestic and international observers raised serious concerns and called for further reforms to meet regional and international standards for democratic elections.

Zimbabwe has a population of approximately 15 million people.³ Zimbabwe's generally poor economic indicators, including on-going inflation and currency woes, political violence and generally low levels of political freedom, including freedom of the press and other media, are well documented and have been further exacerbated by the coronavirus pandemic. However, Zimbabwe's economic outlook was already on a negative trajectory before the pandemic as a result of severe drought and Cyclone Idai that hit the country in 2019. Coupled with shortages of foreign currency and water, more than half the population were pushed into food insecurity. The Zimbabwean GDP contracted by 8.1% in 2019 and it is estimated that it will contract by a further 5 to 10% in 2020.⁴

Zimbabwe's urban population makes up roughly 32% of the nation's total population,⁵ and roughly 41% of the population has access to electricity.⁶ Approximately 36.3% of households had access to a television in 2011, and world bank predictions have shown that there has been little change to this figure since then. Mobile connections reach roughly 83% of the population; however, only 33% of the population has access to the internet, and only 6.6% of the country makes use of social media.⁷

Even though President Mnangagwa promised a new dawn for Zimbabwe,⁸ this has not been experienced by the media. At the time of writing, journalist Hopewell Chin'ono was back in prison awaiting a bail hearing on charges relating to a tweet regarding the court outcome of a gold smuggling scandal. He was already out on bail after being charged with inciting public violence.⁹ International organisations are taking up his case.

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

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

This chapter aims to equip the reader with an understanding of the main laws governing the media in Zimbabwe. Crucial weaknesses and deficiencies in these laws will also be identified. The hope is to encourage media law reform in Zimbabwe, 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 Constitution of Zimbabwe
- ▷ how rights are enforced under the constitution
- ▷ what is meant by the ‘three branches of government’ and ‘separation of powers’
- ▷ whether there are any weaknesses in the Constitution of Zimbabwe that ought to be strengthened to protect the media

2.1 Definition of a constitution

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

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

A crucial constitutional provision in this regard is section 1(1), which provides that Zimbabwe is a unitary, democratic and sovereign republic.

2.2 Definition of constitutional supremacy

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

The Zimbabwe Constitution does make provision for constitutional supremacy.

The supremacy of the constitution is listed in section 3(1)(a) as the first founding value or principle on which Zimbabwe is founded. In addition, section 2(1) specifically states that ‘This Constitution is the supreme law of Zimbabwe and any law, practise, custom or conduct inconsistent with it is invalid to the extent of the inconsistency’. Section 2(2) goes on to specify who is bound by the constitution. Section 2(2) states ‘The obligations imposed by this Constitution are binding on every person, natural or juristic, including the State and all executive, legislative and judicial institutions and agencies of government at every level, and must be fulfilled by them’.

The effect of this wording is that constitutional obligations are binding on every person and not just organs of state, that is, they have a so-called horizontal application (between persons) and not just vertical application (as between the state and the governed).

2.3 Definition of a limitations clause

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 according to the constitution.

The Constitution of Zimbabwe makes provision for two types of legal limitations on the exercise and protection of rights contained in Chapter 4, the Declaration of Rights namely, public emergency limitations and general limitations as contained in Part 5 of Chapter 4, which part is headed Limitation of Fundamental Rights and Freedoms.

2.3.1 Public emergency limitations

Section 87 of the Zimbabwe Constitution, read with the Second Schedule to the constitution, makes it clear that the fundamental rights and freedoms set out in Chapter 4 of the constitution may be limited by a written law providing for measures to deal with situations arising during a period of public emergency. This is, however, subject to certain requirements:

- ▶ such a law must be published in the Government Gazette
- ▶ any limitation which the law imposes on a fundamental right or freedom must not be greater than is strictly required by the emergency
- ▶ no such law (or any other law) may indemnify the state for any unlawful act or limit the following rights: life, human dignity, the right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment; the right not to be placed in slavery or servitude, the right to a fair trial or the right to obtain a *habeas corpus* order
- ▶ if a public emergency is declared in only a part of Zimbabwe, emergency law may not limit fundamental rights or freedoms in any other part
- ▶ as set out in the Second Schedule, there are several specific protections given to people detained under a declaration of a public emergency, including the establishment of a tribunal to review the cases of detainees and which must be given notice of every detention within ten days.

2.3.2 General limitations

The second type of limitation is a general limitations provision. General limitations provisions apply to the provisions of a Bill of Rights or other statement setting out fundamental rights. These types of clauses allow a government to pass laws limiting rights, provided this is done according to the constitution.

The general limitations clause applicable to the constitutional chapter which sets out the Declaration of Rights can be found in section 86 of the Zimbabwe Constitution, headed 'Limitations of Rights and Freedoms'. Section 86(1) provides that the fundamental rights and freedoms set out in Chapter 4 must be exercised reasonably and with due regard for the rights and freedoms of other persons. Section 86(2) provides that the fundamental rights and freedoms may be limited only:

- ▶ in terms of a law of general application. This means that the law may not single out particular individuals and deny them their rights.
- ▶ to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom, taking into account all relevant factors including:
 - ▶ the nature of the right or freedom
 - ▶ the purpose of the limitation, in particular, whether it is necessary in the interest of defence, public safety, public order, public morality, public health, regional or town planning or the general public interest
 - ▶ the nature and extent of the limitation
 - ▶ the need to ensure that the enjoyment of rights and freedoms by any person does not prejudice the rights and freedoms of others
 - ▶ the relation between the limitation and its purpose
 - ▶ less restrictive means to achieve the purpose.

These factors are important because they show that the limitation of a right has to be narrowly tailored and that its purpose must be interrogated by a court when deciding whether or not the limitation of the right is constitutionally sound.

It is also important to note that at least one of the rights contained in the Declaration of Rights is subject to what is known as an internal limitation. This is where the constitution sets out, in the text of the right itself, what the limits of such a right are. This is done, for example, in the right to freedom of expression and freedom of the media. The details of such an internal limitation are dealt with in section 2.5 below.

2.4 Constitutional rights that protect the media

The Zimbabwe Constitution contains several important provisions in Chapter 4, Declaration of Rights, that directly protect the media, including publishers, broadcasters, journalists, editors and producers. There are provisions elsewhere in the

constitution that also assist the media as it goes about its work of reporting on issues in the public interest, and those are included in this section too.

2.4.1 Freedom of expression and freedom of the media

The most important section that protects the media is section 61, which sets out several detailed and important provisions protecting freedom of expression and freedom of the media, including the broadcast media. Section 61(1) provides that:

Everyone has the right to freedom of expression, which includes:

- (a) freedom to seek, receive and communicate ideas and other information;*
- (b) freedom of artistic expression and scientific research and creativity; and;*
- (c) academic freedom.*

Importantly, section 61(2) specifically enshrines the right of every person to freedom of the media, which includes 'protection of the confidentiality of journalists' sources of information'.

The next two subsections of section 61 relate to electronic and state-owned media. The specificity and detail of the protections enshrined are testimony to the abuses that have been evident in the broadcasting sector in Zimbabwe's recent past.

Section 61(3) governs broadcasting generally. It provides that:

Broadcasting and other electronic media of communication have freedom of establishment subject only to State licensing procedures that:

- (a) are necessary to regulate the airwaves and other forms of signal distribution; and*
- (b) are independent of control by government or by political or commercial interests.*

Section 61(4) is noteworthy because it focuses on state-owned media. It provides that:

All state-owned media of communication must:

- (a) be free to determine the editorial content of their broadcasts or other communications independently;*
- (b) be impartial; and*
- (c) afford fair opportunity for the presentation of divergent views and dissenting opinions.*

These provisions require some explanation.

- ▶ These rights and freedoms apply to ‘everyone’ or ‘every person’ and not just to certain people, such as citizens. Hence, everybody enjoys these rights and freedoms.
- ▶ The basic freedom is not limited to speech (oral or written) but extends to non-verbal or non-written expression. There are many examples of this, including physical expression (such as mime or dance), photography or art.
- ▶ The right in section 61(1) specifically enshrines the freedom ‘to seek, receive and communicate ideas and other information’. This right of everyone’s to receive information is a fundamental aspect of freedom of expression, and this subsection enshrines the right to the free flow of information. Thus, the information rights of audiences, for example, as well as the expression rights of the media are protected. This right is important because it also protects organisations that foster media development. These organisations facilitate public access to different sources and types of information, particularly in rural areas which traditionally have little access to the media.
- ▶ Section 61(2) specifies that every person enjoys ‘freedom of the media’, which freedom includes ‘protection of the confidentiality of journalists’ sources of information’. This is very important because it:
 - ▶ makes it clear that this right can apply to corporate entities, such as a media house, a newspaper or a broadcaster, as well as to individuals
 - ▶ makes it clear that the right encompasses the media as a whole, meaning that it extends beyond the press, with its connotations of the news media. Media generally includes, for example, fashion, sport, gardening or business publications or television channels, thereby protecting all media, including the press
 - ▶ clearly protects journalists’ sources, a critical protection if proper investigative journalism (often based on whistleblowing) is to flourish. This kind of provision is extremely uncommon and will undoubtedly have a major impact on journalism in Zimbabwe.
- ▶ Section 61(3) makes it clear that broadcasters have the right to ‘freedom of establishment’. While this is subject to licensing procedures, it is clear that the state will no longer have the right simply to refuse to grant licences.
- ▶ Section 61(4) makes it clear that the state-owned media (including institutions such as the Zimbabwe Broadcasting Corporation) are to have editorial independence and are expected to be impartial and to air dissenting opinions.
- ▶ Section 61(5) lists expression which is excluded from the protections of the freedoms set out above. These are detailed in section 2.5 below.

2.4.2 Right of access to information

Another critically important provision that protects the media is section 62, which enshrines the right of access to information.

Section 62(1) provides that:

Every Zimbabwean citizen or permanent resident, including juristic persons and the Zimbabwean media, has the right of access to any information held by the State or by any institution or agency of government at every level in so far as the information is required in the interests of public accountability.

Section 62(2) provides that:

Every person, including the Zimbabwean media, has the right of access to any information held by any person, including the State, in so far as the information is required for the exercise or protection of a right.

Section 62(3) provides that:

Every person has a right to correction of information, or the deletion of untrue, erroneous or misleading information, which is held by the State or any institution or agency of government at any level, and which relates to that person.

Section 62(4) provides that:

Legislation must be enacted to give effect to this right, but may restrict access to information in the interest of defence, public security or professional confidentiality, to the extent that the restriction is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom.

This right requires some explanation.

- ▶ Sections 62(1) and (2) essentially provide for the right to access two types of information:
 - ▶ The first is a right to information which is required in the interests of public accountability. This right is available only to citizens or those with permanent residence. Note that Zimbabwean juristic persons and the media are specifically included. Further, only a state or government institution is required to provide such information. In other words, private companies or persons cannot be required to provide information on this ground.
 - ▶ The second is a right to information which is required for the exercise and protection of such a right. There are no pre-requirements for this right; everyone has the right to such information; that is there is no citizenship or permanent residency requirement in respect of the exercise of this right. In addition, this right applies in respect of information held by 'any person'. This formulation is broad and includes natural persons, private juristic persons and, specifically, the state.
- ▶ It is important to note the constitutional right to correct information or to delete untrue, erroneous or misleading information held by the state, provided

by section 62(3). Note that this right is not applicable in respect of information held by non- state persons or institutions.

- ▶ The provisions of section 62(4) require legislation to be passed to give effect to this right. This is significant because it means that Zimbabweans can look forward to the passage of access to information legislation. This is critical in the practical implementation of access to information rights.
- ▶ It is important to note, however, that section 62(4) does implicitly contain an internal limitation clause, which is dealt with more fully in section 2.5 below.

The right of access to information is vital in the information age. When states wield enormous power, particularly concerning the distribution of resources, the right of access to information is one of the most important rights in ensuring transparency and holding public power, that is, government, accountable.

If one considers that the media plays an enormous role in ensuring transparency and government accountability by providing the public with information, having this right of access to information is critical to enable the media to perform its functions properly.

2.4.3 Right to administrative justice

A third important provision that protects the media is section 68 headed Right to Administrative Justice. Section 68(1) provides that every person ‘has the right to administrative action that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair’. Section 68(2) provides that any person ‘whose right, freedom, interest or legitimate expectation, has been adversely affected by administrative action has the right to be given promptly and in writing the reasons for the conduct’. Section 68(3) requires that an act of parliament be passed to give effect to the rights provided for in sections 68(1) and (2), and which must provide for a court or independent tribunal to review administrative action and promote an efficient administration.

This right requires some explanation.

- ▶ This provision is important for journalists and the media because it protects them (as it does all people) from administrative officials who act unfairly and unreasonably and who do not comply with legal requirements. It also entitles them to written reasons when administrative action results in them being adversely affected.
- ▶ An administrative body is not necessarily a state body; they are often private or quasi-private institutions. So these constitutional requirements would apply to non-state bodies too.
- ▶ Many decisions taken by bodies are administrative. This requirement of administrative justice is important as it prevents or corrects unfair and unreasonable conduct on the part of administrative officials. Furthermore, having a constitutional right to written reasons is a powerful tool in ensuring rational

and reasonable behaviour on the part of administrative bodies. It also aids in ensuring transparency, and, ultimately, accountability.

Importantly, section 68(3) provides that national legislation must be enacted to give effect to the right to administrative justice. This is significant because it means that Zimbabweans can look forward to the passage of administrative justice legislation. This is critical in the practical implementation of administrative justice rights.

2.4.4 Right to privacy

A fourth protection is contained in section 57, headed Right to Privacy. Section 57 specifies that every person has the right to privacy, which includes the right not to have their:

- ▶ home, premises or property entered or searched
- ▶ person searched
- ▶ possessions seized
- ▶ privacy of their communications infringed on
- ▶ health condition disclosed.

Note that this protection of privacy of communications (which would include emails, SMS and telephone conversations) is an important right for working journalists.

2.4.5 Freedom of assembly and association

A fifth protection provided for in section 58 grants every person the right to freedom of assembly and association, thereby guaranteeing the rights of the press to form press associations, as well as media houses and operations. An interesting feature of the drafting of this right is that section 58 stresses the right *not* to assemble or associate, including the right not to be compelled to belong to an association or to attend a gathering. This is doubtless due to Zimbabwe's recent experience of coerced attendance at political meetings and of forced party membership.

2.4.6 Freedom of conscience

A sixth protection contained in section 60 guarantees every person the right to freedom of conscience. This includes not only 'freedom of thought, opinion religion or belief', s60(1), but also 'freedom to practise and propagate and give expression to their thought, opinion, religion or belief, whether in public or in private and whether alone or together with others', s60(2). Freedom of opinion is important for the media as it protects commentary on public issues of importance. It is noteworthy that the Zimbabwe Constitution expressly protects the right to propagate and give expression to such an opinion. This bolsters the general right to freedom of expression and freedom of the media.

2.4.7 Freedom of profession, trade or occupation

Section 64 guarantees everyone the right to choose and carry on any profession, trade or occupation, but the practice of a profession, trade or occupation may be regulated by law. Note that in and of itself this is not a dangerous internal limitation, it merely allows for appropriate regulation to protect the public, such as ensuring against malpractice by members of, for example, the medical profession or unethical behaviour by lawyers.

2.5 Other constitutional provisions that assist the media

2.5.1 Provisions regarding good governance

One of the provisions of the preamble to the Zimbabwe Constitution provides for ‘recognising the need to entrench democracy, good, transparent and accountable governance and the rule of law’.

Section 3 of the constitution is headed Founding Values and Principles, and one of these is a commitment to good governance. Section 3(2) sets out in more detail what the principles of good governance are. For the media, two principles of good governance that are particularly important are:

- ▶ a multi-party democratic political system
- ▶ transparency, justice, accountability and responsiveness.

Section 9 of the constitution is headed Good Governance. Section 9(1) provides that the state must adopt and implement policies and legislation to develop efficiency, competence, accountability, transparency, personal integrity and financial probity in all institutions of government. In particular:

- ▶ appointments are to be made primarily on merit
- ▶ measures must be taken to expose, combat and eradicate corruption and abuse of power.

The Zimbabwe Constitution is interesting because it has an entire chapter (Chapter 9) devoted to principles of public administration and leadership.

Section 194 of the constitution is headed Basic Values and Principles Governing Public Administration. Some of these are important for the work of the media. For example:

- ▶ efficient and economical use of resources must be promoted
- ▶ public administration must be development-oriented
- ▶ services must be provided impartially, fairly, equitably and without bias
- ▶ people’s needs must be responded to within a reasonable time, and the public must be encouraged to participate in policy-making

- ▶ transparency must be fostered by providing the public with timely, accessible and accurate information.

Section 196 of the Zimbabwe Constitution is titled Responsibilities of Public Officers and Principles of Leadership. Section 196(1) provides that the authority assigned to a public officer is a public trust, which must be exercised in a manner that:

- ▶ is consistent with the constitution
- ▶ demonstrates respect for the people and a willingness to serve rather than rule them
- ▶ promotes public confidence.

Section 196(3) provides that public officers in leadership positions must abide by the principles of:

- ▶ objectivity and impartiality in decision-making
- ▶ honesty
- ▶ accountability
- ▶ discipline and commitment in the service of the people.

Furthermore, section 198 requires that legislation be passed to enforce the provisions of Chapter 9 of the constitution, which legislation is to include measures:

- ▶ requiring public officers to make regular disclosures of their assets
- ▶ establishing codes of conduct
- ▶ specifying standards for good corporate governance for government-owned entities
- ▶ providing for disciplining persons who contravene the provisions of Chapter 9 of the constitution or any applicable code of conduct.

These are relevant to the media because references to transparency, efficient use of resources and the provision of information assist the media in performing its various public information roles.

2.5.2 Provisions regarding the functioning of parliament

Several provisions in the constitution regarding the functioning of parliament are important for the media:

- ▶ Section 141 of the Zimbabwe Constitution is headed Public Access to and Involvement in parliament. In brief, it provides for several mechanisms to facilitate public access to parliament, including the following:
 - ▶ Parliament is to facilitate public involvement in legislative and committee processes.

- ▶ Parliament (including its committees) is to conduct its business transparently and hold its sittings in public. Parliament is entitled to take measures to:
 - › preserve order
 - › regulate public access, including the media, and including to exclude them
 - › search persons entering parliament and, where appropriate, to refuse entry or to remove persons from parliament.

But such measures have to be fair, reasonable and justifiable in a democratic society based on openness, justice, human dignity and freedom.

- ▶ Section 148 of the Zimbabwe Constitution is headed Privileges and Immunities of parliament. It specifically protects freedom of speech of the president of the Senate, the Speaker and members of parliament (MPs). This means that they cannot be arrested, face criminal prosecution, be sued in the civil courts, or face imprisonment or damages for anything said in, produced before, and submitted to parliament or any of its committees.

These provisions assist the media in important key ways. First, they ensure that the media has a great deal of access to the workings of parliament. In other words, the media is physically able to be present in parliament. Second, they protect parliamentarians. The provisions allow MPs to speak freely in front of the media without facing arrest or charges for what they say.

2.6 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. There are a number of these:

2.6.1 Right to human dignity

The right to human dignity is provided for in section 51 of the Zimbabwe Constitution, which states that ‘Every person has inherent dignity in their private and public life, and the right to have that dignity respected and protected’. Dignity is a right that is often raised in defamation cases because defamation, by definition, undermines the dignity of the person being defamed. This right is one that is often set up against the right to freedom of the press, requiring a balancing of constitutional rights. The formulation of this right is interesting because it specifically protects dignity in a person’s public as well as private life. This could potentially be used to bolster the rights of public figures in defamation cases.

2.6.2 Right to privacy

Similarly, the right to privacy (discussed in some detail above) is often raised in litigation involving the media, with the subjects of press attention asserting their rights not to be photographed, written about or followed in public. The media has to be careful in this regard and should be aware that there are always boundaries concerning privacy which need to be respected and which are dependent on the particular circumstances, including whether or not the person is a public figure or holds public office, and the nature of the issue being dealt with by the media.

2.6.3 Internal limitation on the right to freedom of expression

It is important to note that the right to freedom of expression is one of the few rights in the Declaration of Rights that is subject to an internal limitation.

Section 61(5) provides that the right to freedom of expression and freedom of the media does not extend to four types of expression, namely:

- ▶ incitement to violence
- ▶ advocacy of hatred or hate speech
- ▶ malicious injury to a person's reputation or dignity
- ▶ malicious or unwarranted breach of a person's right to privacy.

It is important to understand the nature of the provisions of section 61(5). There is a misconception that the Zimbabwe Constitution outlaws or makes illegal these kinds of expressions. That is not correct. The constitution states that these kinds of expression do not fall within the right to freedom of expression; in other words, they are simply not constitutionally protected.

What is the effect of this? Quite simply, it means that the government may prohibit these kinds of expression without needing to meet any of the requirements contained in the general limitations clause. Why not? As there is no right to make these kinds of expression, there is no need to justify the limitation of these kinds of expression. The danger in this, of course, is that the government is free to be heavy-handed and to legislate disproportionately when regulating these kinds of expression.

Furthermore, it is important to note the provisions of sections 61(5)(c) and (d), which deal with malicious injury to reputation or breach of privacy. These are extremely unusual provisions and could have a negative impact on the actual exercise of freedom of expression by the media if they are interpreted broadly by a court. In our view, dignity and privacy need to be balanced against the rights to freedom of expression in all situations and should not be allowed to trump freedom of expression.

2.6.4 States of emergency provisions

It is also important to note the provisions of section 113, which deal with states of public emergency. A state of emergency may be declared by the president for 14 days (although this can be extended for up to three months at a time) with parliament's approval. As set out above, section 87 specifically allows for emergency legislation to provide for the derogation of rights laid down in the Declaration of Rights (including all of the rights that are important to the media, such as the right to freedom of expression, privacy, access to information, administrative justice and so on), where this is strictly required by the emergency.

2.7 Key institutions relevant to the media established under the Constitution of Zimbabwe

Several important institutions concerning the media are established under the Zimbabwe Constitution. These are the judiciary, the Judicial Service Commission, the Human Rights Commission, the Zimbabwe Media Commission, the National Peace and Reconciliation Commission and the Zimbabwe Anti-Corruption Commission.

2.7.1 The judiciary

In terms of section 162 of the Zimbabwe Constitution, the judicial authority of the republic is vested in the courts. These are the Constitutional Court (the apex court in respect of constitutional matters); the Supreme Court (the apex court in respect of non-constitutional matters); the High Court; the Labour Court; the Administrative Court; magistrates' courts; customary law courts and any other court established in terms of an act of parliament.

The judiciary is an important institution for the media because the two rely on each other to support and strengthen democratic practices in a country. The judiciary needs the media to inform the public about its judgments and its role as one of the branches of government, and the media is essential for building public trust and respect for the judiciary, which is the foundation of the rule of law in 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.

Section 164(1) specifically provides that the courts 'are independent and subject only to this Constitution and the law, which they must apply impartially, expeditiously and without fear, favour or prejudice'. In terms of section 180, judges are appointed by the president, acting on the recommendation of the Judicial Service Commission (JSC). In terms of section 182, magistrates are appointed by the JSC. In terms of section 187, judges are removed by the president acting on a finding by a tribunal of suitably qualified people appointed by him and following a recommendation by the JSC to investigate. Grounds for removal are inability to perform the functions of the office, gross incompetence or gross misconduct.

2.7.2 The Judicial Service Commission

The JSC is a constitutional body that is established in terms of Part 3 of Chapter 8 of the constitution headed The Judiciary and the Courts. Section 190 sets out the functions of the JSC. These include promoting judicial independence and accountability, tendering advice to government on the judiciary, and functions relating to the employment, discipline and conditions of service of persons employed in the courts.

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

In terms of section 189(1), the JSC is made up of :

- ▶ the Chief Justice
- ▶ the deputy Chief Justice
- ▶ the Judge President of the High Court
- ▶ one judge nominated by the judges of the Constitutional Court, the Supreme Court, the High Court, the Labour Court and the Administrative Court
- ▶ the attorney-general
- ▶ the chief magistrate
- ▶ the chairperson of the Civil Service Commission
- ▶ three practising legal practitioners with at least seven years' experience designated by the association representing the Zimbabwe legal profession
- ▶ one professor or senior law lecturer designated by an association representing the majority of law teachers in Zimbabwe
- ▶ one public accountant or auditor designated by an association representing such auditors and public accountants
- ▶ one person with at least seven years' experience in human resources management, appointed by the president.

2.7.3 The Commission on Human Rights and Public Administration

The Human Rights Commission is also an important organisation in respect of the media. It is a Chapter 12 body, that is, an independent commission supporting democracy. Its brief is extremely wide in terms of section 243(1) of the constitution and includes:

- ▶ promoting awareness of, respect for, and the protection, development and attainment of human rights
- ▶ monitoring, assessing and ensuring observance of human rights

- ▶ receiving and considering public complaints
- ▶ protecting the public against abuse of power and maladministration by the state
- ▶ investigating the conduct of any authority or person, where it is alleged that human rights have been violated
- ▶ securing appropriate redress, including recommending the prosecution of offenders
- ▶ directing the police to investigate suspected criminal violations of human rights
- ▶ recommending effective measures to promote human rights to parliament
- ▶ researching issues relating to human rights and social justice
- ▶ visiting and inspecting prisons, refugee camps, and places housing the mentally ill to ascertain conditions and to make recommendations to the responsible minister regarding those conditions.

Section 242 provides that the Human Rights Commission consists of a chairperson (who must be a lawyer with at least seven years' experience) appointed by the president after consultation with the JSC and the Committee on Standing Rules and Orders (note that this is a parliamentary committee) and eight other members from a list of not fewer than 12 nominees submitted by the Committee on Standing Rules and Orders. All members are to be chosen for their integrity and their knowledge and understanding of, and experience in, the promotion of human rights.

In terms of section 237, a member of the Human Rights Commission can be removed only on the grounds of inability to perform the functions of his or her office, gross incompetence, gross misconduct, or if he or she has become ineligible for appointment. Note that the procedure for the removal of judges also applies to the removal of a member of the Human Rights Commission.

2.7.4 The Zimbabwe Media Commission

Section 248 of the Zimbabwe Constitution will, hopefully, prove supportive of the media in Zimbabwe. It establishes the Zimbabwe Media Commission. It is also a Chapter 12 body, that is, an independent commission supporting democracy. The functions of the Zimbabwe Media Commission are set out in section 249(1):

- (a) to uphold, promote and develop freedom of the media;*
- (b) to promote and enforce good practices and ethics in the media;*
- (c) to monitor broadcasting in the public interest and, in particular, to ensure fairness and a diversity of views broadly representing Zimbabwean society;*
- (d) to encourage the formulation of codes of conduct for persons*

employed in the media, and where no such code exists, to formulate and enforce one;

- (e) to receive and consider complaints from the public and, where appropriate, to take action against journalists and others employed in the media or broadcasting who are found to have breached any law or any code of conduct applicable to them;*
- (f) to ensure that the people of Zimbabwe have fair and wide access to information;*
- (g) to encourage the use and development of all the officially recognised languages of Zimbabwe;*
- (h) to encourage the adoption of new technology in the media and the dissemination of information;*
- (i) to promote fair competition and diversity in the media; and*
- (j) to conduct research into issues relating to freedom of the press and expression, and in that regard to promote reforms in the law.*

It is important to note that section 249(2) provides that an act of parliament may confer power on the Zimbabwe Media Commission to:

- ▶ conduct enquiries into circumstances that appear to threaten the freedom of the media and the conduct of the media
- ▶ take or recommend disciplinary actions against media practitioners who are found to have breached any law or any applicable code of conduct.

Furthermore, section 249(3) specifically provides that an act of parliament may provide for the regulation of the media; however, the section is silent as to of what kind of regulation this may consist.

Section 250 specifically provides that the Zimbabwe Media Commission may, via the appropriate minister, submit reports to parliament on particular matters relating to the media which, in the Commission's opinion, should be brought to parliament's attention.

Section 248 provides that the Zimbabwe Media Commission consists of a chairperson appointed by the president after consultation with the Committee on Standing Rules and Orders and eight other members from a list of not fewer than 12 nominees submitted by the Committee on Standing Rules and Orders. All members are to be chosen for their integrity, their competence in administration, and their knowledge and understanding of human rights and best practices in media matters.

In terms of section 237, a member of the Zimbabwe Media Commission can be removed only on the grounds of inability to perform the functions of his or her office, gross incompetence, gross misconduct, or if he or she has become ineligible for appointment. Note that the procedure for the removal of judges also applies to the removal of a member of the Zimbabwe Media Commission.

2.7.5 National Peace and Reconciliation Commission

Although not directly related to the media, the proposed National Peace and Reconciliation Commission, which is established in terms of section 251, may well prove useful for the media. Its aims, which are set out in section 252, include:

- ▶ bringing about national reconciliation by encouraging people to tell the truth about the past, and facilitating the making of amends and the provision of justice
- ▶ developing procedures and institutions at a national level to facilitate dialogue among political parties, communities, organisations and other groups, to prevent conflicts and disputes arising in the future.

The National Peace and Reconciliation Commission is also a Chapter 12 body, that is, an independent commission supporting democracy.

Section 248 provides that the National Peace and Reconciliation Commission consists of a chairperson (who must be a lawyer with at least seven years' experience) appointed by the president after consultation with the JSC and the Committee on Standing Rules and Orders, and eight other members from a list of not fewer than 12 nominees submitted by the Committee on Standing Rules and Orders. All members are to be chosen for their integrity, their knowledge and understanding of, and experience in, mediation, conciliation, conflict prevention and management, post-conflict reconciliation or peacebuilding.

In terms of section 237, a member of the National Peace and Reconciliation Commission can be removed only on the grounds of inability to perform the functions of his or her office, gross incompetence, gross misconduct, or if he or she has become ineligible for appointment. Note that the procedure for the removal of judges also applies to the removal of a member of the National Peace and Reconciliation Commission.

2.7.6 Zimbabwe Anti-Corruption Commission

The Zimbabwe Anti-Corruption Commission is established in terms of section 254 of the constitution and falls under Chapter 13 of the constitution, headed Institutions to Combat Corruption and Crime. Although not directly relevant to the media, certain of the aims of the Commission are of relevance to the media and will assist in creating an overall climate of transparency and accountability.

Section 255(1) sets out the functions of the Zimbabwe Anti-Corruption Commission. These include:

- ▶ investigating and exposing cases of corruption in both the public and private sectors
- ▶ promoting honesty, financial discipline and transparency in the public and private sectors.

Section 254 provides that the Zimbabwe Anti-Corruption Commission consists of a chairperson appointed by the president after consultation with the Committee on Standing Rules and Orders and eight other members from a list of not fewer than 12 nominees submitted by the Committee on Standing Rules and Orders. All members are to be chosen for their integrity and their knowledge of, and experience in, administration or the prosecution or investigation of crime or for their general suitability for appointment.

In terms of section 256, read with section 237, a member of the Zimbabwe Anti-Corruption Commission can be removed only on the grounds of inability to perform the functions of his or her office, gross incompetence, gross misconduct, or if he or she has become ineligible for appointment. Note that the procedure for the removal of judges also applies to the removal of a member of the Zimbabwe Anti-Corruption Commission.

2.7.7 Important features of the independent commissions supporting democracy

Three institutions listed above (the Zimbabwe Human Rights Commission, the Zimbabwe Media Commission and the National Peace and Reconciliation Commission) are Chapter 12 bodies, that is, independent commissions supporting democracy. It is important to note that the Zimbabwe Constitution lays out several provisions specifically intended to bolster the independence of these bodies.

Section 233 sets out certain general objectives applicable to all the Chapter 12 commissions and for the media. The following are particularly important:

- ▶ to support and entrench human rights and democracy
- ▶ to promote transparency and accountability in public institutions
- ▶ to secure the observance of democratic values and principles by the state, and all institutions and agencies of government.

Section 235 states that all such commissions:

- ▶ are independent and are not subject to the direction or control of anyone
- ▶ must act according to the constitution
- ▶ must exercise their functions without fear, favour or prejudice
- ▶ are accountable to parliament for the efficient performance of their functions.

Section 236 contains several provisions designed to ensure that members of the independent commissions are, and remain, non-political. Section 237(1) contains additional provisions regarding the appointment of members of these commissions. Importantly, the Committee on Standing Rules and Orders is required to advertise a position, invite public nominations, conduct public interviews of prospective candidates and prepare a list of appropriate nominees for appointment for submission to the president.

2.8 Enforcing rights under the constitution

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

Section 85 of the constitution provides that rights are generally enforceable by the courts. The constitution envisages the right of people, including individuals or associations acting on their behalf or on behalf of one or more others, to assist in the enforcement of rights by having jurisdiction to bring such court action.

Perhaps one of the most effective ways in which rights are protected under the Zimbabwe Constitution is by the provisions of the constitution which entrench Chapter 4, the Declaration of Rights. Section 328(6) of the constitution requires that a constitutional amendment to Chapter 4 be passed by two-thirds of the members of the National Assembly and the Senate. It must be submitted to a national referendum, thereby providing significant protection for the Declaration of Rights provisions.

2.9 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.

2.9.1 Branches of government

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

The executive

In an unusual formulation, section 88(1) of the Zimbabwe Constitution provides that 'Executive authority derives from the people of Zimbabwe and must be exercised in accordance with this Constitution'. Section 88(2) goes on to specify that executive authority is vested in the president and is exercised by him through the Cabinet subject to the constitution.

In terms of section 105(1) of the Zimbabwe Constitution, the Cabinet is made up of the president (head of Cabinet), the vice-presidents and ministers appointed by the president. Section 110 sets out the executive functions of the president and Cabinet. These include the following:

- ▶ president:
 - ▶ summoning parliament, the National Assembly or the Senate to an extraordinary sitting

- ▶ making presidential appointments
- ▶ calling elections in terms of the constitution
- ▶ calling referendums
- ▶ deploying the defence force.
- ▶ Cabinet:
 - ▶ directing the operations of government
 - ▶ preparing, initiating and implementing national legislation
 - ▶ developing and implementing national policy
 - ▶ advising the president.

Generally, the role of the executive is to administer or enforce laws, to make government policy and to propose new laws.

The legislature

In terms of section 117(1) of the Zimbabwe Constitution, legislative authority in Zimbabwe is vested in the legislature. In terms of section 116, the legislature of Zimbabwe consists of parliament and the president.

In terms of section 118 of the Zimbabwe Constitution, parliament consists of the Senate and the National Assembly. In terms of section 117(2), this legislative authority has the power to amend the constitution, make legislation and confer subordinate legislative powers (for example, the power to make regulations) on another body. Parliament also fulfils other important functions. In terms of section 119(3), these functions include being the body to which all institutions and agencies of the state and government at every level are accountable.

In terms of section 120, the Senate consists of 80 senators, of whom:

- ▶ six are elected from each of the provinces by a system of proportional representation in terms of which party lists are made up of male and female candidates, listed alternately and headed by a female candidate
- ▶ sixteen are chiefs, of whom two are elected by the provincial assembly of chiefs from each province other than the metropolitan provinces
- ▶ one is the president and another the deputy president of the National Council of Chiefs
- ▶ two are elected to represent persons with disabilities.

In terms of section 124, the National Assembly is made up of:

- ▶ 210 members elected by secret ballot from constituencies into which Zimbabwe is divided

- ▶ an additional 60 members, six from each of the ten provinces elected by a system of proportional representation. This applies only for the life of the first two parliaments after the effective date of the constitution.

The judiciary

As already discussed in this chapter, judicial power in Zimbabwe is vested in the courts. The role of the judiciary is essentially to interpret the law and to adjudicate legal disputes in accordance with the law.

2.9.2 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 abuses of power. This is known as the separation of powers doctrine.

The aim, as the Zimbabwean Constitution has done, is to separate the functions of the three branches of government, the executive, the legislature and the judiciary, so that no single branch 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 in accordance with the constitution.

2.10 Weaknesses in the constitution that ought to be strengthened to protect the media

The new Zimbabwe Constitution contains several significant improvements to the previous constitution and represents a new era for the media in Zimbabwe. There are, however, still a number of weak points. If these provisions were strengthened, there would be specific benefits for Zimbabwe's media.

2.10.1 Remove internal constitutional limitations

The internal limitation contained in section 61(5) of the constitution and applicable to the right to freedom of expression and freedom of the media ought to be repealed. These provisions are unnecessary because the provisions of the general limitations clause give the government the power it needs to limit fundamental rights reasonably. Consequently, the legislature already has the power to pass legislation limiting hate speech, unreasonable invasions of privacy and other kinds of expression that are the subject of the internal qualifier found in section 61(5).

2.10.2 Licensing powers to be given to the Zimbabwe Media Commission

Broadcasting is currently regulated by the Broadcasting Authority of Zimbabwe (BAZ). The relationship between the BAZ and the proposed constitutional Zimbabwe Media Commission (which is still to be established some seven years after the coming into force of the constitution) is unclear. We believe that the newly

inaugurated constitutional Zimbabwe Media Commission should be additionally responsible for licensing broadcasting services to ensure that broadcasting licensing matters are carried out by a body with genuine independence.

2.10.3 Constitutional protections for the public broadcaster

The state broadcaster, the Zimbabwe Broadcasting Corporation (ZBC), suffers from a great deal of government interference. Most Zimbabweans access news and current affairs information via the ZBC. The constitution should therefore specifically protect the ZBC's independence and ensure that it operates in the public interest to guarantee impartiality and expose Zimbabweans to a variety of views.

3 The media and legislation

In this section, you will learn:

- ▷ what legislation is and how it comes into being
- ▷ legislation governing the print media
- ▷ legislation governing the media generally
- ▷ legislation governing the broadcast media in general
- ▷ legislation governing the public broadcasting sector
- ▷ legislation governing the broadcasting signal distribution
- ▷ legislation that undermines a journalist's duty to protect his or her sources
- ▷ legislation that prohibits the publication of certain kinds of information
- ▷ legislation that prohibits the interception of communication
- ▷ 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 the legislature, that is, the president and parliament. As already discussed, in terms of the constitution, parliament in Zimbabwe is made up of the Senate and the National Assembly.

Chapter 6 of the Zimbabwe Constitution deals with the legislature, and Part 6 thereof deals with its legislative and other powers. In respect of legislation, sections 130–133 are important.

In terms of section 130 of the constitution, both houses of parliament, the Senate and the National Assembly, have the authority to initiate, prepare, consider or reject legislation.

Section 131(2) provides that an act of parliament is a bill which has been:

- ▶ presented in and passed by both houses of parliament
- ▶ assented to and signed by the president.

There are detailed rules in Schedule 5 to the Zimbabwe Constitution, headed Procedure as to Bills and Other Matters in Parliament, which set out the different law-making processes that apply to different types of legislation. Journalists and others in the media need to be aware that the constitution requires different types of legislation to be passed in accordance with particular procedures. The procedures are complicated and need not be explained here. Journalists should, however, be aware that in terms of the Constitution of Zimbabwe, there are three different kinds of legislation, each of which has particular procedures and, rules both or applicable to it. These are:

- ▶ legislation that amends the constitution, the procedures, applicable rules or both are set out in section 328 of the Zimbabwe Constitution
- ▶ ordinary legislation, the procedures, applicable rules or both are set out in sections 131–133 of the constitution (discussed below)
- ▶ legislation that deals with taxation issues, the procedures, applicable rules or both are set out in paragraph 7 of Schedule 5 of the constitution

3.1.2 The difference between a bill and an act

A bill is a piece of draft legislation that is debated and usually amended by parliament during the law-making process. If a bill is passed by the Zimbabwe Parliament in accordance with the various applicable procedures required for different types of bills, as set out above, it becomes an act once it is signed by the president (signifying his assent to the bill), in terms of section 131 of the constitution.

An act must be published promptly and takes effect or comes into force when

it is published or on a date specified in the act, in terms of section 132 of the constitution. Besides the checks on legislation that are built into the system of having both houses of parliament consider and vote on a bill, the constitution provides for other mechanisms of reviewing a bill passed by parliament before it becomes an act. If the president has reservations about the constitutionality of any bill passed by parliament, she or he may refer it back to the National Assembly for reconsideration, in terms of section 131(6)(b) of the constitution. After the reconsideration has taken place and it has been re-passed, the president must either accept the bill (that is, sign it such that it becomes an act) or refer the bill to the Constitutional Court for a ruling on its constitutionality, in terms of section 131(8). If the Constitutional Court rules that the bill is constitutional, section 131(9) requires the president to assent to and sign the bill.

3.2 Legislation governing the print media

Zimbabwe's print media environment has been one of the most repressed and censored, and routinely features extremely low on international barometers of media freedom. There are several limitations on the ability to operate as a print media publication in Zimbabwe or even as a journalist. Many of the laws impose obligations on the print media. They are unreasonable and unjustifiable in a democratic society and impinge greatly on the public's right to know. New, and controversial, legislation provides for a statutory body, the Zimbabwe Media Commission, to regulate, among other things, the print media. This is not in line with international best practice, which does not consider statutory regulation of the print media to be in accordance with the basic principles of press freedom.

The Printed Publications Act, 1975 (Chapter 25:14) is a pre-independence piece of legislation that has been amended post-independence. There are certain crucial requirements laid down by the Printed Publications Act in respect of a book, which is defined in section 2 as including 'a newspaper, periodical or other printed publication published at regular or irregular intervals', but specifically excludes parliamentary papers in terms of section 3.

- ▶ Section 4(1) requires printers of books in Zimbabwe to include the following information in a legible imprint:
 - ▶ full and correct name of the printer and the place where such book was printed
 - ▶ full and correct name of the publisher and his or her place of business
 - ▶ year of publication.
- ▶ Section 4(2) provides that failure to comply with section 4(1) is an offence and, on conviction, a person would be liable to a fine, imprisonment not exceeding three months or both.
- ▶ Note that section 4(3) provides that the Minister of Home Affairs (or whichever minister is responsible for the administration of the Printed Publications Act) may exempt certain books from compliance with section 4(1), where the book

is used for the state, the courts, statutory bodies, or trade or business, or other books subject to conditions that he may impose.

- ▶ Section 5(1) requires a publisher, at its cost, to supply a copy of each book published, to the Director of the National Archives, the director of the National Library and the authority having control of the Public Library, Bulawayo, within 30 days.
- ▶ Section 5(4) provides that failure to comply with section 5(1) is an offence and, on conviction, a person would be liable to a fine, imprisonment or both.
- ▶ Note that the schedule to the Printed Publications Act contains a list of books which are exempt by the minister from being provided by the publisher in terms of section 5(1). These include diaries, bookplates, Christmas cards, colouring books, forms, postcards, commercial, entertainment or industrial catalogues and the like.

3.3 Legislation governing the media generally

Legislative provisions regarding media regulation, print, broadcasting and online, are in a state of flux at the time of writing this chapter. While commissioners for the constitutionally-mandated Zimbabwe Media Commission (ZMC) have been appointed and the ZMC was formally inaugurated on 15 October 2020,¹⁰ a bill setting out its powers and functions has yet to be enacted.

Similarly, a new Freedom of Information Act, Act 1 of 2020, which came into force on 1 July 2020, has repealed the old Access to Information and Protection of Privacy Act 2002, which contained numerous provisions regarding monitoring and registration requirements of the press, but has kept statutory instruments made thereunder (regulations, for example) in force.

The Assignment of Functions (Minister of Media, Information and Broadcasting Services) Notice, Statutory Instrument 21 of 2014 stipulates that the Minister of Media, Information and Broadcasting is to be responsible for the media and broadcasting sector discussed in the acts below in so far as those functions have not been assigned to a different minister.

3.4 Legislation governing the broadcast media generally

3.4.1 Statutes that regulate broadcasting generally

Broadcasting in Zimbabwe is regulated in terms of the Broadcasting Services Act, 2001 [Chapter 12:06].

The Broadcasting Services Act establishes and empowers the Broadcasting Authority of Zimbabwe (BAZ), the authority that regulates broadcasting.

Section 249(1)(c) read with section 249(1)(e) of the constitution provides that the role of the Zimbabwe Media Commission (ZMC) includes monitoring of

broadcasting in the public interest with particular reference to hearing complaints regarding non-compliance with any applicable code of conduct or any law. Again, it is unclear how the ZMC is to relate to the BAZ going forward in the absence of new legislation governing the affairs of the ZMC in detail.

3.4.2 Establishment of the Broadcasting Authority of Zimbabwe

In section 3, the Broadcasting Services Act establishes the BAZ. In terms of section 4, it operates via a board called the Broadcasting Authority of Zimbabwe board.

Main functions of the BAZ

In terms of section 2A, read with section 3(3) of the Broadcasting Services Act, the main objects of the BAZ and the Broadcasting Services Act include:

- ▶ ensuring efficient use of the broadcasting service bands
- ▶ encouraging modern and efficient infrastructure
- ▶ promoting the provision of a wide range of broadcasting services that are of high quality and calculated to appeal to a wide variety of tastes and interests, providing education, information and entertainment
- ▶ providing sufficient broadcasting services throughout Zimbabwe
- ▶ ensuring that broadcasting services provide:
 - ▶ regular news services
 - ▶ public debate on political, social and economic issues of public interest
 - ▶ programmes on matters of local, national, regional and international interest or significance

to foster and maintain a healthy plural democracy

- ▶ promoting peace, stability and national cohesion by the provision of broadcasting
- ▶ promoting public, community and commercial broadcasting services in the public interest
- ▶ ensuring the independence, impartiality and viability of public broadcasting services
- ▶ ensuring that providers of broadcasting services can do so efficiently, continuously and are independently financially viable
- ▶ developing broadcasting systems following international standards and public demand
- ▶ promoting the interests of consumers, purchasers and others concerning quality and variety of broadcasting services

- ▶ maintaining and promoting effective competition
- ▶ ensuring the application of standards to provide adequate protection against:
 - ▶ material that is harmful or offensive to members of the public
 - ▶ the unfair treatment of individuals in television or radio programmes
 - ▶ unwarranted infringements of privacy
- ▶ preserving national security and the integrity of Zimbabwe
- ▶ fostering a Zimbabwean national identity and Zimbabwean values.

To achieve these and other objectives, the BAZ is granted the following powers and functions in terms of section 3(2) of the Broadcasting Services Act:

- ▶ planning and advising on the allocation and distribution of the available frequency spectrum
- ▶ advising the minister on the adoption of standards and codes for broadcasting equipment
- ▶ receiving, evaluating and considering applications for the issuing of any broadcasting licence
- ▶ monitoring tariffs charged by broadcasting licensees
- ▶ advising the minister of ways to improve the regulatory environment to ensure the development of a broadcasting industry that is efficient, competitive and responsive to audience needs and the national interest
- ▶ encouraging diversity in the control of broadcasting services
- ▶ ensuring Zimbabweans have effective control of broadcasting services
- ▶ promoting high-quality and innovative programming
- ▶ encouraging providers of commercial and community broadcasting services to be responsive to the need for fair and accurate coverage of matters of public interest
- ▶ ensuring the provision of means of addressing complaints about broadcasting services
- ▶ ensuring that broadcasting services place a high priority on the protection of children from exposure to programme material which may be harmful
- ▶ ensuring compliance with the Broadcasting Services Act and licence conditions
- ▶ carrying out functions as may be prescribed by the minister, subject to the Broadcasting Services Act.

Appointment of the BAZ board members

In terms of section 4(2) of the Broadcasting Services Act, the BAZ board is made up of 12 members appointed as follows:

- ▶ Nine members (of whom at least three shall be women) are appointed by the president after consultation with the Minister of State for Information and Publicity and parliament's Committee on Standing Rules and Orders as follows:
 - ▶ two shall be persons chosen for their experience or qualifications in the field of broadcasting technology and broadcasting content, respectively
 - ▶ one shall be a Chief, as defined in the Traditional Leaders Act and nominated by the Council of Chiefs referred to in that Act
 - ▶ one shall be a legal practitioner of not less than five years' standing
 - ▶ one shall be a public accountant of not less than five years' standing
 - ▶ one shall be a representative of churches or other religious bodies, chosen from a list of nominees submitted by groups considered by the minister to be representative of churches or other religious bodies
 - ▶ three other members.
- ▶ Three members (at least one of whom must be a woman) are to be appointed by the president from a list of six nominations submitted by the Committee on Standing Rules and Orders.

Section 4(4) read with section 2 of the Third Schedule to the Broadcasting Services Act sets out grounds for disqualification of BAZ board members. These include being foreign, having a financial conflict of interest, prior criminal convictions, or being a member of parliament or a member of two or more statutory bodies.

Funding for the BAZ

In terms of section 5 read with the Fourth Schedule to the Broadcasting Services Act, the BAZ is funded from a range of sources, including:

- ▶ fees, charges and other income derived from licences issued and other things done by the BAZ in terms of the Broadcasting Services Act
- ▶ proceeds of any monetary penalties imposed by the BAZ for violations by licensees of applicable codes of conduct
- ▶ money appropriated by parliament, in other words, funding for the BAZ must be provided for in the national budget.

3.4.3 Making broadcasting regulations

The Broadcasting Services Act, at section 46, sets out the BAZ's regulation-making powers. The BAZ is given wide powers to make regulations that are required or permitted to be prescribed by the Broadcasting Services Act or that, in the opinion

of the BAZ board, are necessary or convenient to be prescribed for the carrying out or giving effect to the act.

Note, however, that section 46(6) of the Broadcasting Services Act provides that the BAZ's regulations are of no force and effect until they have been approved by the Minister of Information and Publicity and published in the Government Gazette.

3.4.4 Licensing regime for broadcasters in Zimbabwe

Categories of broadcasting services

Section 7(2) of the Broadcasting Services Act provides that there are ten categories of broadcasting services:

- ▶ *Commercial*: This is a free-to-air radio or television service operated for profit and which is intended to appeal to the general public and is capable of being received by commonly available equipment.
- ▶ *Community*: This is a free-to-air radio or television service not operated for profit and which provides programmes for community purposes and is capable of being received by commonly available equipment. It also does not broadcast programmes or advertisements on behalf of any political party.
- ▶ *Subscription satellite*: This is a service which transmits programmes by satellite and which is made available to persons on payment of a subscription fee.
- ▶ *Subscription cable*: This is a service made available to the general public on payment of a subscription fee and provides programmes intended to appeal to the general public.
- ▶ *Subscription narrowcasting*: This is a service which is made available to persons on payment of a subscription fee and the reception of which service is limited by reason of:
 - ▶ being targeted to any special interest group or otherwise not intended to appeal to the general public
 - ▶ being intended only for reception at particular locations
 - ▶ being provided during a limited period or to cover a specific event.
- ▶ *Open narrowcasting*: This is a service which is not made available to persons on payment of any subscription fee, and where the reception of which service is limited by reason of:
 - ▶ being targeted to any special interest group or otherwise not intended to appeal to the general public
 - ▶ being intended only for reception at particular locations
 - ▶ being provided during a limited period or to cover a specific event or is limited for some other reason.

In terms of section 12(2) of the Broadcasting Services Act, licences for the six broadcasting service categories above are valid for ten years.

In terms of section 12(3) of the Broadcasting Services Act, the remaining four broadcasting service categories listed below will have licences that are valid for three years.

- ▶ *Datacasting*: This is an information service that delivers information, whether in the form of data, text, speech, images or any other form, to persons having appropriate receiving equipment, where the delivery of the service uses the broadcasting service bands.
- ▶ *Roadcasting*: This is the broadcasting of pre-recorded programmes for reception by passengers of any public service vehicle as defined in the Road Motor Transportation Act.
- ▶ *Railcasting*: This is the broadcasting of pre-recorded programmes for reception by passengers of any railway service.
- ▶ *Webcasting*: This is a computer-mediated broadcasting service.

It is important to note that in terms of section 2(2) of the Broadcasting Services Act, the Minister of Information and Publicity may, by notice in the Government Gazette, determine other categories of broadcasting services.

Section 7(4) of the Broadcasting Service Act makes it an offence for any person to provide a broadcasting service without a licence issued by the BAZ, the penalty for which is a fine or imprisonment.

Section 8 of the Broadcasting Services Act provides that, a person can be disqualified from receiving a broadcasting licence if that person:

- ▶ is not a Zimbabwean citizen, or a body corporate that is not Zimbabwean owned
- ▶ intends his or her broadcasting service or signal to be wholly or partly funded by foreign donations or contribution
- ▶ has been found guilty of a crime in terms of this Act, the Radiocommunications Act or the Postal and Telecommunications Act before its repeal;
- ▶ has been found guilty of an offence in Zimbabwe or conduct if committed in Zimbabwe that would constitute an offence in the previous five years
- ▶ has been declared bankrupt or insolvent and has not been rehabilitated.

The Minister of State for Information and Publicity may, at his or her absolute discretion, grant an exemption from the disqualifying provisions relating to Zimbabwean citizenship.

Broadcasting licensing processes

In terms of section 9 of the Broadcasting Services Act, the BAZ must, subject to frequency availability and after having planned the broadcasting service bands, publish a notice in the Government Gazette and in a national newspaper inviting applications for a licence to provide:

- ▶ national free-to-air radio broadcasting services
- ▶ national free-to-air television broadcasting services,

in addition to those provided by the public broadcaster, the Zimbabwean Broadcasting Corporation.

An applicant responding to such an invitation must submit its application in the prescribed form and with the prescribed fee.

Within seven days of the submission of its application, an applicant must also publish its application at its own cost in a national newspaper. Written objections by the public must be lodged with the BAZ within 14 days of the publication of any licence application. The BAZ then examines and short-lists qualified applicants. Short-listed applicants are required to attend a public hearing.

The BAZ has the discretion to issue or to refuse to issue a licence. If a licence is issued, the licensee is to publish the licence in a national newspaper at its cost. If a licence is refused, the BAZ must provide reasons for such refusal. In terms of section 14 of the Broadcasting Services Act, licensees who wish to renew their licences must do so before the expiration of their licence.

Section 15 of the Broadcasting Services Act provides that, the BAZ may at any time amend a licence or any term or condition of a licence to:

- ▶ correct any error in the licence
- ▶ regulate the sector in which a licence has been issued
- ▶ comply with a request from the licensee
- ▶ to reflect, in the BAZ's opinion, the true nature of the service the licensee is providing.

Before amending a licence, the BAZ must notify the licensee in writing of the nature of the amendment and provide the licensee with 30 days to make representations on the matter.

Section 16(1) of the Broadcasting Services Act empowers the BAZ to suspend or cancel a licence issued, either on its initiative or at the request of the Minister of State for Information and Publicity if there is evidence that:

- ▶ the licence was issued in error, by fraud, the misrepresentation or non-disclosure of material facts by the licensee

- ▶ the licensee has contravened any provision of the Broadcasting Services Act, relevant to the licensee
- ▶ the licensee misrepresents the service he or she is offering
- ▶ the licensee has failed to comply with a term or condition of his or her licence
- ▶ if the licensee is a body corporate, where the licensee has been finally wound up
- ▶ in the case that the licensee is an individual, has had his or her estate sequestrated
- ▶ the licensee has acted in a manner that is prejudicial to the defence, public safety, public order, public morality or public health of Zimbabwe
- ▶ the licensee has repeatedly breached the provisions of the code of conduct applicable to the licensee in terms of section 24 of the Broadcasting Services Act or any standards determined by section 25 of the Broadcasting Services Act.

It should be noted that section 16(2) of the Broadcasting Services Act provides that the BAZ must notify the licensee, in writing, of any action it intends to take before it takes the action and provide the licensee to make representations on the matter within seven days. Following the receipt of representations from the licensee, should the BAZ still feel the licence should be cancelled, they must inform the licensee in writing of the cancellation of his or her licence in terms of section 16(5) of the Broadcasting Services Act.

Frequency spectrum licensing

Section 27(1) of the Broadcasting Services Act requires the BAZ's authority, whether by licensing or otherwise, to transmit signals, erect broadcasting apparatus, or use a mode of transmission. Section 27(2) makes it an offence to contravene section 27(1), and the punishment, on conviction, is a fine, imprisonment for up to two years or both. Note that in terms of section 27(5), the Minister of State for Information and Publicity may order any person having the technological means to do so, to stop, scramble, obliterate or interfere with a broadcasting transmission which the minister has reason to believe is being provided in contravention of the Broadcasting Services Act.

3.4.5 Responsibilities of broadcasters in Zimbabwe

Adherence to licence conditions, including statutory standard terms and conditions

Section 11 of the Broadcasting Services Act sets out the various conditions that apply to broadcasting licences. The standard terms and conditions are listed in the fifth and seventh schedules to the Broadcasting Services Act. These schedules contain hugely detailed provisions on a range of topics. A summary of these are given below:

- ▶ *Conditions applicable to all broadcasters:*
 - ▶ Conditions relating to political matters:
 - › During an election period, a broadcaster who broadcasts election matter must give reasonable and equal opportunities to all political parties.
 - › Conditions regarding the broadcasting of election advertisements, essentially, election advertisements are not allowed.
 - › Identification of political matter. Where a broadcaster broadcasts political matter at the request of another person, several particular details of the requestor and the matter must be kept. Details of the requestor and the matter must be announced in a form approved in writing by the BAZ, and specific details thereof must be forwarded to the BAZ on written request.
 - › Records of political subjects, whether provided as part of current affairs, news, statements, commentary, and so on are to be kept in the form approved by the BAZ in writing, for six weeks or until a complaint is resolved or as per the BAZ's specific written request.
 - ▶ Conditions relating to medicines: commercial television and radio and subscription broadcasters must not broadcast a medicine advertisement unless the text has been approved by the relevant government official.
 - ▶ News: no broadcaster may broadcast any matter that contains false or misleading news.
 - ▶ Advertisements containing political matter: no broadcaster may broadcast these.
- ▶ *Conditions specific to commercial licensees:* There is a long list of these in both schedules, the critical ones are the following:
 - ▶ Licensee's articles of association must provide for the disposal of shares held by a person if that shareholding would contravene any of the provisions of the Broadcasting Services Act, and must also provide for director's details to be given to the BAZ.
 - ▶ All commercial broadcasters are required to broadcast, free of charge, items of national interest if so required by the Minister of Information and Publicity and, further, even hand over control of all broadcasting facilities to persons authorised by the ministry during an emergency.
 - ▶ The broadcaster will not broadcast something which has been refused classification or prohibited in terms of the Censorship and Entertainments Control Act.
 - ▶ Broadcasting services cannot be used to commit an offence.
 - ▶ Collectively, they must:
 - › provide a diverse range of programmes

- › make programmes available in all languages used in the broadcast area
 - › reflect the culture, character, needs and aspirations of the people in the broadcast area
 - › provide a significant amount of Zimbabwean programming
 - › regularly include news and information programmes, including discussions of matters of national, regional and local significance
 - › meet the highest standards of journalism.
- ▶ *Conditions specific to community licensees:* There is a long list of these in both schedules. The critical ones are as follows:
- ▶ Licensees cannot broadcast ‘any political matter’. Note this is undefined.
 - ▶ Licensees must encourage community participation in operations, programming and membership of its governing body.
 - ▶ Time, content and display limits on sponsorship announcements are required.
 - ▶ Licensees must provide a distinct service dealing with community issues not normally dealt with by the public or commercial broadcasters.
 - ▶ Informational, educational and entertaining programming is required.
 - ▶ Licensees are to concentrate on highlighting community issues, such as developmental issues, health care, basic information and general education, environmental affairs, and the promotion of local culture.
 - ▶ Licensees are to promote a sense of common purpose in the community.
- ▶ *Requirements for public broadcasters:* There is a long list of these in the Seventh Schedule, the critical ones being to:
- ▶ make programmes available in all languages used in Zimbabwe
 - ▶ reflect both unity and cultural and language diversity
 - ▶ provide news and public affairs programming that meets the highest standards of journalism and which is fair, unbiased and independent of government, commercial or other interests
 - ▶ include significant amounts of educational programming
 - ▶ support traditional and contemporary artistic expression
 - ▶ offer a range of services aimed at women, children, the youth and the disabled
 - ▶ include programmes commissioned by independent producers
 - ▶ include programmes featuring national as well as developmental and minority sports.

- ▶ *Language requirements:* Section 11(4) of the Broadcasting Services Act imposes the following language requirements:
 - ▶ ten per cent of the total programming of all licensees shall be in any of the national aboriginal languages of Zimbabwe other than Shona and Ndebele
 - ▶ ten per cent of the total programming of a television licensee must be broadcast in a manner that may be understood by audiences who have a hearing impairment.
- ▶ *Government broadcasting rights:* Section 11(5) of the Broadcasting Services Act requires every broadcaster to make available one hour cumulatively per week of its broadcasting time for the government to explain its policies to the nation.
- ▶ *Copyright compliance:* Section 11(6) of the Broadcasting Services Act requires every broadcaster to comply with the Copyright and Neighbouring Rights Act.
- ▶ *Commencement compliance:* Section 11(7) of the Broadcasting Service Act requires licensees to commence broadcasting within 18 months of the date on which their licence was issued.
- ▶ *Geographical compliance:* Section 11(10) of the Broadcasting Services Act prohibits licensees from broadcasting outside the coverage area of their licence.

In terms of section 11(2), without limiting the range of conditions that may be imposed, the BAZ may, in addition, impose conditions on licensees that include:

- ▶ the requirement that the licensee adheres to a code of conduct
- ▶ in the event of a breach of a licence condition, imposing conditions on the licensee to ensure that breaches do not recur.

Adherence to content conditions

The Sixth Schedule to the Broadcasting Services Act sets out local content requirements for various broadcasting services. It is also important to note that the minister is empowered in terms of this Sixth Schedule to prescribe other local content requirements. Briefly, the local content requirements provided for in the Sixth Schedule are as follows:

- ▶ *Television broadcasting services:*
 - ▶ Single-channel service: 75% of the programming content must at all times be local television content and material from Africa.
 - ▶ Multi-channel services: 30% of programming content must at all times be local television content.
 - ▶ In complying with the above conditions, at least:
 - › 70% of drama must consist of Zimbabwean drama

- › 80% of current affairs must consist of Zimbabwean current affairs
 - › 70% of social documentaries must consist of Zimbabwean social documentaries
 - › 70% of informal knowledge-building must consist of Zimbabwean informal knowledge-building
 - › 80% of educational programming must consist of Zimbabwean educational programming
 - › 80% of children's programming must consist of Zimbabwean children's programming.
- ▶ *Subscription television broadcasting services:*
 - ▶ At least 30% of its encoded programming (or a higher figure as determined by the BAZ) must consist of local television content in such programme categories as may be determined by the BAZ.
 - ▶ At least 50% of its unencoded programming, if any, must consist of local television content in such programme categories as may be determined by the BAZ.
 - ▶ *Independent television production:* Television and subscription television broadcasting services must ensure that at least 40% of their local television content consists of independent productions spread reasonably evenly between Zimbabwean drama, social documentary, informal knowledge-building, and children's and educational programming.
 - ▶ *Radio:*
 - ▶ 75% of music broadcast must be Zimbabwean music
 - ▶ 10% of music broadcast must be music from Africa
 - ▶ *Subscription radio:*
 - ▶ Encoded services:
 - › 30% of music broadcast must be Zimbabwean music
 - › 10% of music broadcast must be music from Africa
 - ▶ Unencoded services:
 - › 75% of music broadcast must be Zimbabwean music
 - › 10% of music broadcast must be music from Africa

Adherence to codes of conduct

In terms of section 24(1) of the Broadcasting Services Act, the BAZ 'in consultation with broadcasters' must develop codes of conduct governing:

- ▶ rules of conduct to be observed by broadcasters

- ▶ standards and practices to be observed in advertising by broadcasters.

In terms of sections 24(6) and (8) of the Broadcasting Services Act, the BAZ is to recommend that such codes be published in the Government Gazette as well as the penalties for breaches of such codes.

Adherence to ownership and control requirements

Regulating ownership and control of broadcasting licences is an important part of the BAZ's regulatory work. The Broadcasting Services Act contains several restrictions concerning ownership and control of broadcasting services:

- ▶ *No party-political broadcasters or signal distributors:* Section 20 of the Broadcasting Services Act prohibits any broadcasting or signal carrier licence to be given to any political party or organisation.
- ▶ *Limitations on foreign ownership, control or funding of broadcasting or signal distribution services:*
 - ▶ Section 8(1) of the Broadcasting Services Act prohibits a person who is not a citizen of Zimbabwe or an organisation that is not controlled by citizens of Zimbabwe from being issued a broadcasting licence. However, in terms of section 8(8), the Minister of Information and Publicity has wide discretion to grant exemptions from these prohibitions and to permit the BAZ to grant licences to such approved persons.
 - ▶ Section 8(6) also prohibits the granting of a licence to a person whose broadcasting service is funded wholly or in part by foreign donations or contributions.
 - ▶ Section 22 of the Broadcasting Services Act prohibits a person who is not a citizen of Zimbabwe from being a director of a broadcasting licensee.

Section 17 of the Broadcasting Services Act provides that licensees must inform the BAZ, within 14 days, of any material alteration to the information or particulars of the licensee. If there is a transfer to or by any single person of more than 10% of the shares of a licensee, the BAZ must be informed.

Section 18 of the Broadcasting Services Act prohibits the transfer or sale of a broadcasting licence.

3.4.6 Is the BAZ an independent regulator?

It is clear from a range of provisions that the BAZ is not an independent regulator. The Broadcasting Services Act does not even use the word independent when establishing the BAZ in section 3, and numerous provisions make it clear that Minister of State for Information and Publicity has extraordinary powers concerning the regulation of the media in Zimbabwe. For example:

- ▶ Section 4B(1) entitles the minister to give the BAZ board general directions relating to policy which he considers 'necessary in the public interest'. The

section further requires that the BAZ 'is to observe [the direction] in the exercise of its functions'. It is, however, important to note that the BAZ board must be given notice of a proposed policy direction and must have an opportunity to comment in writing thereon in terms of section 4B(2).

- ▶ Section 46(6) requires ministerial approval before the BAZ's regulations or orders have any legal effect.

3.4.7 Weaknesses in the legislation that should be amended to strengthen the broadcast media generally

In our view, the Broadcasting Services Act does not comply with international standards of democratic broadcasting regulation:

- ▶ The BAZ is not independent. This body ought to be independent and ought to be appointed by the president following public nominations and short-listing processes involving a multi-party body such as parliament.
- ▶ The clear bias against foreign ownership or involvement of foreigners in the broadcasting sector does not support investment and growth in the media sector.

The laws must be changed to allow for self-regulatory systems, that is, codes of conduct and enforcement mechanisms developed by the media.

3.5 Legislation regulating the public broadcast media

3.5.1 Introduction

The Zimbabwean Broadcasting Corporation (ZBC) is Zimbabwe's public broadcaster, although it clearly operates as a state broadcaster.

The activities of the ZBC are governed by the Zimbabwe Broadcasting Corporation Act [12:01] (ZBC Act), the Zimbabwe Broadcasting Corporation (Commercialisation) Act, Act 26 of 2001, (the ZBC Commercialisation Act) and the Broadcasting Services Act, which has already been discussed above.

It should be noted that, in terms of section 11 of the ZBC Commercialisation Act, when the president is satisfied that the assets and liabilities of the ZBC have been transferred to the 'successor companies' (discussed below), he shall, by statutory instrument, repeal the ZBC Act, this Act has not yet been repealed. However, provision has been made that any regulation that was made in terms of the to be repealed ZBC Act shall continue to be in force as though it had been made in terms of the Broadcasting Services Act.

3.5.2 Establishment of the ZBC

The ZBC was established in terms of section 3 of the ZBC Act. The ZBC began as a company offering both signal distribution and broadcasting services, but these

functions were split between two different corporate entities, in terms of section 3 of the ZBC Commercialisation Act.

3.5.3 The mandate of the ZBC

Section 4(2) of the ZBC Commercialisation Act sets out the objects of the ZBC, which are to:

- ▶ provide broadcasting services
- ▶ provide video and audio production services
- ▶ provide integrated datacasting, broadcasting and webcasting services nationally
- ▶ provide online multimedia news and programme services
- ▶ perform any other function as set out in its memorandum of association.

The requirements for public broadcasters that are set out in the Seventh Schedule to the Broadcasting Services Act (outlined above) are also applicable and inform the nature of the services that must be provided by the ZBC. It should also be noted that Part VIII of the Broadcasting Services Act, titled Application of Act to Public Broadcasters, provides, in section 36 of the Broadcasting Services Act that, the provisions of the Broadcasting Services Act shall apply to the ZBC.

3.5.4 Licensing the ZBC

Section 37 of the Broadcasting Services Act provides that the ZBC shall be deemed to be licensed to provide every class of broadcasting service that is provided before the commencement of the act and the Minister of State for Information and Publicity must cause all the relevant licences to be issued to the ZBC and any other public broadcaster without delay. These provisions also appear in section 9 of the ZBC Commercialisation Act, albeit in less detail.

3.5.5 Appointment of the ZBC board

In terms of section 4(1) of the ZBC Act, the operations of the ZBC are controlled by a board of governors consisting of between six and nine members. All board members are appointed by the Minister of State for Information and Publicity, after consultation and in accordance with any directions the president may give. In terms of section 4(2) of the ZBC Act, the minister also designates one governor as Chairman and another as Vice-chairman of the board.

Considering the wide appointment discretion given to the minister, it is not surprising that the ZBC Act sets out no criteria for board appointments apart from the usual grounds of disqualification, such as being an un-rehabilitated insolvent, having a criminal record or not being a citizen or permanent resident of Zimbabwe.

3.5.6 Funding for the ZBC

Section 19 of the ZBC Act provides that the funds of the ZBC shall consist of:

- ▶ money payable to the ZBC in terms of legislation. Note that section 38B of the Broadcasting Services Act requires every listener (defined, essentially, as a person, other than a dealer, who owns a receiver, which in turn is defined as an apparatus 'capable of being used for the reception of a broadcasting service') to have a licence issued by the ZBC. The licence fee is determined by the ZBC, with the approval of the minister. Section 38C of the Broadcasting Services Act specifies that licence fees are to be paid into the general funds of the ZBC for its use
- ▶ money appropriated by parliament. In other words, funding for the ZBC must be provided for in the national budget
- ▶ money or assets that belong to the ZBC by virtue of its operations.

3.5.7 The ZBC: Public or state broadcaster?

There is no doubt that the ZBC is a state broadcaster and that it is used to bolster the fortunes of the long-standing party in power, Zanu-PF. From a legal point of view, the role of the Minister of State for Information and Publicity is particularly problematic concerning the appointment of ZBC board members; a genuine public broadcaster is required to have a board appointed with the participation of a multi-party body such as parliament.

3.5.8 Weaknesses in the ZBC Act which should be addressed to strengthen the public broadcaster

There is little doubt that the role and position of the ZBC need to be addressed as part of the new constitutional dispensation. There are significant hurdles to the ZBC being transformed into a public broadcaster.

Broadcasting statutory reform would require, at the very least, that:

- ▶ the ZBC's independence and accountability to the public be provided for
- ▶ parliament and the public, in general, play a more active role in the appointment, removal and assessment of the board and its members to reduce the level of executive interference that currently exists
- ▶ the public broadcaster is genuinely only one tier of broadcasting in Zimbabwe. This would require the licensing of free-to-air commercial and community radio and television broadcasters to play their respective roles in the media landscape. The ZBC has dominated the Zimbabwean broadcasting sector in ways that are reminiscent of the pre-liberation Rhodesian regime, which was also characterised by the domination of approved media sources.

3.6 Legislation governing broadcasting signal distribution

The Broadcasting Services Act and the Zimbabwe Broadcasting Corporation (Commercialisation) Act have particular relevance to broadcasting signal distribution, which is the technical process of ensuring that the content-carrying signal of a broadcaster is distributed such that it can be heard, viewed or both by its intended audience.

3.6.1 Licences required by broadcasting signal distribution providers

Section 7(1) of the Broadcasting Services Act makes it clear that, apart from the ZBC, no person may operate as a signal carrier in Zimbabwe except in accordance with a signal carrier licence.

In terms of section 7(3), such licence shall authorise a licensee to operate a signal transmitting station to transmit a radio or television broadcasting service. Any person who operates a transmitting station without a signal carrier licence is guilty of an offence and is liable to a fine, imprisonment for up to two years or both, in terms of section 27 of the Broadcasting Services Act.

3.6.2 The regulatory framework for broadcasting signal distributors

The ZBC Commercialisation Act specifically provided for the ZBC to be divided into a broadcasting company and a 'digital convergence signal carrier company'. The objectives of the digital convergence signal carrier company are set out in section 4(1) of the ZBC Commercialisation Act and include:

- ▶ providing signal transmitting services
- ▶ migrating from terrestrial analogue to digital technology
- ▶ expanding multimedia services by providing internet, web development and e-commerce services
- ▶ establishing sound recording studios and facilities for film and video production. This last function is in line with section 3(b) of the ZBC Commercialisation Act, which states that in addition to its function as a signal carrier company, the new digital convergence signal carrier company is to 'carry on business arising from the convergence of broadcasting, telecommunications and computer technologies'.

In relation to ordinary signal carrier companies, it is important to note that section 8(6)(a) of the Broadcasting Services Act provides that no signal transmission station shall be licensed, where it is wholly or partly funded by foreign donations or contributions. Furthermore, section 22 of the Broadcasting Services Act prohibits a person who is not a citizen of Zimbabwe from being a director of a carrier signal licensee.

3.7 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 only be prepared to provide critical information if they are confident that their identities will remain confidential and will be respected and protected by a journalist.

This is particularly true of whistleblowers, inside sources that 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 is not likely to be given to journalists.

3.7.1 Criminal Procedure and Evidence Act, 1927

Sections 113C and 232 of the Criminal Procedure and Evidence Act, 1927 [9:07] (CPEA) entitle a public prosecutor or court to subpoena a witness.

Furthermore, sections 113D and 237 of the CPEA, respectively, make it an offence to fail to obey a subpoena issued in terms of the CPEA unless that person had a reasonable excuse for such failure. On conviction, the penalty is a fine, imprisonment not exceeding one month or both.

It is also important to note section 295. This oddly-worded section essentially provides that, subject to the CPEA, no witness shall be compelled to give evidence in any criminal proceedings where, if such proceedings were taking place in the Supreme Court of Judicature in England, such witness would not be compelled to give evidence on the grounds of public policy and concerning the public interest, that the fact, communication, and so on ought not to be disclosed and is privileged from disclosure. We are of the view that journalists may use this section to protect their sources.

3.7.2 Prevention of Corruption Act [9:16], 1986

Section 9(1) of the Prevention of Corruption Act, 1986 empowers investigators appointed by the Minister of Justice, Legal and Parliamentary Affairs, or any other minister appointed by the president, in terms of section 7 of the act, to summon and examine any person to whom he has been assigned to investigate, or any other person who in the opinion of the investigator:

- ▶ may be able to give material information concerning the affairs or property of the specified person or concerning any transaction carried out by him or on his behalf
- ▶ has in his possession or custody any book, document or record containing any information referred to in subparagraph.

While this provision does not relate directly to journalists or the media, working journalists should be aware of the provision as it may be used to force a journalist to produce a document or reveal information or the identity of a source who has provided the journalist with information.

Section 13 makes the refusal to appear before an investigator when summoned, or the refusal to answer any question asked at the summons proceedings, without a valid lawful excuse, an offence, the penalty for which is a fine, imprisonment or both.

However, whether or not requiring a journalist to reveal a source is, in fact, an unconstitutional violation of the right to freedom of expression will depend on the particular circumstances in each case, particularly on whether the information is available from any other source and whether it is required for the investigation of a crime.

It is therefore extremely difficult to state that these provisions are, by themselves, a violation of the right to freedom of expression under the constitution.

3.8 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 it.

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

- ▶ the publication of a minor's identity in legal proceedings
- ▶ the publication of certain kinds of information regarding legal proceedings
- ▶ the publication of state security-related information
- ▶ the publication of false news
- ▶ insulting the president
- ▶ the publication of criminal insult
- ▶ invasion of privacy
- ▶ the publication of obscenity
- ▶ the publication of threats to public health
- ▶ the publication of threats to the economic interests of the state
- ▶ the publication of statements offending persons of a particular race, religion, ethnicity and so on

- ▶ advertising on roadsides or near railways.

It is often difficult for journalists or media houses to find out how laws that would seem to have no direct relevance to the media can impact on their work. Important provisions of these kinds of laws are therefore set out below.

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

Section 195 of the Criminal Procedure and Evidence Act [Chap 9:07] 1927, makes it an offence to publish the identity of an accused person in criminal proceedings if that accused person is under 18 years old unless the court rules that such publication would be just and equitable and in the public interest.

The penalty on conviction is a fine, imprisonment, or both.

Section 197 of the CPEA makes it an offence to publish the identity of a witness in a trial if that witness is under 18 years old unless the presiding officer has given his or her written consent. The penalty on conviction is a fine, imprisonment or both.

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

Censorship and Entertainments Control Act [Chap. 10:04] 1967

In terms of sections 13(1) and (2) of the Censorship and Entertainments Control Act, 1967, it is an offence for a person to import, print, publish, manufacture, make or produce, distribute, display, exhibit, or sell or offer or keep for sale any publication that has been declared undesirable by the board of censors in terms of the act. The penalty on conviction is a fine, imprisonment for up to two years or both. Note that the grounds of undesirability include a publication that is likely to disclose, regarding any judicial proceeding:

- ▶ any matter which is indecent or obscene or harmful to public morals or any indecent or obscene medical, surgical or physiological details, the disclosure of which is likely to be offensive or harmful to public morals
- ▶ relating to marriage, any particulars other than:
 - ▶ the names and occupations of parties and witnesses
 - ▶ a concise statement of the allegations, defences or counter-allegations in support of which evidence has been given
 - ▶ submissions on any point of law arising and the decision of the court thereon
 - ▶ the judgment and verdict of the court and any observations made by the judge in giving judgment.

Note that in terms of section 13, the above grounds do not apply to official court

documents such as transcripts, volumes of the law reports, or scientific, professional or religious publications.

Note that the board of censors has the power to grant exemptions from section 13 of the act in writing to any person or institution, and these can be subject to conditions.

Criminal Procedure and Evidence Act [Chap 9:07], 1927

Section 9(1) of the CPEA provides that a court or tribunal may institute proceedings for contempt of court against any person who is alleged to have impaired its dignity, reputation or authority *in the presence of the court or tribunal* (our emphasis). However, in terms of section 9(2), only the attorney-general or someone acting on his or her express authority shall institute proceedings for contempt of court in circumstances other than those referred to in subsection (1).

Section 196 of the CPEA makes it an offence to publish the identity of any person charged in respect of indecent acts, extortion or who is a witness in such proceedings unless the judge has consented to it in writing. On conviction, the penalty is a fine, imprisonment or both.

3.8.3 Prohibition on the publication of state security-related information

Censorship and Entertainments Control Act [Chap. 10:04], 1967

In terms of sections 13(1) and (2) of the Censorship and Entertainments Control Act, it is an offence for a person to import, print, publish, manufacture, make or produce, distribute, display, exhibit, or sell or offer or keep for sale any undesirable publication. The penalty on conviction is a fine, imprisonment for up to two years or both. Note that the grounds of undesirability include a publication that is likely to be contrary to, among other things, the interests of defence, public safety and public order. Note that the board of censors has the power to grant exemptions in writing from section 13 of the Censorship Act to any person or institution, and these can be subject to conditions.

In terms of section 9 of the Censorship and Entertainments Act, it is an offence to distribute, televise or publicly exhibit any film unless the film has been approved by the board of censors. The penalty on conviction is a fine, imprisonment or both.

Section 10(2) sets out the grounds on which the board of censors shall not approve a film. In terms of section 10(2)(b), the board of censors shall not approve any film which, in its opinion, is likely to be contrary to the interests of defence, public safety and public order.

Official Secrets Act [Chap. 11:09], 1970

The Official Secrets Act, section 4 of the act, sets out several provisions relating to the disclosure of security-related information. It essentially makes it an offence to publish a range of security-related information, such as official codes or passwords, or confidential information that has been entrusted to a person by the

government. The penalty for such disclosure is a fine, imprisonment or both.

The Police Act [Chap. 11:10], 1995

Sections 24 and 25 of Schedule 1 to the Police Act do not directly prohibit the publication of information but do make it an offence for a member of the police to communicate:

- ▶ any secret or confidential information other than to the person for whom such information is officially intended;
- ▶ any matter to the press or the public, the communication of which results or is reasonably likely to result in any prejudice to the administration, discipline or efficiency of the police force without authority.

In terms of section 29 of the Police Act, the penalty on conviction for any of the above offences is a fine, imprisonment or both. In our view, these provisions, although not unusual, would negatively impact the media's ability to obtain information from members of the police.

Prisons Act [Chap 7:11], 1956

Section 84(3) of the Prisons Act makes it an offence to publish the whole or part of a letter or document which he 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 of the prison in terms of section 84(1) without the authority of the Minister of Justice, Legal and Parliamentary Affairs, or any other minister tasked with the administration of the Prisons Act. In terms of section 84(4) of the Prisons Act, the penalty on conviction for such publication is a fine, imprisonment or both.

3.8.4 Prohibition on the publication of false news

Criminal Law (Codifications and Reform) Act [Chap 9:23] 2005

Section 31 of the Criminal Law (Codification and Reform) Act (Criminal Code) makes it an offence to communicate or publish certain false statements prejudicial to the state. The penalty on conviction is a fine, imprisonment or both.

The false statements are, in brief, where there is a real risk or possibility of:

- ▶ inciting or promoting public disorder or public violence and endangering public safety
- ▶ interfering with any essential service.

Section 33 of the Criminal Code makes it an offence to make any statement concerning the president or an acting president with the knowledge or realising that there is a real risk or possibility that the statement is false and that it may engender feelings of hostility or cause hatred, contempt or ridicule towards the president or acting president, whether in respect of the president personally or the president's office. The penalty on conviction is a fine, imprisonment or both.

3.8.5 Prohibition on insulting the president

Section 33 of the Criminal Law (Codification and Reform) Act [Chap 9:23] 2005, makes it an offence to undermine the authority or insult the president by publicly, unlawfully and intentionally making any abusive, indecent or obscene statement about or concerning the president, or an acting president, whether in respect of the president personally or of the president's office.

The penalty on conviction is a fine, imprisonment or both.

3.8.6 Prohibition on the publication of criminal insult

Section 95 of the Criminal Law (Codification and Reform) Act [Chap 9:23] 2005, makes it an offence, by words or conduct, to impair the dignity of another person. The penalty on conviction is a fine, imprisonment or both.

There are no provisions in this section regarding defences such as truth in the public interest.

3.8.7 Prohibition on the invasion of privacy

Section 95 of the Criminal Law (Codification and Reform) Act [Chap 9:23] 2005, makes it an offence, by words or conduct, to invade the privacy of another person by observing that person in a state of partial or complete undress. The penalty on conviction is a fine, imprisonment or both.

Note that section 95(5) does provide a defence to this offence, which is that the conduct was motivated solely by the desire to obtain evidence of the commission of adultery and is available to a private investigator or anyone else engaged in obtaining evidence of such adultery by the spouse of that person.

3.8.8 Prohibition on the publication of obscenity

Censorship & Entertainments Control Act [Chap. 10:04], 1967

The Censorship Act is a pre-liberation piece of legislation that remains on the statute books but which has been amended post-liberation. It is the main mechanism for regulating obscene materials in Zimbabwe.

Materials regulated under the Censorship Act

The Censorship Act regulates a wide range of materials including films, video and film material, publications, pictures, statues, records and the giving of public entertainments. Focus here, however, is only on those provisions affecting publications and films.

Bodies established under the Censorship Act, the appointment of members, key functions

The Censorship Act establishes two critical bodies:

- ▶ *The board of censors:*
 - ▶ In terms of section 3, the Minister of Home Affairs or whichever minister is responsible for the administration of the Censorship Act is to appoint a board of censors of not fewer than nine members.
 - ▶ In terms of section 4, the functions of the board of censors are to:
 - › examine any article or public entertainment submitted to it
 - › make enquiries it considers necessary concerning any publication, picture, statue, film, record or public entertainment which is alleged to be or which the board of censors has reason to believe may require to be prohibited or to be subject to conditions in terms of section 17
 - › advise the minister
 - › perform any other function assigned to it under the Censorship Act or any other statute.
- ▶ *The appeal board:*
 - ▶ In terms of section 18(1), the appeal board consists of a president and two members appointed by the minister.
 - ▶ In terms of section 19, any person who is aggrieved at a decision of the board of censors may appeal to the appeal board, which shall enquire into the matter and may confirm, vary, or set aside the decision of the board of censors or give any other decision it considers just and, subject to section 20, the appeal board's decision shall be final.
 - ▶ Note that in terms of section 20, questions of law, whether a matter is a question of fact or law, and questions regarding the admissibility of evidence can be referred to the Supreme Court for determination.

It is, however, critical to point out that the minister plays a significant role in implementing the Censorship Act and can intervene in the affairs of the board of censors and appeal board. Some examples:

- ▶ In terms of section 21, the minister has wide discretion to issue certificates prohibiting disclosure to the appeal board or a court of law, with the result that only the actual result of the deliberations of the body concerned is to be disclosed unless the body specifically orders otherwise.
- ▶ In terms of section 23, the minister has the power to overturn a decision by the board of censors and the appeal board rejecting a film or declaring a film, publication, picture, statue or record undesirable if the minister is satisfied that this is in the public interest. Note further that there is no requirement to hear the parties concerned on the matter.
- ▶ In terms of section 34, the minister is given wide regulation-making powers regarding numerous aspects of the Censorship Act.

Classification of publications

Section 14 of the Censorship Act empowers the board of censors to examine any publication (or picture, statue or record) and to declare whether or not it is undesirable in the opinion of the board of censors.

Section 13(2) sets out the grounds on which a publication can be found to be undesirable; many of these are set out elsewhere in this chapter. Concerning obscenity, it is important to note that in terms of section 13(2)(a), a publication shall be deemed to be undesirable if it or any part thereof is indecent, obscene, offensive or harmful to public morals. Section 33 details the definitions of these terms:

- ▶ *Indecent or obscene:*
 - ▶ if it tends to deprave or corrupt the minds of persons who are likely to be exposed to the effect or influence thereof, or it is in any way subversive of morality
 - ▶ whether or not related to any sexual conduct, it unduly exploits horror, cruelty or violence.
- ▶ *Offensive to public morals:* if it is likely to be outrageous or disgusting to persons who are likely to read, hear or see it.
- ▶ *Harmful to public morals:* if it deals improperly or offensively with criminal or immoral behaviour.

In terms of sections 13(1) and (2), it is an offence for a person to import, print, publish, manufacture, make or produce, distribute, display, exhibit, sell or offer or keep for sale any undesirable publication. The penalty on conviction is a fine, imprisonment or both. Note that the board of censors has the power to grant exemptions from section 13 of the Censorship Act in writing to any person or institution, and these can be subject to conditions.

Note further that, in terms of section 26, possession of a publication, picture, statue or record which is indecent or obscene is an offence; however, no prosecution shall be instituted without the written authority of the attorney-general. The penalty on conviction is a fine, imprisonment or both.

Classification of films

In summary, section 9 of the Censorship Act makes it an offence to distribute, televise or publicly exhibit any film unless the film has been approved by the board of censors. The penalty on conviction is a fine, imprisonment or both.

Section 10(2) sets out the grounds on which the board of censors shall not approve a film (some of these are set out elsewhere in this chapter).

Concerning obscenity, it is important to note that, in terms of sections 10(2)(a) and (c), the board of censors shall not approve any film that, in its opinion, depicts any matter which is, or depicts any matter in a manner that is, indecent, obscene,

offensive or harmful to public morals. Section 33 sets out the definitions of these terms:

- ▶ *Indecent or obscene:*
 - ▶ If it tends to deprave or corrupt the minds of persons who are likely to be exposed to the effect or influence thereof or is in any way subversive of morality
 - ▶ whether or not related to any sexual conduct, it unduly exploits horror, cruelty or violence.
- ▶ *Offensive to public morals:* if it is likely to be outrageous or disgusting to persons who are likely to read, hear or see it.
- ▶ *Harmful to public morals:* if it deals improperly or offensively with criminal or immoral behaviour.

Note too that, in approving a film, the board of censors may impose one or more of the following conditions:

- ▶ In the case of a film to be televised, that it shall not be televised except:
 - ▶ between specified hours
 - ▶ after notices indicating that the film is unsuitable for viewing by a specified class of people
 - ▶ after any specified portion has been cut.
- ▶ In the case of a film other than one to be televised, that it shall not be distributed or exhibited:
 - ▶ to persons of a specified age or sex
 - ▶ except after any specified portion has been cut.

Failure to comply with the conditions for televising or otherwise exhibiting a film is an offence, and the penalty on conviction is a fine, imprisonment or both.

An approved film is given a certificate by the board of censors in terms of section 11 of the Censorship Act. Note that the Board has the power to grant exemptions from sections 9 and 10 of the Censorship Act in writing, and these can be subject to conditions. Note too that, in terms of section 26, possession of recorded video or film material which is indecent or obscene is an offence; however, no prosecution shall be instituted without the written authority of the attorney-general. The penalty on conviction is a fine, imprisonment or both.

3.8.9 Prohibition on the publication of threats to public health

In terms of sections 13(1) and (2) of the Censorship and Entertainments Control Act [Chap 10:04] 1967, it is an offence for a person to import, print, publish, manufacture, make or produce, distribute, display, exhibit, sell or offer or keep for sale

any undesirable publication. The penalty on conviction is a fine, imprisonment or both. Note that the grounds of undesirability include a publication that is likely to be contrary to, among other things, the interests of public health.

Note that the board of censors has the power to grant exemptions from section 13 of the Censorship Act in writing to any person or institution, and these can be subject to conditions.

In terms of section 9 of the Censorship Act, it is an offence to distribute, televise or publicly exhibit any film unless the film has been approved by the board of censors. The penalty on conviction is a fine, imprisonment or both.

Section 10(2) sets out the grounds upon which the board of censors shall not approve a film. In terms of section 10(2)(b), the board of censors shall not approve any film which, in its opinion, is likely to be contrary to, among other things, the interests of public health.

3.8.10 Prohibition on the publication of threats to the economic interests of the state

In terms of sections 13(1) and (2) of the Censorship and Entertainments Control Act [Chap 10:04] 1967, it is an offence for a person to import, print, publish, manufacture, make or produce, distribute, display, exhibit, sell or offer or keep for sale any undesirable publication. The penalty on conviction is a fine, imprisonment for up to two years or both. Note that the grounds of undesirability include a publication that is likely to be contrary to, among other things, the economic interests of the state.

Note that the board of censors has the power to grant exemptions from section 13 of the Censorship Act in writing to any person or institution, and these can be subject to conditions.

In terms of section 9 of the Censorship Act, it is an offence to distribute, televise or publicly exhibit any film unless the film has been approved by the board of censors. The penalty on conviction is a fine, imprisonment or both.

Section 10(2) sets out the grounds on which the board of censors shall not approve a film. In terms of section 10(2)(b), the board of censors shall not approve any film which, in its opinion, is likely to be contrary to, among other things, the economic interests of the state.

3.8.11 Prohibition on the publication of statements offending persons of a particular race, religion, ethnicity, and so on

Section 42 of the Criminal Law (Codification and Reform) Act [Chap 9:23] 2005, makes it an offence to make any insulting or otherwise grossly provocative statement that offends persons of a particular race, tribe, place of origin, colour, creed or religion, intending to cause such offence or realising that there is a real risk or possibility of doing so. The penalty on conviction is a fine, imprisonment or both.

3.8.12 Prohibition on advertising on roadsides or near railways

The provisions of the Advertisements Regulation Act [Chap 14:01] 1929, are probably of more interest to media owners than to practitioners, but it is important to note that this Act makes it an offence to erect or display an advertisement on or near a railway or within any area that the minister responsible for the administration of the Advertisements Regulation Act has declared to be a prohibited area. The penalty is a fine, imprisonment or both.

Note that the act specifically provides that it does not apply to:

- ▶ advertisements in the area of jurisdiction of a local authority, town, ward or rural district council or on any station, yard, platform or station approach belonging to the railways
- ▶ advertisements on land and which relate to the sale or lease of such land or the hire of livestock, implements or produce of such land
- ▶ advertisements displayed within 100 metres of any licensed hotel or general dealer's store premises indicating the situation thereof
- ▶ advertisements approved by the minister and displayed by any automobile, publicity or other association approved by the minister.

3.9 Legislation prohibiting interception of communication

The legality of monitoring, recording and intercepting communications is governed by the Interception of Communications Act [Chap 11:20 2007]. Section 3 of the Interception Act makes it an offence to intercept any communication in the course of its transmission by a telecommunications or radio communications system or through the post. The penalty on conviction is a fine, imprisonment or both.

There are certain important exceptions to the general prohibition in section 3 of which journalists need to be aware. Section 3 specifically allows a person to intercept (note the definition of this includes recording or copying of the content thereof) communication if:

- ▶ he or she is a party to the communication (defined as meaning a person whose access to the information is or might reasonably be known by all other parties)
- ▶ he or she has the consent of the person to whom, or by whom, the communication is sent
- ▶ he or she is authorised by a warrant.

The effect of these exemptions is that if, for example, a journalist is in the office of a news source and the source is a party to a conversation taking place over a speaker-phone in his office, the journalist may record the conversation and make use of the contents thereof without this being an offence under the Interception Act, even though the other party to the conversation is not aware of the journalist's presence and has not consented to the recording or the publication or broadcasting thereof.

3.10 Legislation that specifically assists the media in performing its functions

Freedom of Information Act, Act 1 of 2020

In countries that are committed to democracy, governments pass legislation which specifically promotes accountability and transparency of public and private institutions. Such statutes, while not specifically designed for use by the media, can be, and often are, used by the media to uncover and publicise information in the public interest. There is little doubt that Zimbabwe's recent history makes it an unlikely candidate for a country committed to transparency; however, it has passed legislation that provides for a right of access to information. This was ostensibly first introduced with the passage of the Access to Information and Protection of Privacy Act [10;27] 2002 (AIPPA). While AIPPA was roundly and correctly criticised for its draconian provisions on the media, it did initiate a statutory right of access to information. The Freedom of Information Act repealed and replaced AIPPA in its entirety, but it did save regulations made under AIPPA, so those continue to be in force.

Section 5 of the Freedom of Information Act provides that every public entity, public, commercial entity or holder of statutory office must have a written policy for the disclosure of information in the interest of public accountability. Any person who wishes to access information from a public entity, public, commercial entity or holder of statutory office may apply in writing for access to that information in terms of section 7.

In terms of section 8(1) of the Freedom of Information Act, on receipt of a request for access to information, the information officer must respond to the applicant and, should the request be granted, the information officer must provide the requested information to the applicant within 21 days of receiving the request. If the information seems reasonably necessary to safeguard the life or liberty of a person, the information officer must determine whether or not to provide the information. If the request is granted, that information must be provided within 48 hours of the request being made in terms of section 8(2).

In terms of section 10 of the Freedom of Information Act, if the information officer fails to notify an applicant who has requested access to information of a decision within the specified time the request for access will be deemed to have been refused.

Section 14 of the Freedom of Information Act provides that if part of the requested information is determined to be protected information, that information may be severed from the record or document and access to the remainder of the information must be granted to the applicant.

Section 20 of the Freedom of Information Act provides that a request for access to information may be refused if it falls within certain exemptions which include:

- ▶ *Commercial information* (section 22):
 - ▶ Trade secrets of a private entity or third party.
 - ▶ Financial, commercial, scientific or technical information that is proprietary to a private entity or third party and the disclosure of which is likely to cause harm to that private entity or third party.
 - ▶ Information provided by a third party that can reasonably be considered to put the private entity or third party at a disadvantage in contractual negotiations or prejudice the private entity or third party in commercial competition.
 - ▶ It should be noted that the information officer may not refuse a request for information in the event that the information being requested:
 - › is already publicly available
 - › is about a third party and the third party has given consent for the disclosure
 - › would facilitate accountability and transparency of decisions taken by the entity (other than preliminary test results, research or investigations taken to develop any policy)
 - › relates to the expenditure of public funds
 - › would reveal misconduct or deception.
- ▶ *Confidential information of a third party* (section 23):
 - ▶ The information would constitute a breach of duty of confidence owed to a third party in terms of any agreement.
 - ▶ The information was provided in confidence, and the disclosure could reasonably be expected to prejudice the future supply of information from the same source (this is important to journalists as they may use this to refuse to reveal their sources).
 - ▶ It should be noted that the information officer may not refuse a request for information if the information being requested:
 - › is already publicly available
 - › is about a third party and the third party has given consent for the disclosure.
- ▶ *Information that endangers the safety of individuals or property* (section 24):
 - ▶ The disclosure could reasonably be expected to endanger the life or physical safety of an individual.
 - ▶ The disclosure would impair the security of any property.
 - ▶ The disclosure would endanger the public or any section of the public.

- ▶ *Legal proceedings* (section 25):
 - ▶ Access to the information is prohibited in terms of section 117A(10) of the Criminal Procedures and Evidence Act.
 - ▶ Contains methods, procedures or guidelines for:
 - › the prevention, detection, curtailment, investigation or possible contravention of the law
 - › prosecution of alleged offenders and the disclosure of the methods, techniques or procedures could reasonably be expected to prejudice the effectiveness of those methods, techniques or procedures
 - › information that is likely to impede a prosecution that is underway or result in a miscarriage of justice.
 - ▶ The information could reasonably be expected to:
 - › prejudice an investigation of a contravention of the law
 - › reveal or enable a person to ascertain the identity of a confidential source of information concerning the enforcement or administration of law
 - › result in interference, coercion or intimidation of a witness in legal proceedings
 - › facilitate the commission of a contravention of the law
 - › prejudice or impair the fairness of trial proceedings.
- ▶ *Legally privileged information* (section 26):

The information is privileged under the law in Zimbabwe, and the person or entity entitled to that privilege has refused to give permission for its consent.
- ▶ *Protection of defence, security and international relations of the State* (section 27):
 - ▶ Information that is likely to cause prejudice to:
 - › the defence or security of the state
 - › international relations of the state
 - ▶ information provided in confidence by or on behalf of another state or international organisation or is required to be held in confidence by international agreement
 - ▶ information relating to military tactics, exercises or operations (this may not be refused if the record is more than 20 years old).
- ▶ *Protection of economic interests and financial welfare of the state and commercial interests of public entities* (section 28):
 - ▶ The information would materially jeopardise the national economy or

financial welfare of the state and the ability of the government to manage the national economy effectively in the national best interest.

- ▶ It should be noted that the information officer may not refuse a request for information if the information being requested:
 - › is already publicly available
 - › is about a third party and the third party has given consent for the disclosure
 - › would facilitate accountability and transparency of decisions taken by the entity (other than preliminary test results, research or investigations taken to develop any policy).
- ▶ *Protection of research information of a third party or entity* (section 29):

The information relates to research being done by, or on behalf of, an entity or third party and the disclosure would likely expose the entity, third party, researcher or subject matter to serious disadvantage.
- ▶ *Operations of public entities* (section 30):
 - ▶ The information contains an opinion, advice, report or recommendation obtained to formulate a policy or take a decision in the exercise of the public entity's power.
 - ▶ The disclosure would frustrate the deliberative processes of the public entity by inhibiting candid communication.
 - ▶ Premature disclosure could reasonably be expected to frustrate the success of a policy of the public entity.
 - ▶ The disclosure could be expected to jeopardise the effectiveness of a testing or auditing procedure used by the public entity.
 - ▶ The information contains evaluative material that must be held in confidence by the public entity.
- ▶ *Frivolous or vexatious requests or requests involving an unreasonable diversion of resources* (section 31):
 - ▶ The request for information is frivolous or vexatious.
 - ▶ The work involved in processing the request would substantially and unreasonably divert the resources of the entity.

Section 35(1) of the Freedom of Information Act provides that the applicant requesting access to information may appeal any decision of an information officer to the Zimbabwe Media Commission.

The Freedom of information Act could be critically important for the media and, if used properly (particularly in respect of on-going investigative journalism), could provide access to extremely valuable information.

4 Regulations affecting the media

In this section, you will learn:

- ▷ what regulations are
- ▷ key regulations governing broadcasting

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 broadcasting

The BAZ has made the Broadcasting Services (Licensing and Content) Regulations, 2004, which have been approved and published by the Minister of State for Information and Publicity in terms of section 46 of the Broadcasting Services Act. For our purposes, the most important aspect of the Broadcasting Regulations is Part IV, headed Programme Content and Presentation. This part contains numerous provisions regulating content, many of which are repetitive. However, it also contains important regulatory provisions regarding records to be kept and consumer protection issues. A brief summary of the critical provisions of this part is detailed below.

- ▶ *Section 13 — Programme content and presentation:* Every licensee shall ensure that programming:
 - ▶ upholds national sovereignty, unity, interest, security and Zimbabwe's economic interests
 - ▶ projects Zimbabwean national values and points of view
 - ▶ observes good taste and decency
 - ▶ upholds public morality
 - ▶ avoids intrusion in private lives
 - ▶ does not injure the reputation of individuals
 - ▶ protects children from negative influences
 - ▶ does not incite or perpetuate hatred against or vilify any group or persons on the basis of ethnicity, race, gender, religion or disability.

- ▶ *Section 14 — News and current affairs programmes:* When reporting news or current affairs programmes licensees must:
 - ▶ ensure that where issues of public importance are discussed, a reasonable effort is made to present a fair, accurate, balanced and impartial view
 - ▶ where the licensee allows the expression of personal views, the audience should be informed in advance and should have an opportunity to respond to such views
 - ▶ provide advance audience advisories for news items containing accounts of extraordinary violence, sexual conduct or gruesome accounts of death;
 - ▶ accurately report court and parliamentary proceedings, the reporting of which must not contain premature conclusions which might prejudice the outcome of a case.
- ▶ *Section 15 — Political broadcast during an election:* During an election, licensees must:
 - ▶ give reasonable and equal opportunities for the broadcasting of election matter to all political parties contesting an election
 - ▶ be guided by the provisions of the Broadcasting Services Act when dealing with election advertisements, identification of election matter and keeping records of matters broadcast.
- ▶ *Section 16 — Investigative reporting:* Investigative reporting should be balanced fair, accurate and complete.
- ▶ *Section 17 — Privacy:* Licensees must:
 - ▶ not use material relating to a person's personal or private affairs or which invades an individual's privacy, other than where there is a compelling public interest
 - ▶ not identify rape victims and victims of other sexual offences without the prior written consent of the victim
 - ▶ not identify minors who are victims of rape or any other crime.
- ▶ *Section 18 — Live programmes:* Every licensee must:
 - ▶ be technically equipped in handling live programmes to avoid broadcasting obscene and undesirable comments from participants, callers and audiences
 - ▶ ensure that contributors and participants are treated fairly and avoid discrimination or denigration.
- ▶ *Section 19 — Retractions, corrections or apologies:* Where the broadcaster recognises that a programme has been biased, alleges wrongdoing or incompetence or was a damaging critique of an individual or organisation, the opposing views or those aggrieved should be given a timely opportunity to

respond or comment and the broadcaster shall correct errors promptly and with due prominence.

- ▶ *Section 20 — Sponsorship:*
 - ▶ Every licensee shall adopt and deposit with the BAZ a sponsorship policy, which will ensure that:
 - › advertising material from the sponsor is distinct from programming
 - › the content and format of individual programmes are not influenced by the sponsors thereof.
 - ▶ Sponsorship of news and current affairs programmes is prohibited.
- ▶ *Section 21 — Programme repeats:* Programmes may be repeated during suitable times. For subscription broadcasting services, an adult programme can be re-transmitted only between 22h00 and 05h00.
- ▶ *Section 22 — Scheduling:*
 - ▶ Children must be protected from unsuitable programme material.
 - ▶ For a subscription broadcasting service, programmes dealing with extreme violence, sexual conduct and disturbing social and domestic friction should not be broadcast between the hours of 05h00 and 22h00.
- ▶ *Section 23 — National languages:* Every free-to-air licensee shall:
 - ▶ ensure that not less than 10% of its total programming content is in any of the national languages of Zimbabwe other than Shona or Ndebele
 - ▶ refrain from using language meant to mislead or cause alarm and despondency unnecessarily
 - ▶ take particular care to avoid blasphemy and to take account of cultural and religious sensitivities.
- ▶ *Section 24 — Explicitness:*
 - ▶ Every licensee is required to ensure that in programmes broadcast, sexual activity shall be:
 - › suggested only in discreet visual or verbal reference and never in graphic detail
 - › is infrequent and not gratuitous.
 - ▶ Broadcasters must take into account community values on exposure to unsolicited sexual material.
 - ▶ For subscription services, discussion of sexual matters must be broadcast during the watershed period (22h00 to 05h00), although educational material targeted at children may be broadcast before the watershed period.

- ▶ Broadcasters must ensure that:
 - › no programme depicts actual sexual activity but may depict simulation of sexual activity
 - › nude scenes showing the genitals are not be broadcast
 - › where a news story has a sexual aspect, it should be presented without undue exploitation. The extent of explicitness in the report should be measured against the time of day of the broadcast.
- ▶ *Section 25 — Programme classification, labels or warnings:*
 - ▶ During the early hours of the watershed period (22h00 to 05h00), audience advisories must be provided before the commencement of each programme. These are to be both verbal and displayed in writing on the screen.
 - ▶ During the normal viewing period (that is, not during the watershed period), broadcasters are also required to display classification symbols and what these denote visually.
 - ▶ The regulations set out various warning symbols for such things as offensive language, violence and so on.
 - ▶ The regulations set out various age restriction classifications.
- ▶ *Section 26 — Violence:* Free-to-air-broadcasters shall:
 - ▶ protect children from violent material;
 - ▶ ensure that programmes broadcast do not:
 - › incite or glamourise violence or brutality
 - › contain gratuitous violence
 - › show methods of inflicting injury which can be easily imitated
 - › portray conduct likely to encourage antisocial behaviour and abuse of drugs or alcohol
 - › contain frightening and excessive special effects featuring violence
 - › contain a titillating combination of violence and sex
 - › portray violence against women to encourage the idea that women are to be exploited or degraded by violence, or are the willing victims of violence
 - ▶ portray violence against women as erotic.
- ▶ *Section 27 — Advertising content:*
 - ▶ There shall be a clear separation between programming and advertising content.

- ▶ Every licensee shall:
 - › broadcast a maximum of five minutes of advertising in any 30 minutes of broadcasting
 - › insert a maximum of two advertising breaks in a 30-minute programme
 - › ensure that every advertisement does not exceed 30 seconds in duration.
- ▶ A presenter broadcasting a live advertisement must state clearly at the beginning and end of the advert that it is a commercial or public service announcement.
- ▶ No licensee shall broadcast an advertisement which:
 - › is contrary to good morals
 - › discriminates against or vilifies a person or group
 - › promotes the consumption of alcohol without warning of the hazards of such consumption
 - › promotes smoking tobacco or consuming intoxicating drugs without warning of the hazards of such consumption
 - › is misleading or is likely to cause damage to a competitor.
- ▶ *Section 28 — Stereotypes and portrayal:* Broadcasters shall:
 - ▶ not broadcast material which promotes or glamourises discrimination based on race, ethnicity, origin, colour, religion, race, mental or physical disability
 - ▶ ensure that the programmes portray the intellectual and emotional equality of the sexes
 - ▶ portray men and women as having equal capabilities in performing societal functions
 - ▶ avoid:
 - › identifying people by their colour or ethnic origin
 - › using derogatory terms when speaking about people or a particular ethnicity or race
 - › presenting a group as an undifferentiated mass rather than a collection of people with different interests and beliefs
 - › depicting women as sexual objects
 - ▶ be sensitive to the rights and dignity of people who are mentally or physically challenged.

- ▶ *Section 30 — Community service:* Every licensee shall:
 - ▶ provide sufficient coverage of national events, including various public holidays
 - ▶ when providing information services, provide a fair, balanced, accurate and complete service.
- ▶ *Section 31 — Complaints handling procedure:* Every licensee shall:
 - ▶ establish a complaints handling procedure, a copy of which is to be lodged with the BAZ
 - ▶ acknowledge the right of audiences to make complaints
 - ▶ make arrangements to ensure that:
 - › both verbal and written complaints are recorded
 - › complaints are investigated and addressed within 14 days
 - ▶ advise complainants of their right to refer the complaint to the BAZ
 - ▶ make the records of complaints available for inspection at the request of the BAZ.
- ▶ *Section 32 — Programmes not to be broadcast:* This section essentially repeats several previous prohibitions on violence and sexual content. Two that have not been mentioned previously are prohibitions on broadcasting:
 - ▶ simulated news or events which mislead or alarm viewers
 - ▶ the actual process of hypnosis.
- ▶ *Section 34 — Programme schedules and recordings to be kept:* Licensees:
 - ▶ are required to publish their programme schedules in a national newspaper one month in advance and must adhere to it unless the licensee is obliged to broadcast spontaneous events of national and international significance
 - ▶ shall submit to the BAZ:
 - › a quarterly programme schedule 14 days before each quarter
 - › monthly transmission reports detailing programmes actually broadcast and music play-lists detailing all the music broadcast within seven days of the end of each month
 - ▶ shall maintain copies of all off-air transmission recordings for at least six calendar months.
- ▶ *Section 35 — Disabling of services and consumer protection for subscribers:*
 - ▶ Subscribers to a service must be connected within 24 hours of payment for such service.

- ▶ Licensees must:
 - › respond timeously to repairing faults
 - › compensate subscribers for a downtime caused by the licensee
 - › have a duty of confidentiality to subscribers
 - › not, without the subscriber's consent, disclose personal information to anyone other than a related entity to provide the service
 - › accept a monthly minimum subscription fee.
- ▶ *Section 36 — Community broadcasting codes:* Community broadcasting stations shall:
 - ▶ provide their services in the public interest
 - ▶ have organisational mechanisms to provide for active community participation
 - ▶ demonstrate independence in programming as well as editorial and management decisions
 - ▶ present programmes that contribute to the social and economic development of the community
 - ▶ seek to widen the community's involvement in broadcasting and encourage participation by those not adequately served by other media.
- ▶ *Section 37 — Violations and penalties:* After affording a licensee a reasonable opportunity to be heard, the BAZ shall impose monetary or other penalties for breaches of the regulations.

5 Media self-regulation

The self-regulatory body for the media in Zimbabwe is the Voluntary Media Council of Zimbabwe (VMCZ).

The VMCZ has established a Media Complaints Committee (MCC), which aims to promote and protect a set of common professional standards of conduct for media practitioners, whether these are members of the VMCZ or not. The MCC will, therefore, hear a complaint against any media practitioner or institution in Zimbabwe.

The VMCZ has developed a complaints procedure for the MCC, which requires complaints to be made in writing and within 30 days of the cause of complaint. In brief, the complaints procedure contains several provisions regulating, among other things, the:

- ▶ lodging of complaints

- ▶ fact that a complainant who uses the procedure must waive his or her rights to institute legal action concerning the complaint
- ▶ ability of the chairperson to reject complaints on grounds such as frivolity, failure to take steps to settle the matter amicably, the institution of legal action, no apparent breach
- ▶ adjudication procedure and the powers of the MCC in adjudication. These include that adjudication must be provided in writing and that the MCC has the power to:
 - ▶ dismiss the complaint or
 - ▶ find in favour of the complainant
- ▶ issue a reprimand
- ▶ order the publication of a prompt retraction and apology.

Note that the MCC does not have the power to impose a financial penalty, but it may order the unsuccessful party to pay the costs of the complaint. Although there is no appeal to a ruling of the MCC, its decisions are reviewable for procedural irregularities in the High Court.

In brief, the VMCZ's Code of Conduct for Zimbabwean Media Practitioners provides for the following to apply to media practitioners and institutions:

- ▶ **General standards**
 - ▶ To maintain the highest professional and ethical standards in performing their functions of informing, educating and entertaining.
 - ▶ To defend the principle of freedom of the media to access, collect and disseminate information freely and to publish comments and criticisms. To oppose censorship, suppression of news and the dissemination of propaganda.
- ▶ **Accuracy and fairness**
 - ▶ To report and interpret news with scrupulous honesty and take all reasonable steps to disseminate accurate information, to depict events fairly and without distortion.
 - ▶ Never to publish information known to be false or make unfounded allegations maliciously with intent to harm reputations.
 - ▶ To check facts and take care not to publish inaccurate material. Editors are to ensure that all steps that a reasonable media practitioner would take to check the accuracy of facts have been taken.
 - ▶ Special care must be taken concerning stories that may cause harm to individuals, organisations or the public interest. Before publishing a story of alleged wrongdoing, all reasonable steps must be taken to obtain a

response from the alleged wrongdoer, and any response must be published together with the report in question.

- ▶ To provide full, fair and balanced reports of events and not suppress essential information. Avoid distortion by exaggeration, one-sidedness, improper emphasis, reporting facts out of context or suppressing relevant facts. Avoid misleading headlines or billboard postings.

▶ **Correction of inaccuracy or distortion**

- ▶ On discovering it has published a report containing significant inaccuracy or distortion, a media institution must publish a correction at the earliest opportunity and with comparable prominence.
- ▶ On discovering it has published an erroneous report that has caused harm to a person or institution, it must publish an apology promptly and with due prominence.
- ▶ Media institutions must report fairly and accurately on the outcome of a defamation action against it.

▶ **Right of reply**

Where a person or institution believes that a media report contains inaccurate information or unfair criticism, the media institution concerned must provide a fair opportunity to reply to correct inaccuracies and respond to criticism.

▶ **Comment**

- ▶ A comment or expression of opinion must be a genuine and honest comment or opinion relating to established fact.
- ▶ Comment or conjecture must not be presented to create the impression that it is an established fact.

▶ **Bribes and inducements**

Media practitioners and institutions must not suppress or distort reports or omit or alter vital facts in return for the payment of money or other gifts or rewards.

▶ **Pressure or influence**

Media practitioners and institutions must not suppress or distort information due to pressure or influence from their advertisers or others who have a corporate, political or advocacy interest in the media institution concerned.

▶ **Hatred or violence**

- ▶ Media practitioners and institutions must not publish material that is intended or likely to engender hostility or hatred towards persons on the grounds of race, ethnic origin, nationality, gender, sexual orientation, physical disability, religion or political affiliation.

- ▶ Media institutions must take the utmost care to avoid contributing to the spread of ethnic hatred or political violence.
- ▶ **Reporting of elections**
 - ▶ Election reporting must be fair and balanced.
 - ▶ Before reporting a damaging allegation against a candidate or political party, a media practitioner must obtain, wherever possible, a comment from the candidate or party concerned.
 - ▶ Media practitioners and institutions must not accept gifts, rewards or inducements from a politician or candidate.
 - ▶ As far as possible, media practitioners report the views of candidates or political parties directly and in their own words.
 - ▶ Media practitioners must take care when reporting on opinion polls. Where possible, they must include details of the methodology used in conducting the poll and by whom it was conducted.
- ▶ **Reporting on police investigations and criminal court cases**
 - ▶ The media must refrain from publishing articles prejudging the outcome in criminal cases or seeking to influence the outcome of cases.
 - ▶ The media is entitled to inform the public about arrests of suspects and the trials of accused persons but should avoid naming suspects until formal charges have been filed against them unless the public interest requires otherwise.
 - ▶ Where the media has begun to report on a criminal case, it must follow up and report subsequent developments with due prominence.
- ▶ **Privacy**
 - ▶ It is normally wrong for a media practitioner to intrude into and report on a person's private life without his or her consent.
 - ▶ Reporting on a person's private life can be justified only when it is in the public interest to do so, including:
 - › exposing criminal conduct
 - › exposing seriously antisocial conduct (note this is not defined)
 - › protecting public health and safety
 - › preventing the public from being misled by a statement or action of an individual.
 - ▶ The media may probe and publish details about the private moral behaviour of a public official, where this conduct has a bearing on his or her suitability as a public official.

▶ **Intrusion into grief or shock**

- ▶ In cases involving personal grief or shock, sympathy and tact are required when making enquiries.
- ▶ Members of the media must identify themselves to a responsible official and must obtain permission before entering non-public areas of hospitals or similar institutions.

▶ **Interviewing and photographing children**

- ▶ Normally, the media should not interview or photograph children under the age of 16 in the absence of a parent or adult responsible for the child.
- ▶ Special sensitivity and sympathy are required when interviewing or photographing children in difficult circumstances or with disabilities.
- ▶ Children at a school, crèche or similar institution should not be interviewed or photographed without the permission of the appropriate authorities.

▶ **Children in criminal cases**

Media institutions must not publish the names of any person under 16 who is arrested or on trial.

▶ **Victims of crime**

Media institutions must not identify victims of sexual assault or publish material likely to contribute to such identification unless the victim has consented to such publication or the law authorises such publication.

▶ **Innocent relatives or friends**

Media institutions should avoid identifying relatives or friends of persons accused or convicted of a crime unless this is necessary for the full, fair and accurate reporting of the crime or legal proceeding.

▶ **Surreptitious gathering of information**

- ▶ Open methods of gathering information in which media practitioners clearly identify themselves should be used. Generally, media practitioners should not seek or obtain information by misrepresentation, deception, subterfuge or undercover techniques.
- ▶ Surreptitious methods of information gathering may be used only where open methods have failed to yield information which is in the public interest. Surreptitious methods may be used if they will help to detect or expose criminal activity or bring to light information that will protect the public against serious threats to public health and safety.

▶ **National security**

- ▶ Media institutions must not prejudice the legitimate national security interests of Zimbabwe or place members of the defence force who are on active military duty at risk.

- ▶ However, this does not prevent the media from exposing corruption in security or defence agencies, or from commenting on levels of defence expenditure.
- ▶ **Plagiarism**
Media practitioners must not engage in plagiarism. Plagiarism consists of making use of another person's words, pictures or ideas without permission and proper acknowledgement and attribution of the source of those words, pictures or ideas.
- ▶ **Protection of sources**
 - ▶ Where a person has agreed to supply information on condition of anonymity, and the media practitioner agrees to this, the media practitioner must respect this undertaking and refuse to reveal the identity of the source.
 - ▶ However, the media practitioner may tell the source that his or her identity might have to be revealed if it becomes clear that this information is needed to prevent or expose serious criminal conduct.

6 Case law and the media

In this section, you will learn:

- ▷ the definition of common law
- ▷ defamation
- ▷ unconstitutionality of offences relating to the publication of false statements
- ▷ a journalist's right to protect sources
- ▷ constitutionality of Zimbabwe Broadcasting Corporation's monopoly in respect of broadcasting

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 Zimbabwe's, judges are bound by the decisions of higher courts and also by the rules of precedent. This requires that rules laid down by the court in previous cases must be followed unless they were clearly wrongly decided. Legal rules and principles are, therefore, decided on an incremental, case-by-case basis.

Since the last publication of this chapter, there have been numerous cases challenging decisions made under the Access to Information and Protection of Privacy Act, 2002. However, as that Act has now been repealed, we have not included a reference to these cases in this section as they will not be relevant in the future.

6.2 Defamation

6.2.1 Can an organ of state sue for defamation and does a statutory corporation constitute an organ of state?

In *PTC v Modus (Pvt) Ltd 1997 (2) ZLR 492 (S)*, the issue was whether the Posts and Telecommunications Corporation (PTC), a statutory corporation incorporated under Zimbabwean law, could sue a newspaper for defamation. The Supreme Court, in a unanimous judgment, confirmed three critical issues concerning defamation.

- ▶ It confirmed that an artificial person [that is, a juristic person such as a company] can sue for defamation — at page 494.
- ▶ It held that the state cannot sue for defamation — at page 494. It is important to note that several common law jurisdictions have upheld the principle that 'it would be contrary to the public interest for the organs of government, whether central or local to have that right' [that is, the right to sue for defamation] — see page 497.
- ▶ It held that the PTC could not sue for defamation because the PTC, although having a separate legal personality, was nonetheless an organ of State and therefore had no basis to sue — at page 502.

6.2.2 Factors to be taken into account in assessing damages

In *Shamuyarira v Zimbabwe Newspapers (1980) Ltd & Another 1994 (1) ZLR (H)*, the High Court set out (at page 502) a list of relevant factors in determining damages concerning the defamation in question, many of which are of general application:

- ▶ the content of the article, which includes the defamatory matter
- ▶ the nature and extent of the publication, including the aspect of the re-publication of the defamatory matter
- ▶ the plaintiff's standing, that is, his reputation, character and status
- ▶ the nature of the defamation
- ▶ the probable consequences of the defamation

- ▶ the conduct of the defendants from the time the defamatory matter was published to the time of judgment, including:
 - ▶ their reliance on and persistence in a plea of justification
 - ▶ the question of any malice on their part
 - ▶ the question of any retraction and apology for the publication of the defamatory matter
- ▶ the recklessness of the publication
- ▶ comparable awards of damages in other defamation suits and the declining value of money.

6.2.3 Defamation and public figures

In the case of *Mushunje v Zimbabwe Newspapers (1980) Ltd* (HC 2580/16), the High Court of Zimbabwe per Charewa J made some interesting comments in finding against a plaintiff in a defamation matter, on the issue of the defamation of famous and public figures. At pages 9 – 10, the court held as follows:

I am of the firm view that persons who find themselves in the public eye must expect a certain amount of publicity and intrusion into their private and personal lives, including inaccurate statements, as long as the publicity is not malicious or reckless in its disregard of truth. This is more so when they are public or famous figures where the happenings in their lives are, after all, news for the average citizenry.

They should therefore not be thin-skinned, belligerent or litigious, but ought to have the courage to take such social blows, which go with the territory, on the chin. They must understand that once they are in the public arena, they become targets of pot-shots for real or imagined indiscretions, errors or failures.

Therefore, unless the publications about them are malicious, or reckless in their disregard of truth, or clearly intended to tarnish their reputations, such persons should not rush to court to seek damages.

6.2.4 Unconstitutionality of the crime of defamation

In the case of *Madanhire and Another v Attorney-General of Zimbabwe* (CCZ 2/14 and 2/15), the Constitutional Court of Zimbabwe struck down the crime of defamation, effectively rendering defamation a purely civil matter in terms of which damages are paid for defamation and not a criminal matter involving sanctions such as fines or imprisonment. This was done by holding that section 96 of the Criminal Law (Codification and Reform) Act [9:23] 2005 (which section provided for the offence of criminal defamation), was an unconstitutional violation of the right to freedom of expression.

6.3 Unconstitutionality of offenses relating to the publication of false statements

In the case of *Chimakure and Others v Attorney General of Zimbabwe* (SC 14/2013 and CCZ 6/2014) the Constitutional Court of Zimbabwe struck down offences criminalising the publication of false statements prejudicial to the state by ruling that section 31(a)(iii) of the Criminal Law (Codification and Reform) Act [9:23] 2005 was an unconstitutional violation of the right to freedom of expression.

6.4 A journalist's right to protect sources

In *Shamuyarira v Zimbabwe Newspapers (1980) Ltd & Another 1994 (1) ZLR (H)*, the High Court upheld the right of a journalist not to reveal his or her sources during a civil defamation trial. The High Court made the following important statement on the issue:

Unless our courts are seen to be prepared to lean over backwards to protect, in the public interest, a journalist's source where the journalist has publicly uncovered corruption or some other form of iniquity on the part of those holding high office, whether in government or elsewhere, the courts will be guilty of a grave disservice to Zimbabwean society and to the principles of democracy upon which that society is founded [at page 483].

It is, however, also important to note that the High Court did set out instances where it would be appropriate to require a journalist to reveal his or her sources.

6.5 Constitutionality of provisions granting the Zimbabwe Broadcasting Corporation a monopoly in respect of broadcasting

In *Capital Radio (Pvt) Ltd v Minister of Information (1) 2000 (2) ZLR 243 (S)*, the Supreme Court declared that section 27 of the ZBC Act [Chap 12:01], which provided that 'No person other than the [Zimbabwe Broadcasting] Corporation shall carry on a broadcasting service in Zimbabwe', was inconsistent with the freedom of expression guarantee contained in section 20(1) of the then constitution.

Notes

- 1 <https://mg.co.za/article/2017-11-19-zimbabwes-ruling-party-expels-robert-mugabe/> [Last accessed on 19 October 2020].
- 2 <https://www.bbc.com/news/world-africa-42495934> [Last accessed on 19 October 2020].
- 3 <https://www.worldometers.info/world-population/zambia-population/> [Last Accessed on 19 October 2020].

- 4 <https://www.worldbank.org/en/country/zimbabwe/overview> [Last accessed on 19 October 2020].
- 5 <https://datareportal.com/reports/digital-2020-zimbabwe> [Last accessed on 19 October 2020]
- 6 [https://tradingeconomics.com/zimbabwe/access-to-electricity-percent-of-population-wb-data.html#:~:text=Access%20to%20electricity%20\(%25%20of%20population\)%20in%20Zimbabwe%20was%20reported,compiled%20from%20officially%20recognized%20sources.](https://tradingeconomics.com/zimbabwe/access-to-electricity-percent-of-population-wb-data.html#:~:text=Access%20to%20electricity%20(%25%20of%20population)%20in%20Zimbabwe%20was%20reported,compiled%20from%20officially%20recognized%20sources.) [Last accessed 19 October 2020].
- 7 <https://datareportal.com/reports/digital-2020-zimbabwe> [Last accessed on 19 October 2020]
- 8 <https://mg.co.za/article/2018-08-27-a-new-dawn-or-more-of-the-same-for-zimbabwe/> [Last accessed on 9 November 2020]
- 9 <https://www.aljazeera.com/news/2020/11/6/zimbabwe-journalist-remains-behind-bars-over-tweet> [Last accessed on 9 November 2020]
- 10 <https://allafrica.com/stories/202010151086.html> [Last accessed on 9 November 2020]