KONRAD ADENAUER STIFTUNG

Media Law Handbook for Southern Africa

Volume 2

Justine Limpitlaw

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KAS Media Programme Sub-Sahara Africa

The Konrad-Adenauer-Stiftung (KAS) is an independent, non-profit German political foundation that aims to strengthen democratic forces around the world. KAS runs media programmes in Africa, Asia and South East Europe.

KAS Media Africa believes that a free and independent media is crucial for democracy. As such, it is committed to the development and maintenance of a diverse media landscape on the continent, the monitoring role of journalism, as well as ethically based political communication.

Justine Limpitlaw

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by Justine Limpitlaw

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Cover photograph: Some of the 145 newly admitted advocates stand waiting inside the Supreme Courtroom to pick up their 'certificates of practise' at the Supreme Courts of Kenya in the capital Nairobi on 2 September 2019. (SIMON MAINA/AFP via Getty Images)

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Acknowledgements

It has been nearly ten years since the first edition of the Southern Africa Media Law Handbook was published by the Konrad-Adenauer-Stiftung Media Programme Sub-Sahara Africa (KAS). This second edition of the handbook is more extensive and runs to three volumes. The Tanzania chapter has been greatly enhanced by the inclusion of the media law landscape in Zanzibar. We also have three entirely new country chapters — Seychelles, Mauritius and Mozambique. I am particularly thrilled that we have, at last, been able to include a Lusophone country.

It has been inspiring and rewarding to meet so many people, students, journalists, editors, researchers, bloggers, academics and others who have found the first edition of the handbook a useful resource. Two such encounters stand out. One was an immigration official in Lusaka who studied my passport closely, causing some anxiety on my part. 'Justine Limpitlaw,' he said, 'are you here to talk about media law?' I was flummoxed. How could he know? 'I'm studying law part-time, and your book is a set work!'. Another was Swazi journalist, Bheki Makhubu. I attended court on one of his trial days (he was, of course, acquitted eventually as the charges were ridiculous and designed to stop his work). When I introduced myself as he sat in the dock, he said: 'This is all your fault. I read your book and thought 'publish and be damned', and here I am, damned!'

I am inspired by the courage and resilience of so many in the media who face grave risks in bringing important stories to light. They take their professional responsibilities of ensuring an informed citizenry, seriously.

Besides the journalists, it is important to remember that much-maligned profession, the lawyers. These handbooks could not have been written without the very generous assistance provided by lawyers, legal consultants and academics with better access to the laws of the countries under review than I have. As such, I am greatly indebted to Dr Tachilisa Balule (Botswana), Olivier Marc Mwamba Kabeya (Democratic Republic of Congo), Mabatsóeneng Hlaele (Lesotho), Kelvin Sentala (Malawi), Anushka Radhakissoon (Mauritius), Orquidea Palmira Massarongo (Mozambique), Adv Mohammed Tibanyendera (Tanzania) and Silas Dziike (Zimbabwe, Zambia, Namibia, Swaziland, and Seychelles).

Sadly, I am not multilingual, and so I relied heavily on my able French and Portuguese translators (all of whom are also excellent lawyers). Laurent Badibanga for the Democratic Republic of Congo chapter and Chantelle De Souza and Orquidea Palmira Massarongo for the Mozambique chapter. Again, I am greatly indebted to them.

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Finally, this project would not have happened without the KAS Media Programme Sub-Sahara Africa. While the impacts of this kind of democracy-support are sometimes hard to quantify, it is thanks to work of this kind, painstaking, in-depth, consistent and effective, that so many countries in southern Africa have engaged in media law reform initiatives. These include introducing access to information laws and independent regulators, transforming state broadcasters into public broadcasters and encouraging self or co-regulation of content. The progress is uneven, but it is evident. Programme Director Christoph Plate's recognition of the importance of media law reform and the impact it has on media operations, together with KAS's generous financial support, have made this second edition possible. I am very grateful.

In writing these handbooks, I recognize that censorship and other legal restrictions are only part of the difficulties faced by journalists on the Continent. Consequently, I would like to dedicate this edition of the Southern Africa Media Law Handbook to the journalists of our region, in recognition of the vital work they do and the dangers of it. This is exemplified by the disappearance of Mozambican community radio journalist Ibraimo Mbaruco on 9th April 2020. In his last communication, he said he was 'surrounded by military'. He has not been seen since.[1]

Justine Limpitlaw

1 https://rsf.org/en/news/mozambique-case-missing-mozambican-journalist-referred-un#:~:text=Ibraimo%20Mbaruco%2C%20a%20reporter%20for,been%20raised%2C%20from%20the%20head [Last accessed 10 December 2020]

Foreword

Dear Readers,

KAS Media Africa, the Media Programme for Sub-Sahara Africa of the Konrad-Adenauer-Stiftung, brings together stakeholders in the media industry. We are working on business models for the media which the Covid-19 pandemic has made more necessary than ever. We discuss the credibility crisis of the media, and we work on strategies to counter fake news.

Media Laws on the African continent have been amended, revised and rewritten since the first edition of the SADC Media Law Handbook was first published nearly a decade ago. The reasons for new media laws range from the advent of social media to the realisation of the powers-that-be that, with new technologies, they cannot control the narrative and discussion in the way they used to do. How does one balance the need to prevent hate speech with the necessity to question and control those in power publicly as well as those opposing them?

Our legal expert, Justine Limpitlaw, has taken up the challenge of analysing and scrutinising the media laws of 13 southern African countries over the past four years. We present the results to you in this three-volume-edition. The work will, in the next few years, make its way into legal offices, newsrooms and courtrooms on the continent, just as the first edition did.

It may be the biggest compliment to the author and her many collaborators from as far afield as the Seychelles, Mozambique and Zimbabwe, that she has often been asked for legal advice from lawmakers, politicians and media experts when media laws are being redrafted in their respective countries.

KAS Media Africa would like to thank Justine Limpitlaw and her team of lawyers for their tireless work, including translations in English, French and Portuguese. An accurate and robust quality media strengthens democracy and, therefore, needs the commitment of experts. It also needs you, the readers, who are welcome to share these three volumes' digital versions on our website.

Christoph Plate
Director KAS Media Africa
Johannesburg , South Africa
January 2021

Abbreviations

General

ACHPR	African Commission on Human and Peoples' Rights
Aids	Acquired Immunodeficiency Syndrome
AU	African Union
CEO	chief executive officer
DTT	Digital Terrestrial Television
EU	European Union
GDP	gross domestic product
HIV	human immunodeficiency virus
HRC	Human Rights Commission
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICT	information and communication technology
IMF	International Monetary Fund
IP	Internet Protocol
JSC	Judicial Service Commission
MP	member of parliament
NGO	non-governmental organisation
OTT	Over the Top
SADC	Southern African Development Community
SMS	Short Message Service
SOE	state-owned enterprises
UHF	Ultra High Frequency
UN	United Nations

Unesco	United Nations Education, Scientific and Cultural Organisation
VHF	Very High Frequency
WSIS	World Summit on the Information Society

Mauritius

CC	Complaints Committee
CEB	Central Electricity Board
GAC	General Advisory Council
IBA	Independent Broadcasting Authority
ICTA	Information and Communication Technologies Authority
IMC	Internet Management Committee
ITU	International Telecommunications Union
JLSC	Judicial and Legal Service Commission
MBC	Mauritian Broadcasting Corporation
SC	Standards Committee

Mozambique

BIP	Bureau of Public Information
Frelimo	Front for the Liberation of Mozambique
Gabinfo	Government Press Office
ICS	Institute for Mass Media
NCHR	National Commission for Human Rights
NCPA	National Council of Public Administration
Renamo	Mozambican Resistance Movement
SCMM	Superior Council of the Mass Media

Namibia

ACC	Anti-Corruption Commission
CEO	Chief Executive Officer
CRAN	Communications Regulatory Authority of Namibia
EFN	Editor's Forum of Namibia
FVD Fund	Film and Video Development Fund
JSC	Judicial Services Commission
Nampa	Namibian Press Agency
NBC	Namibian Broadcasting Corporation
NFC	Namibia Film Commission
RSA	Republic of South Africa
Swapo	South West African People's Organization
UGC	user-generated content
WPAC	Whistleblower Protection Advisory Committee
WPO	Whistleblower Protection Office

Seychelles

CAA	Constitutional Appointments Authority
CPC	Criminal Procedure Code
FCB	Film Classification Board
HRC	Human Rights Commission
LUNGOS	Liaison Unit for Non-Governmental Organisations
Nisa	National Information Service Agency
SBC	Seychelles Broadcasting Corporation
SBS	Sound Broadcasting Services
SLA	Seychelles Licensing Authority
SMC	Seychelles Media Commission

South Africa

ABC	Audit Bureau of Circulations
ARB	Advertising Regulatory Board
BBBEE	broad-based black economic empowerment
BCCSA	Broadcasting Complaints Commission of South Africa
CCC	Complaints and Compliance Committee
DTT	Digital Terrestrial Television
ECNS	electronic communications network service
IAB	Interactive Advertising Bureau of South Africa
IBA	Independent Broadcasting Authority
Icasa	Independent Communications Authority of South Africa
IP TV	Internet Protocol Television
ITU	International Telecommunications Union
JSC	Judicial Service Commission
MDDA	Media Development and Diversity Agency
MP	Member of Parliament
NAB	National Association of Broadcasters
NCOP	National Council of Provinces
Sanef	South African National Editors' Forum
SABC	South African Broadcasting Corporation
SAHRC	South African Human Rights Commission
UGC	User-Generated Content
USAF	Universal Service and Access Fund
VOD	Video-On-Demand

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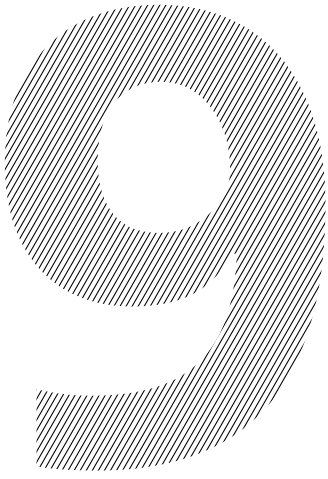

Mauritius

1 Introduction

The Republic of Mauritius is a small country (about 2000 square kilometres) which includes the Agalega Islands and Rodrigues, roughly 800kms off the east coast of Madagascar.[1] It has a population of approximately 1.2 million people.[2]

It was known to Arab and Malay sailors as early at the 10th Century. It was explored by the Portuguese and settled by the Dutch in the 16th Century who named it Mauritius, in honour of their head of state, Maurice, Prince of Orange and Count van Nassau.[3]

The Dutch colonisation of Mauritius was not successful, and they withdrew in 1710.[4] Their short occupation was notorious for the extinction of the Dodo, a flightless bird.[5] The French East India Company claimed the island for France in 1715, establishing sugar cane plantations and using the island as a base for Indian Ocean trade.[6] In 1796, the French government moved to abolish slavery, and the Mauritian settlers broke away from French control in protest.[7] In 1810 during the Napoleonic Wars, the British took control of the island.[8] The United Kingdom abolished slavery in 1834, including in Mauritius, but introduced a system of indentured labour in 1835 leading to the arrival of hundreds of thousands of workers from India.[9]

The first Indo-Mauritians were elected to the government council only in 1926. In 1942, the then governor established a consultative committee with representation from all Mauritian communities;[10] this was a significant milestone. During World War II, the island was strategically important to the United Kingdom, which used it for anti-submarine and convoy operations.[11] In 1957, internal self-government was established based on the Westminster system, and the first elections based on universal adult suffrage were held in 1959.[12]

Mauritius gained independence from the United Kingdom in 1968 during the wave of post-World War II African independence.[13] Since then it has had a stable democracy with numerous elections in which power has changed hands on several occasions. It became a republic in 1992 and is still a member of the Commonwealth.[14]

Since independence, Mauritius has undergone a significant economic transformation from a low-income, agriculture-based economy to a diversified upper middle-income economy with growing industrial, financial and tourism sectors. The mainstays of the economy are sugar tourism, textiles and financial services. However, the country is expanding into other areas including fish processing, information and communication technology, education, hospitality and property development.[15] The country consistently ranks as one of the most business-friendly countries on the continent.[16] The government has introduced policies to stimulate economic growth in five crucial areas:[17]

- as a gateway for international investment into Africa
- renewable energy

- smart cities
- growing the ocean economy
- upgrading and modernising infrastructure, including public transport, the port and the airport.

Recently, Mauritius has been party to a significant international dispute over the Chagos Islands, some 2000kms from Mauritius. In 2019, the International Court of Justice issued an advisory opinion in which it ruled that the United Kingdom is under an obligation to bring an end to its administration of the disputed Chagos islands.[18] The islands were to be handed back to Mauritius as the court held that the islands were unlawfully separated from Mauritius in 1965, before independence. One of the Chagos islands, Diego Garcia, has been leased by the United Kingdom to the United States as the site of a US airbase. After the court ruling, the United Nations voted overwhelmingly (116–6) on a resolution that the islands should be returned to Mauritius.[19] To date the United Kingdom has refused, citing the fact that the court's ruling was 'advisory'.[20] However, it has undertaken to do so once the islands 'are no longer needed for defence' [21] although it disputes that the islands were ever part of Mauritius and it has given no timetable for when that will be.

Mauritius has the second-highest GDP per capita in Africa (coming in behind the Seychelles, which has a much smaller population).[22] According to the World Bank, 97.5% of the people of Mauritius have access to electricity.[23] Internet penetration is 67% which is high by African standards.[24] Mauritius is one of the few African countries that has completed the transition to Digital Terrestrial Television, switching off analogue television transmitters on 17th June 2015, in line with the ITU deadline for the region.[25] While recognising the Mauritian history of commitment to openness and democratic values, media watchers have raised concerns about recent amendments to legislation which provide for a range of internet-related offences.[26]

In this chapter, working journalists and other media practitioners will be introduced to the legal environment governing media operations in Mauritius. 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 primary laws governing the media in Mauritius. Significant weaknesses and deficiencies in these laws will also be identified. The hope is to encourage media law reform in Mauritius, 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 Mauritian Constitution
- ▷ how rights are enforced under the constitution
- ▷ what is meant by the three branches of government and separation of powers
- ▷ whether any weaknesses in the Mauritian Constitution ought to be strengthened to protect the media

2.1 Definition of a constitution

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

The Mauritian Constitution published in Government Notice 54 of 1968, which has been amended several times, sets out the foundational rules of the Mauritian state. These are the rules on which the entire country operates. The constitution

contains the underlying principles and values of the Republic of Mauritius. A key constitutional provision is section 1, which states: 'Mauritius be a sovereign democratic state which shall be known as the Republic of Mauritius.'

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 essential to ensure that a constitution has legal supremacy. If a government passed a law that violated the constitution (was not following or conflicted with a constitutional provision) such legislation could be challenged in a court of law and could be overturned on the ground that it is unconstitutional.

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

2.3 Definition of a limitations clause

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 following the constitution.

The Constitution of Mauritius makes provision for two types of legal limitations on the exercise and protection of rights contained in Chapter II, Protection of Fundamental Rights and Freedoms of the Individual.

2.3.1 Internal limitations

Section 3 of the constitution makes it clear that Chapter II 'shall have effect for the purpose of affording protection to those rights and freedoms'; however, this is not absolute. As section 3 goes on to state:

> ***subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others all the public interest.***

Some limitations are right-specific and contain limitations or qualifications to the particular right that is dealt with in a specific section of Chapter II. As discussed later, the right to freedom of expression contains such an internal limitations clause.

2.3.2 Constitutional limitations

If allowed in terms of any provision of the constitution, a law may limit any right entrenched in the Bill of Rights. See, for example, section 18 of the constitution, which deals with states of emergency. In certain circumstances, section 18(1) specifically allows for emergency legislation to provide for derogations from certain fundamental rights, namely, the right to personal liberty (section 5) and the right not to be discriminated against (section 16). These circumstances include where the derogation is reasonably justifiable for dealing with the situation that exists in Mauritius during any public emergency. A proclamation of a public emergency by the president is required and that the measures authorised by the law are necessary in the interests of peace, order and good government.

The process of declaring a public emergency is set out in section 18(2) of the constitution. Essentially, it requires the National Assembly to approve the proclamation supported by the votes of at least two-thirds of all the members of the National Assembly, failing which it will lapse within 21 days (if the National Assembly is not in session) or within seven days if it is. The proclamation can be extended for six months at a time by resolution of the National Assembly. The proclamation can be revoked at any time by the president or by resolution of the National Assembly.

2.4 Constitutional provisions that protect the media

The Mauritian Constitution contains several essential provisions in Chapter II, Protection of Fundamental Rights and Freedoms of the Individual, that protect the media, including publishers, broadcasters, journalists, editors and producers. However, there are provisions elsewhere in the constitution that assist the media as it goes about its work of reporting on issues in the public interest, and we include these in this section.

2.4.1 Freedom of expression

The most important provision that protects the media is section 12(1), part of the section headed Protection of Freedom of Expression, which states:

> ***Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence.***

This provision needs some detailed explanation.

- This freedom applies to all persons and not just to certain people, such as citizens.
- The freedom is not limited to speech (whether oral or written) but extends to non-verbal or non-written expression. There are many different examples of this, including physical expression (such as mime or dance), photography or art.

- Section 12(1) specifically enshrines the freedom 'to receive or impart ideas and information without interference'. 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 essential because it also protects organisations that foster media development. These organisations facilitate public access to different sources and types of information, particularly in rural areas that traditionally have limited access to the media. This provision is particularly important as the Mauritian Constitution does not have a stand-alone right of access to information.

- Lastly, section 12(1) protects against interference with a person's correspondence which is a particularly important right for the media because it protects from unlawful search and seizure of correspondence which might reveal a confidential source of information.

- However, section 12(1) is subject to an internal limitation which is discussed more fully in section 2.5.3 below. This internal limitation results in less protection being afforded the right to freedom of expression than would appear to be the case on a plain reading of section 12(1) of the Mauritian Constitution.

2.4.2 Privacy

A second protection is contained in section 9, Protection for Privacy of Home and other Property. Section 9(1) specifies that 'no person shall be subjected to the search of his person or his property or the entry by others on his premises', except with his consent. This protection of property would include communications property (including letters, emails, telephone conversations, WhatsApp and other non-public social media communication) and is a basic right for working journalists to protect confidential sources of information.

However, section 9(1) is subject to an internal limitation which is discussed more fully in section 2.5.3 below. This internal limitation results in less protection being afforded the right to privacy than would appear to be the case on a plain reading of section 9(1) of the Mauritian Constitution.

2.4.3 Freedom of conscience

A third protection is contained in section 11, Protection of Freedom of Conscience. Section 11(1), provides that except with his consent 'no person shall be hindered in the enjoyment of his freedom of conscience ... [which] includes freedom of thought'. Freedom of thought is important for the media as it protects media commentary on public issues of importance, along with the right to freedom of expression.

However, section 11(1) is subject to an internal limitation which is discussed more fully in section 2.5.3 below. This internal limitation results in less protection being afforded the right to freedom of conscience than would appear to be the case on a plain reading of section 11(1) of the Mauritian Constitution.

2.4.4 Freedom of association

A fourth protection is provided for in section 13, Protection of Freedom of Assembly and Association. Section 13(1) provides that except with his consent:

> *No person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble free and associate with other persons and, in particular, to form or belong to, trade unions or other associations for the protection of his interests.*

This is important because it guarantees the rights of individuals involved in the media to form press associations and media houses and to conduct media operations.

However, section 13(1) is, subject to an internal limitation which is discussed more fully in section 2.5.3 below. This internal limitation results in less protection being afforded the right to freedom of association than would appear to be the case on a plain reading of section 9(1) of the Mauritian Constitution.

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

Just as some certain rights or freedoms 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 several of these.

2.5.1 Right to privacy

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, followed in public and so on. The media has to be careful in this regard. They should be aware that there are always boundaries concerning privacy that need to be respected and which are dependent on the particular circumstances, including whether or not the person is a public figure or holds public office and the nature of the issue being dealt with by the media.

2.5.2 Internal limitations to various rights

It is important to note that all of the rights that are important to the media and dealt with above are internal limitation provisions.

Internal limitations on the right to freedom of expression

Section 11(2) of the constitution provides that any law does not contravene the right to freedom of expression to the extent that the law makes provision in the interests of:

- defence or public safety, order, morality or health

- protecting the reputations and rights and freedoms of other persons or the private lives of persons concerned in legal proceedings
- preventing the disclosure of information received in confidence
- maintaining the authority and independence of the courts
- regulating the technical administration or operation of electronic communications, including broadcasting
- imposing restrictions on public offices, except if not reasonably justifiable in a democratic society.

These require detailed discussion.

- First, limiting freedom of expression on the grounds of defence or public safety, order, morality, or health are internationally accepted grounds for restrictions. However, it is unfortunate that these are not crafted in a way that requires the limitations to be reasonably justifiable in a democratic society.
- Second, limiting freedom of expression on the grounds of protecting the reputations and rights of others or the private lives of persons concerned in legal proceedings is following internationally accepted grounds for restrictions.
- Third, limiting freedom of expression on the grounds of maintaining the authority and independence of the courts is an internationally accepted ground for restrictions to protect the administration of justice.
- Fourth, restrictions on freedom of expression arising from the technical administration of broadcasting is an internationally accepted ground of restriction. Unfettered or unlicensed broadcasting making use of the radio frequency spectrum would simply result in radio signal interference, rendering all broadcasting impossible.

Internal limitations on the right to privacy

In its relevant part, section 9(2) of the constitution provides that a law does not contravene the right to privacy to the extent that the law makes provision in the interests of defence or public safety, order, morality or health. Although these grounds are internationally accepted, it is unfortunate that the wording of the internal limitation is not crafted in a way that requires the limitations to be reasonably justifiable in a democratic society.

Internal limitations on the right to freedom of conscience

In its relevant part, section 11(5) of the constitution provides that the right to freedom of conscience is not contravened by any law to the extent that the law makes provision in the interests of defence or public safety, order, morality or health or to protect the rights and freedoms of other persons. These grounds are internationally accepted, and, unusually, the wording of the internal limitations provided

for in section 11(5) is crafted in a way that requires the limitations to be reasonably justifiable in a democratic society.

Internal limitations on the right to freedom of association

In its relevant part, section 13(2) of the constitution provides that the right to freedom of conscience is not contravened by any law to the extent that the law makes provision in the interests of defence or public safety, order, morality or health or to protect the rights and freedoms of other persons or to impose restrictions on public officers. These grounds are internationally accepted, and, unusually, the wording of the internal limitations provided for in section 13(2) is crafted in a way that requires all the limitations to be reasonably justifiable in a democratic society.

2.5.3 States of emergency provisions

These have been dealt with in paragraph 2.3.2 above.

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

2.6.1 The judiciary

Chapter VII of the Mauritian Constitution is headed The Judicature. The Supreme Court in Mauritius has unlimited jurisdiction to hear and determine any civil or criminal proceedings provided for in any law or of the constitution, in terms of section 76(1). Section 80(1) provides that the Court of Civil Appeals and the Court of Criminal Appeal are divisions of the Supreme Court with jurisdictions conferred by law and the constitution. The Supreme Court also has jurisdiction to supervise any civil or criminal proceedings before any subordinate court including the authority to give directions for ensuring that justice is duly administered by any such subordinate court, in terms of section 82(1). In terms of section 83(2), the Supreme Court has general jurisdiction to determine whether any provision of the constitution has been contravened and to make a declaration accordingly.

In terms of sections 80 to 82, appeals from subordinate courts go to the Supreme Court. Appeals from the Supreme Court go to the appeal courts on civil matters or criminal matters where the authority to hear such appeals has been conferred by the constitution or any other law. Appeals from the appeal courts or from the Supreme Court on matters where the appeal courts do not have jurisdiction, go to the judicial committee of the Privy Council in the United Kingdom. These matters include final decisions on questions as to the interpretation of the constitution, matters involving high-value disputes, disputes involving applications under section 17 of the constitution which deal with redressing violations of fundamental rights and other case prescribed by parliament.

In terms of section 77:

- the president appoints the Chief Justice of Mauritius after consultation with

the prime minister. Note that this wording formulation means that the prime minister does not have a veto over the president's choice

- the senior puisne judge is appointed by the prime minister acting following the advice of the Chief Justice. Note that this wording formulation means that the prime minister also does not have a veto over the Chief Justice's advice
- the puisne judges are appointed by the president, acting per the advice of the Judicial and Legal Service Commission.

In terms of section 78(1), a person holding the office of the judge of the Supreme Court shall vacate that office on attaining retirement age, subject to certain provisions enabling him or her to stay on to complete any unfinished proceedings.

Supreme Court judges may be removed from office only for the inability to perform the functions of the office or for misbehaviour in terms of section 78, which section also sets out detailed provisions regarding such removals.

Judges are required to take the oath of allegiance and for the due execution of the office set out in the Third Schedule to the constitution.

2.6.2 The Judicial and Legal Service Commission (JLSC)

The JLSC is a constitutional body established to participate in the appointment and removal of judges, section 86. Many would query why the JLSC is relevant to the media. The answer is because of its critical role in the judiciary, the proper functioning and independence of which are essential for democracy. In terms of section 85(1), the JLSC comprises the Chief Justice, the senior puisne judge, the chairman of the Public Service Commission and one other member, a sitting of a former judge appointed by the president acting under the advice of the Chief Justice.

2.6.3 The Ombudsman

Chapter IX of the constitution is headed The Ombudsman. The Ombudsman is a public office appointed by the president, acting after consultation with the prime minister, the leader of the opposition and other leaders of parties in the National Assembly, in terms of section 96 of the constitution.

The Ombudsman is an important office for the media because it is aimed at holding public power accountable. The main power of the Ombudsman is to investigate any action by any officer or authority in which a member of the public (resident in Mauritius or where the action was taken when he or she was present in Mauritius) claims to have sustained injustice as a consequence of maladministration in connection with the action taken, section 97. There are exceptions to the Ombudsman's powers and, in broad terms, these include being unable to investigate the judiciary or actions taken by the Director of Public Prosecutions.

Section 99 of the constitution grants the Ombudsman broad powers to require the production of information or documents for any investigation, except for Cabinet documents.

Section 100 of the constitution grants the Ombudsman a wide range of powers where the Ombudsman finds that the action investigated was unlawful, unreasonably delayed or otherwise unjust or manifestly unreasonable. These include that decisions should be cancelled, reversed or varied, that practices should be altered, that laws should be reconsidered and that any other steps should be taken.

Section 101 specifically protects the independence of the office of the Ombudsman. Section 101(1) even provides that no proceedings of the Ombudsman shall be called into question in any court of law, which puts the activities of the Ombudsman beyond the reach of the judiciary.

2.7 Enforcing rights under the constitution

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

Section 17(1) of the constitution entitles any person to apply to the Supreme Court for redress when he or she alleges that any of sections 3 to 16 of the constitution (those sections deal with fundamental rights) has been, is being or is likely to be, contravened, in addition to any other remedy that may be lawfully available.

In terms of section 17(2), the Supreme Court has original jurisdiction to determine any such application. It may make orders or give directions that it considers appropriate to enforce the protections provided for in sections 3 to 16 of the constitution. Note that the Supreme Court is required not to exercise its powers under section 17(2) if it is satisfied that adequate means of redress for the alleged contravention are available to the person concerned under any other law.

Although rights are generally enforceable by the courts, the constitution itself also envisages the right of people, including the media, to approach a body such as the Ombudsman to assist in enforcing the rights.

Perhaps one of the most effective ways in which rights are protected under the constitution is by the provisions that entrench Chapter II, the chapter on the Protection of Fundamental Rights and Freedoms of the Individual. Section 47(2)(c) of the constitution requires that a constitutional amendment to Chapter II be passed by three-quarters of all of the members of the National Assembly, thereby providing significant protection for fundamental rights.

2.8 The three branches of government and separation of powers

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

2.8.1 Branches of government

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

The executive

The Mauritian Constitution does not refer specifically to 'the executive'. However, in terms of section 28(1) of the constitution, it is clear that executive power is vested in the president as he or she is the Head of State and Commander in Chief of the Republic of Mauritius.

Section 28(1) requires the president to ensure that the institutions of democracy and the rule of law are protected, that the fundamental rights of all are respected and to maintain and strengthen the unity of the diverse Mauritian nation.

In terms of section 28(2), the president is elected by a majority of the National Assembly on a motion made by the prime minister. No person is eligible for election to the office of president unless he or she is a citizen of Mauritius, at least 40 years of age and has resided in Mauritius for at least five years immediately preceding the election. The president holds office for five years and is eligible for re-election in terms of section 28(2)(a)(ii). There are similar provisions about the election of the vice-president in terms of section 29.

Section 30 of the constitution deals with the removal from office of the president and vice president. There are two grounds for removal, namely for violating the constitution or any other serious act of misconduct or an inability to perform his or her functions. The removal requires a motion introduced in the National Assembly by the prime minister that a tribunal investigates the circumstances requiring the removal, as well as a recommendation by the tribunal for such removal. The tribunal must be made up of a chairman and two or four other members appointed by the Chief Justice, who are required to be sitting or retired judges. The motion for removal in the National Assembly must be supported by the votes of at least two-thirds of all the members of the National Assembly.

The constitution is quiet on the precise roles of the executive. The typical role of the executive is to administer or enforce laws, make government policy and propose new laws.

The legislature

In terms of section 45(1) read with sections 46(1), (3) and (5) of the constitution, legislative power in Mauritius is vested in parliament.

In terms of section 31(1) of the constitution, parliament consists of the president and the National Assembly. The National Assembly is made up of 70 members. Mauritius has a constituency-based electoral system, and voters must be registered before they can vote in a particular constituency.

The make-up of the National Assembly is set out in the First Schedule to the

constitution. Sixty-two seats are for members representing 21 constituencies. The island of Mauritius is made up of 20 constituencies, returning three members to the National Assembly each. Rodrigues is made up of one constituency and returns two members to the National Assembly; section 1(1) of the First Schedule read with section 39(1) of the constitution. The remaining eight seats are distributed according to a fairly complex system which focuses on 'successful unreturned candidates', candidates who garnered many votes but were not winners, representing communities, as set out in section 5 of the First Schedule.

The judiciary

As described above, judicial power is vested in the courts. The role of the judiciary is to interpret the law and to adjudicate legal disputes following the law.

2.8.2 Separation of powers

In a functioning democracy, it is essential to divide government power between different organs of the state to guard against the centralisation of power, which may lead to abuse. This is known as the separation of powers doctrine. The aim is to separate the functions of the three branches of government, the executive, the legislature and the judiciary so that no single office can operate alone, assume complete state control and amass centralised power. Each branch performs many different functions, and also plays a watchdog role concerning the other, helping to ensure that public power is exercised in a manner that is accountable to the general public and follows the constitution.

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

There are some weaknesses in the Mauritian Constitution. If these provisions were strengthened, there would be specific benefits for the Mauritian media.

2.9.1 Remove internal constitutional limitations

It would be better to have a general limitations clause, applicable to all limits to rights provided for in the constitution, rather than the series of internal limitations to certain rights as set out in each right. This is particularly so given that the tests for such limitations are not consistent. For example, the internal limitations provisions in respect of the rights to freedom of conscience and association require that any limitation be 'reasonable and justifiable in a democratic society'. However, the internal limitations provisions concerning the rights to freedom of expression and privacy have no such requirement.

2.9.2 Bolster independence of the broadcasting regulator

It would provide greater protection for independent media regulation if the constitution made provision for an independent authority to regulate the media in

Chapter VIII, alongside the other service commissions provided for in that chapter, and the Ombudsman.

2.9.3 Constitutional protections for the public broadcaster

Similarly, it would provide greater protection for the independence of the public broadcaster, the Mauritian Broadcasting Corporation (MBC), if the constitution made provision, in Chapter VIII, for an independent MBC, alongside the other service commissions provided for in that chapter and the Ombudsman.

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 both print and broadcasting media
- legislation governing the broadcast media generally
- legislation governing the public broadcasting sector
- legislation governing broadcasting signal distribution
- legislation governing the internet
- legislation that threatens a journalist's duty to protect sources
- legislation that prohibits the publication of certain kinds of information
- legislation governing the interception of communication
- legislation that protects personal data
- legislation that specifically assists the media in performing its functions

3.1 Legislation: An introduction

3.1.1 What is legislation?

Legislation is a body of law consisting of acts properly passed by parliament; which is the legislative authority. Parliament, in terms of the constitution, is made up of the National Assembly and the president. Consequently, both the president and the National Assembly are involved in passing legislation.

Detailed rules in sections 54, 46 and 47 of the constitution set out the 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 kinds of legislation to be passed according to particular procedures. The procedures are complicated and need not be explained here. Journalists should, however, be aware that, in terms of the constitution, there are three kinds of legislation, each of which has particular procedures or rules or both applicable to it. These are:

- legislation that imposes or alters (other than reducing) taxation, imposes a charge on the Consolidated Fund (essentially the fiscus) or for the composition or remission of any debt to the government, section 54
- legislation to amend the constitution, section 47
- other legislation, section 53.

3.1.2 The difference between a bill and an act

A bill is a draft law that is debated and usually amended by parliament during the law-making process. If the National Assembly passes a bill following the various applicable procedures required for different types of bills as set out above, it is sent to the president for his or her assent.

In terms of section 45(1) read with sections 46(1), (3) and (5) of the constitution, legislative power in Mauritius is vested in parliament. It is exercised when the National Assembly passes a bill which is assented to by the president and published in the gazette as a law, at which point it becomes an act of parliament.

Section 46(2)(b) provides that the president may not withhold consent to a bill passed by the National Assembly:

- for the imposition or alteration of taxation and other matters relating to charges on the Consolidated Fund (essentially the fiscus), section 54
- which amends the constitution and which the speaker has certified complies with section 47 (the section setting-out the procedures for various types of constitutional amendments)
- unless he or she believes that the National Assembly ought to reconsider the bill.

Note that, in terms of section 46(2)(d), the president is required to consent to a bill that has been reconsidered by the National Assembly, whether or not it is amended as a result of the reconsideration.

3.2 Legislation governing the print media

There are few limitations on the ability to operate as a print media publication. The laws setting down specific obligations on the print media are reasonable and justifiable and do not impinge on the public's right to know.

Newspapers and Periodicals Act, Act 6 of 1837

There are certain requirements laid down by the Newspapers and Periodicals Act for the publication of newspapers and periodicals.

- Section 2 makes it an offence to print or publish a newspaper or periodical: 'devoted in whole or in part to news or politics' without first having deposited a notice with the Accountant-General specifying its title, the printer and publisher's addresses, the names and addresses of the printer, the editor and one of the owners residing in Mauritius, together with a statement of his or her interest. The penalty, on conviction, is a fine.
- It is also an offence, with the same penalty, not to update the notice in terms of section 3.
- Section 4 provides that the penalties payable in respect of the offences provided for in sections 2 and 3 are payable daily until the notices have been given.
- Section 6 makes it an offence for a newspaper or periodical not to contain the name and address of the printer and editor in every addition. The penalty on conviction is a fine.

Criminal Code, Act 6 of 1838

Section 289(1) of the Criminal Code grants a person named or referred to in a newspaper, a right of reply, free of charge, within three days (or in the next print run if the newspaper is not a daily). The reply is to be in the same place and type as the original article. If the reply is longer than twice that of the original article, the newspaper may charge advertising rates for the excess. Failing to comply with section 289(1) is an offence, the penalty for which is a fine and an order to publish the reply and a further fine if it is still not published.

Police Act, Act 19 of 1974

Section 13A(1) of the Police Act empowers the Commissioner of Police to declare any area a protected area, if he or she considers its necessary or expedient in the interests of public safety or public order. Section 13A(2) makes it an offence to be in a protected area without lawful authority.

Section 13B(1) of the Police Act empowers the Commissioner of Police to declare any area a protected area, if he or she considers its necessary or expedient in the interests of public safety or public order. Section 13B(2) makes it an offence to be in a restricted area without lawful authority or to contravene the provisions of a permit to be in a restricted area.

Section 13C(1) of the Police Act empowers the Commissioner of Police to order a curfew concerning a particular area and particular hours if he or she considers it necessary or expedient in the interests of public safety or order. Section 13C(2) makes it an offence to contravene a curfew or the provisions of a curfew permit.

In terms of section 24(4) of the Police Act, all of the above offences carry a penalty of a fine and imprisonment on conviction.

Journalists need to be aware of these provisions of the Police because restricting access to a particular place or movement during particular hours can hinder the ability of the media to do its work. The Police Act would meet international good practice standards if the discretion to be exercised by the Commissioner of Police were objective instead of subjective. That is if a court were able to enquire as to whether or not the declaration of a protected or restricted area or a curfew was necessary or expedient in the interests of public safety or public order.

3.3 Legislation governing both print and broadcast media

3.3.1 Media Trust Act 1994

Establishment of the Media Trust

The Media Trust Act establishes the Media Trust as a body corporate in terms of section 3 and which operates with a board of trustees.

Main Functions of the Media Trust

The Media Trust Act, at section 4, provides that the objects of the Media Trust include:

- running a media and documentation centre
- organising seminars, conferences workshops and training courses
- fostering relationships with international media.

Appointment of the Media Trust board members

In terms of section 5 of the Media Trust Act, the board of trustees is made up of nine members appointed by the Minister of Information. Of the nine members:

- one is a chairperson
- two are ministry representatives; one each from the Ministries of Information and Finance

- six are full-time journalists:
  - a representative of the registered associations of journalists
  - a representative of the electronic media
  - four press representatives elected by the press, two of whom are required to be Editors-in-Chief
- The board members hold office for two years and are eligible for reappointment.

Funding of the Media Trust

In terms of section 4(a) of the Media Trust Act, the funds of the Media Trust consist of funds 'obtained from the government and other organisations'.

Regulations

In terms of section 10(1) of the Media Trust Act, the board is empowered to make regulations for itself without them being approved by the minister, published in the Gazette or laid before the National Assembly.

3.4 Legislation governing the broadcast media generally

3.4.1 Statutes regulating broadcasting generally

Broadcasting in Mauritius is regulated in terms of the Independent Broadcasting Authority Act, Act 29 of 2000 (the IBA Act).

3.4.2 Establishment of the IBA

The IBA Act establishes the Independent Broadcasting Authority (IBA) as a body corporate in terms of section 3.

3.4.3 Main functions of the IBA

In terms of section 4 of the IBA Act, the IBA's objectives concerning broadcasting include to:

- promote a diverse range of radio and television broadcasting services throughout Mauritius
- promote the development of broadcasting services which are responsive to the needs of the Mauritian audience
- preserve and promote the plural nature of Mauritian culture by ensuring that licensees include programmes reflecting the linguistic and cultural diversity of Mauritius, including locally produced programmes
- ensure that foreign nationals do not control broadcasting services

- impose cross-media controls
- ensure fair competition
- set and monitor compliance with standards for programming and advertising
- ensure that broadcasting services give adequate coverage to information, education, culture, entertainment and recreation, are impartial and accurate and do not encourage crime or racial hatred leading to disorder or offend public feeling
- issue licences
- promote efficient use of the broadcasting frequency bands
- enquire into, and take appropriate action in respect of, public complaints against a licensee.

Section 5(4) empowers the IBA to establish committees and to delegate functions other than the power to issue licences, borrow money or incur expenditure above a particular threshold.

3.4.4 Appointment of the IBA

In terms of section 6 of the IBA Act, the IBA consists of between nine and 11 people, appointed as follows:

- The president appoints the chairperson after consultation with the prime minister and the leader of the opposition.
- Three ministry representatives, one from each of the ministries responsible for broadcasting, information and arts and culture.
- A representative of the attorney general's office.
- The Chairperson of the Information and Communications Technology Authority of Mauritius
- No fewer than three and not more than five members appointed by the minister responsible for broadcasting, having regard to their experience in the fields of broadcasting policy and technology, media issues, frequency planning, entertainment education or in any other related activities. Provided that the following are disqualified as being so appointed in terms of section 7: members of the National Assembly, office bearers of a political party or organisation or a person whose spouse or child has an interest in the broadcasting, advertising or audio-visual production sectors.

In terms of section 9, the chairperson and the members appointed by the minister responsible for broadcasting hold office for three years and are eligible for reappointment. The chairperson and the members appointed by the minister responsible for broadcast cannot be removed from office by him during their

terms except in terms of section 37(3)(b) of the Interpretation and General Clauses Act, Act 33 of 1974 which sets out the grounds for removal. These are: unreasonably absenting him or herself from meetings, becoming insolvent, being guilty of misconduct or convicted of an offence which renders him or her unfit for office (in the minister's opinion), or is suffering from a physical or mental disability.

In terms of section 11 of the IBA Act, the IBA appoints the director, who is the chief executive officer responsible for the day-to-day running of the business of the IBA. Although the IBA is empowered to appoint employees necessary for the proper discharge of the IBA's duties, such employees are under the administrative control of the director in terms of section 12.

3.4.5 Funding for the IBA

In terms of section 13 of the IBA Act, the IBA is required to establish a general fund into which all of the revenue of the IBA is paid and out of which all expenses incurred are paid.

The revenue of the IBA consists of fees or charges levied on a licensee, amounts received from the Consolidated Fund (the fiscus) and any other sum that may lawfully accrue to the IBA.

3.4.6 Making broadcasting regulations

The IBA Act empowers the IBA to make regulations.

Section 38(1) empowers the IBA to make regulations 'as it thinks fit' for the IBA Act. Section 38(2) grants the IBA additional discretionary power to amend the schedules to the IBA Act by way of regulation. The IBA Act's schedules include categories of broadcast licences (First Schedule) and the Code of Conduct for Broadcasting Services (Second Schedule). These have indeed been amended and are dealt with in section 4 below.

Section 38(3) provides that regulations may contain provisions to levy fees or charges and offences or penalty provisions for regulation contraventions specifying a fine of up to a certain amount and not exceeding two years.

3.4.7 Enforcement of compliance

Section 30(1) and (2) of the IBA Act requires the IBA to establish a complaints committee (the CC). The committee is made up of a chairperson who is a legal practitioner of not less than ten years' standing and six other persons who are not members of the IBA. The CC adjudicates complaints relating to:

- failure to comply with the code of ethics or the code of advertising practice
- unjust or unfair treatment in a broadcast programme
- unwarranted infringement of privacy in obtaining material included in a broadcast programme.

In terms of section 30(5), complaints must be made in writing by an affected person who identifies him or herself and within six months of the date of the broadcast of the relevant programme. Every interested person is to be given a hearing and, in terms of section 30(9), the CC has the power to summon any person to attend the hearing and produce documents. After considering a complaint, the CC forwards a copy of its decision to the IBA and may recommend that the IBA issue a direction to a licensee.

3.4.8 The licensing regime for broadcasters in Mauritius

Section 18 of the IBA Act prohibits the provision of a broadcasting service without a licence. In terms of section 37, to do so is an offence punishable by a fine and imprisonment.

The categories of broadcasting licences are provided for in regulations and are dealt with in section 4 below.

Section 19(1) requires any person who wishes to obtain a broadcasting licence to make an application to the IBA in the prescribed form.

Besides ownership considerations, set out in detail below, in terms of section 19(3), the IBA is also prohibited from granting a broadcasting licence to certain applicants including:

- a non-citizen or non-resident
- a religious organisation
- a local authority
- a declared insolvent or someone that has been found liable for defamation or sedition or convicted of any offence involving fraud or dishonesty.

Section 19(4) of the IBA Act requires the IBA to give notice of the licence application in the Gazette and at least two daily newspapers for three consecutive days, inviting any interested party to lodge objections against the application within 21 days.

Section 20 requires the IBA to take account of the following when determining whether or not to grant an application for a licence:

- objections received
- objectives of the IBA
- qualifications of the applicant
- likelihood of the applicant complying with licence conditions
- possibility of the applicant complying with the broadcasting code of conduct
- the need to promote pluralism in the media by giving priority to applicants

who shall be subject to no editorial control other than independent editorial control exercised from within the broadcasting business of the applicant.

Section 21(1) of the IBA Act requires the IBA to decide to grant or refuse a licence application within three months of the closing date for public objections to an application and to furnish reasons for its decision. Where the IBA does not decide within three months, it is deemed to have refused the licence in terms of section 21(2) of the IBA Act.

Section 21(5) empowers the IBA to refuse a licence application where it believes that granting the licence may impede the promotion of the diversity of broadcasting services and the plural nature of Mauritian culture.

Section 22 of the IBA Act provides that radio broadcasting licences are valid for three years and television broadcasting licences for five years. These are renewable.

Frequency spectrum licensing

Section 19(4) of the IBA Act requires the IBA to ensure that there is a spectrum available in the broadcasting frequency bands and that it will be allocated to a licence applicant by the Information and Communications Technology Authority of Mauritius (ICTA). There is a great deal of liaison regarding spectrum issues that takes place between the IBA and ICTA on spectrum issues.

Digital broadcasting

Mauritius falls in Region 1 of the International Telecommunications Union (the ITU) and was the first African country to provide digital terrestrial television (DTT) to its entire population. It completed the digital switchover (and the analogue switch off) within the ITU target date of June 2015.[27]

3.4.9 Responsibilities of broadcasters in Mauritius

Adherence to licence conditions

Section 21(3) empowers the IBA to impose licence conditions, including the right of reply to a person whose reputation has been adversely affected by broadcast and charges that the licensee can levy from its audience. Section 21(6) requires licensees to comply with the terms and conditions of their licences.

Adherence to content requirements or restrictions

Although all broadcasters enjoy the constitutional right to freedom of expression, this right is not absolute, and broadcasters are subject to a range of content regulation concerning what they may or may not broadcast. These regulations include the following.

Adherence to a broadcasting code of ethics, including local content requirements

Section 29(1) and (2) of the IBA act requires the IBA to establish a Standards Committee (SC) comprising a chairperson and six persons who are not members of the IBA. In terms of section 29(4), the SC is to develop a code of ethics for licensees with the approval of the IBA.

The code of ethics is to give guidance on several issues, including:

- technical standards for broadcast programmes including the need for subtitling for the benefit of the deaf where applicable
- the promotion of locally produced programmes
- standards of taste and decency for broadcast programmes, particularly regarding the portrayal of violence or sexual conduct.

The SC is required to consult with licensees as well as audiences when drawing up or reviewing the code of ethics and is to conduct audience research as required by the IBA.

This code of ethics has been developed by way of regulation, as is set out in section 4 below. Note that in terms of section 24(2)(d), the IBA may revoke a licence for failure to comply with the code of ethics.

Adherence to an advertising code

Section 29(1) and (2) of the IBA act requires the IBA to establish a Standards Committee (SC) comprising a chairperson and six persons who are not members of the IBA. In terms of section 29(5), the SC is to develop a code of advertising practice which licensees are required to adhere to with the approval of the IBA. The SC is required to consult with licensees as well as audiences when drawing up or reviewing codes.

Adherence to ownership and control requirements

Regulating ownership and control of broadcasting licences is an integral part of the IBA's regulatory work.

The IBA has five essential areas of supervision concerning ownership and control:

- approval of transfers of licences or changes in ownership or control
- section 23(1) of the IBA Act provides that no licensee may assign or transfer a licence without the written consent of the IBA
- section 24(1) empowers the IBA to approve a written application to amend a licence, subject to any conditions it deems fit
- section 24(2) empowers the IBA to revoke a licence on the following grounds:

- the licensee has failed to begin operating within six months of the issue of its licence
- the licensee has ceased broadcasting operations
- the licensee has given the IBA information which is materially false or misleading
- failure to comply with the code of ethics
- the revocation is in the public interest
- the licensee has become disqualified from holding a licence in terms of the grounds specified in section 19(3) of the IBA Act.

Section 25 empowers the IBA to suspend a licence on grounds substantially similar to those set out above.

No party political broadcasters

Section 19(3)(c) and (d) of the IBA Act prohibits a broadcasting licence from being given to any political party or association or any person actively engaged in politics.

Limitations on foreign ownership and control of broadcasting licences

Section 19(3)(h)(i)-(iii) of the IBA Act prohibits a broadcasting licence from being given to a company registered in a foreign country or where 20% or more of the shares are owned or controlled by a foreign national or company or where 20% or more of the directors are foreign nationals.

Limitations on the number of broadcasting licences a single entity can control

Section 19(3)(a) of the IBA Act prohibits a broadcasting licence from being given to an applicant that already holds a licence or who has an interest in a company that already holds a licence.

Limitation on cross-media control of broadcasting services

Section 19(3)(h)(iv) of the IBA Act prohibits a broadcasting licence from being given to an applicant where 20% or more of the shares in that company are owned or controlled by an individual or entity which owns or controls a newspaper or magazine.

3.4.10 Is the IBA an independent regulator?

The IBA Act contains specific statements about the IBA's independence. Section 3(2) of the IBA Act states that the IBA 'shall not, in the exercise of its functions, be subject to the control of any person, body or other authority'. However, this is subject to section 3(3) which empowers the minister responsible for broadcasting to issue directions to the IBA in matters affecting national security and public order, and the IBA is required to comply with those directions. While the obligation to

comply with ministerial directions does undermine the independence of the IBA, the grounds on which the minister may issue such directions are narrow.

The IBA does appear to have substantive independence concerning its main broadcasting regulatory functions:

- *Licensing:* The IBA is entitled to consider applications for broadcasting licences and to issue such to broadcasters on its own without any role being played by the executive.
- *Regulation making:* The IBA is entitled to make its own without any role being played by the executive.

However, there are certain regulatory functions that the IBA is not entirely free to regulate.

- *Ministerial policy directions:* Although the IBA Act is required to comply with ministerial policy directions, the minister's discretion to make such policy directions is limited to matters relating to national security and public order.
- *Frequency spectrum management:* Although the IBA Act recognises the importance of the IBA's role in promoting efficient spectrum use, monitoring the availability of segments of broadcasting frequency bands and making recommendations for the allocation of frequencies to licensees, this is done together with ICTA, so the IBA does not act alone.

Further, the process for appointing the members of the IBA undermines its independence because the Minister for Broadcasting has the power to ensure that the majority of members are representatives of the executive branch of government.

3.4.11 Proposed amendments to strengthen the regulation of broadcasting

The single biggest problem with the IBA Act is that the appointments provisions give the minister responsible for broadcasting a great deal of leeway concerning the appointments of the IBA. For example, the minister can determine whether there is an equal number of members who are not themselves members of the executive or fewer such members. The make-up of the members of the IBA is a critical factor in assessing independence. If the IBA Act were amended to provide that the members of the IBA are appointed by process of public nominations, shortlisting and recommendations being made by the National Assembly and appointed by the president, this would significantly strengthen the independence of the broadcasting regulator in line with international best practice.

3.5 Legislation that regulates the public broadcasting sector

3.5.1 Introduction

The Mauritius Broadcasting Corporation (MBC) is Mauritius' public broadcaster providing several DTT channels and sound services.

The principal statutes governing the affairs of the MBC are the:

- Mauritius Broadcasting Corporation Act, Act 22 of 1982 (MBC Act)
- Mauritius Broadcasting Corporation (Collection of Licence Fees) Act 1984.

3.5.2 Establishment of the MBC

Section 3 of the MBC Act establishes the MBC as a body corporate.

3.5.3 The mandate of the MBC

The mandate of the MBC is set out in different provisions of the MBC Act. Section 3(3) provides that the MBC 'shall be a principal medium for the dissemination of information, education and entertainment'. Section 4 sets out the objects of the MBC and these include:

- to provide independent and impartial broadcasting services of information, education culture and entertainment which cater for the aspirations needs and tastes of the population in Creole, Bhojpuri, French, Hindustani, English and other languages spoken in Mauritius determined by the board with the approval of the minister responsible for information
- to ensure that broadcasting services assist the development of the knowledge, sense of initiative, civic rights, duties and responsibilities of the Mauritian population, including cultural exchanges and a Mauritian identity
- to provide a high standard of broadcasting programmes in respect of content and quality covering a broad subject matter range
- to ensure that programming, including advertising, does not offend against decency, good taste or public morality and is not likely to encourage or incite crime, disorder or violence
- to provide both local and foreign news that is accurate and impartial
- to observe neutrality and impartiality on current affairs, matters of public policy and controversial issues relating to culture, politics and religion.

An unusual aspect of the MBC Act is section 19 which grants any person whose honour, character or reputational goodwill has been adversely affected by a broadcast by the MBC, including a political broadcast during an election campaign, to apply, in writing, to exercise his or her right of reply. The prescribed form for such application is set out in regulations which are dealt with in section 4.4.1 below.

3.5.4 Appointment of the MBC board and the general advisory council

In terms of section 6 of the Broadcasting Act, the MBC is controlled by a board of seven members. The board is made up of a chairperson appointed by the minister responsible for information, the supervising officer of the Ministry of Information, the Director of Information Services, and four other people appointed

by the minister responsible for information including two people with experience in education and broadcasting, one with experience in administration and labour relations and one with expertise in economy and finance. Except for the *ex officio* members, members hold office for up to two years, are eligible for reappointment and are required to be Mauritian citizens who are not members of a political party or the National Assembly.

Non-*ex officio* MBC board members may be removed from the board if they were appointed while being disqualified, engage in any political activity or acquire an interest in a company providing radio communication or equipment or advertising services.

Note that the director-general, who is the chief executive officer of the MBC and is appointed by the minister, is required to attend every meeting of the board and take part in its deliberations. However, he or she is not entitled to vote on any question before the board, in terms of sections 13 and 10 of the MBC Act.

Importantly the MBC Act, at section 12, provides for a general advisory council (GAC) to advise the minister and the board on any matter relating to the programming or services of the MBC including making proposals for content standards and programming. The GAC is made up of 23 members appointed by the minister. It includes representatives of a broad cross-section of society including the agricultural community, commerce and industry, students, women and youth, trade unions, religious interests, the arts, consumers, local authorities, benevolent associations, Rodrigues and the Outer Islands, the press and the general public.

3.5.5 Funding for the MBC

The MBC Act provides at section 21 that the MBC is to operate two funds into which all monies received by the board are paid:

- Capital Fund: for income received for capital expenditure including transmitting stations and installations, section 22
- Revenue Fund: for income derived from fees, charges, dues or other sums payable to the Corporation, grants made by the government for operating expenses and all other income, section 23.

The Broadcasting Act does not contain a single clear statement on how the MBC is funded. The MBC is required to keep separate accounts for its public services and public, commercial services divisions, in terms of section 9 of the Broadcasting Act. Its public services division is entitled to draw revenue from a range of sources, including advertising and sponsorships, grants and donations, licence fees and state grants, in terms of section 10(2) of the Broadcasting Act.

In terms of section 24 of the MBC Act, the MBC is to submit an estimate of the revenue and expenditure of the MBC for the next financial year to the minister at least three months before the end of the financial year. The minister must approve the estimate but may approve only part of it or direct the corporation to amend the estimate.

Importantly, section 25 provides that every person is to pay a licence fee in respect of television broadcasts of the MBC following the Mauritius Broadcasting Corporation (Collection of Licence Fees) Act 1984 (Licence Fees Act).

Section 3 of the Licence Fees Act requires every person who is liable to pay an electricity bill for domestic consumption is to pay a television licence fee unless they do not possess a television set. The television licence fee is paid to the Central Electricity Board (CEB) and is remitted to the MBC as agreed between them.

In terms of section 9 of the Licence Fees Act, not paying the television licence fees is an offence and the penalty is a fine and, perhaps more importantly, the defaulting payer is liable to have his or her electricity disconnected by the CEB.

3.5.6 MBC: public or state broadcaster?

The MBC does not operate as a public broadcaster because the minister responsible for information plays several critical roles concerning the MBC, including:

- making five of the seven board appointments
- making all 23 of the GAC appointments
- appointing the director-general of the MBC
- having the power, in terms of section 29 of the MBC Act, to give directions of a general character to the board which the minister considers necessary in the public interest, and with which the board is required to comply.

3.5.7 Amending the legislation to strengthen the public broadcaster

International best practice requires state broadcasters to be transformed into genuine public broadcasters. This ought to be done to the MBC Act by requiring the board and the GAC to act independently in the public interest. Further, the MBC Act ought to be amended to provide that members of the board and the GAC are appointed following a public nominations process, shortlisting and recommendation for appointment to be made by the National Assembly and appointed by the president.

3.6 Legislation governing broadcasting signal distribution

Broadcasting signal distribution is the technical process of ensuring that the content-carrying signal of a broadcaster is distributed so that it can be heard and viewed by its intended audience.

Section 28 of the IBA Act grants Multicarrier (Mauritius) Ltd the exclusive right to act as the Multiplex Operator for the operation and management of digital broadcasting, including DTT, and it also has the exclusive right to carry on the business of terrestrial broadcasting transmission.

3.7 Legislation that regulates the internet

Although there are no statutes that regulate the internet in the sense of requiring licensing to distribute content online, it is important to note that the Information and Communication Technologies Act, Act 44 of 2001 (the ICT Act) does deal with certain, narrow, internet-related issues.

Although the ICT Act is generally concerned with telecommunications services, including the provision of network and related issues such as interconnection, the ICT Act does refer to the internet in several places. Sections 12 and 13 of the ICT Act establish the Internet Management Committee (IMC) which is a committee of ICTA established in terms of section 4 of the ICT Act. Sections 12 and 13 provide for the following:

- The minister responsible for the ICT Act is to appoint the chairperson and the other ten members of the IMC after consultation with the board of ICTA.
- The members of the IMC shall be selected from among representatives of the public and private sectors, non-governmental organisations and academia and by the qualifications, expertise and experience in information and communication technologies, computer science, broadcasting and telecommunication law, business and finance, internet, electronic commerce and related educational and training services.
- The functions of the IMC are to:
  - advise ICTA on internet and related policies, including domain names
  - provide a forum for stakeholder discussions on the administration of the internet
  - administer domain names.
- Section 46 sets out offences, several of which relate to online content. These are dealt with in detail in section 3.9.7 below.

3.8 Legislation that undermines a journalist's duty to protect his or her sources

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

3.8.1 The Commissions of Enquiry Act, Act 7 of 1944

Section 10 of the Commissions of Enquiry Act entitles a commissioner to summon witnesses and call for the production of documents. Any person who, without sufficient cause, refuses to appear or to produce documents as per the summons commits an offence. On conviction, the penalty is a fine.

3.8.2 The Courts Act, Act 5 of 1945

Section 128 of the Courts Act entitles any party to a civil or criminal case, inquiry or other proceedings before an intermediate or district court, to obtain summonses to witnesses with or without requiring the production of papers or writing in their possession from the court registry. Failing to appear as a witness or to produce any document referred to in the summons is an offence. On conviction, the penalty is imprisonment and a fine.

3.8.3 Criminal Procedure Act, Act 6 of 1853

Section 89 of the Criminal Procedure Act (CPA) empowers the Director of Public Prosecutions to summon witnesses for the prosecution in any criminal trial. The penalty for failing to appear as a witness is a fine and the person is liable to be apprehended and forcibly brought to court to give evidence. Thus, if a public prosecutor suspects that a journalist knows something about a crime, the journalist might be ordered to reveal his or her sources of information relating to that crime in terms of section 89 of the CPA.

Section 90 of the CPA empowers the defendant in any criminal proceedings to summon witnesses for the defence in any criminal trial. The penalty for failing to appear as a witness is a fine and the person is liable to be apprehended and forcibly brought to court to give evidence. Thus, if a criminal defendant suspects that a journalist knows something about a crime; in terms of section 90 of the CPA, such journalist might be ordered to reveal his or her sources of information relating to that crime.

3.8.4 The Data Protection Act, Act 13 of 2004

Section 13(1)(a) of the Data Protection Act empowers an investigating authority to apply to the Judge in Chambers for an order compelling any person to submit specified data stored on a computer system where the disclosure of the data is required for a criminal investigation or the prosecution of an offence.

Similarly, section 14(1) and (2) of the Data Protection Act empowers an investigating authority to apply to the Judge in Chambers for the issue of a search and seizure warrant to enter into any premises and search and seize stored data, a computer system or any information and communication technologies medium which would be relevant for an investigation or prosecution of an offence.

The Data Protection Act does not specify the penalties for the above offences.

3.8.5 The Good Governance and Integrity Reporting Act, Act 31 of 2015

Section 8(2)(c) of the Good Governance and Integrity Reporting Act authorises the Integrity Reporting Board to call for the communication and production of any relevant record, document or article from any person. The person is required to comply with the call within 14 days, but the statute is silent as to the consequences for non-compliance.

3.8.6 The Protection of Human Rights Act, Act 19 of 1998

Section 6 of the Protection of Human Rights Act (Human Rights Act) authorises the Human Rights division of the National Human Rights Commission to summon witness and call for the production of any document. Failure to comply with the summons or produce a document is an offence in terms of section 13, and the penalty is a fine and imprisonment.

3.8.7 The Information and Communication Technologies Act, Act 44 of 2001

Section 40(4)(a) of the Information and Communication Technologies Act (ICT Act) empowers the ICT Appeal Tribunal (established in terms of section 36(1) of the ICT Act) to make orders requiring the attendance of persons and the production of articles, documents or other electronic records as it thinks necessary or expedient. The role of the ICT Appeal Tribunal is to hear and dispose of appeals against decisions of ICTA regarding information and communications technologies, in terms of section 39(1) of the ICT Act.

3.8.8 The National Assembly (Privileges, Immunities and Powers) Act, Act 22 of 1953

Section 10(1) of the National Assembly Powers Act allows a committee of the National Assembly to order any person to appear before the committee and give evidence or produce any documents under his or her control. Failing to comply with an order in terms of the National Assembly Powers Act is an offence in terms of section 6(1)(a), (b) and (c) and the penalty, on conviction, is imprisonment or a fine in terms of section 6(3). Giving false evidence in response to an order is also an offence and the penalty, on conviction, is imprisonment in terms of section 13 of the National Assembly Powers Act.

3.8.9 The Prevention of Corruption Act, Act 5 of 2002

Section 50(1) of the Prevention of Corruption Act authorises the Director-General of the Independent Commission against Corruption to order any person to produce a document, record or article if the Director-General decides to proceed with a corruption investigation. The person is required to comply with the order. Failure to comply, without reasonable excuse is an offence in terms of section 50(6) and on conviction, the penalty is imprisonment.

3.8.10 The Prevention of Terrorism Act, Act 2 of 2002

Section 8(1) of the Prevention of Terrorism Act makes it an offence to fail to disclose to a police officer any information which a person knows or believes might be of material assistance in preventing an act of terrorism or in securing the arrest, prosecution or conviction of another person for an offence under the Prevention of Terrorism Act. However, it is important to note that section 8(2) of the Terrorism Act allows a person charged with failing to disclose such information to raise the defence that he or she has 'reasonable excuse for not making the disclosure'. On conviction, the penalty for the offence is imprisonment.

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

3.9 Legislation that prohibits the publication of certain kinds of information

Several statutes contain provisions which, when examined 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:

- certain types of information regarding legal proceedings
- information that constitutes incitement to high treason
- information that constitutes misdemeanours against the public peace:
  - protection of the flag
  - publishing without a description of the author
  - publishing matter conducive to a crime
  - where publishing constitutes outrage against public and religious morality
- information that constitutes offences against the person:
  - stirring up racial hatred
  - inciting to disobedience or resistance to law
  - importing seditious publications
  - defamation
  - criminal intimidation
  - insult

- false news
- information that constitutes contempt of the National Assembly
- indecent photographs of children
- certain kinds of information posted online or sent via an information and communications service.

It is often tough for journalists to find out how laws that would seem to have no direct relevance to the media can affect their work. Critical provisions of these kinds of laws are, therefore, set out below.

3.9.1 Prohibition on the publication of certain information relating to legal proceedings

Section 9 of the Protection from Domestic Violence Act, Act 6 of 1997 provides that all legal proceedings held in terms of its provisions, subject to section 10(10) of the constitution which deal with when legal proceedings may be held *in camera*, are to be held *in camera*. The effect of this is that the press, as a general rule, is barred from attending and reporting on such proceedings. For example, proceedings regarding protection orders, occupation and tenancy orders and the like.

3.9.2 Prohibition on the publication of information that constitutes incitement to high treason

Chapter I of Title I of Book III of the Criminal Code, Act 6 of 1838 (Criminal Code) is headed Offences of a Public Nature and Title I is headed Offences against the State. Section 71 of the Criminal Code is headed Inciting to High Treason. It makes it an offence to incite the commission of the offences listed in sections 50, 51 and 57-70 of the Criminal Code by any writing or printing and the crime is punishable as if the inciter was guilty of the crimes themselves, unless the incitement produced no effect, in which case the penalty is less.

The crimes listed include inducing the president to exercise any lawful power, stirring up a war against the state, plotting with a foreign power, causing a risk of war, exposing a citizen to reprisal, inciting citizens to rise in arms, inciting an officer to mutiny, stirring up a civil war, raising an armed force, taking command of an armed force, destroying state property, plundering public property and harbouring an armed group.

3.9.3 Prohibition on the publication of information that constitutes misdemeanours against the public peace

Chapter III of Title I of Book III of the Criminal Code, Act 6 of 1838 (Criminal Code) is headed Misdemeanours against the Public Peace and Title I is headed Offences against the State. Several of these misdemeanours could impact the media and are set out below.

Protection of the flag

Section 181A of the Criminal Code is headed 'Protection of Flag', and it makes it an offence to bringing into hatred or ridicule the flag of Mauritius or any other state. The penalty, upon conviction, is a fine and imprisonment.

Publishing without a description of the author

Section 202 of the Criminal Code is headed Publishing Matter without Description of Author. It makes it an offence to contribute knowingly to the publication or distribution of a publication, newspaper and periodical without the name, profession and address of the author or printer. On conviction, the penalty is a fine and imprisonment. Section 205 also provides that any copies of the publication seized shall be forfeited.

Publishing matter conducive to a crime

Section 204 of the Criminal Code is headed 'Publishing Matter Conducive to a Crime'. It makes it an offence to sell or distribute knowingly printed writing containing any instigation to a crime or a misdemeanour. The penalty, upon conviction, is to punishment as an accomplice of the instigator, unless the seller or distributor provides information about the person from whom he or she received the printed writing, in which case the penalty is lesser. Section 205 also provides that any copies of the publication seized shall be forfeited.

Outrage against public and religious morality

Section 206 of the Criminal Code is headed 'Outrage against Public and Religious Morality' and section 206(1)(ii) it makes it an offence for a person to commit an outrage against any legally established religion, good morals or public and religious morality in a newspaper or to sell such newspaper. On conviction, the penalty is a fine and imprisonment. Section 206(3) also provides that any copies of a publication seized shall be forfeited.

3.9.4 Prohibition on the publication of information that constitutes offences against the person

Chapter I of Title II of Book III of the Criminal Code, Act 6 of 1838 (Criminal Code) is headed Offences against the Person and Title II is headed Offences against Individuals. Several of these offences could impact on the media and are set out below.

Stirring up racial hatred

Section 282 of the Criminal Code is headed Stirring up Racial Hatred. Section 282(1)(a) and (c) makes it an offence to publish any writing in a newspaper or broadcast any matter which is threatening, abusive or insulting with the intent to stir up contempt or hatred against any section or part of any section of the public, distinguished by race, caste, place of origin, political opinions, colour or creed. On

conviction, the penalty is a fine and imprisonment. Section 206(3) also provides that any copies of a publication seized shall be forfeited.

Sedition

Section 283 of the Criminal Code is headed Sedition, and section 283(1) read with section 206, makes it an offence in writing or printed matter:

- to bring into hatred or contempt or excite disaffection to the government or the administration of justice
- to raise discontent or disaffection among the citizens of Mauritius or promote feelings of ill-will and hostility between different classes of citizens.

On conviction, the penalty is a fine and imprisonment. Section 287 of the Criminal Code empowers the court convicting the person of sedition to order that publication is suspended for up to a year and that the printing press used in the production of the newspaper be used only for specific purposes or be seized and detained by the police for up to one year, either instead of the penalty or in addition to it. Section 287A empowers a judge to order that a seditious publication would be likely to lead to unlawful violence or to promote feelings of hostility between different classes of the community, to prohibit the distribution and require every person having a copy of the prohibited publication to deliver every such copy into the custody of the police on application by the Director of Public Prosecutions.

Importantly, section 283(2) specifically states that it is not an offence under section 283 where the writing shows that the intention was to express disapprobation of the measures or administration of the government to obtain the alteration by lawful means or without exciting hatred contempt or disaffection.

Inciting to disobedience or resistance to law

Section 284 of the Criminal Code is headed Inciting to Disobedience or Resistance to Law. Read with section 206, it makes it an offence to instigate disobedience or resistance to laws or the authorities entrusted with the execution in writing or printed matter. On conviction, the penalty is a fine and imprisonment.

Importantly, section 283(2) specifically states that it is not an offence under section 284 where the writing shows that the intention was to express disapprobation of the measures or administration of the government to obtain the alteration by lawful means or without exciting hatred contempt or disaffection.

Importing seditious publications

Section 286 of the Criminal Code is headed Importing Seditious Publications and section 286(2) makes it an offence to distribute, print or publish any publication whose importation has been prohibited by proclamation in terms of section 286(1). Section 287B provides that the penalty, on conviction, is a fine and imprisonment. Section 286(2) provides for the publication to be forfeited.

Section 287 of the Criminal Code empowers the court convicting the person of sedition to order that publication is suspended for up to a year and that the printing press used in the production of the newspaper be used only for specific purposes or seized and detained by the police for up to one year either instead of the penalty or in addition to it. Section 287A empowers a judge to order that a seditious publication would be likely to lead to unlawful violence or promote feelings of hostility between different classes of the community, prohibit the distribution and require every person having a copy of the prohibited publication to deliver every such copy into the custody of the police on application by the Director of Public Prosecutions.

Besides the Criminal Code's provisions, note that the crime of printing, distributing or publishing a publication which has been prohibited from importation, is also provided for in the Importation of Publications (Prohibition) Ordinance, Ordinance No. 61 of 1953. The penalties are similar.

Defamation

Section 288 of the Criminal Code is headed Interpretation of Defamation Section 288(3) read with section 206 makes it an offence to defame a person in writing or printed matter. The penalty is imprisonment or a fine.

Defamation is defined in section 288(1) as 'any imputation or allegation of a fact prejudicial to the honour, character or reputation of the person to whom such fact is imputed or alleged'. Section 288(2) provides that defamation of a deceased person is also defamation 'where it is calculated to throw discredit on or be hurtful to the feelings of the family or relatives of the deceased'.

The defences to a charge of defamation are set out in section 288(4) and, in brief, are:

- the publication of truth for the public good
- fair comment and criticism of the conduct of a public servant in the discharge of his public functions or respect of his or her character in so far as his or her character appears in that conduct
- fair comment and criticism on the conduct of any person touching any public question or in respect of his or her character in so far as his or her character appears in that conduct
- impartial and accurate reports of court proceedings unless the court itself has prohibited publication or the subject matter of the trial is unfit for publication, or the subject matter of the proceedings is blasphemous or obscene. Note that, in terms of section 290, no civil or criminal proceedings for defamation can be launched against any person who is a party to, or witness in, court proceedings
- fair comments or criticism on the merits of any civil or criminal case which has been decided by a court or respecting the conduct of any person as a party or witness in the case

- fair comment or criticism of the merits of any performance which its author has submitted to the judgement of the public
- good faith comments on the conduct of a person written by another person in lawful authority over such conduct or published in a newspaper if there was no other way for the writer to protect his or her or society's interests to which the lawful authority relates
- an accusation made in good faith to any person who has lawful authority over the person whose conduct is complained of
- an allegation on the character of another person provided the allegation is made in good faith for the protection of the interests of the person making it or of any other person or for the public good
- conveying a caution in good faith to a person against another provided the caution is intended for the good of the person to whom it is conveyed or for the public good
- publication of an impartial and accurate report of the proceedings of a public meeting or any open meeting of the National Assembly or a municipal council.

Criminal intimidation

Section 291 of the Criminal Code is headed Criminal Intimidation. It makes it an offence to threaten another, including in writing, with a disclosure which may cause injury to his or her person, reputation or property or that of his or her family with the intention that the person concerned engages in illegal conduct. The penalty is imprisonment and a fine.

Insult

Section 292 of the Criminal Code is headed Insult, and it makes it an offence to use any: 'injurious expression or any term of contempt or infective, or other abusive language, not carrying with it the imputation of a fact' using printed matter. The penalty is imprisonment and a fine.

False news

Section 299 of the Criminal Code is headed Publishing False News. It makes it an offence to publish false news or news which, although accurate in substance, has been altered in one or more parts or falsely attributed to some other person in a newspaper if the publication disturbs public order or public peace. It is a defence to show that the publication was made in good faith and after making sufficient enquiries to ascertain its truth. On conviction, the penalty is a fine or imprisonment.

3.9.5 Prohibition on the publication of contempt of the National Assembly

Section 6 of the National Assembly (Privileges, Immunities and Powers) Act, Act 22 of 1953 lists several acts that constitute the offence of contempt of the National

Assembly. The penalty for such offences is imprisonment or a fine. The offences that are of particular relevance to the media include:

Defamation

Publishing any defamatory statement about the assembly or any committee or the conduct or character of any member concerning actions performed or words uttered by him or her in the National Assembly, section 6(1)(n).

Note that a person cannot be held liable for defamation under section 6(1)(n) of the Powers Act unless the publication is also punishable as defamation under section 288 of the Criminal Code dealt in paragraph 3.9.4 above, section 6(2).

Biased reports of National Assembly proceedings

Publishing any perverted or biased reports of debates or proceedings of the National Assembly or any of its committees, or gross misrepresentations of the speeches of particular members, section 6(1)(o).

An accusation of impartiality of the speaker, deputy speaker or chairperson of any committee

Publishing any statement reflecting on the conduct or character of, or constituting an accusation of partiality in the discharge of his or her duty by, the speaker, deputy speaker or chairperson of any National Assembly committee, section 6(1)(s).

3.9.6 Prohibition on the publication of indecent photographs of children

Section 15 of the Child Protection Act, Act 30 of 1994, makes it an offence to distribute an indecent photograph or pseudo-photograph (where the impression conveyed is that the person shown is a child) of a child or to publish any advertisement likely to be understood as conveying that the advertiser distributes such indecent photographs or pseudo-photographs or intends to do so. The penalty is a fine and imprisonment.

3.9.7 Prohibition on certain kinds of information posted online or sent via an information and communication service

Section 46 of the Information and Communication Technologies Act, Act 4 of 2001 (ICT Act) sets out a list of offences under the ICT Act regarding content posted online, including via the social media platforms and websites of media outlets. In brief, the offences include:

- using telecommunication equipment to deliver a message which is obscene, indecent, abusive, threatening, false or misleading, or is likely to cause distress and anxiety
- using an information and communication service to transmit a message:
  - which is grossly offensive or indecent, obscene or menacing

- which is likely to endanger or compromise state defence, public safety or public order.

In terms of section 47(1), the penalty on conviction for the above offences is a fine and imprisonment.

It is important to note that the definitions of 'message', 'information and communication service and 'telecommunication equipment are all sufficiently broad to encompass media activities which take place online. Consequently, these offences are too broadly framed to follow international good practice as they could, theoretically, contain journalistic activities that are in the public interest, including the publication of important information that is untrue or only particularly true, despite reasonable efforts being taken.

3.10 Legislation governing the interception of communication

For the media, the legality of monitoring, recording and intercepting communications both of and by the media, is an important issue and, in Mauritius, is governed by the Computer Misuse and Cybercrime Act, Act 22 of 2003 (the Cybercrime Act).

In this section, we deal only with those aspects of the Cybercrime Act, which are of relevance to the media.

Although the Cybercrime Act refers to a computer system throughout, the definition is sufficiently broad to include electronic communication devices such as a cell phone.

Section 3 makes it an offence to access a computer system to cause it to perform a function when such access is unauthorised, that is, he or she is not entitled to access the computer system and does not have the consent of the person who is allowed to access it. The penalty is a fine and imprisonment.

Section 5(1)(b) read with section 5(4) of the Cybercrime Act makes it an offence to intercept any function of or data in a computer system (for example, an email or voice communication), unless both the sender and recipient consent to the interception or it is done under a statutory power. On conviction, the penalty is a fine and imprisonment in terms of section 5(2)(a).

3.11 Legislation that protects personal data

The media needs to be aware of the provisions of the Data Protection Act, Act 13 of 2004 (the DPA). It contains several detailed provisions regarding how personal data is to be collected, stored and used.

Importantly for the media's purposes, section 49 of the DPA specifically grants an exemption from compliance with several of the provisions of the DPA for journalistic, literary or artistic purposes. Section 49(1) provides that the processing of personal data for journalistic purposes is exempt from numerous provisions of the DPA where processing is undertaken with a view to the publication of any

journalistic material in the public interest and compliance with the provisions of the DPA would be incompatible with those purposes.

The exemption is from:

- the second, third, fourth, fifth and eighth data principles contained in the first schedule to the DPA which deal with personal data use and processing;
- the provisions of sections 23-29 which deal with the accuracy, processing, use, security, duty to destroy and the unlawful disclosure of personal data and the processing of sensitive personal data;
- Part VI of the DPA concerns blocking, which is defined as suspending the modification of data or suspending the provision of information to a third party where such provision is suspended or restricted per the DPA.

In all other respects, the provisions of the DPA apply to the media and will require that much greater attention be paid to how personal data is acquired, stored and maintained.

3.12 Legislation that specifically assists the media in performing its functions

In countries that are committed to democracy, governments pass legislation which specifically promotes the accountability and transparency of public and private institutions as well as human rights. 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 and to protect the media from threats to freedom of expression. Although Mauritius has passed some crucial pieces of legislation of this kind, we note that the country has yet to pass an access to information statute.

3.12.1 The Good Governance and Integrity Reporting Act, Act 31 of 2015

Section 4 of the Governance and Integrity Reporting Act establishes an Integrity Reporting Services Agency which operates as a focal point for receiving, evaluating and processing reports and disclosures of positive acts of good governance and integrity, as well as acts of malpractices and unexplained wealth.

Importantly, section 20 is headed Protection of Persons making Reports and offers protections to whistleblowers, i.e. persons who make a disclosure or report to the agency which he or she had reasonable grounds to believe was genuine at the time the disclosure or report was made.

Section 20(1) provides that a whistleblower (note that the term is not used in the statute) shall incur no civil or criminal liability as a result of the disclosure or report. Further, section 20(2) makes it an offence to victimise or retaliate against a whistleblower and, on conviction, the penalty is a fine and imprisonment. 'Victimisation' and 'retaliation' are defined as meaning an act:

- which causes injury, damage or loss
- of intimidation or harassment
- of discrimination, disadvantage or adverse treatment concerning a person's employment
- amounting to threats of reprisals.

Section 20(3) makes it an offence to knowingly make a false, malicious or vexatious disclosure to the Integrity Reporting Services Agency and, on conviction, the penalty is a fine and imprisonment.

3.12.2 The Prevention of Corruption Act, Act 5 of 2002

Section 19 of the Prevention of Corruption Act establishes the Independent Commission against Corruption and section 20 sets out its functions which include:

- detecting and investigating any act, or allegation of an act, of corruption including the conduct of any public official connected with corruption
- monitoring the implementation of any contract awarded by a public body, to ensure that no irregularity or impropriety is involved
- educating the public against corruption
- enlisting and fostering public support in combating corruption.

The last two are of particular importance to the media because of the role that it plays in stimulating public debate on matters of governance. Another important provision is section 46 which requires the commission, once it becomes aware that corruption or money-laundering offence may have been committed, to refer the matter to the Director of the Corruption Investigation Division for preliminary investigation. The effect of this is that investigative journalism can contribute to making the commission aware of corruption and securing investigations into corruption.

Importantly, section 49 is headed Protection of Witnesses, and it offers protection to whistleblowers, persons who make a disclosure or report which is genuine or which he or she had reasonable grounds to believe was genuine at the time the disclosure or report was made. Section 49(1) provides that a whistleblower (note that the term is not used in the statute) shall incur no civil or criminal liability as a result of the disclosure or report. Section 20(5) makes it an offence to victimise or retaliate against a whistleblower and, on conviction, the penalty is a fine and imprisonment. 'Victimisation' and 'retaliation' are defined as meaning an act:

- which causes injury, damage or loss
- of intimidation or harassment
- of discrimination, disadvantage or adverse treatment concerning a person's employment

- amounting to threats of reprisals.

Section 49(6) makes it an offence to knowingly make a false, malicious or vexatious disclosure concerning corruption and, on conviction, the penalty is a fine and imprisonment.

3.12.3 The Protection of Human Rights Act, Act 19 of 1998

The Protection of Human Rights Act (Human Rights Act) establishes the National Human Rights Commission (the commission) in terms of section 3. Section 3A sets out the functions of the commission relevant to the media, and the important ones include:

- promoting and protecting human rights;
- publicising human rights to combat all forms of discrimination by increasing public awareness, especially by information and education and by making use of all press organs.

Section 4(1) empowers the human rights division of the commission to enquire into any written complaint alleging a human rights violation or to initiate an enquiry of its own accord.

3.12.4 The National Assembly (Privileges, Immunities and Powers) Act, Act 22 of 1953

The National Assembly (Privileges, Immunities and Powers) Act sets out the privileges and immunities that are given to the National Assembly. Section 5 provides that no civil or criminal proceedings may be instituted against any person for any act done by him or her under the lawful authority of the National Assembly. This is important because it encourages people to speak freely in the National Assembly, which assists the media in reporting matters relating to the National Assembly.

4 Regulations affecting the media

In this section, you will learn:

- ▷ definition of regulations
- ▷ key regulations governing broadcast licences
- ▷ key regulations governing general broadcasting content
- ▷ key regulations governing the Mauritius Broadcasting Corporation

4.1 Definition of regulations

Regulations are a type of subordinate legislation. They are legal rules that are made in terms of a statute. Regulations are a legal mechanism for allowing ministers, or even organisations such as the IBA, to make legally binding rules governing an industry or sector without parliament having to pass a specific statute.

The empowering statute will allow the minister or a body such as the IBA to make regulations, rules or both on particular matters within the scope of the functions and powers of that minister or body.

4.2 Key regulations governing broadcast licences

In 2002 the types of broadcasting licences available in Mauritius were amended by the IBA via the Independent Broadcasting Authority (Amendment of Schedule) Regulations 2002 (Amendment of Schedule Regulations), published in Gazette No 38 of 2002.

Another essential regulation concerning broadcast licences is the Independent Broadcasting Authority (Licence Fees) Regulations, 2002 (Licence Fees Regulations), published in Gazette No 39 of 2002. The regulations were made by the IBA under section 38(3) of the Independent Broadcasting Authority Act, 2000 (IBA Act) and prescribe the licence fees that can be charged for broadcasting licences in Mauritius.

4.2.1 Types of broadcasting licences

The broadcasting licences are:

- Radio Broadcasting Licences:
  - Public Radio Medium Wave Broadcasting Licence: to establish and operate a radio broadcasting service in the medium wave frequency band.
  - Public Radio FM Broadcasting Licence: to establish and operate a radio broadcasting service in the VHF FM band.
  - Private Commercial Free-to-Air Medium Wave Radio Broadcasting Licence: to establish and operate a private commercial free-to-air radio broadcasting service in the medium wave frequency band.
  - Private Commercial Free-to-Air FM Radio Broadcasting Licence: to establish and operate a private commercial free-to-air broadcasting service in the VHF FM band.
  - Community Free-to-Air Radio Broadcasting Licence: to establish and operate a community free-to-air radio broadcasting service in either the medium wave or VHF FM band.
  - Narrowcasting Radio Licence: to establish and operate a private radio broadcasting service whose reception is limited to:
    - a specific audience in a precise location
    - specific events held over a limited time

- programmes of limited appeal.

- Terrestrial Television Broadcasting Licences:
  - Public Television Broadcasting Licence to establish and operate a private television broadcasting service in the VHF/UHF television frequency band.
  - Private Commercial Television Broadcasting Licence, to establish and operate a private television broadcasting service in the VHF/UHF television frequency band.
- Subscription Television Broadcasting Licences:
  - Subscription Television Rebroadcasting Licence: to establish and operate subscription television rebroadcasting services whereby television signals received from satellites via large receive-only dish antennas are retransmitted for direct reception by the public on payment of a monthly subscription fee.
  - Subscription Television Direct to Home Satellite Broadcasting Providers Licence: to provide television services to the public whereby television signals are transmitted by satellites for direct reception by the public via receive-only dish antennas and decoders managed by the services provider on payment of a monthly subscription fee.
  - Subscription Cable Television Broadcasting Provider Licence: to provide television services to the public via a cable network to which the public is connected on payment of a monthly subscription fee.
- Other Licences:
  - Community Television Free-to-Air Broadcasting Licence: to establish and operate a community free-to-air television service in the VHF/UHF television band.
  - Narrowcasting Television Licence: to establish and operate a private narrowcasting television service whose reception is limited to:
    - a specific viewership in a precise location
    - specific events held over a limited time
    - programmes of limited appeal.

4.2.2 Fees for broadcasting licences

Section 4(1) of the Licence Fees Regulations provides that, any person receiving a new broadcasting licence must pay the licence fee specified on the schedule of the regulations on or before the date the licence is issued. Payment for the renewal of a broadcasting licence must be made 15 days before the licence expires. Section 4(2)(a) provides that, where a licensee has failed to meet the deadline for renewal payments, payment can be made up to the date of expiration; however, a 10% surcharge will be added in addition to the renewal fees.

It should be noted that should a broadcasting licensee pay his or her renewal fee after the expiration of his or her broadcasting licence, but before the expiry of 90 days from the expiration date, the IBA may revoke the licence.

4.3 Key regulations governing broadcast content

Several different regulations in Mauritius control broadcasting content, depending on the type of content being broadcast. The regulations are the Independent Broadcasting Authority Code of Ethics and the Independent Broadcasting Authority Code of Advertising Practice

4.3.1 The Independent Broadcasting Authority Code of Ethics

The IBA Act makes provision for the development of a Code of Ethics (Code) for broadcasters. The Code applies to radio broadcasters, television broadcasters and internet broadcaster or content providers. The key provisions of the Code are as follows:

Offence to good taste and decency

Language

- Broadcasters must consider people's religious, social and political sensitivities, as well as the time of the broadcast when using strong language.
- Offence is most likely to be taken during family viewing hours without warning.
- Programmes aimed at children should contain the appropriate language.
- Broadcasting Licensees should be aware of the connotations of language concerning religion, culture, race and gender.
- Language offensive to persons with disabilities should not be used.
- Subtitles must be presented in the correct form.

Sex and Nudity

Sex and nudity must not be portrayed gratuitously and should always be shown in a contextualised manner and appropriately scheduled.

Violence

- Broadcasters must ensure portrayals of violence are kept to an acceptable minimum.
- Broadcasters must be cognisant that the consequences of violence, both revealed and concealed, can be equally harmful.
- Violence that be easily replicated must be avoided.

- Unavoidable violence in news or current affairs programmes must be shown only when essential and for the integrity and completeness of the programme.
- Broadcasters must be aware that violence can affect children, and special care must be taken in its presentation.
- Scheduling: viewers and listeners have the right to know what sort of programming to expect at what times when preparing their programming schedule.
- Broadcasters have a duty not to expose children to offensive material.
- Broadcasters must make use of the watershed period (21:00 – 05:30) to broadcast adult material. It should be noted that the change from family viewing to adult viewing should not be abrupt and so broadcasters should make use of the second watershed of 23:00 to adjust their programme content gradually.
- Sufficient warnings concerning the type of content being broadcast must be displayed, including minimum ratings for films.
- Times when children are likely to stay up later, public holidays, weekends and school holidays must be considered when programming schedules are being made.
- Advertising content must be suitable for the likely audience at the time they are transmitted.
- Radio broadcasters should take care when scheduling their broadcast content that their content does not offend. This is particularly true of times when children may be listening, even though the radio does not have a watershed period.

Impartiality and accuracy

Citizens have the right to access information and broadcasters have the right to provide that information. The only restriction to a broadcaster's rights is the obligation to present the material that is balanced, fair, accurate and impartial.

Different types of factual programmes must ensure that accuracy and impartiality are preserved. These programmes include:

- News:
  - reporting should be dispassionate and even-handed
  - mistakes must be acknowledged and corrected on the same channel at the first available opportunity.
- Particular impartiality for news and other programmes is required where these include matters of political or industrial controversy, issues of public policy and debates between politicians.
- Personal view programmes:

- programmes that include personal views must be identified before the start of the programme containing personal opinions and before any announcement of personal views
- facts must be respected, and personal views should not rest on false evidence.

- Drama and drama-documentary must be clearly labelled and where a drama attempts to recreate actual events, factual and fictional elements must be carefully labelled to ensure they are not misleadingly presented.
- Conduct of interviews:
  - interviewees should be made aware of the format, subject matters and purpose of the interview and how their contributions are likely to be used
  - in programmes dealing with political or industrial controversy, all participants should be informed of the identities and intended roles of all involved
  - an impartial account must be given of the subject matter.
- Live phone-in programmes:
  - care must be taken to maintain the principles of fairness, integrity, objectivity and balance by securing a broad range of views
  - presenters must moderate discussions and not present their personal opinions on air
  - presenters must treat all callers fairly
  - presenters must ensure that the pressure groups or irresponsible people do not capture the programme.
- Autofill broadcast delay:
  - Broadcasters must make use of delay equipment with at least 30 seconds delay for all live and call-in programmes
  - The delay should permit the station to bleep, pixilate or otherwise preempt offending materials before they are broadcast.

Matters relating to privacy

Private lives of individuals typically have no legitimate interest to the public and must be protected from the public gaze. However, collective interests prevail over those of the individual when society's wellbeing is threatened and in certain well-defined conditions for the public's interest.

Broadcasters must take care to respect the privacy of citizens during the process of collecting material and the way the material is used in a programme.

Infringement of privacy is only justified by an overriding public interest in disclosure of information such as:

- revealing or detecting crime or disreputable behaviour
- protecting public health or safety
- exposing misleading claims by individuals or organisations
- disclosing significant incompetence in public office.

Special circumstances

- Public places:
  - When people are caught up in events which hit the headlines for a short time, their situation should not be abused or exploited.
  - When covering events in public places, broadcasters should ensure that the content of their programme is sufficiently in the public domain to justify their inclusion without the consent of the individuals concerned.
  - In sensitive situations such as hospitals, prisons or police stations, the consent of the individuals involved must be obtained, unless their identity has been concealed.
  - Not everything which interests the public is in the public interest. People who are in the public eye, their relatives and friends, do not forfeit their right to privacy unless their private behaviour raises broader public issues.
  - The location of a person's home or family should not be revealed unless strictly relevant to the behaviour under investigation.
- Secrecy:
  - The use of hidden microphones and cameras can be unfair to those recorded, as well as infringe their privacy; hence it should only be considered when it is necessary to the credibility and authenticity of the story.
  - An unattended recording device should not be left or placed on private property without the full and informed consent of the occupiers or their agents unless seeking such permission might frustrate the investigation into matters of overriding public interest. Even then such use must be appropriate to the importance or nature of the story.
  - When secretly obtained material is being broadcast, the privacy of innocent bystanders must be protected.
  - For secret recordings as part of an entertainment programme, broadcasters should seek the consent of the subjects of a recorded deception, before the material is broadcast.
  - In a live broadcast, special care should be taken to avoid offence to the individuals concerned.

- Door stepping:
  - People who are in the news cannot reasonably object to being questioned and recorded by the media when in public places.
  - If a broadcaster phones a person in the news, he or she should make it clear who is calling and for what purpose.
  - People in the news have the right to make no comment or to refuse to appear in a broadcast. The decision and the reason given should appear in any relevant broadcast.
  - Besides the urgency of the daily news context, surprise can be a legitimate device to elicit the truth.
  - Care must be taken not to make it easy to locate or identify the refuser's address unless it is strictly relevant to the behaviour under investigation, and there is an overriding public interest.
- Telephone calls:
  - Broadcasters should generally identify themselves to telephone interviewees from the outset, or seek the agreement of the other party if they wish to broadcast the recording of a telephone call.
  - Recording a call for broadcast purposes without prior warning is the equivalent of door stepping and similar rules apply.
- Suffering and distress:
  - Broadcasters should not add to the distress of people involved in emergencies or personal tragedies. The use of material which infringes their privacy or is distressing can only be justified by overriding public interest.
  - Broadcasters should not reveal the identity of a person who has died, or victims of accidents or violent crimes unless and until the next of kin has been notified.
  - Broadcasters should refrain from causing additional anxiety or distress when filming or recording people who are already extremely upset or under stress.
  - Broadcasters should ask themselves whether the repeated use of traumatic library material is justified if it features identifiable persons who are still alive or who have died recently.
- Children:
  - Children's vulnerability needs special protection from broadcasters, regardless of the status or actions of their parents.
  - Children's gullibility or trust must not be abused.
  - Children should not be questioned about private family or other matters beyond their understanding.

- The consent of parents should be obtained before interviewing children under 16 on matters of significance.
- Where consent has not been obtained or been refused, only overriding public interest can justify a decision to go ahead with an interview.
- Children under 16 involved in police enquiries or court proceedings relating to sexual offences should not be identified in news or other programmes.

- Agency operations:
  - When accompanying operations of police, emergency services or other social bodies, broadcasting crews should declare for whom they are working and what they are doing as soon as practicable.
  - When asked by owners or occupiers to stop filming on private premises or leave, broadcasters should comply, unless there is an overriding public interest.
  - Bystanders caught on camera should have their identities obscured where unfairness might arise.

Human rights

Broadcasting licensees enjoy the privilege of licences issued by the IBA to operate using frequencies that are public property. This privilege is granted on the understanding that licensees have a responsibility for the programmes they broadcast and are subject to the requirements of the laws of Mauritius, and any conditions of the licence that may be imposed by the IBA pursuant to the IBA Act.

Rights and Freedoms

- The fundamental rights and freedoms of the individual are enshrined in Chapter II of the constitution and other laws of Mauritius.
- The international community has stated its commitment to the right to free expression in a series of fundamental agreements, to which Mauritius has agreed to adhere, such as the:
  - Universal Declaration of Human Rights and
  - International Covenant on Civil and Political Rights.
- Building on the constitutional rights and principles expressed in international human rights instruments, broadcasters must be guided by the following:
  - the right of the individual's private and family life, his or her home and his or her correspondence.
  - the right to freedom of thought, conscience and religion
  - the right to freedom of expression, including the right to hold opinions and receive and impart information and ideas without interference.

- There shall be no interference with the exercise of the rights of the individual except:
  - following the law
  - where it is necessary in a democratic society
  - in the interests of national security
  - in the interests of public safety
  - in the interests of the economic well-being of the country
  - for the prevention of disorder or crime
  - for the protection of health or morals
  - for the protection of the rights and freedoms of others.
- The IBA recognizes the importance of the principle of freedom of expression. The freedom of expression of broadcasters is thus counterbalanced by the right of listeners and viewers to programming that complies with the IBA Act and associated regulatory requirements.

Abusive and offensive comments

- Broadcasters must ensure that their programming does not contain abusive or offensive comments and discriminatory remarks on material about race, colour, age, sex, religion, social origin, marital status or physical or mental disability.
- Remarks which are abusive or offensive and risk exposing an individual or a group to contempt or hatred, contravene the objectives of the broadcasting policy set out in the Code.
- Programming should be of a high standard, and the Mauritian licensees broadcasting system should reflect the circumstances and aspirations of Mauritian citizens, including the linguistic, cultural and ethnic plurality of the Mauritian society by programming.
- The IBA recognizes the right of licensees to criticize and question on air the actions of individuals, groups and institutions in the interest of community via their employees.
- The IBA considers that the right to criticize does not give anyone the right to degrade others, to be unduly fierce in his or her criticism, or to use the airwaves to make personal attacks.

Protection of children

- Licensees should be alert to the likely effects of all live broadcast materials of children. There should be a balanced mix of programmes to cater for the needs of children of different age groups.

- Materials that might seriously impair the physical, mental or moral development of children must not be broadcast.
- Children must also be protected from material that is unsuitable for them by appropriate scheduling.
- Radio broadcasters must have particular regard to times when children are particularly likely to be listening.
- No advantage should be taken of children's natural credulity and sense of loyalty. The licensees should ensure that scenes likely to frighten or cause pain to children be avoided in programmes targeting children.
- All scenes in which pleasure is taken in inflicting or accepting pain or humiliation on others should be avoided.
- The portrayal of dangerous behaviour easily imitated by children should be avoided. This applies especially to the use of knives and other offensive weapons, articles or substances which are readily accessible to children in a manner likely to cause serious injury.
- Ingenious and unfamiliar methods of inflicting pain or injury, which are capable of easy imitation, should be avoided. These include, for example, rabbit punches, suffocation, sabotage of vehicles and booby traps.
- Smoking, drinking of alcoholic beverages, use of illegal drugs, solvents and glues by minors must not be featured in programmes made for children. It must not be condoned, encouraged or glamorized.
- References to the consumption of illegal drugs should only be made where justified by the storyline or programme context.
- Representation of sexual intercourse must not occur during children and family viewing hours unless there is a serious educational purpose.
- Violence, its after-effects and descriptions of violence, whether verbal or physical, must not be featured in programmes made for children and must not be condoned, encouraged or glamorized.
- Care must be taken in the treatment of themes dealing with gambling, prostitution, crime, the paranormal, social or domestic conflict.
- Due care must be taken over the physical and emotional welfare and the dignity of children who take part or are otherwise involved in programmes.
- The rules as to the use of children in advertising materials are clearly defined in the Code of Advertising Practice (below).
- Disrespect for law and order, adult authority, good morals and clean living and downgrading or humiliating situations for children should be strictly disallowed.

- Children's programmes should be wholesome and, in general, designed to impart a broader knowledge of the world around them, to encourage the habit of acquiring knowledge, to stimulate active interest in sports and hobbies and to promote appreciation of spiritual and moral values.

Religious programmes

- A balance must be struck between the fundamental human right to freedom of expression and the broadcasting of religious programmes.
- In the broadcast of religious programmes, licensees should be aware of what may offend.

Broadcasters must ensure that:

- They exercise a proper degree of responsibility concerning the content of religious programmes.
- Religious programmes do not involve any improper exploitation of susceptibilities of the audience for such a programme.
- Religious programmes do not involve any abusive treatment of the religious views and beliefs of those belonging to a particular religion or religious denomination.
- Where a religion or religious denomination is the subject, or one of the subjects, of a religious programme, the identity of the religion, religious denomination or both, must be clear to the audience.
- During the broadcast of religious programmes, licensees must be aware of circumstances which may cause distress to sections of the audience, such as:
    - the casual use of names, words or symbols regarded as sacred by different sets of believers can cause hurt as well as offence
    - broadcast of programmes on the principal holy days of the main religions should not cause unnecessary offence in the way they are presented, though the same material may be more acceptable at other times
    - offence may be caused by profane references or disrespect whether verbal or visual, directed at deities, scriptures, holy days and rituals which are at the heart of various religions
    - the promotion of religious views or beliefs, directly or indirectly, must not be done by downgrading other faiths
    - religious programmes must not influence audience members and viewers to join a particular religion or religious denomination.

4.3.2 The Independent Broadcasting Authority Code of Advertising Practice

Advertising serves as an essential source of income for the media industry. The IBA Act makes provision for setting up the Code of Advertising Practice (Advertising Code) for regulating advertising in Mauritius.

- Section 1 of the Advertising Code provides that the Advertising Code aims to ensure that advertising does not:
  - cause harmful behaviour
  - cause offence
  - mislead viewers or listeners.

  It also requires that advertisements:
  - be differentiated from other programming
  - the frequency and duration of commercial breaks be restricted
  - sponsorship be regulated.
- Advertisements must consider the diversity of society and must be sensitive to gender and avoid the use of stereotypes. As far as possible, local individuals should be used in advertising.
- The editorial responsibility for advertisements rests on the licensee and not the IBA.
- Additional provisions of the Advertising Code are summarised below.

General principles

- Advertisements should be decent, honest and truthful.
- The content, presentation and placement of all advertising materials must comply with the Advertising Code.
- All advertisements must comply with the laws of Mauritius.
- Complaints concerning advertising can be made to the Complaints Committee of the IBA under section 30(4)(a). Non-compliance with the direction of the Complaints Committee constitutes an offence by sections 5(i) and 37 of the IBA Act and is punishable by a fine or imprisonment.

Identification of advertisements

Advertising must be identifiable from other broadcast content.

Unacceptable advertising

- Except for the announcement of political events, advertisements must not:
  - be directed towards any political end
  - be inserted by or on behalf of anybody whose objects are wholly or mostly of a political nature
  - have any relationship to any industrial dispute
  - show partiality in matters of political or industrial controversy or current public policy.
- No advertisement may contain extracts from parliamentary proceedings.
- Advertisements may not discredit the state and no person holding political office may be represented without authorisation.
- Advertisements may not be disrespectful to Mauritius,
- Advertisements must not refer to the use or appearance of any product or service which have already appeared in a non-commercial programme.

Good and bad taste

- Advertising matter should be presented with courtesy and good taste.
- Disturbing and offensive material should not be used in advertising.

Racism and stereotyping

Advertisers must take caution to avoid the promotion of any racist or stereotypical messages, which might offend.

Safety and caution

- Potential dangers and risks associated with using any product being advertised must be presented, and the safest way to use the product must be indicated.
- Advertising should not present any dangerous behaviour except to discourage it.
- Special care must be taken in advertising directed at children and teenagers.

Sound effects

- Advertisements should not include sounds likely to create safety hazards.
- Distracting or potentially alarming sound effects should be avoided.

Disparagement

Advertising matter should not contain any claims that have the effect of disparaging competitors, competing products or services of other industries, professions, or institutions.

Precision and clarity

Advertisements should be precise. Care should be taken to ensure that there is no ambiguity, and the message is clear and concise.

Truthful presentation

Advertising must be honest and should not mislead viewers or listeners about the product being advertised or its suitability for the purpose being recommended.

Imitation

Advertisements should not imitate or approximate the name or advertising slogans of competitors.

Appeals to prejudice

Advertisements should not appeal to prejudices, superstitions or religious sentiments to manipulate behaviour.

Acceptability of advertisement matters

- Licensees may refuse to advertise any matter where there is good reason to doubt the integrity of the advertiser or the truth or compliance with the Advertising Code of the message of the advertisement.
- Licensees may refuse to advertise material that he or she believes is objectionable to a substantial portion of the community.

Testimonial and endorsements

- Testimonials may be used in advertising as long as:
- They are genuine and not misleading.
- Licensees obtain satisfactory documentary evidence in support of any testimonial or claim before accepting it for inclusion in an advertisement.
- Children must not testify about any product or service.
- A person's credentials may be used to give credence to any testimonial he or she makes.
- Presenters may not give testimonials on broadcasting channels or stations on which they appear.

Comparative advertising

- Comparative advertising concerns goods or services of the same nature, with the same characteristics.
- Advertising should be objective, truthful, loyal, correct and non-degrading and should be limited to essential, significant, relevant and verifiable characteristics of the products or services compared only.
- Advertising should compare products or services available in the same market.
- Advertising should give fair treatment (sound, images, copies or other means of comparable quality) to the different products compared.
- When comparison concerns prices, it should refer to identical products, sold under the same conditions.
- The validity of prices announced should be indicated.
- Comparative advertising cannot be based on opinions or appreciations, on aesthetics, taste or seduction of a product or service.

Programmes with limited or restricted advertisement

Advertisements must not be inserted during religious or school programmes in the Educational Television time slot or radio broadcast.

Claims to be substantiated

- Advertising must be very clear in the use of language to avoid unnecessary confusion, for example, the word:
  - 'New' may be used only during the first year of launch
  - 'Happiness' may not be used to indicate that the advertised product is required to attain happiness
  - 'First' or 'best' must include imperative reasons why the advertised product is first or best
  - 'Guarantee', 'guaranteed', 'warranty' or 'warranted' or words having the same meaning may not be used, unless the full terms of the guarantee are available for inspection by the licensee
  - 'Free' may not be used to describe goods, services or samples unless the goods, services or samples are supplied at no cost or no extra cost to the recipient, other than actual postage or carriage or incidental travel undertaken by the customer in collecting the offer. No additional charge for packing and handling may be made. A product may be described as 'free'. However, the customer is expected to pay the cost of returning the goods, provided that the advertisement makes clear the customer's obligation to do so. In the case of phone-in services, the use of the word 'free' should be properly defined, specifying exactly what service(s) is or are free

- 'Natural' or 'pure' may be used only if no additives or synthetic products have been added to the product
- 'Healthy' is only allowed when the product has been officially certified by a medical practitioner or nutritionist that the product advertised is good for health.

- Superlatives such as 'most popular', 'most favoured' when used in a manner which suggests a number one sales position, should be substantiated by independently audited sales figures, and reliable and valid sample surveys.
- Terms or words such as 'most successful', 'safest', 'quickest' or containing any similar use of superlative adjectives must not be used in statements unless the truthfulness is adequately substantiated.

Research claims

Where a factual claim is substantiated by research or testing based on the advertiser's assessment or work done at his or her request, the source and date of the assessment or research should be indicated in the advertisement.

Misleading claims

- No advertisement may claim or imply that the product or service advertised, or any ingredient of it, has some special feature or composition if these are incapable of being established and substantiated.
- References to the results of research surveys or tests relating to the product or service to be advertised should be presented carefully, so as not to mislead viewers.
- Information conveyed must be accurate and not misleading by concealing or failing to make clear significant facts.
- Visual and verbal presentations of advertisements indicating price, price comparisons or reductions or any pricing element must be accurate and must not be misleading.

Superimposed text

- When information is included in the form of captions, either standing alone or superimposed onto other images, the text must be legible and held long enough for the full message to be read by the average viewer on a standard domestic television set.
- Particular attention should be paid to the typeface, letter spacing, line spacing, background or other elements of presentation including, without limitation, the interaction with the background which may render the text blurred or otherwise indistinct.

Protection of children

- No product or service may be advertised, and no method of advertising may be used, in association with a programme intended for children which may result in physical, mental, moral or emotional harm to them. No method of advertising may be employed, which takes advantage of the natural credulity and sense of loyalty of children.
- Advertisements must not lead children to believe that they will be inferior in some way to other children or liable to be held in contempt or ridicule unless they acquire or use the product advertised.
- Advertisements must not misguide minors to obvious abuse or excess. They should clearly explain the use of the products advertised to avoid unfortunate incidents.
- Advertisements must not offer mail orders or sale on credit to children.
- If there is to be a reference to a competition for children in an advertisement, the value of the prizes and the chances of winning one must be fairly stated.

Children in advertisements

The appearance of children in advertising is subject to conditions that include:

- the safety of the child in the advertisement and the safety of the action being portrayed to viewers
- the protection of children, bearing in mind the provisions of the Child Safety Act
- the manners and behaviour of children, preferably children shown in advertisements should set a good example and should be shown in a family background
- any nudity or partial nudity be dealt with carefully and with restraint
- children may not be shown to be gambling.

Political advertising

Paid political advertisements and announcements on the radio must not exceed 15 seconds and must include only the name of the party, the place and time of events and the names of the speakers. Similar requirements are applied to television with a picture background showing only the official symbol, colours or both, of the political party.

Toys

- Advertisements must give an accurate and exact presentation of toys and must not create any doubt or confusion regarding the real contents of toy

boxes or packages. Advertisements should mention the minimum age for which the advertised toy is intended.

- A warning should accompany advertisements for toys and their components or detachable parts which may present a risk of physical injury or being swallowed or inhaled: 'To Be Used Under Adult Supervision'.
- Advertisements for 'electric toys', 'functional toys', 'chemical toys' and toys intended for use in water should bear a warning: 'For Use under Adult Supervision'.
- Food advertisements accompanied by small toys for children should mention that these toys are not edible.
- Advertisements for toys and articles such as slides, suspended swings and rings, trapezes and ropes should mention that these toys and articles should be correctly assembled, checked and maintained.
- Advertisements for skates and skateboards for children should indicate the recommended protective equipment to be worn by the user.
- Advertisements for video games should mention that it is not recommended that a child plays with them for long hours.
- Advertisements for fireworks should bear a warning: 'For Use Under Adult Supervision'.

Food

- Advertisements shall not contain any statement or visual presentation which directly or by implication, omission or exaggerated claim, is likely to mislead consumers concerning food.
- Advertisements must not:
  - contain generalised claims such as 'goodness' or 'wholesome' which may imply that a food product or ingredient has a more significant nutritional or health benefit than is the case unless supported by sound medical evidence
  - disparage good dietary practice; any comparison between foods shall not discourage the selection of foods such as fresh fruits and vegetables
  - encourage or condone excessive consumption of any food
  - encourage frequent consumption throughout the day (particularly of potentially carcinogenic products, such as those containing sugar) or depict situations which discourage the cleaning of teeth every night when addressed to children.
- Advertisements may be accepted:
  - for vitamins or minerals where they relate to restricted, un-supplemented

or low food energy diets, for the use of women who are pregnant or lactating and growing children and some people over 50

- for low-calorie food and drinks, if presented as, or as part of, slimming regimes or if using a slimming or weight control theme. It should not be claimed that the products can reduce weight by themselves without being part of a calorie or energy-controlled diet.

Tobacco and alcohol products

Advertisements for tobacco-related products and alcohol are prohibited.

Medicines, treatments and health claims

- The Pharmacy Act provides that no person shall advertise any pharmaceutical product intended for human or veterinary use, except in such technical or professional publications as may be approved by the Pharmacy Board.
- The Pharmacy Act defines such pharmaceutical products as medicines, drugs, preparations, poisons or therapeutic substances. Generally, all products making a: 'clear therapeutic claim' are drugs, for this purpose.
- In case of doubt as to whether the advertisement of any drug on radio or television is permissible, the Pharmacy Board should be consulted
- No advertisement for pharmaceutical products may be directed at children under the age of 16.
- No advertisement may contain any offer to diagnose, advise, prescribe or treat by correspondence (including post, telephone, fax or email).
- Advertisements must not imply or encourage indiscriminate, unnecessary, or excessive use of any medical product or treatment.
- Advertisements must not make any exaggerated claims, by the selection of testimonials or other evidence unrepresentative of a product's effectiveness, or by claiming that it possesses some unique property or quality which cannot be substantiated.
- Advertisements must not make any exaggerated claims, by the selection of testimonials or other evidence unrepresentative of a product's effectiveness, or by claiming that it possesses some unique property or quality which cannot be substantiated.

Charity advertising

- Licensees must satisfy themselves that the association is registered as a charitable association or that its charitable status has otherwise been recognised.
- Charitable organisations proposing to advertise are required to undertake that:

- They are not involved in transactions in which members of their governing body or staff have a financial interest.
- The response to their proposed advertising, whether in cash or kind or services, will be applied solely for the purposes specified or implied in the advertisements.
- They will not publish or otherwise disclose the names of contributors without prior permission.
- The IBA reserves the right to seek other assurances on other matters, where appropriate.
- Advertising for charitable organisations must:
- Handle likely to arouse strong emotions in the public with care and discretion matters.
- Respect the dignity of those on whose behalf an appeal is being made.
- Avoid presenting an exaggerated impression of the scale or nature of the social problem to which the work of the charity is addressed, for example, by illustrating the message with non-typical extreme cases.
- Reveal the destination of the funds collected or indicate how the public can obtain this information, and the information should be made readily available to the public.
- Not address any fund-raising message to children.
- Not contain comparisons with other charities.
- Not mislead in any way as to the field of activity of the charity, or the use to which donations will be put.
- Not suggest that anyone will lack proper feeling or fail in one's responsibility by not supporting a charity.
- Charitable organisations are not exempt from abiding by the general principles spelt out in the Code of Advertising Practice.
- When reference made to a known personality may be understood by the public as a guarantee of the seriousness of the advertised association, the person's qualifications and exact relationship with the association must be indicated.
- Commercial advertisers may promote, either as a primary or incidental purpose, the needs and objects of charitable organisations, in conformity with the Advertising Code, subject to the conditions that:
- Evidence must be provided to the licensee that the charitable organisation concerned has given its consent to the proposed advertisement.

- In the case of an advertisement including an offer to donate part of the proceeds of sales to charity, such advertisement shall specify which organisation or organisations will benefit and make clear the basis on which the donation of the proceeds will be calculated.

4.4 Key regulations governing the MBC

- The Mauritius Broadcasting Corporation (Right of Reply) Regulations 1983 (Right of Reply Regulations), published in Gazette No 135 of 1983
- The Mauritius Broadcasting Corporation (Advertisement) Regulations 1982 (Advertising Regulations) published in Gazette No 79 of 1982.

4.4.1 The Mauritius Broadcasting Corporation (Right of Reply) Regulations 1983 (Right of Reply Regulations)

In terms of section 3 of the Right of Reply Regulations, any person who wishes to exercise the right to reply provided for under section 19 of the Mauritius Broadcasting Corporation Act must make a written application to the chairperson of the MBC in the form provided in the schedule to the Right of Reply Regulations.

4.4.2 The Mauritius Broadcasting Corporation (Advertisement) Regulations 1982 (Advertising Regulations)

In terms of section 3(2) of the Advertising Regulations, where a request for the sale of airtime for advertising is made to the MBC, and the director-general believes that the airtime should not be sold for the advertisement, the MBC or the director-general must refer the request to the minister responsible for information for his or her determination and the minister's decision shall be final.

5 Media self-regulation

- Given the size of the population and the limited number of media operators, Mauritius lacks self-regulatory mechanisms for content dispute resolution. Concerning broadcasting, complaints regarding content are processed by the Complaints Committee of the IBA.
- Concerning the print and online media, content disputes are presumably left to the courts to resolve.

6 Case law and the media

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

However, Mauritius has a hybrid legal system using elements of both civil and common law practices due to its history as a colony of both France and the United Kingdom.

Notes

1 https://www.cia.gov/library/publications/the-world-factbook/geos/mp.html [accessed 19 December 2020]

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4 https://www.cia.gov/library/publications/the-world-factbook/geos/mp.html [accessed 19 December 2020]

5 https://www.britannica.com/animal/dodo-extinct-bird [accessed 19 December 2020]

6 https://www.cia.gov/library/publications/the-world-factbook/geos/mp.html [accessed 19 December 2020]

7 https://www.bbc.com/news/world-africa-13882731 [accessed 19 December 2020]

8 https://www.cia.gov/library/publications/the-world-factbook/geos/mp.html [accessed 19 December 2020]

9 https://www.bbc.com/news/world-africa-13882731 [accessed 19 December 2020]

10 https://www.bbc.com/news/world-africa-13882731 [accessed 19 December 2020]

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13 https://www.cia.gov/library/publications/the-world-factbook/geos/mp.html [accessed 19 December 2020]

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26 https://rsf.org/en/mauritius [accessed 19 December 2020]

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10

Mozambique

1 Introduction

The Republic of Mozambique (Mozambique) is a member of the Southern African Development Community[1] and has a population of approximately 28.8 million people.[2] It is a vast country with a landmass of about 799 000 m^2 and a long coastline of nearly 2.5 thousand km.[3] It has many neighbours, Malawi, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. Both the Limpopo and Zambezi rivers flow through Mozambique to the Indian Ocean.[4]

The Portuguese settled the Mozambique area in the early part of the 16th century, but the colonial rule was characterised by disputed territorial claims by local chieftains as well as Arab settlers. Slavery and forced labour were notable features of Portuguese rule. While slavery was formally abolished in 1879, forced labour continued until well into the 20th century[5] to provide cheap labour to South Africa's mining industry.[6] The country was administered, not only by direct Portuguese governmental rule but also via several colonial companies, the largest of which was the Mozambique Company, which ruled large areas of the country until the company's charter ended in 1942 and the Portuguese government took over the administration of the whole territory.[7] In 1951 Portugal declared Mozambique to be one of its provinces.[8]

The Front for the Liberation of Mozambique (Frelimo) began a guerrilla war of independence in 1964 and, by 1974, controlled the north of the country and was moving south.[9] In April 1974, a coup in Portugal toppled the right-wing dictatorship of the Estado Novo and Portugal immediately began the process of granting independence to its colonial territories in Africa, including Mozambique.[10] Mozambique obtained its independence on 25th June 1975[11] with Samora Machel (the head of Frelimo) at the helm of a one-party state[12] left to deal with the legacies of colonialism that included a literacy rate of only five per cent.[13] Almost immediately, the settler population of over 200 000 left, most of them returning to Portugal or moving to South Africa,[14] and the Mozambique government embarked on an economically disastrous course of nationalisation and agricultural collectivisation.[15]

Mozambique's post-independence period has been characterised by extreme conflict. Frelimo sided unambiguously with liberation movements in the then-Rhodesia (now Zimbabwe) and South Africa, allowing them free movement and the use of its territory for guerrilla attacks against both states.[16] Both states retaliated. In 1976 the then-Rhodesian intelligence forces established the Mozambican Resistance Movement (Renamo) which effectively waged a civil war against the government, seeking its overthrow, heavily supported by Rhodesia and, later, South Africa. By the mid-1980s, Renamo controlled much of the country:[17]

> ***disrupting its economy and infrastructure by cutting railway power lines, destroying roads and bridges and sabotaging oil depots. In some towns and villages, the guerrillas sometimes engaged in the wholesale massacre of civilians. By the late 1980s, Renamo's insurgency***

had caused at least 100,000 deaths and the creation of more than 1,000,000 refugees.[18]

In 1984, South Africa withdrew its support for Renamo in return for an agreement that Mozambique would no longer provide refuge for the African National Congress.[19] In 1986, Samora Machel was killed when his plane crashed in South Africa.[20] He was succeeded by President Joaquim Chissano who began a period of constitutional reform, including moving to multi-party democracy.[21] In 1990 changes were made to the Constitution to make provision for multi-party democracy[22] and, in 1992, Frelimo and Renamo reached a historic peace deal which paved the way for the country's first democratic election in 1994 and the passage of a new, democratic constitution founded on universal suffrage. Frelimo narrowly won the 1994 elections,[23] and President Chissano retained the presidency. In 1995, Mozambique joined the Commonwealth, an unusual step given that it is not a former British colony. The exception was made because each of its neighbouring states is a member.[24]

Over time, relations between the ruling Frelimo and Renamo, now the main opposition party, frayed and, by 2013, open-armed conflict was, once again, a reality.[25] Peace talks, which took place over several years, resulted in a new peace agreement in 2019 dealing with issues such as better integrating Renamo's armed forces into the military.[26] Frelimo again won the 2019 elections with President Nyusi at the helm and leaving Renamo calling the elections flawed and contesting the results.[27]

Besides on-going political tensions between its two largest parties, the country has, since 2017, been facing an Islamist insurgency in its northern Cabo Delgado province.[28] The Institute of Security Studies has posited that Islamic State may have taken charge of the insurgency[29] perhaps via local proxies. It is estimated that over 600 people have died[30] and over 115 000 displaced.[31]

The economy in Mozambique remains weak, and its population is poor. Natural disasters such as the catastrophic floods in 2000 and two recent cyclones in 2019 have undermined potential economic growth.[32] Literacy is only 58% per cent, whereas the global average is 86%.[33] *Per capita* gross national income is approximately USD 1,430.00[34] and the country routinely features on lists of the ten poorest countries in the world[35] despite large deposits of natural gas having been discovered in 2011. However, there is hope that this will transform the country's economic fortunes[36] in future.

Mozambique's media freedom levels remain extremely low. Recently, journalists have been arrested, abducted, tortured and criminally charged for reporting on the insurgency in Cabo Delgado.[37] There are notorious historical cases of journalists investigating corruption having been murdered.[38] Media outlets critical of the government have been shut down.[39]

Mozambique regularly features on international lists of poor media environments,[40] and there is little doubt that the country is not in line with international standards for democratic media regulation. Internet penetration is low at approximately 20.8%.[41]

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

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

This chapter aims to equip the reader with an understanding of the primary laws governing the media in Mozambique. Key weaknesses and deficiencies in these laws will also be identified. The hope is to encourage media law reform in Mozambique, 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 Mozambican Constitution or related legislation
- ▷ how rights are enforced under the constitution
- ▷ what is meant by the three branches of government and separation of powers

- whether there are any obvious weaknesses in the Mozambican Constitution that ought to be strengthened to protect the media

2.1 Definition of a constitution

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

The Mozambican Constitution sets out the basic rules of the Mozambican state. These are the rules on which the whole country operates. The constitution contains the underlying principles, values and laws of the Republic of Mozambique. Key constitutional provisions in the Mozambican constitution include article 1 which states: 'The Republic of Mozambique is an independent, sovereign, democratic state based on social justice.' Article 2 provides that the sovereignty of Mozambique 'resides in its people' who 'exercise their sovereignty through the constitution'.

2.2 What is meant by constitutional supremacy

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

The Mozambican Constitution makes provision for constitutional supremacy. Article 2(3) specifically states: 'The State is subordinate to the constitution and is based on legality'. Article 2(4) goes on to provide that: 'Constitutional norms prevail over all other rules of the legal system'.

2.3 How a limitations clause operates

It is clear that rights are not absolute as society would not be able to function. For example, if the right to freedom of movement were absolute, society would not be able to imprison convicted criminals. Similarly, if the right to freedom of expression were absolute, the state would not be able to protect its citizens from hate speech. Obviously, 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 in accordance with the constitution.

The Constitution of Mozambique makes provision for three types of legal limitations on the exercise and protection of rights in Chapter I of Title III, Fundamental Rights, Duties and Liberties.

2.3.1 Internal limitations

These are limitations that are right-specific and contain limitations or qualifications to the particular right that is dealt with in a particular section of the chapter on Fundamental Rights, Duties and Liberties. As discussed later, the right to freedom of expression and information contains such an internal limitations clause.

2.3.2 Constitutional limitations

Article 56(3) provides that: 'a law may limit any right entrenched in the chapter on Fundamental Rights, Duties and Liberties only if this is expressly provided for in a provision of the Constitution'. Examples of such constitutional limitations are the constitutional provisions regarding states of emergency discussed in detail below.

2.3.3 General limitations

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

The Mozambican general limitations clause applicable to the chapter on Fundamental Rights, Duties and Liberties can be found in article 56. Article 56(2) provides that rights can be limited: 'to safeguard other rights or interests protected by the Constitution'. Article 56(4) also provides that laws that limit rights and liberties must be of general application and cannot have retrospective effect (that is, cannot be used to punish acts committed before the law was enacted). Interestingly, article 57 specifically provides that a law can have retrospective effect only if this will benefit Mozambican citizens.

It is not always clear why it is necessary to have internal limitations clauses if there is a general limitations clause as well. Often, internal limitations clauses offer insight into rights that appear to be substantive but which are not very effective.

2.4 Which constitutional provisions protect the media

The Mozambican Constitution is not a document that is easy to digest for those who are not legally trained. In particular, there are several different chapters contained in Title III (the title that deals with Fundamental Rights, Duties and Liberties). Besides these, other provisions in the constitution can assist the media as it goes about its work of reporting on issues in the public interest. These are also included in this section.

2.4.1 Freedom of expression

The most important provision that protects the media is article 48 which is headed Freedom of Expression and Information.

Article 48(1) states: 'All citizens have the right to freedom of expression, freedom of the press as well as the right to information'.

Article 48(2) provides that: 'The exercise of freedom of expression, in particular, the right to disclose one's thoughts by legal means and the exercise of the right to information cannot be limited by censorship'.

Article 48(3) provides that:

> ***The freedom of the press includes, in particular, the freedom of expression and creativity of journalists, access to sources of information, the protection of the independence and professional confidentiality and the right to establish newspapers, publications and other means of dissemination.***

Article 48(4) provides that 'The public sector media's rights to expression and to disseminate a variety of views is protected'.

Article 48(5) provides that 'The state guarantees the independence of the public sector media and its journalists from the government, the administration and political powers'.

Article 48(6) contains an internal limitations clause to the rights provided for.

Article 48 requires some detailed explanation and discussion.

- This right to freedom of expression does not apply to everyone; it is protected for a certain group of people only, namely, citizens. This is a narrowing of the right that is unusual as most constitutional rights to freedom of expression recognise that this is a fundamental human right that ought to be guaranteed to all and not just to certain people, such as citizens.

- The freedom is not limited to speech (whether oral or written) but extends to non-verbal or non-written expression too. There are many different examples of this, including physical expression (such as mime or dance), photography or art.

- Article 48 also expressly gives content to media-related sub-rights that are specified in the article. These include that citizens' rights to freedom of expression include freedom of the press. This is very important because it makes it clear that this right can apply to corporate entities such as media houses, newspapers or broadcasters, as well as to individual members of the press. Also, the specific mention of the press means that the expressive rights of the press are specifically protected within the broad ambit of expression. Indeed, the wording of the right freedom of the press specifically includes the right: 'to establish newspapers, publications and other means of dissemination'. This is important because it makes it clear that the definition of the press is not confined to the print media but includes other distribution means such as broadcast and online media as well.

- Additionally, article 48 expressly sets out additional provisions regarding what is included under the ambit of freedom of the press. Again, these are significant provisions which are uncommon. The particular sub-rights (as it

were) that are expressly mentioned are, the right to the training of journalists, access to sources of information, the protection of independence and professional confidentiality. Each of these is significant, particularly the protection of independence and professional confidentiality. The protection of professional confidentiality includes, in my view, two different aspects, the protection of the confidentiality of the journalists' communications and communication tools, such as emails, phone calls, laptop, phone and so on. However, it surely also protects a journalist in respect of his or her confidential sources. This is particularly so, given the specific mention of the right of access to sources of information. These are, on paper, significant protections for the press and working journalists.

- Article 48 also specifically enshrines the right to information. This right of citizens to receive information is a fundamental aspect of freedom of expression, and this provision enshrines the right to the free flow of information for citizens. Thus, the information rights of citizens, for example, as well as the expression rights of the media are protected. This right is important because it also protects organisations that foster media development. These organisations facilitate public access to different sources and types of information, particularly in rural areas that traditionally have limited access to the media.

- Article 48 expressly provides that the exercise of freedom of expression and the right to information cannot be limited by censorship. This is an extraordinary provision which is not commonly found in other countries in southern Africa. It is not clear what credence to give it. What constitutes censorship is critical to whether or not this clause is genuinely meaningful. If censorship is interpreted to exclude any law that meets the requirements of any of the applicable constitutional limitations on the right to freedom of expression, then this provision is not particularly noteworthy as those limitations exist in any event.

- Lastly, article 48 contains express provisions regarding the expression rights of the public sector media (including, for example, the national broadcaster) and these include the right to disseminate a variety of views and the state guaranteeing its independence from 'the government, the administration and political powers'. Again, these are, on paper, significant protective provisions. However, it appears that these are not given effect to in practice as is clear from other provisions in this chapter.

2.4.2 Privacy

The Mozambican Constitution does not contain a stand-alone privacy right. Such a right is provided for with respect to professional communications for media practitioners in terms of article 48(3) dealt with immediately above.

2.4.3 Freedom of information

The Mozambican Constitution does not contain a stand-alone right to freedom of

information. Such a right is provided for as part of article 48(1) dealt with under the heading Freedom of Expression, above.

2.4.4 Freedom of association

Article 52(1) of the Mozambican Constitution provides that 'citizens enjoy freedom of association.'

Article 52(2) provides that 'social organisations and associations have the right to pursue their objectives, create institutions to achieve their objective and to acquire assets for carrying out their activities in accordance with the law.'

Article 52(3) provides that 'armed militia or paramilitary forces and organisations that promote violence, racism, xenophobia or that pursue objectives contrary to the law are prohibited.'

Article 86 of the Mozambican Constitution is headed Freedom of Professional Associations and Trade Union Membership. Article 86(1) grants workers the right to form professional associations and trade unions.

Article 86(2) deals with how such professional associations or trade unions are to operate; namely they must 'be governed in accordance with principles of democracy based on the active participation of its members in all activities and the periodic election of office-bearers by secret ballot.'

Article 86(3) provides that such bodies must also be 'independent of the state, political parties, churches or other religious institutions and general patronage.'

Article 86(4) provides for the regulation of such bodies by law.

Articles 52 and 86 require detailed explanation and discussion:

- As is the case with the right to freedom of expression, the right to freedom of association is available only to citizens. This is a disappointing and unusual limitation on the right because most constitutional rights to freedom of expression recognise that this is a fundamental human right that ought to be guaranteed to all, and not just to certain, people such as citizens.

- It is important to note that the right of freedom of association includes the right to form associations which are, in turn, entitled to achieve their objectives. However this is subject to some internal limitations, including that this is done 'in accordance with the law'; that such bodies are required 'to be regulated by law', and expressly prohibiting organisations whose objectives are, among other things, 'contrary to the law'. These kinds of limitations are worrying because they undermine, in fact, effectively do away with, the very concept of constitutional supremacy. This is because the constitutional provision subordinates elements of the right to freedom of association to the prescripts of ordinary laws, denying citizens effective constitutional protection of the right to freedom of association, even if the laws themselves are unreasonable or otherwise unconstitutional.

- Article 86 specifically protects the right of citizens to form 'professional associations' and trade unions. This is important because it protects, for example, the right of media organisations to form industry-based self-regulatory bodies and the rights of journalists to form trade unions and other kinds of professional bodies such as editors' forums. Interestingly, sub-articles 86(2) and (3) contain unusually specific detail (for a constitutional provision) regarding how such professional associations are to be governed, for example, requiring their independence and the periodic election of office bearers by secret ballot.

2.4.5 Right to work

Article 84(1) provides that work is 'a right and a duty of every citizen'. Additionally, article 84(2) provides that 'every citizen has the right to choose their profession.'

This is important because it is clear that the right of citizens to choose to participate in the journalism profession is protected under article 84(2).

2.4.6 Right to petition

Article 79 provides that 'all citizens have the right to submit petitions and complaints to a competent authority to demand the reinstatement of their rights that have been violated or in defence of the public interest.'

Article 79 is noteworthy because it provides a mechanism for redress if a journalist or media house is of the view that one or more of their rights have been violated or that a civil society organisation is of the view that the public interest is being undermined concerning the practice of any of the rights sets out above.

2.5 Other constitutional provisions that assist the media

It is important to note that there are provisions in the Mozambican Constitution, apart from the Fundamental Rights, Liberties and Duties (and associated) provisions, that are important and assist the media in performing its functions.

2.5.1 Provisions regarding the role and importance of civil society

Civil society organisations, including non-governmental organizations, trade unions, academic institutions, industry bodies and other social formations, often play a supportive role to the media by helping to highlight social issues. They are not only sources of information, but often directly support media freedom and access to information initiatives.

- Article 78(1) of the Mozambican Constitution provides that 'civil society with legitimate interests plays an important role in the promotion of democracy and in ensuring citizen participation in public life.'

- Article 78(2) provides that 'civil society organisations contribute towards the realisation of rights and liberties of citizens as well as to the elevation of individual and collective consciousness in the fulfilment of civic duties.'

2.5.2 Provisions regarding public administration

Article 248 is headed Fundamental Principles and forms part of Chapter I headed Public Administration in Title XII headed Public Administration, Police and the Ombudsman. Article 248 sets out the principles of the Mozambican public administration. Some of these have particular relevance for the media:

- Article 248(1) provides that 'the public administration serves the public interest, and in its work, it must respect the fundamental rights and liberties of citizens.'
- Article 248(2) states that 'the organs of the public administration obey the constitution and the law and respect the principles of equality, impartiality, ethics and justice.'

There can be little doubt that the media plays a crucial role in educating the population, enabling citizens to participate meaningfully in a democracy. These provisions could, therefore, be interpreted as requiring media-friendly policies on the part of the state if it is to serve the public interest properly.

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 reputation

Article 41 is part of the chapter on Fundamental Rights, Duties and Liberties and concerning reputation it provides that 'all citizens have the right to know, a good name, reputation, [and] to defend their public image'. This right is often raised in defamation cases because defamation, by definition, undermines the good name and reputation of the person being defamed. This right is often set up against the right to freedom of the press, requiring a balancing of constitutional rights.

2.6.2 Right to privacy

Article 41 is part of the chapter on Fundamental Rights, Duties and Liberties and concerning privacy it provides that all citizens have the right 'to preserve their private life.' The right to privacy 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 and so on. The media has to be careful in this regard. In general, the media should be aware that, in respect of privacy, there are always boundaries that need to be respected, unless the public interest requires otherwise. These privacy boundaries 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. However, it has to be said that the public interest is not a well-developed concept in Mozambican law generally and so particular care needs to be exercised by journalists operating in that country.

2.6.3 Internal limitation to the right to freedom of expression

Article 48(6) contains an internal limitation to the rights contained in article 48, including the right to freedom of expression and information provided for in article 48(1). Article 48(6) provides that 'exercise of rights and liberties referred to in this article is regulated by law with its base in the imperatives of respect for the Constitution and human dignity.' The discussion on this is set out above under the heading Freedom of Expression in section 2.4.1.

2.6.4 Internal limitation to the right to freedom of association

Sub-articles 52(2) and (3) contain internal limitations to the right to freedom of association. Article 52(2) protects the right to form associations and for such associations to conduct their business 'in accordance with the law', while article 52(3) provides, among other things, that associations that pursue objectives contrary to the law are prohibited. The discussion on these internal limitations as set out above under the heading Freedom of Association in section 2.4.1.

2.6.5 Acts against national unity

Article 39 is headed Acts Against National Unity, and in its relevant part it provides that:

> ***any act that undermines national unity, prejudices social harmony, creates division, or that creates situations of privilege or discrimination based on colour, race, sex, ethnic origin, place of birth, religion, education level, social status, physical or mental condition, marital status of parents, profession or political choice, shall be punishable by law.***

It is not unusual for constitutions to contain wording about building the nation-state and calling for national unity. However, article 39 is extremely broadly worded and, unusually for a constitutional provision, establishes as punishable by law acts that, among other things, undermine national unity or prejudice social harmony. This is a regressive provision as there are numerous important social, political and economic debates that require airing, particularly in the media, but which are, by their nature, controversial and divisive. The effect of this provision could be to open the media up to legal sanction for disseminating content on controversial issues capable of dividing public opinion and upending social harmony. This appears to contradict the right to freedom of expression directly.

2.6.6 Duties towards each other

Article 44 is headed Duties Towards Each Other and provides 'every citizen has

the duty to respect and consider each other without discrimination of any kind and to maintain relations that promote, safeguard and reinforce respect, mutual tolerance and solidarity.'

It is unusual for constitutions to impose duties on individuals other than, in certain jurisdictions, by way of a horizontal application of constitutional rights. The Mozambique Constitution does not provide expressly for horizontal application in the same way that, for example, the South African Constitution does.[42] It is not clear if article 44 can be said to introduce the concept of a horizontal application of the Fundamental Rights provisions in the Mozambican constitution; nevertheless, the duty of acting with respect and mutual tolerance and to act without discrimination encourages citizens to treat each other in accordance with constitutional values.

2.6.7 Duties towards the community

Article 45 is headed Duties towards the Community, and in its relevant part it provides that:

> ***every citizen has a duty towards the community to serve the national community according to their physical and intellectual capabilities, by paying their taxes and, in their relations with the community, to preserve cultural values, in the spirit of tolerance and dialogue and, in a general manner, to contribute towards civic activism and education.***

Again, it is unusual for constitutions to impose duties on individuals other than, in certain jurisdictions, by way of a horizontal application of constitutional rights, as discussed above. These kinds of duties towards the community are unusual. It is not clear what reliance can be placed on them, if any, other than as a general indication, by the constitutional drafters, of the kind of conduct expected of a citizen.

2.6.8 State of emergency provisions

Several provisions in the Mozambican Constitution deal with states of emergency or similar conditions.

Article 72 provides that individual liberties and guarantees can be suspended or limited only temporarily and only in the case of a declaration of war or a state of siege or emergency declared in terms of the constitution.

Article 160(a) empowers the president to declare a state of war 'in the national defence and public order.' It is important to note that a declaration of war can be made even if there is no other country threatening Mozambique, consequently public unrest can lead to such a declaration.

Article 290 is headed State of Siege or Emergency. It provides that 'a state of siege or emergency can be declared in all or part of the territory only in circumstances of actual or threatened aggression constituting a grave threat to the preservation of the constitutional order or public peace.'

Article 292 provides that a state of siege or emergency can be declared for a maximum of 30 days and can be renewed for up to 120 days in total, provided the circumstances giving rise to the emergency or siege remain in existence.

Article 293 has the heading Process of Declaration and article 293(1) provides that within 24 hours of declaring a state of siege or emergency, the president must submit such a declaration to parliament for ratification. However, if parliament is not in session, the president must constitute parliament to consider such ratification within five days, in terms of article 293(2). In terms of article 293(3), parliament must decide on the ratification of the president's declaration within 48 hours remains constituted for as long as the state of siege or emergency persists.

Article 294 is headed Limits of the Declaration and provides that the declaration of a state of siege or emergency cannot result in the limitation or suspension of the following:

- the right to life
- the right to personal integrity
- the right to civil capacity and citizenship
- the rights of the accused persons
- the right to religious freedom
- the non-retrospective application of any aspect of the criminal law.

Article 295 specifically provides for restrictions on individual liberties under a state of emergency, including freedom of movement, the privacy of communications, freedom of expression, including the press and broadcast media, and provision of information. It also makes provision for detention.

We think it noteworthy that there are at least six different articles in the Mozambican Constitution that deal with the declaration of states of war or emergency. It is noteworthy that the right to freedom of expression and privacy of communications are rights which can be restricted under a state of emergency.

2.7 Key institutions relevant to the media established under the Mozambican Constitution or related legislation

Several important institutions concerning the media are established under the Mozambican Constitution. These include the judiciary, the judicial council, the Ombudsman, the national commission for human rights and the superior council of the mass media.

2.7.1 The judiciary

Article 240 of the constitution provides for a Constitutional Council. This is a sovereign organ of state responsible for administering justice concerning matters of

a constitutional nature. Its functions include preserving constitutionality, considering the constitutionality of legislation and acts of organs of state and resolving jurisdictional disputes between organs of state. Article 241 provides that the Constitutional Council consists of seven judges appointed as follows, the Chief Justice appointed by the president; five judges appointed by parliament and one judge appointed by the judicial council.

Article 224 of the constitution provides that the Supreme Court is the superior court in the hierarchy of courts. This is implicitly subject to the stipulation in article 240 that only the constitutional council rules on constitutional issues. The Supreme Court is required to 'guarantee the uniform application of the law within its jurisdiction and in the public interest.'

Article 225 provides that the president appoints the president and vice president of the Supreme Court on the recommendation of the judicial council. The other members of the Supreme Court are also appointed by the president on the recommendation of the judicial council but following a public vetting process which is open to magistrates and other law graduates.

Article 227 of the constitution empowers the administrative court to hear matters concerning the public administration. Article 228 states that the president appoints the president and other members of the administrative court on the recommendation of the administrative judicial council.

Article 211 of the constitution provides for ordinary courts which do not have the jurisdiction to pronounce on the constitutionality of legislation or acts of organs of state. Article 217 provides that these courts have responsibility for resolving disputes in respect of matters set out in specific legislation.

The judiciary is an important institution for the media because the two rely on each other to support and strengthen democratic practices in a country. The judiciary needs the media to inform the public about its judgments and its role as one of the branches of government. 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 it from unlawful action by the state and unfair damages claims by litigants.

Article 216 of the constitution specifies that judges are independent, impartial and must obey the law.

In terms of article 216(3), judges have security of tenure and cannot be transferred, suspended, retired or dismissed except in accordance with the law.

2.7.2 The Judicial Council

Article 219 of the constitution establishes the judicial council which is responsible for the management of the judiciary, including in respect of disciplinary matters. Many would query why the judicial council is relevant to the media. The answer is because of its critical role in the judiciary, the proper functioning and independence of which are essential for democracy. In terms of article 220, the judicial

council comprises the president (who is the president of the judicial council) and vice president of the Supreme Court, two members designated by the president of the Republic, five representatives of the parliament elected based on proportional representation and seven judges from diverse courts elected by their peers in accordance with legislation.

2.7.3 The Ombudsman

The Ombudsman is an important office for the media because it, too, is aimed at holding public power accountable. The Ombudsman is established in terms of article 255 of the Constitution. That article provides that the Ombudsman's purpose is to guarantee the rights of citizens and to ensure legality and justice in the performance of the public administration. In terms of article 256, the Ombudsman is elected by a two-thirds majority vote by the members of parliament.

In terms of article 258, the main powers of the Ombudsman are to consider complaints made to it and to make recommendations to competent bodies in the public administration to repair or prevent instances of illegality or injustice. Further, where the Ombudsman's investigations reveal conduct which leads to the presumption that the public administration committed errors, irregularities or grave violations, the Ombudsman must report these to the parliament, the Attorney-General and the central or local authority together with recommendations for measures to be taken.

Additional provisions on the role and functioning of the Ombudsman are contained in legislation, particularly Law 7/2006 (the Ombudsman's Act). The Ombudsman's Act grants citizens (individually or as part of a collective such as an organisation) the right to complain to and petition the Ombudsman in terms of article 3.

Article 15 of the Ombudsman's Act expands on the Ombudsman's competencies set out in the constitution by including, among other things:

- the power to make recommendations to the president as to legal changes (amendments, repeals) that ought to be made to address any deficiencies in the law
- the duty to provide parliament, on request, with an opinion on any matter within his or her competence
- the power to request the constitutional council to declare a law unconstitutional
- the duty to disseminate human rights-related information among the citizens
- the power to intervene to protect collective interests in disputes involving a public entity.

Article 16 of the Ombudsman's Act expands on the Ombudsman's powers, and these include:

- processing complaints

- undertaking investigations and enquiries to collect evidence and material
- making use of any reasonable procedure provided that these respect the rights of citizens
- appointing the staff of the office of the Ombudsman
- mediating in disputes
- conducting inspections of public entities at the national, provincial and local level as well as being able to require the production of documents and information.

The Ombudsman is elected for five years, renewable once, in terms of article 6 of the Ombudsman's Act. In terms of article 8(1), the Ombudsman will cease to fulfil the role if he or she resigns, dies, is permanently incapacitated either physically or mentally, becomes ineligible for the position (article 5 lists the eligibility requirements, including citizenship, impartiality), engages in conduct incompatible with the office, is sentenced to imprisonment or if he or she is grossly negligent in the carrying out of his or her functions. In terms of article 8(2), the body responsible for conducting the enquiry into the Ombudsman's continuing fitness to hold office is parliament.

2.7.4 The National Commission for Human Rights

Although not provided for in the constitution itself, Law 33/09 has established a National Commission for Human Rights (NCHR) in Mozambique (the NCHR Act).

The NCHR is an important office for the media because it, too, is aimed at holding public power accountable and for promoting human rights, a key component of which are the rights to expression and information which are fundamental to the work of the media.

Article 3 establishes the NCHR as an autonomous public entity.

The NCHR's functions are set out in article 5 of the NCHR Act, and these include:

- promoting and protecting human rights in Mozambique by education programmes
- actively engaging in acts to protect human rights provided for in the constitution and the NCHR Act
- developing and conducting information programmes to promote public understanding of the role and activities of the NCHR and the NCHR Act as well as of Chapter III of the constitution which sets out rights, duties and fundamental liberties (some of which have been dealt with in paragraph 2.1 above)
- making proposals to organs of state or other entities established by law for domesticating international and regional human rights norms and standards

- assisting indigent citizens in cases involving human rights violations
- co-operating with national, regional and international human rights organisations.

The NCHR comprises 11 members, including a president and a vice president elected by their peers in terms of article 7(1). In terms of article 8(1), the members of the NCHR are made up as follows:

- four representatives from civil society
- three members from the education, justice and health sectors designated by the prime minister
- three persons with human rights expertise elected by parliament
- a representative of the Bar Association.

A member of the NCHR is elected for five years, renewable once, in terms of article 9(1) of the NCHR Act. In terms of article 14(1), a member of the NCHR will cease to fulfil the role if he or she resigns, dies, is permanently incapacitated or accepts a position or engages in conduct incompatible with the office. In terms of article 14(2), a resignation of a member of the NCHR must be given in writing to the president of the NCHR. If the president of the NCHR resigns, such written notice of resignation must be given to the national president with 90 days' notice. The NCHR is responsible, by a two-thirds majority vote, following a deliberation, for removing a member of the NCHR that no longer meets the requirements to hold the office, article 14(4).

2.7.5 The Superior Council of the Mass Media

Article 50 of the constitution establishes the Superior Council of the Mass Media (SCMM). However, it is important to note that the SCMM is not a media regulatory authority and does not issue licences or play a key role in the structure and make-up of the media sector. While it is provided for in the constitution, it appears to play more of a guidance and advisory role than the more usual role of media bodies provided for in constitutions, namely, a more in-depth regulatory role. It is unfortunate that in fact, real regulation of the media is carried out by organs of the state and the executive in particular.

Article 50(1) provides that the SCMM disciplines and consults to ensure the independence of the media in the exercise of the right to information, freedom of the press as well as rights to broadcasting. In terms of article 50(2), it is empowered to issue opinions on the issuance of licences to private broadcasting entities. The SCMM has a role in the appointment and dismissal of directors-general of the public broadcaster in terms of article 50(3). In terms of article 50(4), the SCMM is regulated by legislation, including in respect of its composition and functions.

The legislation that governs the SCMM is the Press Act, Law 18/1991, dealt with in various places below.

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 of Rights, and yet remain empty of substance because they cannot be enforced.

Article 2(3) of the constitution specifies that the state is 'subordinate to the constitution and is founded upon legality.' Article 38(1) provides that all citizens must respect the constitutional order. Article 38(2) provides that 'any acts that are contrary to the constitution will be subject to sanction in terms of the law.'

Further, article 79 grants citizens the right to submit petitions or complaints to the competent authority to exercise or restore, rights that have been violated or, more generally, in the public interest. This is an additional mechanism to the right of access to the courts and is one that has proved fruitful in other jurisdictions.

Perhaps one of the most effective ways in which rights are protected under the constitution is by the provisions that deal with proposed constitutional amendments. Article 299(1) provides that constitutional amendments can be proposed only by the president or by one-third of the members of the parliament. In contrast, article 303(1) requires any constitutional amendment to be passed by a two-thirds majority vote in the parliament. Further, article 300(1) requires that all constitutional amendments 'respect ... rights, liberties and fundamental guarantees' and it goes on to specify various democratic characteristics, including at (f), pluralism of expression. Lastly, all proposed constitutional amendments that deal with rights, liberties and fundamental guarantees set out in article 300(1) are required to be put to a national referendum in terms of article 300(2).

Also, article 301 prohibits an amendment taking place within five years of the previous amendment unless extraordinary powers of review have been invoked, in which case a constitutional amendment requires a vote in favour of three-quarters of the members of the parliament. Further, article 302 prohibits any amendment to the constitution being carried out during the declaration of a state of siege or emergency.

In our view, these amendment provisions grant a measure of additional protection, particularly for freedom of expression.

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 in a democracy, governmental power is exercised

by three branches of government, namely: the executive; the legislature; and the judiciary.

Mozambique is slightly different from the norm because the constitution recognises organs of sovereignty in article 133, namely, the president, the parliament, the government, the courts and the constitutional council. Article 134 provides that these organs of sovereignty are separate and inter-dependent and are subject to the constitution and the laws.

In broad terms, it can be said that the president and the government constitute the executive; the parliament constitutes the legislature and the courts, and the Constitutional Council constitutes the judiciary of Mozambique.

The executive

In terms of article 145(1) of the constitution, the president is the head of state and is Commander-in-Chief of the defence force. He or she represents the nation of Mozambique internally and internationally and symbolizes national unity.

The president is elected by direct presidential elections, in terms of article 147(1) of the constitution. Note that the president must be elected by a majority of the votes cast and article 147(2) provides for a presidential election run-off between the two leading candidates to provide for such an outcome if this does not occur during the first round of voting.

The president's functions are set out in article 158. These include leading the nation, giving the state of the nation address annually to parliament, calling referendums and national elections, dissolving parliament, appointing the attorney general, among other things. In terms of article 200(1), he or she also appointments the council of ministers, which acts as the Cabinet of Mozambique. The council of ministers is made up of the president (who presides over the council), the prime minister and the ministers of government.

The prime minister's role, in terms of article 204(1), is to assist and to advise the president in running the government. In terms of article 204(2), this includes advising on ministerial appointments, developing government programmes and ensuring the execution of decisions of the government. The prime minister chairs the meetings of the council of ministers.

Article 203(1) sets out a number of functions of the council of ministers. These include:

- guaranteeing the enjoyment of the rights and liberties and citizens
- ensuring political order and social discipline
- developing and submitting legislation to parliament
- developing the social and economic plan and the budgets of the state for parliamentary approval

- promoting and regulating economic and social activity
- ratifying international instruments such as treaties
- directing labour and social security policy
- directing the sectors of the state, particularly concerning education and health.

Essentially, it can be said that the role of the executive is to administer or enforce laws, make government policy and propose new laws. However, as is set out elsewhere in the chapter, it is clear that the executive also has significant law-making powers, albeit of a quasi-subordinate nature.

The legislature

In terms of article 167(1) of the constitution, parliament is the representative assembly of all Mozambican citizens. Article 168(1) provides that parliament is the highest legislative organ in Mozambique. However, article 142(3) provides that the council of ministers also has legislative powers and is responsible for making decrees.

Article 168(2) determines the norms that govern the functioning of the state and economic and social life.

Article 178(1) provides that parliament legislates on both internal and external policy. In terms of article 178(2), parliament has the exclusive competence to approve constitutional amendments, determine national and provincial borders, and to approve or pass national legislation that is in line with the constitution.

Parliament also fulfils other important functions including, in terms of article 178(2)(j), deliberating on the programme of government and the reports on the activities of the council of ministers, article 178(2)(k). Essentially this is an oversight role, holding the executive accountable for its operations.

In terms of article 169(2), the parliament is made up of 250 people, directly elected through universal suffrage that is equal, secret, personal and periodic.

The judiciary

As described above, judicial power is vested in the courts. The role of the judiciary is to interpret the law and to adjudicate legal disputes in accordance with the law.

2.9.2 Separation of powers

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

It appears that the division of governmental power in Mozambique is not ideal, with the executive playing a role that far outweighs, in influence and impact, the legislative and judicial branches of government and with the executive playing a significant role about developing quasi-subordinate legislation.

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

There are several weaknesses in the Mozambican Constitution. If these provisions were strengthened, there would be significant benefits for the media in Mozambique.

2.10.1 Ensure that media-related rights are generally applicable to the people living in Mozambique

There are numerous rights which are important to the media, such as freedom of expression, information and association, which are guaranteed to citizens only. This is a diminishing of the fundamental nature of rights which are recognised internationally as human rights, as opposed to rights which are recognised to be available only to citizens, such as voting rights.

2.10.2 Remove internal constitutional limitations and update the general limitations clause.

The internal limitations contained in articles 48(6) and (52)(2) and (3) of the constitution and applicable to the rights to freedom of expression and association ought to be repealed. These provisions are unnecessary because the provisions of the general limitations clause give the government the powers it needs to limit fundamental rights in accordance with the constitution.

The general limitations clause provided for in article 56 ought to be amended to make it clear that limitations on rights must be reasonable and necessary in addition to the other pre-existing requirements. The lack of measurement of reasonableness or necessity gives the legislature over-broad powers to draft a law of general application that limits rights unreasonably or unnecessarily.

2.10.3 Create an independent communications regulator

While the constitution does refer to a specific media-related body, the SCMM, in article 50, that body is not a regulator and has no direct role in licensing, oversight and other regulatory functions.

The bodies that do perform those functions do not enjoy constitutional protection of their functional independence and are not functionally independent. This is a

significant deficiency. The body that is responsible for licensing falls under the control of the executive and is set out elsewhere in this chapter.

2.10.4 Constitutional protections for the public broadcasters

It is clear that Radio Mozambique and Television Mozambique, the two public broadcasters in Mozambique, are in no way independent or required to act in the public interest.

The constitution should, therefore, specifically protect their independence and stipulate that they are to operate in the public interest.

2.10.5 Strengthening the separation of powers doctrine

The constitution does provide for three branches of government but, in practice, it is obvious that the executive branch of government plays a significant legislative role too, with decrees being issued by the government by an authorisation granted by the parliament to enact laws. These acts of the council of ministers in terms of article 142(3) appear to have similar legal force as actual legislation enacted by the parliament.

This skewing of the powers so that they are imbalanced undermines the specific functions of all three branches, the legislature, the executive and the judiciary.

3 The media and legislation

In this section, you will learn:

- ▷ what legislation is and how it comes into being
- ▷ legislation governing the mass media generally
- ▷ legislation governing journalists
- ▷ legislation governing the print media
- ▷ legislation governing the broadcasting media in general
- ▷ legislation governing the state broadcasting sector
- ▷ legislation governing cinema
- ▷ legislation that undermines or upholds a journalist's duty to protect sources

- legislation that prohibits the publication of certain kinds of information
- legislation that specifically assists the media in performing its functions

3.1 What legislation is and how it comes into being

As a general rule, legislation is a body of law consisting of acts properly passed by parliament, which is the legislative authority. As discussed, Mozambique vests legislative authority in the parliament.

Detailed rules in the constitution set out the 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, there are two kinds of legislation, each of which has particular procedures and/or rules applicable to it. These are:

- legislation that amends the constitution, the procedures for which are set out in articles 299 to 303 of the constitution, and
- ordinary legislation, the procedures and/or applicable rules are set out in article 186(1) and essentially this legislation requires a majority of elected parliamentarians to pass laws (that is, fifty per cent plus one vote).

A bill is a draft law that is debated and usually amended by parliament during the law-making process. If a bill is passed by parliament in accordance with the various applicable procedures required for different types of bills as set out above, it is sent to the president. Article 190(c) read with article 181 of the Constitution provides that once a bill is signed by the president (signifying his assent to the bill) it becomes an once it is promulgated, that is, published in the Bulletin of the Republic.

The constitution provides mechanisms of reviewing the constitutionality of an Act passed by parliament. Article 244(2) of the constitution provides that the following entities may request the constitutional council to make a declaration on the constitutionality of an act of parliament. The president, the president of parliament, one-third of the members of parliament, the prime minister, the Attorney-General, the Ombudsman and two thousand citizens (presumably acting by way of a petition). However, there is no mechanism for such a review to take place while a piece of legislation is still a bill and not yet promulgated as an act of parliament.

3.2 Legislation governing the mass media

Mozambique's Press Act, Law 18/91, governs the mass media as a whole, including print and broadcast media as well as cinema. We deal with the Press Act in several subsequent subsections in greater detail as its provisions pertain to particular aspects of the media. However, it is important to give an overview of the Press Act, given its wide ambit.

Article 1 of the Press Act, defines the mass media as including print, broadcasting and cinema.

Article 2 of the Press Act provides that freedom of the press encompasses several different aspects, including:

- the right to freedom of expression
- the right to access sources of information
- the right to develop journalists
- the protection of the independence of journalists
- the protection of journalists' sources
- the right to develop newspapers and other publications.

Article 3 deals with the right to information. Article 3(1) provides that concerning the press, the right to information means the ability of citizens to:

- inform themselves and to be informed of all facts and opinions at the national and international level
- share information, opinions and ideas through the press.

Article 3(2) prohibits any employer from prejudicing an employee in exercising his or her right to freedom of expression through the press.

Article 4 sets out the eight prescribed objectives of the press, namely:

- the consolidation of national unity and the defence of the national interests
- the promotion of democracy and social justice
- the development of science, economics, society and culture
- to elevate social, educational and cultural consciousness
- to provide timely access to citizens to facts, information and opinion
- to educate citizens about their rights and duties
- to promote dialogue between public authorities and citizens
- to promote dialogue between the cultures of the world.

Article 11(1) of the Press Act defines the public sector mass media to include the national radio and television broadcasters, a national news agency and any other entity established to serve the public interest in this sector.

A comment on the ambit of the Press Act is required, given some of the provisions summarised above. It is unusual for a statute to set out the objectives of the press in this way as it is, of course, for the press to determine, on an on-going basis what its objectives are.

3.2.1 Establishment of the SCMM

Article 35(1) of the constitution read with article 36 of the Press Act establishes the SCMM as a body by which the state guarantees the independence of information agencies. These are defined in section 1 of the Press Act as including any media that disseminates information to the public and it specifically includes the print and broadcast media. It also guarantees freedom of the press, the right to information, the exercise of the right to broadcast airtime and the right of reply.

It is important to note that as a state organ, the SCMM is also governed by Decree 5/2000 which establishes the National Council of Public Administration (NCPA). The NCPA is made up of the ministers of state administration, finance, justice and labour and the NCPA is empowered to make regulations to govern state organs, including the SCMM. Relevant regulations made in terms of this decree are dealt with in the regulations section below.

3.2.2 Main functions of the SCCM

The powers of the SCMM are set out in article 37 of the Press Act, and they include:

- to obtain information from information agencies and government authorities to enable it to perform its functions
- to consider any violation of the Press Act and other relevant laws and to take appropriate measures to deal with such violations
- to hear and determine complaints received from the public about information agencies
- being responsible for journalists' and advertisers' adherence to ethical norms and standards.

What is glaringly absent in these functional provisions of the Press Act is any reference to regulating the mass media in terms of, for example, licensing broadcasters, making regulations to govern operations of the mass media and the like. Indeed it is clear that the Press Act does not empower the SCMM to make regulations governing the broadcast sector. Instead, it provides, at article 6(4) that the conditions for participation in the broadcasting sector for a private entity or cooperative will be contained in specific regulations or subordinate legislation, taking into account the public interest and the state's prerogative.

3.2.3 Appointment of SCCM members

In terms of article 38(1) of the Press Act, the SCMM comprises 11 members (including a president designated by the national president, article 38(2)) made up as follows:

- two members designated by the president
- four members elected by parliament
- a magistrate designated by the superior council of the judicial magistracy
- three journalists' representatives elected by the respective professional organisations
- a representative of media operators.

A member of the SCMM serves for five years in terms of article 39(1) of the Press Act. In terms of article 39(3), a member of the SCMM cannot be removed from office. Their functions cannot cease before the end of their terms of office except in the following instances, death or permanent incapacity, resignation, imprisonment or loss of eligibility to hold office which is based on enjoying full civil and political rights in terms of article 38(4). Note that, in terms of the constitution, these are guaranteed only to citizens.

In terms of article 61(3) of the Press Law, the SCMM is empowered to make internal governance rules for itself. The SCMM has done so by way of regulations that are dealt with in the regulations section below. The regulations section (below) also contains other regulations that are relevant to the composition of the SCMM.

3.2.4 Funding for the SCMM

Legal provisions regarding the funding of the SCMM are dealt with in the regulations section.

3.2.5 Is the SCMM an independent regulator?

Despite the SCMM featuring fairly prominently in the constitution and the Press Act, it is clear that the SCMM is not, in fact, a regulator of anything at all concerning the media, apart from the general issue of media ethics. Certainly, the SCMM does not engage in regulatory activities such as issuing licences, determining local content requirements and the like. These critical functions are carried out by the relevant ministry, currently, the prime minister, via the information-related executive body, Gabinfo, as is more fully set out in the regulations section below.

3.3 Legislation governing journalists

In its introductory provisions, the Press Act, Law 18/91, contains article 5 sets out the rights and duties of journalists, namely:

- in the exercise of their functions, journalists enjoy the rights and must exercise the duties provided for in the constitution, this Press Act and other applicable legislation
- journalists and the press exercise their rights and duties based on respect for the constitution, human dignity and imperatives of foreign policy and national defence.

The Press Act contains a Chapter (IV) which governs journalists working in both print and broadcast media. In brief, it provides as follows;

- Article 26 defines a journalist as a professional dedicated to the public investigation, collection, selection, elaboration and presentation of events which are news-worthy, informative or constitute an opinion by the mass media (which is defined as including print and broadcast media) and for whom this activity constitutes their principal profession and which is permanent and remunerated.
- Article 27 sets out the rights of journalists, and these include:
  - unfettered access to public places they deem necessary to exercise their profession
  - the right not to be detained, excluded or otherwise impeded from being in any location necessary for them to exercise their profession
  - the right to refuse to comply with editorial instructions that do not emanate from competent authorities within a print or broadcast media outlet
  - the right to refuse to hand over their working materials in response to an illegal request to do so
  - the right to participate in the internal activities of the editorial board of the mass media entity he or she is employed by
  - the right of recourse to competent authorities of any infringement of any of his or her professional rights
  - in the case of violence, intimidation, aggression or attempts to corrupt faced by a journalist in the exercise of his or her profession, the employer must institute legal proceedings against the perpetrator. The journalist in question has the right to be a part of the process
  - cancel an employment contract in circumstances where there has been a material and unilateral change in the editorial policy of the media entity he or she is employed by, as confirmed by the directors or otherwise clearly expressed, together with indemnity for any claims arising out of such cancellation.
- Article 28 of the Press Act sets out the duties of journalists. In brief, these include to:
  - respect the rights and liberties of citizens

- produce information that is complete and objective
- exercise his or her profession with rigour and objectivity
- rectify false or inaccurate information published
- refrain from endorsing hatred, racism, intolerance, crime or violence
- refrain from engaging in plagiarism, slander, defamation, lies, accusations without any factual basis, injurious reporting, falsifying documentation, using his or her professional prestige for personal or material gain.

- Article 31 deals with journalists in the public sector media:
  - Article 31(1) provides that public sector journalists are required to conduct their profession in a manner that is independent of their personal opinions and trade union and political affiliations. These are essential conditions for their appointment, promotion or transfer. It is not clear what this means, as, on the face of the prohibition, it appears as if opinion pieces based on the journalist's views would fall foul of this section.
  - Article 31(2) provides that a journalist who has full time employment in the public sector media may contribute content to other media operations only with the agreement of his or her employer.
- Article 32 deals with the accreditation of journalists. In brief, it provides as follows:
  - Article 32(1) provides that local correspondents and part-time contributors must be accredited by the media house that employs them.
  - Article 32(3) provides that the government may regulate the activities of foreign correspondents. It appears that this is done through Gabinfo as is set out more fully in the regulations section below.

The duties imposed on journalists in the Press Act in terms of article 5 are unusual; it is not common for a statute to stipulate that journalists exercise duties based on criteria such as national imperatives of foreign policy and national defence. This kind of wording seems a throw-back to Mozambique's past as a one-party state and is indicative of how much work still needs to be done to embed democratic values, particularly concerning the media. Additionally, while the obligations contained in article 28 are not uncommon, it is usual to find these in a self-regulatory code of ethics rather than in a statute as it leads to the question of whether or not this article is capable of being enforced against a journalist by the state (as is done in criminal matters) rather than by a self-regulatory body.

3.4 Legislation governing the print media

The Press Act, Law 18/91 governs the mass media, including print and broadcast media as well as cinema. It contains several provisions that impose obligations or restrictions on the operations of the print media. It is important to note that references in the Press Law to the minister of information are to be understood

as being references to the executive body Gabinfo. This body operates from the office of the prime minister and has taken over the responsibilities of the minister of information since 1995.[43] To avoid confusion, we refer to Gabinfo although the provisions of the Press Law still refer to the minister of information. These are set out below.

3.4.1 Registration and publishing requirements

Article 14(1) defines the print media as including publications of general information and specialised publications. Publications of general information are defined as periodicals which are a source of information about both national and international current affairs that are aimed at the greater public. Specialised publications are defined as publications that deal with specific themes or areas. Thus the print media includes both newspapers and magazines, whether general or with specialised subject matter such as business, fashion, agriculture and so on.

Article 19(1) requires the mass media (which includes the print media) to register with the minister of information before commencing operations.

In terms of article 19(2), an application for registration must include the following:

- the title of the publication
- the object of the publication
- the address of the place of publication
- the languages in which the publication is printed
- the identification of the owner
- the legal status of the entity producing the publication
- the identification of directors and the editor of the publication.

In terms of article 19(4), the application must be accompanied by certain annexures, including:

- a certified copy of the constitution of the entity producing the publication. These would include documentation such as a memorandum of incorporation, articles of association and the like
- a certified copy of the editorial policy
- information setting out the sources of funds constituting the share capital and general financial resources of the publication
- information regarding the origin and nature of any subsidies or grants received by the publication, whether directly or indirectly.

Additionally, in terms of article 19(3) of the Press Act, the print media is required

to include the following additional information in its application for registration:

- the frequency of the publication
- the minimum circulation, that is, the number of copies printed
- the format and price of the publication
- the identification of the printer
- the identification of the distributor.

Any changes in the information provided as part of a registration application must be notified to Gabinfo within ten days in terms of article 21 of the Press Act.

In terms of article 20, the registration process is required to be completed within 30 days of receipt of the application. Gabinfo must provide the applicant with the certificate of registration which is valid for two years. It is automatically renewable, except where the minister has withdrawn the certificate in terms of a court order or if the registered entity has renounced the certificate of registration. No print media entity may commence operations without the certificate of registration. It appears that Gabinfo (dealt with in the regulations section below) is, in fact, responsible for carrying out the registration functions of the ministry of information.

In terms of article 22(1) of the Press Act, Gabinfo has the power to refuse an application for registration only if the applicant has not complied with the informational requirements or legal conditions set out above. Such refusal of registration must, in terms of article 22(2), be set out clearly and must contain the reasons for such refusal.

In terms of article 23 of the Press Act, Gabinfo has the power to cancel a certificate of registration:

- if the entity is unable to verify the information that was contained in its registration application or in the event of a contravention of law; or
- if the application contained false information.

These matters have to be referred to the public prosecutor, and the cancellation of registration may take place only after a finding to that effect by way of a judicial order.

In terms of article 25, any refusal to register or cancellation of registration may be appealed or taken on judicial review within 30 days.

In terms of article 24, Gabinfo may exempt a print media entity from the registration obligation if the circulation of the publication is less than 500 copies.

There are certain key requirements laid down by the Press Act in respect of periodicals once they begin publishing. These include:

- article 15(1) which requires all periodicals to include the following information in every publication printed:
  - title of the publication
  - place of printing
  - date and cost of the publication
  - number of the edition
  - the identification of the owner, editor and directors of the publication
  - the address of the editorial staff and administration of the publication
  - the name and address of the printer of the publication
  - the frequency of the publication of the periodical
  - the circulation areas of the publication
  - the registration number of the publication.
- In terms of article 50 of the Press Act, a publication will be deemed to be a clandestine publication if it does not comply with article 15(1). Article 50(2) empowers the police, the military and the administrative authorities to arrest the clandestine press (presumably this means the editor, directors, printer and/or staff thereof) and hand them over to judicial authorities within 24 hours. In terms of article 50(3), writing, editing, printing, distributing or selling a clandestine publication is an office punishable by imprisonment and the payment of a fine.
- article 16 of the Press Act requires a publication to send at least two copies, free of charge and on the day of publication, to the following institutions:
  - Gabinfo
  - the SCMM
  - the attorney general
  - the National Library
  - the Historical Archives of Mozambique
  - any other entities legally entitled to receive such publication.

However, the Press Act contains no provisions prescribing a penalty for a failure to comply with article 16.

3.4.2 Ownership and control requirements for the print media

Article 7(1) of the Press Act specifies that a print media entity must be a legal entity or juristic person, for example, in the form of a company. The implicit effect of this is that an individual cannot own a print media entity.

Article 6(1) of the Press Act contains some provisions regarding the ownership of the print media, including that the state can own them, the community, the private sector or by a mixed entity, that is, where members of the above sectors share ownership.

Article 6(3) provides that the state can acquire ownership of a print media operation that is not part of the public sector and/or can provide other forms of subsidy or support.

Article 6(5) restricts ownership of print media outlets to Mozambican companies or citizens. Additionally, article 6(6) provides that only 20% of the share capital of a print media owner may be provided from foreign sources.

It is also important to note article 6(8) which specifies that the state observes an anti-monopoly policy concerning the print media to preserve the public's right of access to information.

In respect of control, article 9 of the Press Act deals with directors of print media entities. In brief, it provides that every director of a print media entity must be a Mozambican citizen, resident in the country and must enjoy full civil and political rights.

3.4.3 Obligation to have an editorial policy

Article 8 of the Press Act requires all print media operators to develop and have an editorial policy.

3.4.4 Obligation to have an editorial board

Article 10 of the Press Act requires all print media operators to have an editorial board the composition and competencies of which are defined in its founding documentation.

3.4.5 Obligation to publish government news

- Article 13(1) of the Press Act read with the Presidential Decree 4/95, which establishes the government press office, Gabinfo, requires all daily print media operators to publish official government news disseminated by Gabinfo.
- Article 13(3) of the Press Act provides that the publication of government news is to be provided at no cost to the government and the government source is to be cited.

This is a particularly onerous obligation to impose, particularly on the private sector media, and it is noteworthy that there are no provisions regarding the amount of Gabinfo news to be disseminated in this way. This gives rise to the danger of an arbitrary insistence on an unrealistic amount of government news to be carried, free of charge, by a private publication.

3.4.6 Obligation to give a right of reply

Articles 33 and 34 of the Press Act deal with the right of reply. In brief, they provide as follows:

- any person (note both individuals and juristic persons or legal entities) who considers themselves to have been injured by the publication of false or incorrect information affecting their moral integrity and good name, has the right of reply
- the right to reply can be exercised by themselves, their legal representative, their heirs or surviving spouse.

The right to reply must be exercised within 90 days on the following terms:

- the reply is to be published in the same publication
- the reply is to be published only once, and at no charge to the person making the reply
- the reply must not itself be injurious to the publication. If it is so injurious, the head of operations may legitimately refuse to publish the reply and notify the injured person within three days of his or her decision not to publish. The injured person has an opportunity to resubmit an amended reply
- the reply is required to deal with the publication in question and must be as concise as possible
- the right to reply is independent of any criminal and civil proceedings that may be instituted against the publication
- if the reply is published in a manner that does not comply with the above requirements, the injured person may notify the media house and call on it to remedy the situation. If the media house does not remedy the situation, then the injured person may approach a competent court for an order. The court must make an order within ten days, and such order may be appealed.

Article 49(1)(b) of the Press Act provides that if a director of a publication has not acted on a court order regarding the right to reply, he or she is guilty of the offence of disobedience, for which the penalty is a fine in terms of article 49(2). In terms of article 53, the owners of the publication are jointly liable for the payment of the fine. Additionally, article 54 of the Press Act requires the offenders to be subject to internal disciplinary procedures in addition to any civil or criminal proceedings.

3.4.7 Obligations imposed on the foreign press

Article 17 of the Press Act regulates the foreign press. Article 17(1) defines the foreign press as those publications which are published abroad as well as those published in Mozambique but under the title and responsibility of a foreign entity. It appears, therefore, that the provisions of article 17 apply to foreign print media only.

Article 17(2) makes the provisions of the Press Act and all other relevant legislation applicable to the foreign press, unless obviously inapplicable.

Article 49(1)(d) of the Press Act provides that if a director of a foreign publication publishes in violation of a court-ordered suspension, he or she is guilty of the offence of disobedience, for which the penalty is a fine in terms of article 49(2). In terms of article 53, the owners of the publication are jointly liable for the payment of the fine. Article 54 of the Press Act also requires the offenders to be subject to internal disciplinary procedures in addition to any civil or criminal proceedings.

3.4.8 Advertising obligations

Article 18 of the Press Act regulates advertising in the mass media, including the print media. It provides, in brief:

- advertising is defined as including images, text and graphics that are paid for
- advertising must always be clearly designated as advertising
- any sponsored editorial content must identify the name of the sponsor clearly.

3.5 Legislation governing the broadcast media generally

A single act governs general broadcasting in Mozambique, namely the Press Act, Law 18/91, which governs the mass media, including print and broadcast media as well as cinema. Besides the Press Act, there are several decrees and diplomas which regulate broadcasting, including state broadcasting, and which are dealt with in paragraph 4 below. Again, the Press Act makes numerous references to the minister of information, but his responsibilities have been assigned to Gabinfo since 1995.

3.5.1 Registration requirements

Article 19(1) requires the mass media (which includes broadcasters) to register with Gabinfo before commencing operations (note that in respect of broadcasting, an actual licence is required in addition to these registration requirements. The licensing process is dealt with below). In terms of article 19(2), an application for registration must include the following:

- the name of the service
- the object of the broadcasting service
- the address of the place where the broadcasting service is produced
- the languages broadcast
- the identification of the owner
- the legal status of the entity producing the broadcasting service

- the identification of directors and the managing editor of the broadcast service.

In terms of article 19(4), the application for registration must be accompanied by certain annexures, including:

- a certified copy of the constitution of the broadcasting entity. These would include documentation such as the memorandum of incorporation, articles of association and the like
- a certified copy of the editorial policy
- information setting out the sources of funds constituting the share capital and general financial resources of the broadcaster
- information regarding the origin and nature of any subsidies or grants received by the broadcaster whether directly or indirectly. This is an interesting requirement and obviously enables the government to be aware of foreign and/or donor funding for broadcasting outlets.

In terms of article 21 of the Press Act, any changes in the information provided as part of a registration application must be notified to Gabinfo within ten days.

In terms of article 20, the registration process is required to be completed within 30 days of receipt of the application. Gabinfo must provide the applicant with the certificate of registration which is valid for two years and is automatically renewable except where the minister has withdrawn the certificate in terms of a court order or if the registered entity has renounced the certificate of registration. No broadcast entity may commence operations without the certificate of registration.

In terms of article 22(1) of the Press Act, Gabinfo has the power to refuse an application for registration only if the applicant has not complied with the information requirements or legal conditions set out above. Such refusal of registration must, in terms of article 22(2), be set out clearly and must contain the reasons for such refusal.

In terms of article 23 of the Press Act, Gabinfo has the power to cancel a certificate of registration:

- if the entity is unable to verify the information that was contained in its registration application or in the event of a contravention of law
- if the application contained false information.

These matters have to be referred to the public prosecutor, and the cancellation of registration may take place only after a finding to that effect by way of a judicial order.

In terms of article 25, any refusal to register or cancellation of registration may be appealed or taken on judicial review within 30 days.

In terms of article 50(1) of the Press Act, a broadcaster will be deemed to be a

'clandestine broadcaster' if it does not comply with article 19 of the Press Act (the registration provisions). Article 50(2) empowers the police, the military and the administrative authorities to arrest a clandestine broadcaster (presumably this means the station manager, directors, and/or staff thereof) and hand them over to judicial authorities within 24 hours. In terms of article 50(4), the broadcast or distribution of a clandestine broadcasting service is an offence punishable by imprisonment and the payment of a fine.

3.5.2 Provisions regarding the broadcast radio frequency spectrum

Broadcasting cannot take place without access to the radio frequency spectrum. This is a finite national resource. In terms of article 6(2) of the Press Act, the radio frequency spectrum is 'an integral part of the public domain of the state'. Consequently, radio frequency spectrum matters are under the control of the government.

3.5.3 Obligation to broadcast government news

Article 13(1) of the Press Act read with the Presidential Decree 4/95 which establishes the government press office, Gabinfo, requires all broadcasters to broadcast official government news disseminated by Gabinfo.

Article 13(3) of the Press Act provides that the broadcast of government news is to be done at no cost and the government source is to be cited.

This is an especially onerous obligation to impose on the private sector media in particular, and it is noteworthy that there are no provisions regarding the amount of Gabinfo news to be disseminated in this way. This gives rise to the danger of an arbitrary insistence on an unrealistic amount of government news to be carried, free of charge, by a private broadcaster.

3.5.4 Advertising obligations

Article 18 of the Press Act regulates advertising in the mass media, including the broadcast media. It provides, in brief:

- advertising is defined as including images, text and graphics that are paid for
- advertising must always be designated as advertising
- any sponsored broadcast content must identify the name of the sponsor.

3.5.5 Obligation to give a right of reply

Article 33 of the Press Act deals with the right of reply. In brief, it provides as follows:

- Any person (note both individuals and juristic persons or legal entities) who considers themselves to have been injured by a broadcast of false or incorrect information affecting their moral integrity and good name, has the right of reply.

- The right to reply can be exercised by themselves, their legal representative, their heirs or surviving spouse.
- The right to reply must be exercised within 90 days on the following terms:
  - the reply is to be broadcast by the same broadcaster
  - the reply is to be broadcast only once, without interruption, and at no charge to the person making the reply
  - the reply must not itself, be injurious to the broadcaster. If it is so injurious, the head of operations may legitimately refuse to broadcast the reply and notify the injured person within three days of his or her decision not to broadcast. The injured person has an opportunity to resubmit an amended reply.
- The reply is required to be as concise as possible and must deal with the broadcast in question.
- The right to reply is independent of any criminal and civil proceedings that may be instituted against the broadcaster.
- If the reply is broadcast in a manner that does not comply with the above requirements, the injured person may notify the broadcaster and call upon it to remedy the situation. If the broadcaster does not remedy the situation, then the injured person may approach a competent court for an order. The court must make an order within ten days, and such order may be appealed.

Article 49(1)(b) of the Press Act provides that if a director of a broadcaster has not acted on a court order regarding the right to reply, he or she is guilty of the offence of disobedience, and the penalty is a fine in terms of article 49(2). In terms of article 53, the owners of the broadcaster are jointly liable for the payment of the fine. Additionally, article 54 of the Press Act requires the offenders to be subject to internal disciplinary procedures in addition to any civil or criminal proceedings.

3.5.6 Broadcasting ownership and control obligations

Ownership and control obligations in respect of broadcasters are regulated in terms of the Press Act.

Article 7(1) of the Press Act specifies that a broadcaster must be a juristic person, for example, in the form of a company. The implicit effect of this is that an individual cannot own a broadcasting service.

Article 6(1) of the Press Act contains several provisions regarding the ownership of the broadcast media, including that the state can own them, the community, the private sector or by a mixed entity of a combination of the above media sectors.

Article 6(3) provides that the state can acquire ownership of a broadcaster that is not part of the public sector and/or can provide other forms of subsidy or support.

Article 6(5) restricts ownership of broadcasters to Mozambican companies or

citizens. Additionally, article 6(6) provides that only 20% of the share capital of a broadcaster may be provided from foreign sources.

It is also important to note the provision of article 6(8) which specifies that the state observes an anti-monopoly policy in the broadcasting sector to preserve the public's right of access to information.

In respect of control, it is important to note article 9 of the Press Act, which deals with directors of broadcasters. In brief, it provides that every director of a broadcast entity must be a Mozambican citizen, resident in the country and must enjoy full civil and political rights.

3.5.7 Obligation to have an editorial policy

Article 8 of the Press Act requires all broadcasters to develop and have an editorial policy.

3.5.8 Obligation to have an editorial board

Article 10 of the Press Act requires all broadcasting operators to have an editorial board whose composition and competencies are defined in its founding document.

3.5.9 Obligation to stop broadcasting if a licence is suspended

Article 49(1)(a) of the Press Act provides that if a director of a broadcaster continues to broadcast in violation of a suspension order, they are guilty of the offence of disobedience, and the penalty is a fine in terms of article 49(2). In terms of article 53, the owners of the broadcasting service are jointly liable for the payment of the fine. Article 54 of the Press Act also requires the offenders to be subject to internal disciplinary procedures in addition to any civil or criminal proceedings.

3.5.10 Amending the legislation to strengthen the broadcast media generally

The provisions of the Press Act regarding the regulation of the broadcasting sector are out of step with good international practice in several ways:

- first, the Press Act doesn't deal with the issue of licensing broadcasters, including the imposition of licence conditions
- second, the Press Act is silent on who is responsible for regulating broadcasting as a whole.

Instead, such critical issues regarding broadcasting are dealt with by way of decrees and the like. Putting these critical issues in what are, effectively, regulations instead of having such issues settled in legislation undermines the importance of the broadcasting legislative regime of Mozambique.

3.6 Legislation that regulates the state broadcasting sector

The state broadcasting sector is dealt with in a single statute. Namely, the Press Act 18/91 and then by way of regulation dealt with in the regulations section below.

Unusually, the state broadcasting sector is divided into two separate entities, namely Radio Mozambique and Mozambique Television.

3.6.1 Objectives of public sector mass media, including broadcasting

Article 11(2) of the Press Act sets out the principal functions of the public sector mass media, and these include:

- to promote access to information by citizens throughout the country
- to guarantee impartial, objective and equitable news coverage
- to reflect the diversity of ideas and opinions
- to develop the use of national languages.

Article 11(3) of the Press Act sets out the objectives for the state broadcasting operators, both radio and television, and these are to:

- provide balanced programming, taking into account the diverse interests and preferences of its audience
- promote communication for development
- to promote culture and creativity by the production and broadcasting of local content.

Article 11(4) of the Press Act provides that the state broadcasting entities carry out their functions free of any interference or external influence that may compromise its independence. However, this appears unlikely given that all directors of a public broadcasting service are appointed by the state, as is dealt with immediately below.

3.6.2 Control of public broadcasting entities

Besides the generally-applicable rules governing ownership and control of broadcasting entities deal with above, article 9(2) of the Press Act provides that all directors of a public broadcasting service are to be appointed by the state. For more detail on this, see the regulations section in paragraph 4 below.

3.6.3 Obligation to broadcast government news

Article 13(1) of the Press Act read with the Presidential Decree 4/95 which establishes the government press office, Gabinfo, requires all broadcasters to broadcast official government news disseminated by Gabinfo. Additionally, article 13(2) requires the national radio and television broadcasters to broadcast government news immediately subject to any embargoed content.

Article 13(3) of the Press Act provides that the broadcast of government news is to be done at no cost and the government source is to be cited.

Article 13(4) of the Press Act requires the national radio and television broadcasters to broadcast statements by the president of the Republic urgently subject to any embargoed content at no charge.

3.6.4 Elections-related obligations

Article 12 of the Press Act deals with elections-related obligations imposed on the national broadcasters. Article 12(1) grants political parties represented in the National Assembly the right to airtime on the national radio and television broadcasters per regulations governing access to airtime for political parties.

Article 12(2) provides that, during an election period, political parties have the right to regular and equitable air time on the national radio and television broadcasters per electoral laws. The Elections Law (Law 8/2013) also specifically protects the rights of freedom of expression of the media during election periods (article 22), and article 31 entitles political parties and presidential candidates to make use of the state broadcaster to publicise their election campaigns.

Article 12(3) provides that opposition political parties have the right to reply to political declarations made by the government on the national radio and television broadcasters.

3.7 Legislation governing cinema

The Press Act, Law 18/91 governs the mass media, including print and broadcast media as well as cinema. Note that the Press Act continues to refer to the minister of information. However, that ministry no longer exists and, since, 1995, all functions of the minister of information are carried out by Gabinfo.

3.7.1 Registration of cinema operators

Article 19(1) requires the mass media (which includes cinema operators) to register with Gabinfo before commencing operations. In terms of article 19(2), an application for registration must include the following:

- the name of the cinema operator
- the object of the cinema operator
- the address of the place from which the cinema business is operated
- the languages in which films are shown
- the identification of the owner
- the legal status of the cinema operator

- the identification of directors and the manager of the cinema business.

In terms of article 19(4), the application must be accompanied by certain annexures, including:

- a certified copy of the constitution of the cinema operator. These would include documentation such as the memorandum of incorporation, articles of association and the like
- a certified copy of the cinematic policy, if any, that is, a type of editorial policy in respect of cinema
- information setting out the sources of funds constituting the share capital and general financial resources of the cinema operator
- information regarding the origin and nature of any subsidies or grants received by the cinema operator, whether directly or indirectly.

In terms of article 50(1) of the Press Act, a cinema operator will be deemed to be a clandestine cinema operator if they do not comply with article 19 of the Press Act (the registration provisions). Article 50(2) empowers the police, the military and the administrative authorities to arrest a clandestine cinema operator (presumably this means the manager, directors, and/or staff thereof) and hand them over to judicial authorities within 24 hours. In terms of article 50(4), the distribution and screening of audio-visual material by a clandestine cinema operator is an offence punishable by imprisonment and the payment of a fine.

3.7.2 Ownership of cinemas

Article 7(1) of the Press Act specifies that a cinema operator must be a juristic person, for example, in the form of a company. The implicit effect of this is that a cinema operator cannot be an individual.

Article 6(1) of the Press Act contains several provisions regarding the ownership of cinema operators, including that the state can own them, the community, the private sector or by a mixed entity.

Article 6(3) provides that the state can acquire ownership of a cinema operator that is not part of the public sector and/or can provide other forms of subsidy or support.

Article 6(5) restricts ownership of a cinema to Mozambican companies or citizens. Additionally, article 6(6) provides that only 20% of the share capital of a cinema operator may be provided from foreign sources.

It is also important to note the provision of article 6(8) which specifies that the state observes an anti-monopoly policy concerning cinema operators to preserve the public's right of access to information.

In respect to control, it is important to note article 9 of the Press Act, which deals with directors of cinema operator entities. In brief, it provides that every director

of a cinema operator entity must be a Mozambican citizen, resident in the country and must enjoy full civil and political rights.

Article 9(2) of the Press Act provides that all directors of a state-owned cinema operator are to be appointed by the state.

3.7.3 Obligation to have a cinematic policy

Article 8 of the Press Act requires all cinema operators to develop and have an editorial policy. We presume this to mean a cinematic policy akin to an editorial policy in other media contexts.

3.7.4 Obligation to have an editorial board

Article 10 of the Press Act requires all cinema operators to have an editorial board (we presume this to mean a cinematic policy board) whose composition and competencies are defined in its founding documentation.

3.8 Legislation that undermines or upholds a journalist's duty to protect his or her sources

Interestingly, there are no laws that we have been able to find which specify that a journalist can be forced to reveal his or her sources in Mozambique.

Article 30(1) of the Press Act deals with the protection of journalists' sources of information, and it provides that journalists, editors, publishers and broadcasters have the right to keep their sources of information secret in respect of material published or broadcast. Article 30(2) contains a presumption that, unless the source of information is indicated, the author will be presumed to have obtained the information.

3.9 Legislation that prohibits the publication of certain kinds of information

Several statutes contain provisions which, when closely examined, undermine the public's right to receive and the media's right to publish information. The word publish here is meant broadly, as in getting information out in the public domain and includes print, broadcast and online publication. Such statutes are targeted and prohibit the publication of certain kinds of information, including:

- general defamation and injury, as well as defamation against the head of state and other dignitaries
- false news and unfounded rumours
- publication that offends against national symbols
- publication that reveals the identities of minors in court proceedings

- publication of child pornography
- publication that disrupts public order
- publication of state secrets
- publication that violates the rights of others
- publication that constitutes hate or discriminatory speech
- publication that incites the commission of an offence.

3.9.1 Publications that constitute general crimes of defamation and injury, as well as defamation against public authorities, the head of state and other dignitaries, and foreign governments and ambassadors

Two different pieces of legislation criminalise defamation and related injurious expression:

- the Press Act, Act 18 of 1991
- the Penal Code, Act 24 of 2019 which comes into force in June 2020.

Article 41 of the Press Act provides that a media outlet (print or broadcast) is civilly liable (in other words for damages to a person wronged) for publications of broadcasts which are injurious or contrary to legally-protected rights. In brief, it provides:

- for joint responsibility between the author or programme manager (in the case of broadcast material) and the media entity for the publication or broadcast of injurious material or between the author or programme manager and the editor if they had knowledge about the material and did nothing to oppose the publication or broadcast of it, article 41(2)
- that a decision of the court in any civil action brought in terms of this article 41 must be published or broadcast together with the facts giving rise to the action, the injurious material, the identities of both the complainant and the respondent in the matter and the sanction imposed by the court, article 41(3). Article 49(1)(c) of the Press Act provides that if a director of a media entity has not published or broadcast the decision of the court as required in terms of article 41, he or she is guilty of the offence of disobedience and the penalty is a fine in terms of article 49(2). In terms of article 53, the owners of the media entity service are jointly liable for the payment of the fine. Article 54 of the Press Act also requires the offenders to be subject to internal disciplinary procedures in addition to any civil or criminal proceedings.

Article 42 of the Press Act provides that crimes of abuse of the freedom of the press are injurious acts or those contrary to legally-protected rights that are published or broadcast. Articles 43 and 44 of the Press Act deal with criminal liability for material published or broadcast that causes harm. In brief, it assigns liability successively as follows:

- first, the author of the relevant article or image or the person who promoted the publication without the consent of the author or producer of the broadcast programme as an accomplice
- second, the editor of the publication or broadcast programme manager provided that it was not signed (the author is not identified) and the publication was done without his consent, and he could not prevent it
- third, the managing director of a publication or broadcaster, unless he or she can exonerate him or herself
- the members of the editorial board of a publication or broadcaster are presumed criminally liable to the same extent as a managing director, where the decision to publish or broadcast was subject to a vote, unless a board member can prove that he or she did not participate in the vote or voted against publication or broadcast.

Article 45 provides that publishers of publications and signal distributors of a broadcast service will not be liable for any publication or programme broadcast unless the publication or broadcaster is clandestine (that is, unregistered) or where the publication or broadcast service has been judicially suspended.

Article 46(1) of the Press Act, Act 18 of 1991 makes it an offence to publish or broadcast material that constitutes injury, threats, defamation or calumny against the president, members of government and parliament, magistrates, public authorities in Mozambique, foreign governments or accredited diplomats.

Article 47(1) provides that: 'truth in the public interest which respects the bounds of privacy' is a defence to a charge of defamation. The offence is punishable by imprisonment and a fine in terms of section 47(2) of the Press Act.

Article 51(1) provides that a court can suspend a publication or broadcast service if the court finds that it has published or broadcast, as the case may be, content that disrupted public order, violated rights of citizens or that incited the commission of offences.

Interestingly, article 47(2) of the Press Act, Act 18 of 1991, also makes it an offence to publish or broadcast material that constitutes defamation (note defamation is also not defined in the Press Act) of a person. Article 47(1) provides that truth in the public interest which respects the bounds of privacy is a defence to a charge of defamation. The offence is punishable by imprisonment and a fine in terms of section 47(2) of the Press Act. Note that journalists who are employed by the state can also be penalised for having abused their authority in terms of article 52(2) of the Press Act.

There are additional provisions regarding punishments for periodicals. If a periodical publication is found to have published defamatory material on three or more occasions within five years, it can be suspended in terms of article 48. The periods of suspension are set out in article 48(1) and are as follows:

- up to one month for a daily publication
- up to six months for a weekly publication
- up to12 months for a monthly publication.

Additionally, a director of a periodical that has been found to have published defamatory material on three or more occasions is prohibited from acting as a director of any periodical for two years.

Article 48(3) also provides that the person responsible for a defamatory statement or image published is liable for a fine in respect of defamation in the following circumstances:

- if there was no truth to the defamatory statement
- if the statement or image was published negligently without the intention to defame
- if this is a repeat offence by the person responsible.

Chapter IX of Title I of Book Two of the New Penal Code, Act 24 of 2019, is headed Crimes Against Dignity of Persons. It details some instances where publishing material constitutes a crime against the dignity of persons:

- Article 233(1) deals with the crime of defamation. It provides that those who defame another publicly, whether spoken, written, images published or by any other medium of dissemination (including broadcasting or the exhibition of films) or offends a person's honour (including reproducing existing defamatory material) is guilty of an offence punishable by up to one year's imprisonment and a corresponding fine. It is important to note that the penal code does not define defamation. However, the general understanding of the term is that it is a publication of material that impairs a persons' reputation.
- Article 233(2) deals with the defences to a charge of defamation. Essentially, these are that it was done to protect legitimate interests and a person facing a charge of defamation is required to prove the truth of the facts in the publication or that the publication was made in a good faith belief that the facts in question were true. However, even truth will not be a defence to a charge for defamation where the facts concern private or family life, article 233(4).
- Article 234(1) deals with the crime of injury or injuria, and it provides that the crime of injury committed against a person publicly by gestures, images, spoken words or any other medium of publication is punishable by imprisonment of up to six months. Article 234(2) specifically provides that truth is not a defence to a charge of injury when it relates to the intimacy of private life. It is important to note that the penal code does not define injury. However, the general understanding of the term is that it is intentional wrongful damage to a persons' dignity. Consequently, injury and defamation are very similar.
- Article 237(1) of the penal code provides that crimes of defamation, and injury

committed against the head of state or its legal, constitutional substitute, are punishable, on conviction, by imprisonment of between one and two years. Note that this essentially doubles the normal period of imprisonment for such crimes, when they are committed against Mozambican dignitaries.

- Article 237(2) of the penal code deals with the crimes of defamation and injury perpetrated against holders of sovereign public offices and members of the administration of justice organs. Such crimes are punishable, on conviction, by imprisonment of up to two years.

It is important to point out that there has not been an attempt at harmonising the provisions of the Press Act and penal code concerning defamation and injury. This means that these laws apply side by side even though they deal with very similar, indeed overlapping matters. However, it is important to note the provisions of article 2(2) of the penal code, which specifies that laws that are contrary to the provisions of the code are repealed. Hence, the penal code takes precedence over the criminalisation of defamation.

3.9.2 Publications that constitute false news or unfounded rumours

Article 48(4) of the Press Act, Act 18 of 1991 makes it an offence to publish or broadcast material that constitutes false news or unfounded rumours if aggravating circumstances exist, for example, where the public interest or law and order are concerned. The offence is punishable by imprisonment, and a fine in terms of article 47(2) of the Press Act read with article 48(4). Note that truth is a defence.

This is an interesting provision. Currently, countries all over the world are grappling with how to regulate so-called fake news or misinformation, particularly online. Many have decided against regulating this because of the chilling effect on breaking news that may, eventually, turn out to be simply incorrect. The problem with the provisions of article 48 is that they create a criminal offence out of what could be an error, as opposed to an intention to spread misinformation. Reasonable apprehension that the material was true ought to be a defence to such a charge and not simply truth.

3.9.3 Publications that offend against national symbols

Chapter I of Title VI of Book Two of the Penal Code, Act 24 of 2019, is headed Crimes Against the Security of the State. It details several instances where publishing material constitutes a crime against the security of the state. Article 397of the penal code provides that publishing material that offends against national symbols is a crime punishable by a prison sentence of up to a year with a corresponding fine. Such symbols are set out in article 13 of the constitution and are the flag and the national emblem and anthem.

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

Although there is no written legal provision dealing with the protection of a minor's

identity in legal proceedings, the Mozambique courts have ruled against publishing a minor's identity in cases where this would be in the best interests of the child.

3.9.5 Prohibition on the publication of child pornography

Chapter VII of Title I Book Two of the Penal Code, Act 24 of 2019, is headed Crimes Against Sexual Liberty. Article 211 provides that the publication of child pornography (a sexually explicit visual representation of a minor) is a crime punishable, on conviction, by imprisonment.

3.9.6 Prohibition on publishing or broadcasting material that disrupts public order

Article 51(1) of the Press Act, Law 18 of 1991 provides that a court can suspend a publication or broadcaster if the court finds that it has published or broadcast content that disrupts public order.

3.9.7 Prohibition on publication of state secrets

Chapter I of Title VI Book Two of the Penal Code, Act 24 of 2019, is headed Crimes Against State Security. Article 380 provides that the publication of information that endangers the security interests of the state to 'unauthorised persons' or to the public is a crime punishable, on conviction, by imprisonment.

3.9.8 Prohibition on publishing or broadcasting material that violates the rights of citizens

Article 51(1) of the Press Act, Law 18 of 1991 provides that a court can suspend a publication or broadcaster if the court finds that it has published or broadcast content that violated the rights of citizens.

3.9.9 Prohibition on publishing or broadcasting material that constitutes hate or discriminatory speech

Chapter V of Title I Book Two of the Penal Code, Act 24 of 2019, is headed Crimes against Humanity, Cultural Identity and Personal Integrity. Article 191(3) makes it an offence, punishable by imprisonment, to disseminate by any media:

- provocation of acts of violence against a person or group based on their race, colour, ethnic origin, nationality, religion, race or gender identity
- defamation of a person or group based on their race, colour, ethnic origin, nationality, religion, race or gender identity by the denial of war crimes to incite or encourage discrimination
- threats against a person or group based on their race, colour, ethnic origin, nationality, religion, race or gender identity.

3.9.10 Prohibition on publishing or broadcasting material that incites the commission of an offence

Two different pieces of legislation criminalise incitement, the:

- Press Act, Act 18 of 1991
- Penal Code, Act 24 of 2019 which comes into force in June 2020.

Article 51(1) of the Press Act, Law 18 of 1991 provides that a court can suspend a publication or a broadcaster if the court finds that it has published or broadcast content that incited the commission of an offence.

Chapter I of Title VI Book Two of the Penal Code, Act 24 of 2019, is headed Public Instigation and Criminal Association. Article 345(1) makes it an offence, punishable by imprisonment, to incite the commission of a crime employing communication.

3.10 Legislation that specifically assists the media in performing its functions

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

3.10.1 Press Act, Act 18 of 1991

The Press Act contains some provisions that support the media:

- Article 3(1) of the Press Act provides that the right to information gives every citizen the right to be informed about relevant facts and opinions at the national and international level as well as the right to divulge information, opinion and ideas via the press.
- Article 3(2) of the Press Act provides that no citizen may be prejudiced in their work by them exercising their right to freedom of expression in the press. It appears that this could be used to protect whistleblowers that divulge wrong-doing at their place of work.
- Article 29 of the Press Act deals with sources of information. In brief, it provides that journalists shall be given access to official sources of information. However, the following sources of information are exempted:
    - judicial proceedings held *in camera*, in other words, without public access as ordered by the presiding judge
    - facts and documents considered secret by the competent military or state authorities

- facts and documents considered secret or confidential in terms of the law
- facts and documents, the publication of which would constitute an infringement of the privacy of citizens.

- Article 52(1) of the Press Act makes it an offence, punishable by a fine, for any person to violate the rights, liberties and guarantees given to the mass media. This includes print and broadcast media (note that online media protection is not expressly specified) and to journalists, in terms of the Press Act. Moreover, if the offender is a public official, then he or she can also be liable for the crime of abuse of authority, in which case the state is jointly liable for the payment of the fine, article 52(2) of the Press Act.

3.10.2 The Right to Information Act, Act 34 of 2014

Article 1 sets out the objectives of the Right to Information Act (the Info Act). These are to:

- provide for the exercise of the right to information
- materialise the constitutional principle of permanent participation in the democracy and in public life by citizens
- guarantee the fundamental rights connected with the above.

Article 3 details who is bound by the Info Act. In brief, it applies to:

- organs and institutions of the state, including local authorities
- diplomatic representatives of Mozambique in foreign countries
- private entities that provide a public service or which access public resources and which hold information that is of interest to the public.

Article 4 sets out the principles of the Info Act. In brief, these are that:

- exercise of the right to information must respect the constitutional order, protect national unity and social harmony
- the following principles govern exercise of the right to information:
  - the right to dignity
  - maximum sharing of information
  - public interest
  - transparency in the activities of public and private entities
  - permanent accountability to citizens
  - open public administration
  - the prohibition against unlimited exceptions

- the promotion of the rights of citizenship
- permanent democratic participation of citizens in public life
- simplicity and swiftness of legal procedures and regulations
- respect for classified information.

Article 6 deals with the principle of 'maximum divulgence', and it requires information to be provided in the public interest and to be disseminated as widely as possible by diverse mediums accessible to citizens. Article 6(2) sets out the kinds of information that public and private bodies ought to provide as a matter of course, including:

- information regarding organisational structures and services provided
- annual budgets and organisational plans for activities as well as annual reports on their execution
- audit reports, court judgments, enquiries and inspections of its activities
- such information must be available online, on broadcasting services and other mass media outlets as well as being affixed in public buildings.

Article 14 grants citizens the right to request and receive information that is in the public interest from the state or applicable private persons.

Article 15 sets out the procedure for such requests. These are, in brief:

- requests for information must be directed to the manager responsible for information, archives and the like in the public sector or private sector body
- requests for information can be made in writing, orally or even by gesticulations (see articles 15 and 18). However, certain requests for information must be put in writing, namely:
  - requests for official correspondence
  - information regarding government services
  - information regarding government officials.

Article 16 provides that information must be provided to the requestor within 21 days.

Article 17 provides that information which is provided in response to a request must be provided free of charge unless the provision of such information required copying, certifying or authenticating documentation, or unless the provision was subject to any taxation.

Article 22 sets out the limitations on the right to information. In brief, these include:

- classified information, that is, where the state has classified information as being secret, restricted or confidential, article 20(1)

- restricted information, article 20(2) that is:
  - state secrets: detailed information and documents that have a decree of security classification and which require protection from unauthorised distribution to avoid risks to the state and damage to internal and external security (read with article 21)
  - secrets of justice: documentation, the publications of which would undermine the administration of justice or the protection of private life (read with article 22)
  - information regarding the public administration received as being confidential (read with article 25)
  - information regarding relations with foreign states or international organisations (read with article 21)
  - professional secrecy, for example, attorney-client privilege (read with article 23)
  - banking secrecy, including banking information of clients (read with article 24)
  - personal information, this includes the protection of electronic information as well as information regarding the private lives of citizens, and any other information that could cause prejudice to one's good reputation or image. Any images of private life may be shared only with the express consent of the person involved (read with article 27)
  - Victims, witnesses and whistle-blower information, this is information regarding victims of or witnesses to a crime and whistleblowers (read with article 26)
  - commercial secrets, where the publication of information would divulge commercial or industrial secrets or information regarding the internal life of a business enterprise (read with article 28)
  - authored publications, copyrighted works are protected from distribution where the rights of the author would be violated by their use or reproduction (read with article 29).
- Articles 37-39 of the Info Act make it clear that providing information in ways that violate laws governing the protection of human dignity, classified information, professional, banking and justice secrecy will be dealt with in terms of applicable legislation in respect of such violations.

4 Regulations affecting the media

In this section, you will learn:

- ▷ what regulations are
- ▷ regulations on the mass media including the print media
- ▷ regulations governing the SCMM
- ▷ regulations governing broadcasting generally
- ▷ regulations governing the state broadcasting sector
- ▷ regulations governing the establishment of a government press office, Gabinfo
- ▷ regulations governing the Bureau of Public Information
- ▷ regulations governing the Institute for Mass Media
- ▷ regulations governing journalism education

4.1 Definition of regulations

In general terms, regulations are subordinate legislation. They are legal rules made in terms of a statute. Regulations are a legal mechanism for allowing a member of the executive or a state institution to make legally binding rules governing an industry or sector without requiring parliament to pass a specific statute.

Mozambique, however, has a range of regulatory mechanisms. Many of these have the force of law in a very similar way to an act of parliament such as a statute. This feature of Mozambican law has already been discussed in paragraph 2.9.5 above.

There are four types of non-statute regulatory mechanisms in Mozambique, diplomas, decrees, deliberations and resolutions:

- a singular ministry makes diplomas on sector-specific issues
- the government makes decrees. These can be either by the president as the chief of the government or council of ministers on a specific matter or a joint decree involving two or more ministries

- deliberations are made by a collective decision-making body such as a council or something similar
- resolutions, these are other acts or decisions of the government that are not made in a decree form.

4.2 Regulations governing the mass media, including print media

Diploma 2/2005 issued by the prime minister, sets out additional functions of Gabinfo (dealt with in more detail in section 4.6 below) in many key areas. One of these has particular importance for the mass media, including broadcasting.

Information-related additional functions, article 3(1): to facilitate compliance by the government with its obligations under the Press Act (dealt with above). It is clear that this has been interpreted as allowing the ministry of information to delegate many of its functions under the Press Act to Gabinfo which carries out some functions on behalf of the ministry including to:

- accredit and register foreign correspondents. The effect of this is that Gabinfo is the body that carries out the responsibilities of the ministry of information in respect of the registration and accreditation of foreign correspondents and publications provided for in the Press Act
- ensure the registration and licensing of the mass media. The effect of this is that Gabinfo is the body that carries out the responsibilities of the ministry of information in respect of the registration and licensing of the mass media provided for in the Press Act.

4.3 Regulations governing the SCMM

4.3.1 Deliberation 9/1994 (the SCMM Deliberation)

The SCMM Deliberation, passed by the SCMM in terms of the Press Act (dealt with above), contains the SCMM's own internal rules. Those that are particularly relevant include:

- article 2(1) provides that the SCMM is funded out of the national budget and that it is entitled to receive funding from other sources, including donations
- article 13(1) provides that decisions of the SCMM are taken on a simple majority basis
- article 15 provides that decisions of the SCMM and the outcome of complaints will be made available to media institutions.

4.3.2 Ministerial Diploma No. 86/1998 (the diploma)

The Diploma was enacted by four ministers, state administration, justice, finance, and labour in terms of Decree 3/85 (now repealed and replaced by Decree 5/2000). Essentially the diploma repeats provisions relating to the composition and powers of the SCMM that have already been dealt with above concerning the Press Act. One additional key aspect, not covered in the Press Act, is that a member of the SCMM cannot be a member of a government body or the leader of a political party, article 4.

4.4 Regulations governing broadcasting

4.4.1 Decree 9/93 (The Broadcasting Decree)

The Broadcasting Decree was enacted by the council of ministers acting in terms of article 6(4) of the Press Act and is the most significant set of regulations dealing with broadcasting in Mozambique. The Broadcasting Decree deals only with private or community or a mixed model of both, broadcasters. Public or state broadcasting is dealt with in other regulations as set out below.

Licensing-related provisions

Article 3(2) of the Broadcasting Decree provides that no-one may provide broadcasting services without a licence issued in terms of this decree or other applicable laws.

Article 4(1) of the Broadcasting Decree stipulates that the licensed broadcast coverage area of a particular broadcasting service is as specified in the licence. Coverage areas are either national or a part of the national territory.

The minister responsible for transport and communications is also responsible for licensing the use of the radio frequency spectrum by broadcasting licensees in terms of article 5 of the Broadcasting Decree.

Article 13 deals with licensing of broadcasting services. It is clear from the provisions of article 13 that the power to grant and issue broadcasting service licences in Mozambique is vested in the minister of information. Note that it is clear from the provisions of Decree 2/2005, dealt with below, that this function has been delegated to Gabinfo. Thus, the SCMM plays no role in the granting of broadcasting licences.

Article 14(1) provides that an application for a radio or television broadcasting licence must be made to the Minister of Information.

Article 14(2) makes it clear that the licensing process for broadcasters operates in parallel with the general registration requirements applicable to print media entities, broadcasters and cinema operators in terms of the Press Act, that is, broadcasters have to be both registered with, and licensed by, the Minister of Information.

Article 14(2)(a) specifies what is to be included in a broadcast licence application, namely:

- the proposed coverage area, specified on a coverage map
- a description of the proposed broadcasting service
- proposed specifications of transmitter equipment and installations, including the effective radiated power of the transmission.

Additionally, where an application is made by an entity that includes participation by the state, the application must include a feasibility study for the service, article 14(3).

Article 26(1) requires an application fee to be paid in respect of every licence application. The licence application fee is prescribed by the ministers of information, transport and communications and finances in terms of article 26(4).

An application must be decided on within 90 days by the minister of information in terms of article 14(4). Importantly, article 15 provides that it is the minister of transport and communication that is responsible for determining the technical, that is, transmission-related licence conditions.

Article 13(2) sets out the features of a broadcasting licence (after the decision to grant it has been made), and these include:

- the name of the licensee
- the ambit and scope of the licensed activity. For example, whether the service is radio or television and the format of any radio service
- the assigned frequencies
- the period of broadcast transmission, that is, how many hours per day
- the period of validity of the licence (up to ten years renewable, in terms of article 17 of the Broadcasting Decree).

Article 16 provides that it is the Council of Ministers, that is, the Cabinet, which grants broadcasting licences to applicants. The political nature of that body and the fact that it lacks independence can hardly be overstated.

Suspension of a licence

A reference to a licence being suspended means that it would be suspended for between seven and 30 days as stipulated by the minister of information with the concurrence of the minister of transport and in terms of article 22(2) of the Broadcasting Decree. A failure to comply with any broadcast licence suspension order may result in the relevant authority (we presume this to mean the minister of information and the minister of transport and communications) cancelling the licence in terms of article 23(1)(a). Additionally, the imposition of three suspension

orders in three years may result in the cancellation of the licence in terms of article 23(1)(b) of the Broadcasting Decree.

Responsibilities of broadcasters in Mozambique

- **Adherence to licence conditions**

  Article 22(1)(a) of the Broadcasting Decree provides that a licence may be suspended if the licensee does not comply with its licence conditions.

- **Obligation to broadcast**

  Article 18 of the Broadcasting Decree provides that licensed broadcasters must commence broadcasting operations within one year of the granting of the licence.

  Article 19 prescribes a minimum broadcast transmission period of four hours per day.

- **Obligation to eliminate interference**

  Article 22(1)(b) of the Broadcasting Decree provides that a licence may be suspended if the licensee does eliminate interference with other frequencies after been notified to do so.

- **Obligation to grant access to inspectors**

  Article 22(1)(c) of the Broadcasting Decree provides that a licence may be suspended if the licensee does not grant access to its installations or equipment by a designated inspector.

- **Obligation to pay licence fees**

  Article 22(1)(d) of the Broadcasting Decree provides that a licence may be suspended if the licensee does not pay the licence fee prescribed in terms of article 26. Article 26(2) read with article 26(3) makes provision for a licensed broadcaster to pay two different types of licence fees, one for the broadcast service and one for the transmission equipment.

- **Obligation to have a fixed address**

  An interesting negative obligation is set out in article 27 of the Broadcasting Decree which prohibits a broadcaster from broadcasting from a ship, aeroplane, or any other mode of transport. Thus all broadcasters have to broadcast from a fixed address. This is doubtless to try to avoid the so-called pirate broadcast ships phenomenon of people directing transmitters onshore from off-shore boats to avoid licensing requirements.

- **Obligation to keep a register of broadcasting equipment**

  Article 28 of the Broadcasting Decree requires all broadcasters to maintain a record of all transmission equipment.

4.4.2 Diploma 2/2005

Diploma 2/2005 issued by the prime minister, sets out additional functions of Gabinfo (dealt with in more detail in section 4.6 below) in several key areas, including to:

- accredit and register foreign correspondents. The effect of this is that Gabinfo is the body that carries out the responsibilities of the ministry of information in respect of the registration and accreditation of foreign correspondents and publications provided for in the Press Act
- ensure the registration and licensing of the mass media. The effect of this is that Gabinfo is the body that carries out the responsibilities of the ministry of information in respect of the registration and licensing of the mass media provided for in the Press Act.

4.5 Regulations governing the state broadcasting sector

4.5.1 Introduction

Radio Mozambique and Mozambique TV were both nationalised as state broadcasters in 1975 following Mozambique gaining independence. They continue to operate separately.

Two decrees govern the state broadcasting sector, namely:

- Decree No 18/1994 creation of Radio Mozambique
- Decree No 31/2000 creation of Mozambique TV.

4.5.2 Establishment of Radio Mozambique

Radio Mozambique is governed in terms of Decree 18/1994 (the Radio Decree). Article 1 provides that Radio Mozambique is a public organ. It has a separate legal personality and has administrative and financial autonomy in terms of article 2(1). Article 2(2) stipulates that Radio Mozambique is also subject to the applicable provisions of the Press Act.

4.5.3 Radio Mozambique's mandate

The Radio Decree sets out the functions of Radio Mozambique in articles 3 and 4. These include:

- to provide a public radio service as its principal objective
- the right to carry out commercial activities (presumably the right to sell advertising and the like).

The Radio Decree contains provisions titled Statute of Radio Mozambique, namely Chapters I to XII of the Radio Decree (the Statute). Note that these are entirely standalone as they too have articles within them.

Articles 4 and 5(1) of the statute sets out additional broad objectives of Radio Mozambique, and these are essentially concerned with promoting national unity, identity and values.

A commitment to the pluralism of programming is expressed in articles 5(2) and 9(2) of the statute which contains some sub-articles that elaborate on this principle, including:

- promoting access to information;
- promoting national languages and culture. In this regard, article 7 of the statute specifies that at least one national service is to be provided in Portuguese with other Mozambican languages being accommodated at the provincial services level.
- ensuring the provision of educational programming
- that programming must be objective, impartial, true, factual and rigorous.

4.5.4 Appointment of the Radio Mozambique's Board

In terms of article 22, Radio Mozambique has a board of five directors, including a president designated by the council of ministers and the other four appointed as follows:

- two directors are designated by the minister responsible for the mass media
- one director is designated by the Minister of Finance
- one is designated by the staff of Radio Mozambique.

Directors are appointed for a three-year term, which is renewable in terms of article 21(1) of the statute.

All directors are required to be citizens who enjoy full civil and political rights in terms of article 20 of the statute. There are no other stipulated criteria.

Article 27 of the statute provides that the board is responsible for managing Radio Mozambique including administratively and financially. In particular, it is responsible for determining the internal operations, coordinating the activities and managing the programming.

Article 35 of the statute also establishes and provides for a fiscal council of Radio Mozambique comprising three members, all of whom are appointed by the minister of finance. Article 36 of the statute sets out the role of the fiscal council, and essentially these consist of overseeing the financial affairs and corporate governance of Radio Mozambique.

4.5.5 Funding of Radio Mozambique

Article 5 of the Radio Decree and Chapter IV of the statute refer to a statutory fund

that is available to Radio Mozambique. The annual amount available is set out in article 15 of the statute and may be augmented only by the minister of finance in terms of article 16(2) of the statute. Article 15 of the statute also refers to Radio Mozambique being funded by way of other state or public entity endowments.

The Radio Decree also goes on to provide, in article 7, that in carrying out its functions, it has the powers to: 'collect fees, service revenues and other credits'. In our view, this includes collecting advertising revenues. There is a radio licence fee that is charged at the time of the annual car licence fee — so in effect the radio fee is charged to car users.

Article 14 of the Radio Statute in the Radio Degree deals with limitations on advertising flighted on Radio Mozambique. In addition to the general advertising requirements set out in the Press Act, advertising on Radio Mozambique is restricted in that the following is prohibited:

- advertising content that is not acknowledged as advertising
- misleading advertising in respect of the quality of the goods offered
- advertising of products that are harmful to health
- pornography and incitement of violence.

4.5.6 Radio Mozambique: public or state broadcaster?

There is no doubt that Radio Mozambique is a state broadcaster given that the majority of its board is appointed by members of the executive branch of government. Article 2(1) of the Radio Decree specifies that it is a subordinate arm to the Ministry of Information.

4.5.7 Establishment of Television Mozambique

Television Mozambique is governed in terms of Decree 31/2000 (the Television Decree). As was the case with the Radio Decree, the Television Decree also contains a statute for Television Mozambique (the Television Statute). Article 1 of the Television Statute provides that Television Mozambique is a public organ. It has a separate legal personality and has administrative and financial autonomy. Although it is not expressly stated in the Television Decree, it is clear that Television Mozambique is also subject to the applicable provisions of the Press Act.

4.5.8 Television Mozambique's mandate

The Television Decree contains within it, provisions that are titled Statute of Television Mozambique, namely Chapters I to XII. Note that these are entirely standalone as they too have articles within them.

The Television Statute sets out the functions of Television Mozambique in article 4. These include:

- to provide a public television service as its principal objective
- the right to carry out supporting commercial activities (presumably the right to sell advertising and the like).

Article 10 of the Television Statute sets out the requirements of Television Mozambique's programming, and these include that programmes are to be informative, entertaining and cultural. Article 10 also contains additional specific requirements that programming is to:

- be factual, truthful and rigorous
- promote Mozambican language, music and culture
- promote the integration of minorities or specific groups such as children and the youth
- provide a diversity of programmes reflecting the diversity of the country
- promote sporting information and the playing of sport
- promote civic education and de-incentivise anti-social behaviour.

4.5.9 Appointment of the Television Mozambique's board

In terms of article 20 of the Television Statute, Television Mozambique has a board of five directors. They are appointed by the council of ministers and include:

- a president designated by the council of ministers
- one director designated by the Minister of Planning and Finance
- one director designated by the staff of Television Mozambique.

Article 20(4) specifies that directors must have the necessary technical expertise.

Directors are appointed for a three-year term, which is renewable in terms of article 20(5) of the statute.

Article 23 of the Television Statute provides that the board is responsible for managing Television Mozambique including administratively and financially. In particular, it is responsible for determining the strategic plans and budget of Television Mozambique as well as being responsible for managing its activities.

Article 30 of the Television Statute also establishes and provides for a fiscal council of Radio Mozambique comprising three members. The Minister of Planning and Finance appoints all of them. Article 31 of the Television Statute sets out the role of the fiscal council, and essentially these consist of overseeing the financial affairs and corporate governance of Radio Mozambique.

4.5.10 Funding of Television Mozambique

Article 38 of the Television Statute makes it clear that the sources of funding for Television Mozambique include:

- returns on its assets
- revenue generated by advertising and other commercial activities
- dividends from its investments
- donations and subsidies from the state and/or private entities, nationally or foreign.

It is noteworthy that article 38 allows for donations and so-called subsidies from both foreign and private entities. It is not clear to what extent such non-public funding takes place. The issue raises concerns regarding potential conflicts of interest.

There are no provisions in the Radio Decree for the levying of a television licence.

Article 12 of the Television Statute in the Television Decree deals with limitations on advertising flighted on Television Mozambique. In addition to the general advertising requirements set out in the Press Act, advertising on Television Mozambique is restricted in that the following is prohibited:

- advertising content that is not acknowledged as advertising
- misleading advertising in respect of the quality of the goods offered
- advertising of products that are harmful to health
- pornography and incitement of violence.

4.5.11 Television Mozambique: public or state broadcaster?

There is no doubt that Television Mozambique is a state broadcaster given that the majority of its board are appointed by members of the executive branch of government.

4.6 Regulations establishing a Government Press Office — Gabinfo

4.6.1 Introduction

There are two key regulations regarding Gabinfo:

- Decree 4/95
- Diploma 2/2005

Presidential Decree 4/95 establishes the government press office, Gabinfo. In

terms of article 1, it has a juristic personality that is, it can sue and be sued in its own right, and has administrative autonomy. In terms of article 2, it is accountable to the prime minister.

Article 7 of Decree 4/95 provides that the prime minister appoints the director of Gabinfo.

It is clear that Gabinfo operates as an arm of the executive branch of government under the auspices of the prime minister who can issue diplomas regarding Gabinfo.

4.6.2 The functions of Gabinfo

Article 3 of Decree 4/95 sets outs the functions of Gabinfo, and these include to:

- advise the prime minister in matters relating to the mass media
- facilitate interaction between the government and the mass media
- promote interactions between ministerial spokespeople and the mass media
- promote the public dissemination of information regarding governmental activities
- facilitate access to information by the mass media on government activities
- making proposals to support the mass media (public, private and community)
- exercise state oversight over public or state organs of communication.

Diploma 2/2005, issued by the prime minister, sets out additional functions of Gabinfo in three key areas, and these include:

- Information-related, article 3(1):
  - to divulge information about its activities
  - to disseminate information that promotes development
  - accredit and register foreign correspondents. The effect of this is that Gabinfo is the body that carries out the responsibilities of the ministry of information in respect of the registration and accreditation of foreign correspondents and publications provided for in the Press Act
  - ensure the registration and licensing of the mass media. The effect of this is that Gabinfo is the body that carries out the responsibilities of the Ministry of Information in respect of the registration and licensing of the mass media provided for in the Press Act.
- Mass media development-related, article 3(2):
  - to study and propose legislation and governmental initiatives to support the mass media

- to work cooperatively with the mass media to meet the development objectives of the media sector.

- State/public media sector-related, article 3(3): to exercise oversight over state/public sector mass media. The effect of this is that Gabinfo is the body that exercises regulatory oversight of the state media and not the SCMM.

4.7 Regulations governing the Bureau of Public Information

Diploma 11/89 establishes the Bureau of Public Information (BIP) in article 1.

Article 2 sets out the aims of the BIP and these include to:

- guarantee the dissemination of written and audio-visual materials that promote the image of the country

- evaluate the informational activities of Mozambican media in Mozambique both within and outside the country

- evaluate the presentation of information regarding Mozambique produced outside the country.

Article 3(1) sets out the functions of the BIP, and these include:

- to establish a centre of public access in Maputo to supply information and material about Mozambique

- to collect and prepare written and audio-visual material about Mozambique in a range of foreign languages

- to develop a foreign distribution network for the written and audio-visual material about Mozambique prepared by it and to research its impact

- to investigate the impact of content produced by the mass media within Mozambique

- to solicit necessary information from state or private entities to fulfil its functions.

Article 3(2) provides that in carrying out its functions, the BIP must develop relations with the mass media and with other entities that disseminate public information both within and outside Mozambique.

Article 5 provides that the BIP is managed by a director appointed by the minister of information.

The BIP operates as an arm of the executive branch of government under the auspices of the minister of information. However, it has separate legal personality and is financially and administratively autonomous, see article 1(1).

It is clear that the BIP essentially operates as a government public relations operation concerning information about Mozambique aimed at foreigners.

4.8 Regulations governing the Institute for Mass Media

Decree No. 1/89 (amended by Decree 59/2004) passed by the council of ministers established the Institute for Mass Media (ICS) whose main objective is to provide development-related information to people in rural areas. In terms of article 2 of the Amendment Decree, the ICS is subordinate to Gabinfo (dealt with above).

In terms of article 3 of the Amendment Decree, its functions are, essentially, to support rural community development by developing community radio and television channels. While these are styled as community broadcasters, they are obviously part of the state broadcasting machinery, as they operate under the auspices of the state.

4.9 Regulations governing journalism education

Decree 27/2008 is a decree published by the council of ministers which creates a school of journalism as an institute of higher learning. The school of journalism established in terms of Decree 27/2008 is a state-run institution funded by the government.

5 Media self-regulation

Mozambique has not established any self-regulatory structures or codes for the media.

6 Case law and the media

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

Mozambique court decisions are not published electronically or in law reports and there is no formal indexing system of previous judgments. However, court decisions are available at the court registrar's office and the Supreme Court has published its decisions in a print format. The services of a lawyer who has access to the registrar of the relevant court is usually essential when trying to obtain a copy of a particular judgment.

Notes

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42 The South African Constitution at section 8(2) expressly provides as follows: 'A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the writer and the nature of any duty imposed by the right.'

43 Article 8 of Presidential Decree 4 of 1995.

11

Namibia

1 Introduction

The Republic of Namibia is a large country with a small population of just over 2.5 million people, and approximately 55% of the population lives in an urban environment.[1] The territory, previously known as South West Africa, was administered by South Africa from the end of World War I and gained independence in 1990. Since independence, Namibia has been a constitutional democracy with the South West African People's Organization (Swapo) as the ruling party. The current media environment in Namibia, particularly in respect of broadcasting, is very different compared to the pre-independence regime. There are, for example, several broadcasters, and the public has access to a wider range of news, information and viewpoints than was previously the case. In both 2019 and 2020, Namibia ranked first among African countries on the World Press Freedom Index.[2]

Namibia is a country of contradictions. Although Namibia claims 53% of the population has access to electricity, it varies considerably across the country with 35% of people in rural areas and approximately 72% of the urban population having access to electricity.[3] Internet access is available to roughly 53% of the population, with just over 27% having a Facebook account.[4] It is probable that urban vs rural internet penetration rates will be similarly unequal. Namibia has not yet completed the Digital Terrestrial Television (DTT) conversion, having failed to meet their self-imposed 2016 analogue switch-off deadline.[5] However, DTT rollout has reached roughly 70% completion.[6] The last census relating to radio access in Namibia was performed in 2007 and, at that time, approximately 75% of households in Namibia had access to a radio.[7]

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

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

The aim of this chapter is to equip the reader with an understanding of the main laws governing the media in Namibia. Critical weaknesses and deficiencies in these laws will also be identified. The hope is to encourage media law reform in Namibia, 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
- definition of constitutional supremacy
- definition of a limitations clause
- constitutional provisions that protect the media
- constitutional provisions that might require caution from the media or might conflict with media interests
- key institutions relevant to the media are established under the Namibian Constitution
- enforcing rights under the constitution
- the 'three branches of government' and 'separation of powers'
- weaknesses in the Namibian Constitution that ought to be strengthened to protect the media

2.1 Definition of a constitution

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

The Namibian Constitution sets out the foundational rules of the Namibian state. These are the rules upon which the entire country operates. The constitution contains the underlying principles and values of the Republic of Namibia. An important constitutional provision in this regard is article 1(1), which states: 'The Republic of Namibia is hereby established as a sovereign, secular, democratic and unitary State founded upon the principles of democracy, the rule of law and justice for all.'

2.2 Definition of constitutional supremacy

Constitutional supremacy means that the constitution takes precedence over all other law in a particular country, for example, legislation or case law. It is important to ensure that a constitution has legal supremacy; if a government passed a law that violated the constitution (was not in accordance with or conflicted with a constitutional provision) such law could be challenged in a court of law and could be overturned on the ground that it is unconstitutional. The Namibian Constitution makes provision for constitutional supremacy. Article 1(6) specifically states: 'This Constitution shall be the Supreme Law of Namibia.'

2.3 Definition of a limitations clause

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 in accordance with the constitution.

The Namibian Constitution makes provision for two types of legal limitations on the exercise and protection of rights and freedoms contained in Chapter 3 of the Namibian Constitution, headed Fundamental Human Rights and Freedoms.

2.3.1 Internal limitations

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

2.3.2 Constitutional limitations

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

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

- be generally applicable — that is, the law may not single out particular individuals and deny them their rights

- not negate the essential content of the right. This is a difficult legal concept. It means that the limitation cannot do away with the entire right; its essence must remain intact. For example, the death penalty negates the essential content of the right to life — there is nothing left of the right
- specify the ascertainable extent of the limitation — that is, the law must clearly set out what the limitation is and how far it reaches
- specify the articles in the constitution that give authority for the limitation.

It is not always clear why it is necessary to have internal limitations clauses if there is a general limitations clause as well. Often, internal limitations clauses offer insight into rights which appear to be substantive but which are not very effective.

2.4 Constitutional provisions that protect the media

The Namibian Constitution contains several important articles in Chapter 3, Fundamental Human Rights and Freedoms. These articles directly protect the media, including publishers, broadcasters, journalists, editors and producers. There are several articles in other chapters of the Namibian Constitution which can be used by the media to ensure effective reporting on government activities.

2.4.1 Freedom of expression

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

This freedom applies to 'all persons'. This is important as certain rights apply only to particular groups of people, such as citizens (in respect of voting rights, for example) or children (in respect of children's rights). Freedom of expression is, therefore, a fundamental right enjoyed by everyone in Namibia, including foreigners.

The freedom is not limited to speech (oral or written) but extends to non-verbal or non-written expression. There are many examples of this, including physical expressions, such as mime or dance, photography or art.

The article specifies that the right to freedom of expression includes 'freedom of the press and other media'. This is very important for two reasons:

- it makes it clear that this right can apply to corporate entities such as media houses, newspapers or broadcasters, as well as to individuals
- it makes it clear that the right extends to both the press and other media. The article distinguishes between the press (with its connotations of the news media) and other media. Thus other media could include, for example, fashion, sports, gardening or social media. Note that all technology platforms are also protected, print media, broadcasting and the internet.

2.4.2 Administrative justice

Another important provision that protects the media is article 18, Administrative Justice, which states:

> ***Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.***

This right also requires further explanation:

An administrative body is not necessarily a state body; they are often private or quasi-private institutions, such as a press council operated by private newspapers or an independent broadcasting regulator. This constitutional requirement would therefore apply to these non-state bodies too.

This provision is important for journalists and the media because it protects them (as it does all people) from administrative officials who act unfairly (for example, maliciously or in a biased manner) and unreasonably (which means there is no rational justification for the action) and who otherwise do not comply with legal requirements. The provision gives them the right to approach a court to review administrative decisions.

2.4.3 Privacy

A third protection is contained in article 13, Privacy. Article 13(1) specifies, among other things, that:

> ***no person shall be subject to interference with the privacy of their homes, correspondence or communications save as in accordance with the law and as is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the protection of health or morals, for the prevention of disorder or crime, or for the protection of the rights and freedoms of others.***

The provisions of article 13 are problematic and do not afford the media a great deal of protection. This is because the supposed protections are rather weak. The article contains an internal limitation clause, namely, that the constitutional right to privacy can be limited by law in certain circumstances. Unfortunately, these are widely cast. In particular, it is a pity that terms such as 'national security', 'public safety', and so on are employed as they can be used to deny the media the right to report on sensitive issues. The effect of this is that the constitutional right to privacy is watered down. This article probably does not provide substantial privacy protection to the media and journalists.

2.4.4 Emergency provisions

Important protection for the media is contained in the constitutional articles dealing with states of emergency and derogations of fundamental rights. Chapter 4 contains only one article, article 26, Public Emergency, State of National Defence and Martial Law.

Article 26 contains several provisions which allow the president to:

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

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

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

2.4.5 Public access to sittings of the National Assembly

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

Disappointingly, there are exceptions, as provided in article 61(2); however, the public can be excluded only on the adoption of a motion to this effect supported by at least 66% of the members of the National Assembly.

2.4.6 State policy principles encourage public debate

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

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

The media undoubtedly plays a crucial role in educating the population to participate meaningfully in a democracy. This article could therefore be used to

encourage the growth of a culture of openness and transparency on the part of the government. It could be interpreted as requiring media-friendly policies on the part of the state to meet the informational needs of the population.

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

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

Just as there are certain rights or freedoms that protect the media, other rights or freedoms can protect individuals and institutions from the media. Journalists need to understand which provisions in the Namibian Constitution can be used against the media. There are several of these.

2.5.1 Internal limitations on freedom of expression

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

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

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

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

2.5.2 Dignity

The requirement of respect for human dignity set out in articles 8, and 8(1) specifically provides that the 'dignity of all persons shall be inviolable'. Dignity is a right

that is often raised in defamation cases because defamation usually undermines the dignity of the person being defamed. This right is frequently set up against the right to freedom of the press, requiring a balancing of constitutional rights.

2.5.3 Privacy

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

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

2.6 Key institutions relevant to the media established under the Namibian Constitution

Four important institutions concerning the media are established under the Namibian Constitution, the judiciary, the Judicial Services Commission (JSC), the Ombudsman and the Anti-Corruption Commission.

2.6.1 The judiciary

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

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

Article 78(2) specifically provides that the courts are independent and subject only to the constitution and the law. Judges are appointed and removed by the president, acting on the recommendation of the JSC. Article 78(7) assigns supervisory authority over the judiciary to the Chief Justice.

2.6.2 The Judicial Services Commission (JSC)

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

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

In terms of article 85, the JSC is made up of the Chief Justice, the Deputy Chief Justice, the Attorney-General and two members of the legal profession nominated by professional bodies. The provisions regarding the JSC are adequate as it is apparent that legal practitioners, as opposed to politicians, serve on the JSC. This is important to protect the independence of the JSC, which, in turn, is necessary to protect the independence of the judiciary.

2.6.3 The Ombudsman

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

The Ombudsman is appointed and removed by the president, acting on the recommendation of the JSC. Specific legislation has been passed governing the office and functions of the Ombudsman in the Ombudsman Act, Act 7 of 1990.

2.6.4 The Anti-Corruption Commission

In terms of article 94A(2) of the Namibian Constitution, the Anti-Corruption Commission (ACC) is established as an 'independent and impartial body'. Article 94A(1) provides that the powers and functions of the ACC in combatting corruption are to be set out in legislation. Such legislation pre-dates the reference to the ACC in the constitution as the ACC was established in terms of the Namibia Anti-Corruption Commission Act, Act 8 of 2003 (the NACCA).

According to section 2(3) of the NACCA Act, the ACC is an agency in the public service as contemplated in the Public Service Act, Act 13 of 1995. The appointment and removal process for ACC commissioners is that they are appointed by the prime minister on the recommendation of the Public Service Commission, in terms of section 18(1) of the Public Service Act.

Interestingly, the constitution was amended to provide for the ACC, which indicates a desire to give the ACC additional protections beyond those provided for in legislation. For example, abolishing the ACC would require a constitutional amendment as opposed to the repeal of the NACCA Act, for example.

The essential role of the ACC is to investigate allegations of corruption or initiate investigations in terms of section 3(a) of the NACCA Act. The ACC is significant because it, as does the media, contributes to transparency and lawful action on the part of the state.

2.7 Enforcing rights under the constitution

A right is only as effective as its enforcement. All too often rights are enshrined in documents such as a constitution or a Bill of Rights, and yet remain empty of substance because they cannot be enforced properly. There are several ways in which the Namibian Constitution addresses the issue and tries to ensure that rights are effective.

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

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

However, it is obvious that the constitution itself also envisages the right of people, including the media, to approach a body, such as the Ombudsman or the courts, to assist in the enforcement of rights.

Perhaps one of the most effective ways in which rights are protected under the constitution is by the provisions of the constitution that entrench the chapter on fundamental human rights and freedoms. If it were easy for the National Assembly to do away with the constitutional protection of rights and freedoms, then, in an overall sense, the enforcement of the rights would be weak. The rights and freedoms would be subject to the constant potential threat of the rights simply being done away with. Article 131 of the constitution, Entrenchment of Fundamental Rights and Freedoms, addresses this concern.

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

2.8 The three branches of government and separation of powers

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

2.8.1 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 Namibia, executive power is vested in the president and the Cabinet, in terms of article 27(2). In terms of article 35, the Cabinet is made up of the president, the vice-president, the prime minister, the deputy prime ministers and the ministers appointed from members of the National Assembly. The article has removed the wording that refers to the appointments being made by the president, but it seems clear that this was inadvertent and that Cabinet members do serve at the pleasure of the president.

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

- in terms of article 40(a) 'to direct, coordinate and supervise the activities of Ministries and Government departments, including parastatal enterprises'
- in terms of article 40(b) 'to initiate Bills for submission to the National Assembly'.

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

The legislature

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

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

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

The judiciary

The judicial power, as discussed above, is vested in the courts. The main role of the judiciary is to interpret the law and to adjudicate legal disputes following the law. The judiciary has no powers of enforcement.

2.8.2 Separation of powers

In a functioning democracy, it is important to divide government power between different organs of the state to guard against the centralisation of power, which may lead to abuses of power. This is known as the separation of powers doctrine. The aim, as the Namibian Constitution has done, is to separate the functions of the three branches of government, the executive, the legislature and the judiciary, so that no single branch 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.

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

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

2.9.1 Remove internal limitations on fundamental rights and freedoms

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

2.9.2 Recognise the right to information

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

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

2.9.3 Provide for an independent communications regulator and public broadcaster

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

The constitution should specifically protect their independence and ensure that

they operate in the public interest to guarantee impartiality and ensure that the Namibian public is exposed to a variety of views.

3 The media and legislation

In this section, you will learn:

- what legislation is and how it comes into being
- legislation governing the operations of print media
- legislation governing the state newspaper
- legislation governing films
- legislation governing the broadcasting media generally
- legislation governing the state broadcasting sector and the state news agency
- legislation governing broadcasting signal distribution
- legislation governing the internet
- legislation that threatens a journalist's duty to protect sources
- legislation that prohibits the publication of certain kinds of information
- legislation that specifically assists the media in performing its functions

3.1 Legislation: An introduction

3.1.1 What is legislation and how it comes into being

Legislation is a body of law consisting of acts properly passed by the legislative authority. Legislative authority in Namibia is vested primarily in the National Assembly, with legislation also being referred to the National Council on certain

occasions, in terms of the constitution. Legislation or statutes are therefore acts of the National Assembly made into law.

Article 75 of the constitution provides that all bills approved by the National Assembly must be referred to the National Council by the Speaker; the National Council must then submit a report with its recommendations to the Speaker. Should the National Council confirm a bill in its report, the Speaker must then refer the bill to the president who must approve the bill in accordance with article 56 of the constitution. After that it becomes law when published in the Government Gazette. The president may withhold consent to a bill in accordance with article 64 if he or she has concerns regarding its constitutionality and informs the Speaker of the National Assembly and the Attorney-General. The Attorney General refers the bill to court for a ruling on its constitutionality. From here, there are two different processes:

- If the court finds that the bill is constitutional, then the president must assent if it was passed by a two-thirds vote in the National Assembly in terms of article 56(2) of the constitution.
- The president can continue to withhold consent if it was passed by a vote with less than two-thirds support in the National Assembly in terms of article 56 (4) of the constitution in which case, the bill is returned for review, and if the National Assembly declines to amend or withdraw the bill, the president may continue to withhold consent in which case the bill will lapse.
- If the court finds that the bill is not constitutional, then the president is not required to assent to the bill, and it lapses.

Chapter 19 of the Namibian Constitution deals with amendments of the constitution. Article 131 of the constitution provides that no amendments can be made to Chapter 3 of the constitution in so far as it repeals, amends, diminishes or detracts from the fundamental rights and freedoms defined in the chapter.

Article 132 of the constitution sets out the requirements that must be met to repeal or amend other aspects of the constitution. These include that two-thirds of both the National Assembly and the National Council must be in favour of the amendment. Should a bill proposing an amendment or repeal of the constitution fail to secure a two-thirds majority in either the National Assembly or National Council, the president may make the bill proposing the repeal or amendment the subject of a national referendum by proclamation. Should the referendum gain two-thirds of the votes cast, the bill shall be deemed to have met the requirements of the constitution and the president shall assent to the bill, and the bill must be published as an act in the Gazette.

It is important to note that the effect of section 132 is that the president has a mechanism to appeal directly to the voters on constitutional issues even in the face of objections by the legislature.

3.1.2 The difference between a bill and an act

A bill is a draft law that is debated and usually amended by parliament during the law-making process. If a bill is passed by parliament (that is, by the National Assembly and the National Council), it becomes an act once it is signed by the president (signifying his assent to the bill) and published in the Government Gazette, in terms of article 56 of the Namibian Constitution.

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

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

3.2 Legislation governing the operations of print media

The print media in Namibia is regulated under the Newspaper and Imprint Registration Act, Act 63 of 1971 (RSA) (Newspaper Act). Unfortunately, some of the provisions of legislation place restrictions on the ability to operate as a print media publication in Namibia.

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

3.2.1 Requirements associated with registration

In terms of section 4 of the Newspaper Act, registration certificates are issued by the Minister of the Interior (note that it seems the Minister of Home Affairs now performs this function). However, the application for registration must be made in accordance with the prescribed form and on payment of the prescribed fee, to the Secretary for the Interior, in terms of section 3. The only basis for refusing to register a newspaper is set out in section 4, and this is if the name of the newspaper too closely resembles the name of another registered newspaper and could be deceiving.

Section 5 of the Newspaper Act requires changes to the registration information to be notified to the secretary.

Section 6 of the Newspaper Act provides that a copy of the first edition of the newspaper must be forwarded to the secretary. Also, if the minister makes a written request for any issue, this must be sent to the minister.

In terms of section 7, the name and address of where the newspaper is published

and the name and addresses of the proprietor, printer and publisher must be published in every issue of a registered newspaper.

In terms of section 8, the editor of a registered newspaper must be a resident.

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

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

3.2.3 Amending the legislation to strengthen the media generally

While ordinarily registration requirements are not seen as being in accordance with the right to freedom of expression, these are not problematic because there are very limited grounds for a refusal to register a newspaper other than the similarity of name or title.

3.3 Legislation governing the state newspaper

3.3.1 Establishment of the state-sponsored newspaper

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

3.3.2 Main functions

In terms of section 3 of the New Era Publication Corporation Act, New Era's main function is to provide an objective and factual information service by compiling, publishing and distributing the New Era newspaper in English as well as in different indigenous languages. Section 3(b) sets out the reporting objectives of the newspaper. These are community-related issues (particularly in rural areas), issues of national interest and government-related matters.

3.3.3 Board appointments

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

3.3.4 Funding

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

3.3.5 Is the newspaper independent?

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

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

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

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

If the government wanted to ensure the development of community-focused media, it could encourage this by, for example, funding community media initiatives or establishing a genuine public broadcasting service.

3.4 Legislation governing films

The Namibia Film Commission Act, Act 6 of 2000 (Film Act) provides for the establishment of the Namibia Film Commission to regulate activities relating to film production, and the development and promotion of the film industry in Namibia.

3.4.1 Establishment of the Namibia Film Commission (NFC)

Section 2 of the Film Act establishes the NFC.

3.4.2 The objects of the NFC

Section 3 provides that the objects of the NFC are to:

- support, encourage and promote the development of film production, the film industry and film marketing in Namibia
- promote Namibia as a location for film production on the international market
- attract film producers to carry out film productions in Namibia
- encourage film producers to employ or make use of Namibian personnel and facilities for film production

- establish relationships with any local or international person, which may contribute to the development and promotion of the film industry in Namibia.

3.4.3 Powers duties and functions of the NFC

Subject to the provisions of the Film Act, the NFC is empowered under section 4 of the Film Act to administer the Film and Video Development Fund (FVD Fund) established in Part II of the Film Act (discussed below) and to authorise the production of films by foreigners in accordance with section 20 of the Film Act. Section 20 prohibits non-Namibian nationals from producing a film (defined as including television series and interactive media) without authorisation by the NFC. Note that the definition of film is so wide that it could include, for example, a video taken by a foreign tourist on holiday. This is unworkable, and it seems clear that the Film Act was intended to regulate only commercial film productions. Note that the definition of film specifically excludes reports on the news or current affairs.

3.4.4 Composition of the NFC

Section 5 of the Film Act provides that the NFC must comprise five members who are appointed by the minister responsible for broadcasting services, these include:

- one person who is a staff member of the ministry responsible for the administration of broadcasting services
- one person nominated by the Minister of Home Affairs
- one person nominated by the Minister of Environment and Tourism
- two people nominated by a body recognised by the minister as representing film producers.

One-third of the people appointed to be members of the NFC must be female.

A person may be disqualified from being appointed to the NFC if he or she:

- is not a citizen or permanent resident in Namibia
- is a member of parliament or local or regional authority
- has been convicted of an offence in any country and sentenced to a term of imprisonment without the option of a fine
- is an unrehabilitated insolvent.

3.4.5 The Film and Video Development Fund (FVD Fund)

Section 14 of the Film Act establishes the FVD Fund and provides that it will be credited with:

- sums of money appropriated by parliament

- sums of money accrued from the fund from any other source, including donations or grants made for the benefit of the fund
- prescribed fees received by the NFC for granting, renewing or transferring any authorisation in terms of the Film Act
- any amounts of money received in respect of the repayment of a loan granted from the FVD Fund
- interest derived from investments made by the FVD Fund.

All money available in the FVD Fund must be utilised to:

- establish a film industry in Namibia
- financially assist Namibian film producers
- develop and distribute Namibian film, video and television production projects.

3.4.6 Making regulations relating to film

Section 28 of the Film Act empowers the minister responsible for broadcasting, in consultation with the NFC, to make regulations relating to:

- the terms and conditions subject to which authorisations may be issued, renewed or transferred
- the fees payable for the application, issue, transfer or renewal of an authorisation
- the administration of the FVD Fund
- achieving the aims of the Film Act.

3.4.7 Enforcement of the Film Act

In terms of section 31 of the Film Act, any person who contravenes or fails to comply with:

- section 10 of the Film Act, which provides a person who comes into any secret knowledge during the exercise of his or her duties is required to preserve the secrecy of that knowledge except in so far as any such communication is made in the ordinary course of the exercise of the performance of his or her duties under the act or any other law, or is required by order of a competent court or is effected with prior permission in writing of the NFC or person concerned
- section 24(1) of the Film Act, which provides that any person required to hold an authorisation must when asked by a person authorised to request it, present that authorisation for inspection;
- section 20(1) of the Film Act, which provides that no person who is not a Namibian citizen, a company registered in Namibia, or a lawfully admitted

permanent resident in Namibia shall carry out any film production in Namibia, except with the written authorisation of the NFC granted on an application made to it by the secretary in such form and manner as the NFC may determine;

- section 22(1) of the Film Act, which provides a holder of an authorisation may transfer that authority to another person without the written approval of the NFC upon application made in writing and upon payment of a subscribed fee;

commits an offence, the penalty for which, on conviction, is a fine, imprisonment or both.

3.5 Legislation governing the broadcasting media generally

3.5.1 Statutes that regulate broadcasting

Broadcasting in Namibia is regulated in terms of the Communications Act, Act 8 of 2009 which came into force in 2011.

3.5.2 Establishment of the Communications Regulatory Authority of Namibia (CRAN)

Section 4 of the Communications Act establishes the Communications Regulatory Authority of Namibia (CRAN).

3.5.3 Composition of Members of CRAN

In terms of section 8 of the Communications Act, CRAN is managed by a board of five members unless a different number is determined in accordance with section 14(1)(a) of the State-Owned Enterprises Governance Act, Act 2 of 2006 (SOE Governance Act), which limits the number of board members to between five and seven members. The Board consists of a Chairperson, Vice-Chairperson, and other members who, in accordance with section 9 of the Communications Act, must represent a cross-section of the population of Namibia, taking into account gender qualifications, expertise and experience in the fields of information and communication policy and technology, radio services, law, economics, business practice and finance.

CRAN Board members are appointed in terms of the SOE Governance Act and for terms also determined by the SOE Governance Act, failing which determination, a term is three years, subject to reappointment in accordance with section 11 of the Communications Act. In terms of section 15(5) of the SOE Governance Act, the minister responsible for communications appoints the members of CRAN on the recommendation of the minister responsible for public enterprises.

A person may be disqualified from becoming or remaining a member of the board in terms of section 10 of the Communications Act if he or she:

- is not a citizen or permanent resident of Namibia

- is not resident in Namibia
- is a member of parliament, a regional council, or local authority
- manages, is employed by, or has any financial interest in any provider of telecommunications services or any business having a financial interest in any product or industry that is or may be regulated by CRAN
- has been convicted of an offence, other than a political offence committed before the date of independence of Namibia, in any country and sentenced to imprisonment without the option of a fine
- has any financial or other interest likely to prejudicially affect the performance of his or her duties as a member of the board
- has been declared mentally ill under any law relating to mental health
- is an unrehabilitated insolvent.

A member of the board vacates his or her office in terms of section 12 of the Communications Act if he or she:

- resigns by giving not less than one month's notice to the minister responsible for communications
- has been absent from three consecutive meetings of the board without leave of the board
- has become subject to any disqualification referred to in section 10
- the minister has given the member notice of intent to dismiss the member from office and provided the member with the opportunity to be heard.

The minister may remove any member from office if he or she is satisfied that the member:

- is either physically or mentally incapable of acting as a member of the board
- is guilty of conduct which renders him or her unable or unfit to discharge the functions of the office of a member of the board efficiently
- has taken part in a discussion of, or has voted in connection with, any matter in which he or she has an interest
- is guilty of conduct prejudicial to the objectives of CRAN.

Section 13 of the Communications Act provides that the minister must appoint the Chairperson and Vice-Chairperson of the Board.

In terms of section 20 of the Communications Act, the Board must appoint a suitably qualified person as the Chief Executive Officer of CRAN in accordance with section 22(3) of the SOE Governance Act. The person selected to be CEO of CRAN

may not be selected if he or she is disqualified from being a member of the board in terms of section 10 of the Communications Act.

3.5.4 Funding for CRAN

Section 22(1) of the Communications Act outlines how CRAN is funded. Funding methods include:

- an initial amount appropriated by parliament
- fees received concerning the granting, renewal or transfer of any licence or authorisation in terms of the Communications Act or any other law
- fees received concerning the regulation and control of the radio frequency spectrum
- fees and levies prescribed under the Communications Act or any other law for the benefit of CRAN
- revenue received for services provided in the course of its activities
- fines and other monetary sanctions imposed by CRAN in accordance with the provisions of the Communications Act or any other law
- interest derived from investments
- monies accrued to CRAN from any other source, including donations or grants made for the benefit of CRAN.

3.5.5 Main functions of CRAN

Section 5 of the Communications Act provides that the object of CRAN is 'to regulate the communications industry [defined to mean electronic communication and the postal service] in Namibia in accordance with the provisions of the Communications Act'.

3.5.6 Requirements for a broadcasting licence

Section 83(1) of the Communications Act prohibits any person from broadcasting or operating a broadcasting service without a broadcasting licence required under the Communications Act.

In terms of section 83(2) of the Communications Act, a broadcasting licence is also required for any broadcast transmitted from outside Namibia if such broadcast is intended to be received by persons who subscribe to receive that service. Any person in question who promotes such a service in Namibia or who receives payment as consideration for access to such service is deemed to be operating the service in question, in terms of section 83(3).

Section 114(1) of the Communications Act makes it an offence to provide a broadcasting service without a licence, the penalty for which is a fine or imprisonment.

Section 114(2) of the Communications Act makes it an offence to provide a broadcasting service outside the scope of a licensee's licence, the penalty for which is a fine or imprisonment.

3.5.7 Broadcasting licence categories in Namibia

In terms of section 84 of the Communications Act, CRAN is empowered to prescribe the categories of broadcasting licences. It should be noted that, when determining the different categories of broadcasting licences, the following distinguishing characteristics must be taken into account by CRAN when making licence category regulations:

- the method of distribution used
- whether scarce resources such as portions of the radio spectrum are used by the service
- the extent to which the licensee has editorial control over the contents of channels or programmes forming part of the services concerned and whether the provider concerned is a provider contemplated in section 83(2)
- whether the services concerned are community, commercial or public broadcasting services.

It clear that the Communications Act envisages the standard three-tier broadcasting sector of public, commercial and community broadcasting services in accordance with best practice.

3.5.8 Licensing regime for broadcasters in Namibia

CRAN is authorised under section 85(1) of the Communications Act, to issue a broadcasting licence in the appropriate category and may determine any prescribed fees for those licences.

In terms of section 85(2), the persons to whom CRAN may issue a broadcasting licence include Namibian citizens and juristic person of which at least 51% of the shareholding is beneficially owned by Namibian citizens and which is not controlled by persons who are not Namibian citizens, and has its principal place of business or registered office in Namibia.

In an important departure from the essential regulatory regime provided for in the Communications Act, section 85(3) empowers the minister responsible for communications to authorise the issuing of a broadcasting licence to a juristic person other than those mentioned in section 85(2). This undermines the ability of CRAN to regulate the communications sector as a whole.

In terms of section 85(4) of the Communications Act, every application for a broadcasting licence must be made in the prescribed form and in accordance with the prescribed requirements.

Sections 85(6) and (7) of the Communications Act require a public notice and comment procedure in respect of applications for a broadcasting licence, which encourages transparency in the licensing process. CRAN is required to take any opposition into account when considering the application.

Section 85(8) of the Communications Act provides that, when considering an application for the issue of a broadcasting licence, CRAN must take into account:

- the character of the applicant, or if the applicant is a body corporate, the character of its directors
- the adequacy of the expertise, experience and financial resources available to the applicant
- the desirability or otherwise of allowing any person or association of persons to have control of or a substantial interest in:
  - more than one broadcasting service
  - more than one radio station and one television station and one registered newspaper with a common coverage and distribution area or significantly overlapping coverage and distribution areas
- whether or not the applicant is likely to comply with such technical broadcasting standards as CRAN may prescribe
- whether or not the conditions of a broadcasting license will unjustly benefit one licensee above another
- the allocation of spectrum resources in such a manner as to ensure the widest possible diversity of programming and the optimal utilisation of such resources provided that the priority may be given to broadcasters transmitting the maximum number of hours per day
- the reservation of radio frequency spectrum for future use
- the desirability of giving priority to community-based broadcasts.

Section 85(9) of the Communications Act requires CRAN to give notice in the Government Gazette when it grants a licence application.

It should be noted that section 85(10) of the Communications Act provides that, in accordance with article 18 of the Namibian Constitution, the decision of CRAN to grant or refuse an application for the issue of a broadcasting licence is final.

Section 86 of the Communications Act provides that CRAN may impose such conditions on broadcasting licenses as are appropriate for the category of the broadcasting license issued to the licensee concerned. The conditions may include:

- the frequencies that may be used and the power limitations of transmitters used in connection with the broadcasting service, as well as the transmitter location

- the broadcasting of reports, announcements, news, or other information which is required to be broadcast in the public interest.

Section 86(3) provides that CRAN may, in respect of any particular license, amend any of the conditions, or add additional conditions, to a broadcasting licence:

- if CRAN believes that it is in the interest of orderly spectrum management
- to give effect to any international treaty concerning broadcasting to which Namibia is a party
- at the request of the licensee.

The licensee must be provided with the opportunity to make representation to CRAN relating to any amendment that CRAN chooses to impose on a licensee, in cases where the licensee has not requested the amendment.

Any decision made by CRAN is subject to article 18 of the Namibian Constitution.

Section 87 of the Communication Act provides that, broadcasting licences are issued for the following terms:

- radio broadcasting licences — five years
- television broadcasting — ten years
- any other broadcasting licence — for a period determined by CRAN.

CRAN may renew a licence for a further period in accordance with the above. An Application for the renewal of a licence must be made not earlier than six months and not later than 60 days before the expiry of the existing licence.

When considering an application for renewal of a broadcasting licence, CRAN may require any new additional information it deems necessary to make a finding concerning the renewal. CRAN must renew a licence unless, in its opinion, the licensee has contravened the Communications Act or a condition of the licence or the renewal of the licence will not be in accordance with the object of the Communications Act. If CRAN is unable to come to a decision pending the renewal of a licence by the expiration of the previous licence period, the licence continues pending the decision by CRAN.

A broadcasting licence will be considered to have lapsed after the expiry of a period which may be prescribed if no broadcasts are made under that licence.

Section 88 of the Communications Act provides that, should any prescribed fees not be paid by the licensee on the date that such fees are due, and remain unpaid after the expiry of seven days after the written notice by CRAN to the licensee, CRAN may declare the license to be forfeited.

Section 91 of the Communications Act provides that every licensee must submit to CRAN statements audited by a person registered as an accountant and auditor in

terms of the Public Accountants' and Auditors' Act within 60 days after the end of the licensee's financial year.

3.5.9 Broadcasting Code

Section 89(1) of the Communications Act provides that CRAN must develop a Broadcasting Code that must be followed by broadcasting licensees. Section 89(2) provides that the broadcasting code may:

- prescribe duties relating to the coverage of news and current affairs to ensure that the news coverage by broadcasters is fair, objective and impartial
- prescribe such duties as may be required to comply with generally accepted journalistic ethics
- regulate the broadcasts of any matter having the purpose of promoting the interests of any political party (whether it is in the form of a paid advertisement or otherwise)
- prescribe special duties for broadcasters while campaigns are being conducted for elections or referendums as will promote democracy and the fair conducting of such elections or referendums
- regulate the broadcasting of matters of a sexual or violent nature containing offensive or strong language or that is offensive or degrading to any portion of the Namibian public or prohibit such broadcasts under prescribed circumstances or during prescribed times or prescribe other conditions relating to such broadcasts or, subject to the Namibian Constitution, prohibit the broadcast of a prescribed class of such matter under the prescribed circumstances
- prescribe the duty to broadcast a prescribed class of public announcements free of charge
- prescribe the circumstances under which corrections or counter-versions must be broadcast when factually incorrect or defamatory or injurious material or matter whose broadcast is prohibited by the code, has been broadcast
- require the broadcast of prescribed types of content produced in Namibia
- prescribe the amount and nature of advertisements that may be broadcast and prohibit the broadcast of advertisements that are degrading or offensive
- prescribe any duty that will improve the quality of the service provided by broadcasters.

Section 89(3) provides that, when the Broadcasting Code is prescribed, CRAN must:

- ensure that the duties imposed on a specific category of broadcasting service are appropriate for the services in question

- ensure that duties are not imposed that will make some class of service uneconomical or impractical
- ensure that community broadcasting is promoted
- impose duties that will, as far as practical, promote Namibian creativity.

In terms of section 89(4), if CRAN believes that a licensee belongs to an organisation that enforces the compliance of its members with broadcasting standards that comply with the requirements of the Broadcasting Code, it may with the concurrence of the minister responsible for communications, decide that the licensee concerned does not require regulation by a broadcasting code. It should be noted that section 89 (5) provides that if CRAN determines that a large percentage of licensees already follow their own Broadcasting Code, and it meets the requirements of the Broadcasting Code developed by CRAN, CRAN may, with the concurrence of the minister responsible for communications decide that the making of a Broadcasting Code is no longer worthwhile due to the small number of licensees that will be subject to the broadcasting code. Section 89(6) provides that CRAN may still, following a rule-making procedure, prescribe in respect of all, or a specified class of licensees, any matter which may be prescribed in the Broadcasting Code.

Section 89(4) is an important provision because it envisages self-regulation of broadcasting content. This follows the South African model.

3.5.10 Making broadcasting regulations

Broadcasting regulations (as with all regulations made in terms of the Communications Act) are made by the CRAN.

3.5.11 Is the CRAN an independent regulator?

Despite section 2 of the Communications Act which refers to an 'independent regulatory authority', CRAN does not meet the requirements of an independent regulator, which can be seen from several factors:

- The minister responsible for communications appoints the Board after recommendations have been made by the public service commission, so there is no involvement by the public or by a multi-party body such a parliament.
- Nowhere does the Communications Act specify to whom CRAN is accountable. Concerning an independent broadcasting regulator, such accountability statements are common, and the governing legislation of many regulators will state that the regulator is accountable to the public (via parliament) and acts in the public interest.
- The minister may authorise the issuing of a broadcasting licence even in cases where the applicant does not meet the requirements set out in the Communications Act. This undermines the authority of CRAN.

3.5.12 Amending the legislation to strengthen the media generally

There are several weaknesses in the Communications Act which ought to be strengthened in the interests of a free and independent media, and of the public more generally:

- The concept of regulating 'in the public interest' needs to be strengthened in the act, and the direct involvement of the executive branch of government, namely the minister, in the appointment and affairs of CRAN and the licensing process needs to be diminished. This is in line with international best practice standards.
- The public ought to be involved in making CRAN member nominations.
- There ought to be a public interview process for short-listed candidates.
- Parliament (as a multi-party body) ought to make binding recommendations on CRAN appointments to the minister.
- The activities of the Namibian Broadcasting Corporation (NBC) should fall under the jurisdiction of CRAN, to ensure that the NBC is regulated in the public interest (this issue is dealt with in more detail below, Key legislative provisions governing the state news agency and the state broadcaster).

3.6 The Namibian Press Agency (Nampa)

Establishment of Nampa

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

Nampa's main mandate

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

Appointment of the Nampa board

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

Funding for Nampa

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

Given that Nampa is essentially government-funded and controlled, it appears that Nampa operates as a government communication and information service.

3.7 The Namibian Broadcasting Corporation (NBC)

Establishment of the NBC

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

3.7.1 The NBC's mandate

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

- provide a broadcasting service to inform and entertain the public
- contribute to the education and unity of the nation and peace in Namibia
- provide and disseminate information relevant to the socio-economic development of Namibia
- promote the use and understanding of English.

3.7.2 Appointment of the NBC board

The NBC is controlled by a board comprising between six and 11 members, who are appointed by the minister responsible for broadcasting services, in terms of section 6(1) of the Namibian Broadcasting Act.

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

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

3.7.3 Funding for the NBC

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

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

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

3.7.4 NBC: public or state broadcaster?

Unfortunately, it appears that the NBC does not meet certain basic standards for public broadcasting. It is evident that the NBC is not sufficiently independent from government and in particular, is not sufficiently independent from the minister responsible for broadcasting. This can be seen in several important areas.

The minister appoints the entire board. While section 6(2) of the act specifies some objective (and good) criteria for the board as a whole, including knowledge or experience in the administration or management of public affairs and the political, socio-economic and communication field, the minister has sole discretion over board appointments.

The minister also plays a role in several of the NBC's functions, as is seen from the provisions of section 4 of the act, some of which require the minister's permission before the NBC can engage in certain activities, including erecting foreign broadcasting installations and entering into programming supply agreements.

Nowhere does the act specify that the NBC is editorially independent and free to express its views.

Nowhere does the act specify to whom the board is accountable. Such accountability statements are common in a public broadcaster, and the governing legislation of many public broadcasters will state that the corporation is accountable to the public and acts in the public interest.

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

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

- the public ought to be involved in making board nominations

- there ought to be a public interview process for short-listed candidates
- parliament (which is a multi-party body) ought to make recommendations on board appointments to the president and not to a minister
- the NBC's mandate ought to be expanded to develop measurable goals for broadcasting in the public interest.

3.8 Legislation governing broadcasting signal distribution

3.8.1 Regulation of Radio Spectrum

Section 99 of the Communications Act empowers CRAN to control, plan, administer, manage and license the Radio Spectrum in Namibia. In doing so, CRAN must comply with the standards and requirements of the International Telecommunication Union and its Radio Regulations as agreed to or adopted by Namibia. CRAN must honour current and future commitments of Namibia in terms of international agreements and standards in respect of radio communications and telecommunication matters.

Radio frequency plan

Section 100 of the Communications Act provides that CRAN may prescribe a frequency band plan in respect of any part of the radio frequency spectrum. A frequency band plan must:

- define how the radio spectrum must be used
- ensure that the radio frequency spectrum is utilised and managed in an orderly, efficient and effective manner
- reduce congestion in the use of frequencies and protect frequency users from any interference or other inability to make use of the frequencies assigned to them
- avoid obstacles to the introduction of new technologies and telecommunication services
- provide opportunities for the introduction of the widest range of telecommunication services and the maximum number of users thereof as is practically feasible.

In developing a band plan, CRAN must have a public notice and comment procedure to ensure the views of interested parties are taken into account.

Spectrum licences, certificates and authorities

Section 101(1) of the Communications Act prohibits any person from:

- transmitting any signal by radio waves;

- using radio apparatus to receive signals transmitted by radio waves;
- instructing, permitting or failing to prohibit any person in his or her employ or under his or her control from transmitting or using radio apparatus to receive signals transmitted by radio waves,

except in accordance with a licence or authorisation issued by CRAN.

Section 101(6) provides that a spectrum licence is required in addition to any broadcasting where the broadcasting service entails the use of radio waves. In terms of section 101(7), an application for a broadcasting licence must be accompanied by an application for the necessary spectrum required to render the service concerned.

3.9 Legislation governing the internet

No legislative provisions regulate the internet except for section 103 of the Communications Act which establishes the .na Domain Name Association (Name Association) as a juristic person with the object of obtaining all rights necessary for administering the .na namespace. The Name Association will come into being on a date to be determined by the minister responsible for communications. This has yet to happen, and so the Name Association is not yet operational, and the .na domain name is being administered by the Namibian Network Information Centre.

Note that section 112 provides that CRAN, with the approval of the minister responsible for communications, may make regulations relating to the management of domain names in Namibia which are to be implemented by the Name Association.

3.10 Legislation that undermines a journalist's duty to protect his or her sources

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

3.10.1 Criminal Procedure Act, Act 51 of 1977

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

Section 205 of the CPA essentially empowers a presiding officer to call any person who is likely to give material or relevant information as to any alleged offence to come before him or her and to be examined by the public prosecutor, at the request of a public prosecutor. Thus, if a public prosecutor suspects that a journalist knows something about a crime, such journalist might be ordered, in terms of section 205 of the CPA, to reveal his or her sources of information relating to that crime.

3.10.2 Security Commission Act, Act 18 of 2001

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

Section 5(6) of the Security Commission Act empowers the commission to conduct an enquiry into any matter relating to its functions and, at such enquiry, the Commission is empowered, in terms of section 5(6)(a), to require any person who, in its opinion, can provide information relevant to the enquiry to appear before the Commission and to give evidence.

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

3.10.3 Prevention of Organised Crime Act, Act 29 of 2004

In terms of section 87(1) of the Prevention of Organised Crime Act, an authorised member of the police may request any person employed in, or associated with, an agency, office, ministry or statutory body to furnish him or her with all information which may be required for any investigation. If a person requested for information by an authorised person fails to provide the information requested, the Prosecutor-General may request a judge, divisional magistrate or any other magistrate, for an order compelling the person to appear before the judge or magistrate for examination by the Prosecutor-General, in terms of section 87(2).

Journalists should be aware of this as it could be used to force a journalist working for the state broadcaster, state newspaper or the state news agency to reveal his or her sources.

It is important to note, however, that whether requiring a journalist to reveal a source is an unconstitutional violation of the right to freedom of expression will depend on the particular circumstances in each case. 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.

3.11 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 and the media's right to publish information. These statutes are targeted and prohibit the publication of certain kinds of information, including:

- prohibition on the publication of a minor's identity in legal proceedings
- prohibition on the publication of certain information relating to criminal proceedings
- prohibition on the publication of identities involved in protection order proceedings
- prohibition on the publication of information relating to defence, security and prisons
- prohibition on the publication of obscene photographic matter
- prohibition on the publication of advertising on roadsides
- prohibition on the disclosure of Bank of Namibia information
- prohibition on the publication of racist publications.

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

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

General Law Amendment Ordinance 22 of 1958

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

Section 1(1) of the ordinance prohibits the publication of the name, address, school, place of employment or any other information likely to reveal the identity of any person who is under 18 years and who is a party to any civil proceedings or is a witness in any legal proceedings, unless the judge or magistrate in question has agreed, in writing after consultation with the person's parent or guardian. A violation of section 1(1) is an offence, and the penalty is a fine, imprisonment or both.

Criminal Procedure Act, Act 51 of 1977

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

Section 154(3) of the CPA prohibits the publication of the identity of an accused person or a witness in criminal proceedings if that accused person or witness is under 18 years unless the court rules that such publication would be just and equitable. In terms of section 154(5), such publication is an offence with a penalty of a fine, imprisonment or both.

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

The Criminal Procedure Act, Act 51 of 1977, at section 154, read with section 153, sets out circumstances in which a court may direct that no information relating to certain criminal proceedings may be published. These circumstances include:

- in the interests of the security of the state or of good order, public morals or the administration of justice
- in extortion proceedings
- where the identity of the complainant in the case of a sexual offence might be revealed, unless the judge authorises such publication as being just and equitable, or where the complainant is 18 or older and consents to the publication
- the publication of the identity of a complainant concerning a charge involving extortion or sexual offences from the commission of the offence until the accused has pleaded to the charge.

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

Importantly, section 154(6) of the CPA specifically states that, to the extent that such prohibitions upon publication authorise interference with a person's freedom to publish, this is done in terms of article 21(2) of the Namibian Constitution. This clause was dealt with in greater detail at the beginning of the chapter; it is the so-called internal limitation to, among others, the right to freedom of expression.

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

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

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

Defence Act, Act 1 of 2002

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

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

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

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

Protection of Information Act, Act 84 of 1982

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

Correctional Services Act, Act 9 of 2012, The Correctional Services Act, is a Namibian statute regulating prison matters. Section 82 of the Correctional Services Act makes it an offence for anyone to, without the written permission of the Commissioner-General:

- take a photograph or make a film, video, sketch or drawing of a correctional facility
- or cause to be published a photograph, film, video, sketch or drawing of a correctional facility Take a photograph or make a film, video, sketch or drawing of a prisoner or group of prisoners, whether inside or outside of correctional facility
- publish or cause to be published a photograph, film, video, sketch or drawing of an offender or offenders, whether inside or outside of a correctional facility. It is also an offence to publish false information concerning an offender's

behaviour or experience in a correctional facility, knowing the same to be false or without taking reasonable steps to verify such information.

3.11.5 Prohibition on the publication of obscene photographic matter

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

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

3.11.6 Prohibition on the publication of advertising on roadsides

The Advertising on Roads and Ribbon Development Ordinance, 30 of 1960, is an ordinance that was passed by the Legislative Assembly for the Territory of South West Africa and which remains in force. Its provisions are probably of more interest to media owners than to media practitioners, but it is important to note that this act allows for local government to regulate certain forms of advertising, such as billboards, on roadsides.

3.11.7 Prohibition on the disclosure of Bank of Namibia information

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

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

3.11.8 Prohibition on the publication of racist publications

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

In terms of section 10 of the act, no one can publish an advertisement that indicates an intention to discriminate concerning public amenities, provision of goods and services, selling or letting immovable property (houses, flats, and so on), educational institutions, medical institutions, employment and the formation of associations and religious services.

In terms of section 11 of the act, no one can publish an article which intends to:

- threaten or insult any person or group on racial grounds

- incite hatred between different racial groups
- disseminate ideas based on racial superiority.

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

Section 15, in the parts relevant to the media, provides that where the person convicted of an offence under the act also holds a licence, such as a broadcasting licence, the court may enforce additional penalties, including a declaration that imposes conditions upon, suspends or even cancels such a licence.

In terms of section 16, in deciding in respect of an offence, a court may make a compensatory damages award in favour of the person who originally complained about the conduct. Thus, a media outlet might find itself liable for these damages.

3.12 Legislation that specifically assists the media in performing its functions

Namibia passed the Whistleblower Protection Act, Act 10 of 2017 to make provision for both private and public sector employees to disclose information regarding unlawful or irregular conduct by their employers, or other employees, and to be protected concerning such disclosures.

Section 6(1) read with section 7 of the Whistleblower Protection Act establishes the Whistleblower Protection Office (WPO) as an independent office to investigate, consider and take the appropriate action regarding whistleblower disclosures.

Part 3 of the Whistleblower Protection Act establishes the Whistleblower Protection Advisory Committee (WPAC) to advise both the minister responsible for justice on matters relating to whistleblower protection in Namibia and the WPO on the exercise of its powers and performance of its functions.

Section 3 of the Whistleblower Protection Act provides that disclosures may be made to authorised persons, including:

- the commissioner or a staff member of the WPO
- an employee's supervisor or another senior member of the employer who has been designated by that employer to receive disclosures
- an ethics and integrity officer who is appointed by the minister responsible for justice
- a person, institution or entity declared by the minister responsible for justice to be an authorised person

- to the Ombudsman of Namibia where the disclosure relates to the WPO itself.

In terms of section 36 of the Whistleblower Protection Act, a person may make a public disclosure (for example to the media) in circumstances where there is insufficient time to make the disclosure to an authorised person, and the whistleblower has reasonable grounds to believe that the subject matter of the disclosure is an act or omission that constitutes:

- a serious offence under any law of Namibia
- imminent risk of substantial and specific danger to the life, health and safety of persons, or the environment.

Before making a disclosure public, the person who receives the disclosure must take all reasonable steps to ensure that the information received is true and find out the identity of the person making the disclosure.

It should be noted that the public disclosure of any information that is prohibited or restricted by any law in Namibia in the interest of national security, national defence, the prevention and detection of crime, the administration of justice or the sovereignty and integrity of Namibia is not protected under the Whistleblower Protection Act.

Section 47 of the Whistleblower Protection Act, protects whistleblowers from liability in civil or criminal proceedings or disciplinary action for disclosures made under this act unless the whistleblower knew the information was false and the disclosure is determined to have been in bad faith. Further, section 78(3) empowers the Minister of Justice to make any contravention of a provision of the Whistleblower Protection Act an offence carrying a penalty of a fine or imprisonment or both.

4 Regulations affecting the broadcast media

In this section, you will learn:

- ▷ definition of regulations
- ▷ regulations governing broadcasting licences
- ▷ regulations governing broadcasting quality
- ▷ regulations governing broadcasting content

4.1 Definition of regulations

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

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

4.2 Regulations governing broadcasting licences

4.2.1 Broadcasting licence categories

The Board of CRAN has passed regulations setting out Broadcasting and Telecommunications Service Licence Categories in General Notice 124, published in the Government Gazette No 4714 dated 18 May 2011 (Licence Categories Regulations), which have been subsequently amended. Section 4 of the Licence Categories Regulations distinguishes between the following categories of licensed services:

- a commercial broadcasting service: defined as a broadcasting service operating for profit
- a community broadcasting service: defined as a service that serves a particular community and is wholly owned by a non-profit association registered in terms of section 21 of the Companies Act, Act 28 of 2004, or which operates under a non-profit constitution
- public broadcasting service: defined as a broadcasting service provided by the Namibian Broadcasting Corporation.

4.2.2 Licence procedures

CRAN has passed regulations for the procedures to be followed by applicants wishing to apply for a broadcasting licence. The Regulations regarding Licensing Procedures for Telecommunications and Broadcasting Service Licences and Spectrum Use Licences (General Notice 272, published in the Government Gazette 4785 dated 29 August 2011) (Licensing Procedures Regulations).

Annexure A of the Licensing Procedures Regulations is the application form for a broadcasting licence.

The Licensing Procedures Regulations also contain provisions regarding applying for radio frequency spectrum as well as provisions relating to the transfer, amendment renewal and withdrawal (which includes a surrender of a licence) of broadcasting and spectrum licences.

Key features of the form include providing information regarding foreign share-

holding and a statement about the nature of the broadcasting service the applicant intends to provide.

Section 11 of the Licensing Procedures Regulations provides that notice of applications made in terms of the Licensing Procedures Regulations must be published by CRAN, and it must invite written representations thereon.

After considering any application made in terms of these regulations and any written and oral submissions, CRAN will either approve or deny the application and issue the appropriate licence, transfer, amendment renewal or withdrawal.

Section 11 of the Licensing Procedures Regulations provides that all decisions made in terms of the regulations will be communicated to the applicants and other relevant parties in writing, together with reasons, and must be published in the Government Gazette.

4.2.3 Licence conditions

Licence conditions for broadcasting licences are regulated in terms of the Communications Act by regulations passed by CRAN. CRAN has passed the Regulations regarding Licence Conditions for Broadcasting Service Licences (Notice 309 published in Government Gazette No 5037on 13 September 2012) Licence Conditions Regulations.

These licence conditions regulations apply to all broadcasting licences except the Namibian Broadcasting Corporation (NBC). Section 4 of the licence condition regulations provide that all licences issued with a broadcasting licence in accordance with Annexure A, are duly authorised to provide broadcasting services. The licence condition regulations entitle licence broadcasters to provide their own signal distribution, provided the licensees obtain a spectrum user licence and set out the licence terms, five years for a radio licence and ten years for a television licence. Licensees are required to renew their licences before the expiry of the licence.

If a licensee fails to commence providing a broadcasting service within six months from the date of issue of the licence, the licence will automatically expire.

4.3 Key regulations governing broadcasting quality

Broadcasting quality in Namibia is governed by the Regulations Prescribing Quality of Service Standards applicable to Service Licences, published in Notice 152, Government Gazette No 5713, dated 21 April 2015 (the Quality Regulations).

Section 4 of the Quality Regulations provides that licensees must maintain quality of service standards in accordance with the requirements contained in Appendix A of the Quality Regulations which deal with service quality, billing, customer service and network quality.

Section 8 of the Quality Regulations makes it an offence for any licensee to fail to maintain the minimum quality of service standards set out in these regulations or

to submit the reports required to be submitted by section 5 of these regulations. Where a licensee contravenes one or more of these regulations or the quality of service standards, CRAN is empowered to take several actions, including requiring a licensee to implement a remedial plan, ordering a licensee to compensate consumers for a poorer quality of service or imposing penalties.

4.4 Key regulations governing broadcasting content

Although CRAN published draft regulations containing a code of conduct concerning broadcasting content, these were never finalised, and so there are no regulations governing broadcasting content at this time. It appears that, in practice, Namibian broadcasters self-regulate content issues in terms of a self-regulatory code which is dealt with in the next section.

5 Media self-regulation

Self-regulation of the media, including print, broadcast and certain online media, is done by the Media Ombudsman together with the Editor's Forum of Namibia and is intended to be in keeping with international best practice principles on media self-regulation. A self-regulatory code of ethics and conduct in Namibia has been introduced by the Editor's Forum of Namibia (EFN) to regulate the media environment better and is enforced by the Media Ombudsman.

5.1 The self-regulatory code of ethics and conduct

The EFN Code of Ethics and Conduct for Namibian Print, Broadcast and Online Media (the Code) is set out in four parts which are summarised below:

5.1.1 Media-generated content and activities applicable to all print, broadcast and online media

Gathering and reporting of news

- The media shall take care to report news truthfully, accurately and fairly.
- News shall be presented in context and a balanced manner, without any intentional or negligent departure from the facts whether by distortion, exaggeration or misrepresentation, material omissions, or summarisation.
- Only what may reasonably be true, having regard to the sources of the news, may be presented as fact, and such facts shall be published fairly with reasonable regard to context and importance. Where a report is not based on facts or is founded on opinion, allegation, rumour or supposition, it shall be presented in such manner as to indicate this clearly.

- News should be obtained legally, honestly and fairly, unless the public interest dictates otherwise.
- The gathering of personal information for the purpose of journalistic expression must only be used for this purpose.
- Media representatives shall identify themselves as such unless public interest or their safety dictates otherwise.
- Where there is reason to doubt the accuracy of a report or a source and it is practicable to verify the accuracy thereof, it shall be verified. Where it has not been practicable to verify the accuracy of a report, this shall be stated in such report.
- The media shall seek the views of the subject of critical reportage in advance of publication. This need not be done where the institution has reasonable grounds for believing that by doing so it would be prevented from reporting, where evidence might be destroyed or sources intimidated or because it would be impractical to do so in the circumstances of the publication. Reasonable time should be afforded the subject for a response. If the media are unable to obtain such comment, this shall be reported.
- Where a news item is published on the basis of limited information, this shall be stated as such, and the reports should be supplemented once new information becomes available.
- The media shall make amends for presenting information or comment that is found to be inaccurate by communicating promptly and with appropriate prominence to attract attention, a retraction, correction or explanation.
- An online article that has been amended for factual accuracy should indicate as such. In the event of an apology or retraction, the original article may remain, but the publisher must prominently indicate that it has led to an apology or retraction and should link to both the apology or retraction and the original article.
- No person shall be entitled to have an article removed which falls short of being defamatory but is alleged by such person to be embarrassing.
- Journalists shall not plagiarise.

Independence and conflicts of interest

- The media shall not allow commercial, political, personal or other non-professional considerations to influence or slant reporting. Conflicts of interest must be avoided, as well as arrangements or practices that could lead audiences to doubt the media's independence and professionalism.
- The media shall not accept bribes, gifts or any other benefits where this is intended or likely to influence coverage.

- The media shall indicate clearly when an outside organisation has contributed to the cost of newsgathering.
- Editorial material shall be kept distinct from advertising and sponsored content.

Privacy, dignity and reputation

- The media shall exercise care and consideration in matters involving the private lives and concerns of individuals. The right to privacy may be overridden by public interest.
- In the protection of privacy, dignity and reputation, special weight must be afforded to cultural customs concerning the privacy and dignity of people who are bereaved and their respect for those who have passed away, as well as concerning children, the aged and the physically and mentally disabled.
- The media shall exercise care and consideration in matters involving dignity and reputation. The dignity or reputation of an individual should only be overridden if it is in the public interest and the following circumstances:
  - the reportage amounts to fair comment based on facts that are adequately referred to and that are true or substantially true
  - the facts reported are true or substantially true
  - the reportage amounts to a fair and accurate report of court proceedings, parliamentary proceedings or the proceedings of any quasi-judicial tribunal or forum
  - it was reasonable for the information to be communicated because it was prepared in accordance with accepted principles of journalistic conduct and the public interest
  - the article was, or formed part of, an accurate and impartial account of a dispute to which the complainant was a party.
- Rape survivors and survivors of sexual or gender-based violence shall not be identified without the consent of the victim or, in the case of children, without the consent of their legal guardians (or a similarly responsible adult) and the child (taking into consideration the evolving capacity of the child), and public interest is evident, and it is in the best interest of the child.
- The HIV/Aids status of people shall not be disclosed without their consent. In the case of children, the HIV/Aids status of the child shall not be disclosed without the consent of the child (taking into consideration the evolving capacity of the child) together with the consent of their legal guardian or a similarly responsible adult, provided that such disclosure is in the public interest and is in the best interests of the child.

News and current affairs during elections and referenda

- News coverage of elections and referenda shall be left to the discretion of the media concerned.
- Proper balance and fairness shall be applied to all current affairs programmes that deal with elections and referenda.

Balance and impartiality during elections and referenda

- The media must afford reasonable opportunities for the discussion of conflicting views and must treat all political parties equitably.
- The media must ensure that they are balanced and impartial in their election reporting and that no political party or candidate shall be discriminated against in editorial coverage or the granting of access to coverage.
- In the event of any criticism against a political party being levelled in a particular medium:
  - without that party having been allowed to respond immediately
  - without the view of that political party having been reflected therein, the medium concerned must afford that political party a reasonable opportunity to respond to the criticism.

Protection of personal information

- The media shall take reasonable steps to ensure that the personal information under their control is protected from misuse or loss and to prevent unauthorised access to such information.
- The media shall ensure that the personal information they gather is accurate, reasonably complete and up to date.
- Where a person requests a correction to be made to his or her personal information under the control of a member, the media must take reasonable steps to verify the accuracy of the information and, if necessary, amend the information.
- Some personal information, such as addresses, may enable others to intrude on the privacy and safety of individuals who are the subject of news coverage. The media shall only disclose sufficient personal information to identify the persons being reported in the news to minimise these risks.
- Where it is reasonably suspected that an unauthorised person may have obtained access to personal information held by a member, the media must inform the affected person(s) and take reasonable steps to mitigate any prejudicial effects.

Violent, discriminatory or hate speech

- The media must not publish material which, judged within context, amounts to:
  - propaganda for war
  - incitement of imminent violence
  - the advocacy of hatred that is based on race, ethnicity, religion or gender
  - constitutes incitement to cause harm.
- The above does not apply to material which, judged within context, amounts to a:
  - *bona fide* scientific, documentary, dramatic, artistic or religious material
  - discussion, argument or opinion on a matter pertaining to religion, belief or conscience
  - *bona fide* discussion, argument or opinion on a matter of public interest.
- Except where it is strictly relevant to the matter reported and is in the public interest to do so, the media shall avoid discriminatory or denigratory references to people's sex, race, colour, sexual orientation, ethnic origin, religion, creed or social or economic status, age, or mental or physical disability.

Opinion

The media are justified in airing their own views on controversial topics, provided that they treat their constituencies fairly by:

- making fact and opinion clearly distinguishable
- not misrepresenting or suppressing relevant facts
- not distorting the facts.

Protected comment

- The media shall be entitled to comment upon or criticise any actions or events of public interest.
- Comment or criticism is protected even if extreme, unjust, unbalanced, exaggerated and prejudiced, as long as it:
  - expresses an honestly-held opinion
  - is without malice
  - is on a matter of public interest
  - has taken fair account of all material facts that are substantially true
  - is presented in such a manner that it appears clearly to be a comment.

Children

Article 15 of the Namibian Constitution protects children's rights. The media also recognises that special protective measures in respect of children are needed and shall, therefore:

- exercise exceptional care and consideration when reporting on children. If there is any chance that coverage might cause harm of any kind to a child, he or she shall not be interviewed, photographed or identified without the consent of a legal guardian or of a similarly responsible adult and the child (taking into consideration the evolving capacity of the child), and unless a public interest is evident
- not publish child pornography
- not identify children who have been victims of abuse, exploitation, or who have been charged with or convicted of a crime, without the consent of their legal guardians (or a similarly responsible adult) and the child (taking into consideration the evolving capacity of the child), unless a public interest is evident and it is in the best interests of the child.

Violence and graphic content

- Due care and responsibility shall be exercised by the media concerning the presentation of brutality, gratuitous violence and suffering.
- Material, judged in context, should not sanction, promote or glamourise violence or unlawful conduct, or discrimination based on sex, race, colour, ethnic origin, religion, creed or social or economic status.
- Content which depicts violent crime or other violence or explicit sexual conduct should be avoided unless the public interest dictates otherwise, in which case prominent indication and warning must be displayed indicating that such content is graphic and inappropriate for certain audiences such as children.
- The media must not publish material which, judged in context:
  - contains violence which does not play an integral role in developing the plot character or theme of the material as a whole
  - sanctions, promotes or glamourises violence or unlawful conduct, particularly if based on race, national or ethnic origin, colour, religion, gender, sex and sexual orientation, age, or mental or physical disability.
- The above does not apply to material which, judged in context, amounts to:
  - *bona fide* scientific, documentary, dramatic, artistic or religious material
  - a discussion, argument or opinion on a matter pertaining to religion, belief or conscience
  - *bona fide* discussion, argument or opinion on a matter of public interest.

Headlines, posters, pictures and captions

- Headlines and captions to pictures or broadcasting content shall give a reasonable reflection of the contents of the report or picture in question.
- Posters shall not mislead the public and shall give a reasonable reflection of the contents of the reports in question.
- Pictures, video or audio content shall not misrepresent or mislead nor be manipulated to do so.

Confidential and anonymous sources

The media shall:

- protect confidential sources of information; the protection of sources is a basic principle in a democratic and free society
- avoid the use of anonymous sources unless there is no other way to deal with a story and care should be taken to corroborate the information
- not publish information that constitutes a breach of confidence, unless the public interest dictates otherwise.

Payment for information

The media shall avoid paying informants to induce them to give information, particularly when they are criminals, except where the material concerned ought to be published in the public interest and the payment is necessary for this to be done.

Competitions and audience participation

- Where audiences are invited on air to react to a programme or competition, the media must make known the full cost of a telephone call or SMS.
- The media must specify the proportion of the cost of the call or SMS, as the case may be, which is intended for any specified charitable cause.
- The media must ensure that audiences who are encouraged to compete in any competition are made aware of the rules of the competition on air. Such rules must include the closing date and how the winner is to be determined.

5.1.2 Broadcasting content and activities applicable to broadcast media only

Children

- Broadcasting service licensees must not broadcast material which is harmful or disturbing to children at times when a large number of children are likely to be part of the audience.

- Broadcasting service licensees must exercise particular caution, as provided below, in the depiction of violence in children's programming.
- In children's programming portrayed by real-life characters, violence may, whether physical, verbal or emotional, only be portrayed when it is essential to the development of a character and plot.
- Animated programming for children, while accepted as a stylised form of story-telling which may contain non-realistic violence, must not have violence as its central theme, and must not incite dangerous imitation.
- Programming for children must deal with reasonable care themes that could threaten their sense of security when portraying, for example, domestic conflict, death, crime or the use of drugs or alcohol.
- Programming for children must deal with reasonable care themes which could influence children to imitate acts which they see on screen or hear about, such as the use of plastic bags as toys, the use of matches or the use of a dangerous household object as toys.
- Programming for children must not contain realistic scenes of violence which create the impression that violence is the preferred or only method to resolve a conflict between individuals.
- Programming for children must not contain realistic scenes of violence which minimise or gloss over the effect of violent acts. Any realistic depiction of violence must portray, in human terms, the consequences of that violence for both its victims and perpetrators.
- Programming for children must not contain frightening or otherwise excessive special effects not required by the storyline.
- Offensive language, including profanity and other religiously sensitive material, must not be broadcast in programmes specially designed for children.
- No excessively or grossly offensive language should be used outside the watershed period on television or at times when a large number of children are likely to be part of the audience on television or radio.

Watershed period

- Programming on television which contains scenes of explicit violence, sexual conduct, nudity, grossly offensive language or all of these, intended for adult audiences must not be broadcast before the watershed period.
- Promotional material and music videos which contain any or all of the following, scenes of explicit violence, explicit threats of violence, sexual conduct, fondling or touching of breasts, genitalia, the anus or all three, nudity, offensive language intended for adult audiences must not be broadcast before the watershed period.

- Some programmes broadcast outside the watershed period may not be suitable for very young children. Licensees must provide sufficient information, in terms of regular scheduling patterns or audience advisories, to assist parents and *de facto* legal guardians in making appropriate viewing choices.
- Television broadcasting service licensees may, with the advance of the watershed period, progressively broadcast more adult material.
- Broadcast service licensees must be particularly sensitive to the likelihood that programmes which commence during the watershed period and which run beyond it may be viewed by children.

Sexual conduct

- Broadcasting service licensees must not broadcast material which, judged in context, contains a scene or scenes, simulated or real, of sexual conduct.
- The above shall not apply to *bona fide* scientific, documentary, dramatic or artistic material which, judged in context, is of such a nature, provided that it is broadcast with due audience advisories after the watershed period.

Audience advisories

- To assist audiences in choosing programmes, television broadcasting service licensees must provide advisory assistance which, when applicable, must include guidelines as to age, where such broadcasts contain any or all of the following, violence, sex, nudity, offensive language.
- The advisory must be visible on the screen for a minimum of 30 seconds at the commencement of the programme and a minimum of 30 seconds after each advertisement or other break.
- Where the frequency of the said subject matters, or any one or some of them, is high, a continuous advisory will be necessary, whether it is broadcast before or after the watershed.
- The following visual advisory age system must be used: 10, 13, 16 and 18.
- The following symbols must be used in accordance with the relevant content: V (violence), L (language), N (nudity), S (sex), PG (Parental Guidance).
- An audio advisory before the commencement of the programme must also accompany the broadcast of a film with an age restriction of 18.

News broadcasts

- Broadcasting service licensees must advise viewers in advance of scenes or reporting of extraordinary violence, or graphic reporting on delicate subject matter such as sexual assault or court action related to sexual crimes, particularly during afternoon or early evening newscasts and updates.

- Broadcasting service licensees must not include explicit or graphic language related to news of destruction, accidents or sexual violence which could disturb children or sensitive audiences, except where it is in the public interest to include such material.

Controversial issues of public importance

- In presenting a programme in which a controversial issue of public importance is discussed, a broadcaster must make reasonable efforts to present opposing points of view fairly, either in the same or subsequent programme forming part of the same series of programmes presented within a reasonable time after the original broadcast and substantially within the same time slot.
- A person whose views are to be criticised in a broadcasting programme on a controversial issue of public importance must be given the right to reply to such criticism on the same programme. If this is impractical, reasonable opportunity to respond to the programme should be provided where appropriate, for example in a right-to-reply programme or a pre-arranged discussion programme with the prior consent of the person concerned.

Elections and referenda

During any election or referendum period, as defined in applicable electoral legislation from time to time, all broadcasters are to comply with the requirements prescribed by CRAN. The EFN does not have jurisdiction in these matters, and complaints must be directed to CRAN.

5.1.3 User-generated content applicable to online media only

Guiding principles

- This chapter applies where a complaint is brought against an online media member in respect of comments and content posted by users on all online platforms it controls and on which it distributes content.
- The media are not obliged to moderate all user-generated content in advance.
- All members should have a policy in place governing moderation, removal of user-generated content or user profiles, or both, posted on the platforms (UGC Policy) which must be consistent with the of the Namibian Constitution.
- Members may remove any user-generated comment, content or user profile in accordance with their UGC Policy. A member's UGC policy should be publicly available and:
  - set out the authorisation process, if any, which users who wish to post comments must follow, as well as setting out any terms and conditions and any indemnity clauses during such registration process
  - set out the content which shall be prohibited

- explain how the public may inform the member of prohibited content.

- Members should where practical, place a notice on the platforms to discourage the posting of prohibited content.
- The public should be informed that UGC is posted directly by users and does not necessarily reflect the views of the member.
- Users shall be encouraged to report content which they believe violates the provisions of the member's UGC Policy.
- Online forums directed at children and the young should be monitored particularly carefully.

Prohibited content

- Material constitutes prohibited content if it is expressly prohibited in a member's UGC policy.
- In addition to, and notwithstanding anything to the contrary contained in a member's UGC policy, prohibited content for this Code consists of the following:
  - propaganda for war
  - incitement to imminent violence
  - advocacy of hatred that is based on race, ethnicity, gender or religion that constitutes incitement to cause harm.

Defences in relation to user generated content

- It is a defence, concerning any complaint brought against the media regarding UGC, for the member to show that it did not itself author or edit the content complained of.
- This defence will not apply in the following circumstances:
  - the complainant sent a written notice to the member concerning the content concerned
  - the member failed to remove the content in accordance with the above.
- The written notice mentioned above must:
  - be sent via email or letter to the particular address stipulated by the member
  - identify the content concerned and, in particular, specify where on the website the statement was posted
  - explain why the content concerned is prohibited, either in terms of a member's UGC Policy or the above.

- On receipt of a written notice complaining about UGC the member must:
  - remove the relevant UGC from the platform as soon as operationally possible and notify the complainant that it has done so
  - decide not to remove the UGC and notify the complainant of this decision.
- Where a member has decided not to remove the UGC:
  - the complainant may complain to the EFN enforcement structures
  - it will be treated as if the UGC had been posted by the member itself, and the member will be liable for such content if it is shown to be prohibited in terms of the above.

5.1.4 Enforcement procedures concerning the code of ethics

- The code contains detailed provisions regarding enforcement and, essentially, complaints are considered by the media ombudsman or a media complaints committee appointed by the EFN. If a party to a complaint is unhappy about a ruling of the media ombudsman or media complaints committee, it may appeal the ruling to the media appeals committee, also established by the EFN.
- The media ombudsman, the media complaints committee or the media appeals committee may uphold or dismiss a complaint or appeal, as the case may be.
- The media ombudsman, the media complaints committee or the media appeals committee, as the case may be, may make any one or more of the following sanction orders against the publication, radio or television station or online publication in question:
  - caution or reprimand a respondent
  - direct that a correction, retraction or explanation and, where appropriate, an apology, the findings of the media complaints committee and or the media appeals committee, or both as the case may be, be published or broadcast by the respondent in such manner as may be determined by the media complaints committee or the media appeals committee
  - order that a complainant's reply to a published or broadcast article, comment or letter be published, whether in print or online or broadcast by the respondent
  - make any supplementary or ancillary orders or issue directives that are considered necessary for carrying into effect the orders or directives made in terms of this clause and, more particularly, issue directives as to the publication of the findings of the media complaints committee or the media appeals committee, as the case may be
  - a fine may be imposed for a second or subsequent violation of the code. Fines collected in this manner shall be utilised solely to promote the code by means of publicity campaigns and training.

In the reasons for the decision, sanction or both, the media ombudsman, the media complaints committee or the media appeals committee is entitled to criticise the conduct of the complainant, respondent or both, concerning the complaint, where such criticism is warranted in the view of the media ombudsman, the media complaints committee or the media appeals committee.

6 Case law and the media

In this section, you will learn:

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

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

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

6.2 Defamation

6.2.1 Definition of defamation

Defamation is part of the common law of Namibia, and reliance is placed on several leading South African cases. Defamation is the unlawful publication of a statement about a person which lowers his or her standing in the mind of an ordinary, reasonable and sensible person. It is important to note that the media can be liable for defamation even if it is merely reporting on a defamatory statement made by someone (see *Smit v Windhoek Observer (Pty) Ltd and Another* 1991 NR 327 (HC)).

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

Once it is proved that a defamatory statement has been published, two legal presumptions arise. Firstly, that the publication was unlawful; this is an objective test which determines the lawfulness of a harmful act based on considerations of fairness, morality, policy and by the court's perception of the legal convictions of the community. Secondly, the person publishing the same had the intention to defame. The person looking to defend against a claim of defamation must then raise a defence against the claim.

6.2.2 Defences to an action for defamation

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

Truth in the public interest: This is where an action for damages is defended by stating that the defamatory statement was true and, further, that it is in the public interest to publicise the information. It is important to note that 'public interest' does not mean what is interesting to the public, but rather what contributes to the greater public good. It is therefore often the case that it will be in the public interest to publish true, albeit defamatory, material about public representatives. This is because of the importance of the public having accurate information to engage in democratic practices such as voting.

Privileged occasions: These are when the law recognises that certain situations require statements to be made freely, even if the statements are defamatory. For example:

- In the discharge of a legal, social or moral duty to a person having a reciprocal duty or interest to receive the statement. For example, when a teacher reports suspected child abuse to a social worker.
- In the protection or furtherance of an interest to a person who has a common or corresponding duty or interest to receive such information, and the statement was relevant to the matter under discussion on that occasion. For example, a manager giving an assessment of the work performance of an employee to a management committee

6.2.3 Remedies for defamation

There are two main remedies in respect of defamation in the absence of a defence: an action for damages; or a prior restraint.

Action for damages: This is where a person who has been defamed sues for monetary compensation. This takes place after the publication has occurred, and

damages (money) are paid to compensate for the reputational damage caused by the defamation in circumstances where there are no defences to defamation. The quantum of damages (in other words, the amount to be paid in compensation) will depend on several factors, including whether or not an apology or retraction was published, and also the standing or position of the person being defamed in society (see, *Smit v Windhoek Observer (Pty) Ltd and Another* 1991 NR 327 (HC)).

It is important to note that the Namibian courts have ordered that exemplary damages (this is where a high amount is ordered to be paid to make an example of the defamer) be awarded in circumstances where defamatory material was published and continued to be published about a person after the institution of legal proceedings and without an apology, and also without defending the defamation action (see, *Afrika v Metzler and Another* 1994 NR 323 (HC)).

Prior restraint: This is where the alleged defamatory material is prevented from being published in the first place. Where a person is aware that defamatory material is going to be published, he or she may be able to go to court to, for example, obtain an interdict prohibiting the publication, thereby preventing the defamation from occurring. Prior restraints are dangerous because they deny the public (such as readers of a publication or audiences of a broadcaster) the right to receive the information that would have been publicised had it not been for the interdict. Prior restraints are a last resort mechanism, and the legal systems of countries which protect the right to freedom of expression usually prefer to allow publication and to deal with the matter by damages claims, in other words, using 'after publication' remedies. The Namibian High Court has refused to grant an interdict preventing the broadcast of material in circumstances where the producer has taken reasonable steps to ascertain the truth of the allegations to be broadcast (see, *Muheto and Others v Namibian Broadcasting Corporation* 2000 NR 178 (HC)).

6.3 Contempt of court

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

6.3.1 The *sub judice* rule

The *sub judice* rule guards against people trying to influence the outcome of court proceedings while legal proceedings are underway. It is, therefore, illegal to report on judicial proceedings in such a way as to pre-empt the outcome of the proceedings.

6.3.2 Scandalising the court

The rule against scandalising the court is there to protect the institution of the judiciary. It acts to prevent the public undermining of the dignity of the courts. This issue has been addressed by the Namibian courts and by the judiciary in *S v Heita and Another* 1992 NR 403 (HC). The court discussed contempt of court as follows: 'Contempt of Court is a common law crime. This crime is necessary to protect the

independence of the court and the independence, dignity and effectiveness of the courts and their judicial officers.'

The court also quoted extensively from a public statement by the Minister of Justice on contempt of court in which the minister contrasted criticism with contempt, quoting former Judge President Strydom:

> ***An honest and temperate expression of a dissenting opinion regarding, for example, the perennial topic of inequality of sentences will not constitute contempt of Court … However it is one thing to exercise one's right to make fair comment, it is quite another to scandalise or intimidate a Judge by calling him or her names … We … say yes to fair comment but definitely no to undue political and other pressures on members of the judiciary.***

6.4 Interpreting national security laws

In *Director-General of the Namibian Central Intelligence Service and Another v Haufiku, Mathias and Another* [2019] NASC 7, the Supreme Court considered an appeal by the Namibian Central Intelligence Service against a ruling of the High Court refusing to grant it an interdict against an online and print newspaper for publishing a story which would place the intelligence services in an unfavourable light. In dismissing the appeal with costs, the Supreme Court held that the submission that 'publication of information relating to the [intelligence service] must, without exception, be suppressed even if doing so would expose a crime, cannot be sustained'. The Intelligence Services had based its argument on the provisions of the Protection of Information Act, dealt with in section 3 above.

Notes

1 https://www.worldometers.info/world-population/namibia-population/ [Last accessed on 22 June 2020].

2 https://rsf.org/en/ranking/2020 and https://rsf.org/en/ranking/2019 [Last accessed 16 October 2020]

3 https://tradingeconomics.com/namibia/access-to-electricity-percent-of-population-wb-data.html#:~:text=Access%20to%20electricity%20(%25%20of%20population)%20in%20Namibia%20was%20reported,compiled%20from%20officially%20recognized%20sources. [Last Accessed on 22 June 2020].

4 https://www.internetworldstats.com/africa.htm#ls [Last accessed on 22 June 2020]

5 https://www.itu.int/net4/ITU-D/CDS/DSO2019/CountryDetails.asp?Country=71[Last accessed on 22 June 2020].

6 https://www.news24.com/fin24/tech/news/namibia-beats-sa-to-digital-terrestrial-tv-20150202 [Last accessed on 22 June 2020].

7 https://tradingeconomics.com/namibia/households-with-a-radio-percent-wb-data.html [Last accessed on 22 June 2020].

12

Seychelles

1 Introduction

The Republic of Seychelles is an island nation off the east coast of Africa with a small population of just over 98 000 people, approximately 56% of whom live in an urban environment.[1] Traders from the Persian Gulf have known the islands for centuries; however, the first recorded landing on the then-uninhabited islands was made by the British East India Company in 1609. France annexed the islands in 1756. Following a war between France and the United Kingdom, the islands were surrendered and officially ceded to the British by the Treaty of Paris in 1814. Seychelles became an official Crown Colony in 1903, having been a dependency of Mauritius until that time. In 1975, Seychelles became self-governing, and a coalition government was formed with President James R Mancham as president and France-Albert René as the vice-president. Seychelles was granted independence in 1976. In 1977, France-Albert René came to power as president in a coup d'état led by the Seychelles People's United Party (renamed United Seychelles in 2018) and remained in power under the 1979 constitution which provided for a one-party state. Seychelles enacted a new constitution and held democratic elections in 1993,[2] part of a wave of democratisation that swept the continent in the early to mid-1990s.

In October 2020, Seychelles saw the first democratic handover of power from one ruling party to another since independence. The ruling United Seychelles party was defeated in the national election by the opposition party, Linyon Demokratik Seselwa,[3] and Wavel Ramkalawan was sworn in as president on 26 October 2020.[4]

Seychelles is currently ranked 43rd in the world human capital index. It is also the only country in the African region and the Indian Ocean to have attained the Very High Development Index category in 2019.[5]

The whole population has access to electricity,[6] and the country ranks third in Africa for internet penetration with over 70%, while over 64% of the population has a Facebook account.[7]

In the 2020 World Press Freedom Index rankings, Seychelles moved up six places to number 63 globally.[8] Reporters Sans Frontiers says that the media environment in Seychelles is slowly improving 'giving way to a broader range of opinion and more editorial freedom'.[9] This is true of the print and sound broadcasting media, but there is only one television service that is operated by the government.

In this chapter, working journalists and other media practitioners will be introduced to the legal environment governing media operations in Seychelles. 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 primary laws governing the media in Seychelles. Significant weaknesses and deficiencies in these laws will also be identified. The hope is to encourage media law reform in Seychelles, 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
- ▷ the definition of constitutional supremacy
- ▷ the definition of a limitations clause
- ▷ constitutional provisions that protect the media
- ▷ constitutional provisions that might require caution from the media or might conflict with media interests
- ▷ key institutions relevant to the media are established under the Seychelles Constitution
- ▷ enforcing rights under the constitution
- ▷ the three branches of government and separation of powers'
- ▷ weaknesses in the Seychelles Constitution that ought to be strengthened to protect the media

2.1 Definition of a constitution

A constitution is a set of rules that are foundational to the country, institution or organisation to which they relate. For example, you can have a constitution for a

soccer club or a professional association, such as a press council. Constitutions such as these set out the rules by which members of the organisation agree to operate. Constitutions can also govern much larger entities, indeed, entire nations.

The Seychelles Constitution sets out the foundational rules of the Seychelles state. These are the rules on which the entire country operates. The constitution contains the underlying principles, values and law of the Republic of Seychelles. Article 1(1) is a critical constitutional provision in this regard and states: 'Seychelles is a sovereign democratic 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 essential to ensure that a constitution has legal supremacy. If a government passed a law that violated the constitution, was not per 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 Seychelles Constitution makes provision for constitutional supremacy. Article 1(5) states explicitly: 'This Constitution shall be the Supreme Law of Seychelles.'

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 vital societal interests; however, owing to the supremacy of the constitution, this can be done only following the constitution.

The Seychelles Constitution makes provision for two types of legal limitations on the exercise and protection of rights and freedoms contained in Chapter III of the Seychelles Constitution, headed Seychelles Charter of Fundamental Human Rights and Freedoms.

2.3.1 Internal limitations

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

Article 47 of the Seychelles Constitution provides that, where a right or freedom contained in Chapter III of the constitution is subject to a limitation, that limitation may not have a broader effect than is strictly necessary. It may not be applied for any purpose other than that for which it was prescribed.

Often, internal limitations clauses offer insight into rights which appear to be substantive, but which are not very effective.

2.3.2 Constitutional limitations

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

The Seychelles Constitution does not have a general limitations provision applicable to limiting all rights, except by way of a state of emergency. The president may, in terms of article 41 of the constitution, declare a state of emergency if he or she believes there is a grave or imminent:

- threat to national security
- threat to public order
- civil emergency.

Should the president declare a state of emergency, article 43(2) permits the passing of laws limiting the rights and freedoms provided for in Chapter III. However, the limitations may only be imposed in as far is it is necessary to meet the exigencies of the situation. Article 43(3) provides that any state of emergency limitation may not be inconsistent with the fundamental rights to:

- life
- dignity
- freedom from slavery forced labour or bondage
- liberty, excepting the internal limitation in article 18(3) relating to legal arrest or detention
- a fair and public hearing
- freedom of conscience
- equal protection of the law.

2.4 Constitutional provisions that protect the media

The Seychelles Constitution contains several essential articles in Chapter III. These articles directly protect the media, including publishers, broadcasters, journalists, editors and producers. There are additional articles in other chapters of the Seychelles Constitution which can be used by the media to ensure effective reporting on government activities.

2.4.1 Freedom of expression

The most important provision that protects the media is article 22(1), which states that every person has a right to freedom of expression. The right to freedom of expression includes the right to hold opinions and to seek, receive and impart ideas and information without interference.

Freedom applies to every person which is essential as certain rights apply only to particular groups of people, such as citizens (in respect of voting rights, for example) or children (in respect of children's rights). Freedom of expression is, therefore, a fundamental right enjoyed by everyone in Seychelles, including foreigners.

The freedom is not limited to speech (oral or written) but extends to non-verbal or non-written expression. There are many examples of this, including physical expressions, such as mime or dance, photography or art.

The right to freedom of expression is subject to an internal limitation at article 22(2) that allows for the restriction of expression:

- in the interest of defence, public safety, public order, public morality or public health
- for protecting the reputation, rights, freedoms or private lives of persons
- for preventing the disclosure of information received in confidence
- for maintaining the authority and independence of the courts
- for maintaining the authority and independence of the National Assembly
- for maintain the technical administration, operation or general efficiency of wireless broadcasting, television or other means of communication or regulating public exhibitions or entertainment
- for the imposition of restrictions on public officers.

2.4.2 Right to privacy

Article 20 of the Seychelles Constitution guarantees every person the right to privacy. In terms of article 20(1)(b), this includes the right not have any form of interception of communications, written, oral or in any other medium, without their consent, unless by order of the Supreme Court,

This right is important for journalists because it can be raised to protect communications with confidential sources of information.

It should be noted that this right may be subject to a limitation in terms of article 20(2) if it is determined that any communication is reasonably required in the interest of defence, public safety, order, morality or health, the protection of the rights and freedoms of others, the administration of the government, by order of

a court, the conservation and development of the economy and the well-being of the country.

2.4.3 Equal protection of the law

Another important provision that protects the media is article 27, Right to Equal Protection of the Law. Article 27(1) provides that every person has a right to equal protection of the law, including the enjoyment of the rights and freedoms set out in the Seychelles Charter of Fundamental Human Rights and Freedoms without discrimination on any ground except as is necessary for a democratic society.

This provision is vital for journalists and the media because it protects them (as it does all people) from unfair or unequal treatment before the law and guarantees the rights of every person in Seychelles, including journalists.

2.4.4 Right of association and assembly

Article 23(1) of the Seychelles Constitution provides that every person has the right to freedom of peaceful assembly and association, including the right to associate with others and form or belong to political parties, trade unions or other associations. It should be noted that no person can be compelled to belong to any association.

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

As previously discussed, not all rights are absolute; the right of association and assembly is subject to an internal limitation in article 23(2) that allows for restrictions:

- in the interest of defence, public safety, public order, public morality or public health
- in respect of the registration of associations or political parties
- for the protection of the rights and freedoms of others
- on persons who are not citizens of Seychelles
- on public officers or members of the disciplinary forces.

2.4.5 Right of access to official information

In terms of article 28(1) of the Seychelles Constitution, every person has the right to access information relating to him or herself that is being held by a public authority performing a government function and to have that information corrected in the case that it is inaccurate. The right to access to personal information is expanded in article 28(4) to include the public's right to access all information held by a public authority performing a government function.

This right is essential to journalists because it guarantees them, as well as the public at large, access to information held by public and government bodies.

As previously discussed, not all rights are absolute. The right to access to official information is subject to an internal limitation at article 28(2) that allows for restrictions:

- for protecting national security
- for the prevention and detection of crime and the enforcement of the law
- for compliance with an order of a court or per a legal privilege
- for the protection of the privacy, rights or freedoms of others.

2.4.6 Privileges and immunities of the National Assembly

Article 102(1) of the Seychelles Constitution provides members of the National Assembly freedom of speech in debates and immunity from prosecution in any court, or other proceedings, except proceedings in the National Assembly when exercising the freedoms or performing the functions of a member of the National Assembly. Article 102(2) specifically prohibits the arrest of any member of the National Assembly. If any proceedings are instituted against a member, those proceedings must not interfere with the member's ability to perform his or her functions.

This is important for the journalists as it allows members of the National Assembly to speak freely without fear of prosecution, allowing for the dissemination of information of national importance that journalists can report to the public.

2.4.7 Independent state-owned broadcasting media

Article 168(1) of the constitution provides that the state must ensure that all broadcasting media owned or controlled by the state or which receives contributions from public funds, must be constituted and managed so that they may operate independently of the state or any political party and without influence from any other body or person.

Further, article 168(2) requires all state-owned broadcast media to present divergent views.

This provision is important as it creates a constitutional requirement of independence of state-owned broadcasters, thereby making it clear that these are to operate as public broadcasters as opposed to state mouthpieces.

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

2.5.1 Right to privacy

Article 20 of the Seychelles Constitution guarantees every person the right to privacy. Article 20(1)(a) provides that this includes the right to refuse consent to the lawful entry of others onto that person's property.

It should be noted that this right may be subject to limitation. In terms of article 20(2), if it is determined that any communication is reasonably required in the interest of defence, public safety, public order, public morality, public health, the protection of the rights and freedoms of others, the administration of the government, by order of a court, the conservation and development of the economy and the well-being of the country.

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

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

2.5.2 States of emergency

Article 41 of the Seychelles Constitution empowers the president to declare a state of emergency where he or she believes there is a grave or imminent threat to national security or public order in Seychelles, or during a civil emergency. This is important as article 43 of the Seychelles Constitution provides that, during a state of emergency, certain rights may be limited, and this includes limitation of the rights to freedom of expression and association.

The ability to restrict the right of freedom of expression is worrying as it can be used to limit the media's ability to inform the public about matters of importance during a state of emergency. The restriction on the right of association is similarly worrying as the limitation can be used to disband media organisations or prevent them from performing their functions during a state of emergency.

2.5.3 Dignity

The requirement of respect for human dignity set out in article 16 provides that every person has a right to be treated with dignity. Dignity is a right that is often raised in defamation cases because defamation usually undermines the dignity of

the person being defamed. This right is frequently set up against the right to freedom of the press, requiring a balancing of constitutional rights.

2.6 Important institutions relevant to the media established under the Seychelles Constitution

Three important institutions concerning the media are established under the Constitution of Seychelles, the judiciary, the Constitutional Appointments Authority and the Ombudsman.

2.6.1 The judiciary

In terms of article 119(1), the judiciary is the Seychelles courts, that is, the Court of Appeal, the Supreme Court and subordinate courts or tribunals established by acts of the National Assembly.

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 role as one of the branches of government. 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 ability of the court to protect the former from unlawful action by the state and unfair damages claims by litigants.

The Court of Appeal

Article 120 of the Seychelles Constitution provides for the Court of Appeal. It has jurisdiction to hear appeals from any judgment or order from the Supreme Court or any subordinate court established under an act. It should be noted that any matter relating to the application, contravention, enforcement or interpretation of the constitution takes precedence over any other matter before the Court of Appeal. If the Court of Appeal finds that a law, or any provision of a law, contravenes the constitution, the Justice of Appeal presiding over the court must send a copy of the finding to the president and the Speaker of the National Assembly.

In terms of article 121, the Court of Appeal is made up of a president of the Court of Appeal, two or more other justices and judges who are *ex-officio* members of the court. The president appoints the president of the Court of Appeal and the other Justices of Appeal from candidates proposed by the Constitutional Appointments Authority.

The Supreme Court

In terms of article 125(1) of the Seychelles Constitution, there shall be a Supreme Court with original jurisdiction and powers, conferred on it by the constitution, in matters relating:

- to the application, contravention, enforcement and interpretation of the constitution

- civil and criminal matters
- other jurisdiction conferred on it by an act of the National Assembly.

The Supreme Court also has supervisory jurisdiction over subordinate courts, tribunals and adjudicating authorities.

Article 129(3) provides that when the Supreme Court presides over a constitutional matter, it shall be referred to as the Constitutional Court. Matters relating to the interpretation, application, contravention and enforcement of the constitution must, in terms of article 125(2) take precedence over any other matter. In terms of article 129, jurisdiction relating to constitutional matters before the Supreme Court must be exercised by no fewer than two judges sitting together. The Constitutional Court has jurisdiction to hear all constitutional issues. Concerning alleged violations of the rights protected in Chapter III, the Constitutional Court's authority comes from article 46. Concerning other types of constitutional violations, the Constitutional Court's authority comes from article 129.

In terms of article 125(3) of the Seychelles Constitution, the Supreme Court consists of the Chief Justice, the puisne judges and the masters of the Supreme Court. They may exercise such limited jurisdiction and powers as conferred on them under an act of the National Assembly or following the rules of the Supreme Court in respect of interlocutory proceedings. In terms of article 125(6), it should be noted that an act of the National Assembly prescribes the number of puisne judges and masters of the Supreme Court who may be appointed.

Article 127 of the Seychelles Constitution empowers the president to appoint the judges and masters of the Supreme Court from candidates proposed by the Constitutional Appointments Authority.

2.6.2 The Constitutional Appointments Authority

The Constitutional Appointments Authority (CAA) is essential for the media because it plays a pivotal role in the appointments of judges and the Ombudsman. In terms of article 141, the CAA is made up of three members, one appointed by the president and one appointed by the leader of the opposition. These two members appoint the third member who is to be the chairperson. All members are required to be citizens who have held either judicial or high government office. In terms of article 142, the term of office of a member of the CAA is seven years, renewable for further terms.

2.6.3 The Ombudsman

In terms of article 143(1) of the Seychelles Constitution, the Ombudsman is appointed by the president from candidates proposed by the Constitutional Appointments Authority. In terms of article 143(3), the Ombudsman is not subject to the direction or control of any person or authority in the performance of his or her duties.

In terms of article 143(4), the person holding the office of the Ombudsman is

prohibited from holding any other public office or engaging in any occupation for reward outside the function of the office of Ombudsman which might compromise the integrity, impartiality and independence of the office.

Schedule 5 of the Seychelles Constitution relates to the Ombudsman. In terms of section 3 of this Schedule, the Ombudsman has the same power as a judge of the Supreme Court in performing his or her functions.

In terms of section 1(1) of schedule 5, the Ombudsman may:

- investigate any allegations of fraud or corruption against a public authority, the president, vice-president, a minister or any officer or member of a public authority
- become a party to any legal proceeding relating to the contravention of the rights provided for in Chapter III of the Seychelles Constitution
- initiate proceedings relating to the constitutionality or provision of a law.

Section 2 of Schedule 5 prohibits the Ombudsman from investigating matters that concern:

- actions taken by the president, vice-president or the relevant minister concerning dealings between the government of Seychelles and any other government or international organisation or the security of the republic or investigation of a crime
- the performance of a judicial function or a Justice of Appeal, judge or person performing a judicial function
- directions to a disciplinary force or member of the force. Note these include the police, navy, air force, military and prison service and similar forces
- grievances from persons that are not citizens or residents of Seychelles or grievances that did not occur in Seychelles concerning rights or obligations that arose or accrued in Seychelles.

Article 144 of the Seychelles Constitution provides that the Ombudsman is appointed for seven years and is eligible for re-appointment. The office of the Ombudsman becomes vacant at the end of a period of tenure when the Ombudsman is not re-appointed, the person holding the office of the Ombudsman dies, or the Ombudsman provides his or her resignation to the president in writing.

2.7 Enforcing rights under the constitution

A right is only as effective as its enforcement. All too often rights are enshrined in documents such as a constitution or a bill of rights, and yet remain empty of substance because they cannot be adequately enforced. The Seychelles Constitution addresses the issue and tries to ensure that rights are effective.

Article 40 of the Seychelles Constitution makes it the duty of every citizen of Seychelles to uphold and defend the constitution and the law. Article 46 provides that any person who claims that any provision of the Seychelles Charter of Fundamental Human Rights and Freedoms has been, or is likely to be contravened, by any law, act or omission may apply to the Constitutional Court for redress.

Another way in which the Seychelles Constitution protects rights and freedoms is by article 91(1). It provides that any changes to Chapter III, the Seychelles Charter of Fundamental Human Rights, must be approved by a national referendum, in which 60% of the votes cast approve the amendment.

The constitution envisages the right of people, including the media, to approach a body, such as the Ombudsman or the courts, to assist in the enforcement of rights.

2.8 The three branches of government and separation of powers

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

2.8.1 Branches of government

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

The executive

In Seychelles, executive power is vested in the president in terms of article 66(1). It should be noted that, in terms of 61(3), executive authority may be exercised by the president directly or via subordinate officers. The president is responsible for a ministry or department until and unless he specifically assigns responsibility to the vice-president or a minister.

Article 66A of the Seychelles Constitution provides for the office of the vice-president. It makes it clear that the functions of the vice-president will be assigned to him or her by the constitution, the president and acts of the National Assembly.

In terms of article 67, the Cabinet consists of the vice-president and ministers. The president presides over meetings of the Cabinet and, in his or her absence, the vice-president chairs the Cabinet. In terms of article 68, Cabinet is responsible for advising the president on government policy and other matters referred to it by the president.

In terms of article 69 of the Seychelles Constitution, the president may, with the approval of the majority of the National Assembly, appoint between seven and 14 persons as ministers. Article 70 provides that the president assigns portfolios and responsibilities to ministers.

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

The legislature

In terms of article 85, the legislative authority that is the power to make laws in Seychelles is vested in the National Assembly. In terms of article 79, the vast majority of members of the National Assembly are elected by general, direct and secret ballot. However, ten members of the National Assembly must be elected based on proportional representation following Schedule 4 of the constitution. Section 2 of schedule 4 provides that, for every 10% of the total votes cast in a general election that a political party receives, that party may elect one member of the National Assembly.

In terms of article 86 of the Seychelles Constitution, the National Assembly exercises legislative authority by passing bills which must be assented to by the president. A bill that has been passed by the National Assembly and assented to by the president becomes an act and must be published in the Gazette as soon as is practical after which it becomes law.

Article 87 of the Seychelles Constitution empowers the president to refuse to assent to a bill where he or she believes that it infringes, or may infringe the constitution. The president must then refer the bill to the Constitutional Court for a decision concerning its constitutionality as soon as is practically possible but not later than fourteen days. The Constitutional Court must inform both the president and the Speaker of the National Assembly of its decision. If the bill infringes any provision of the constitution, it must be returned to the Speaker.

Article 88 provides that when the president withholds assent for a bill, he or she must return the bill to the Speaker of the National Assembly, within fourteen days along with written reasons for his or her refusal for assent. Three months after a bill is returned to the Speaker of the National Assembly, and with voted approval of no fewer than two-thirds of the National Assembly, the bill may be returned to the president for assent and the bill will be assumed to have been assented to following the expiration of fourteen days.

It should be noted that article 91(1) of the Seychelles Constitution provides that any amendment to Chapters I and III, article 91, or articles 110 and 111 (the latter two articles relate to the dissolution of the National Assembly) have to be put to a national referendum, which must obtain at least 60% approval. After that, the National Assembly is also required to vote on the amendment with a two-thirds majority vote. If the National Assembly fails to support a 60% or more referendum-approved amendment by a two-thirds majority, then the National Assembly is to be dissolved by presidential proclamation, and a general election must take place, article 110(4)(a).

Article 91(2) requires that the National Assembly must pass any other amendments to the constitution by a two-thirds majority vote without the need for a public referendum.

In terms of article 106, the National Assembly shall begin on the first meeting and shall be dissolved in the event of a general election.

It should be noted that article 110(1)-(3) of the Seychelles Constitution empowers the president to dissolve the National Assembly for any reason that he or she believes to be in the national interest no more than once in a five-year presidential term. However, in terms of article 110(5), the president may not dissolve the National Assembly during a state of emergency or during proceedings to remove him or her.

Article 111 allows the National Assembly to dissolve itself should a motion for dissolution be voted on and the motion receives two-thirds approval.

The judiciary

The judicial power, as discussed above, is vested in the courts. The primary role of the judiciary is to interpret the law and to adjudicate legal disputes following the law. The judiciary has no powers of enforcement.

2.8.2 Separation of powers

In a functioning democracy, it is important to divide government power between different organs of the state to guard against the centralisation of power, which may lead to abuse. This is known as the separation of powers doctrine. The aim, as the Seychelles Constitution has done, is to separate the functions of the three branches of government, the executive, legislature and judiciary, so that no single branch can operate alone, assume complete state control and amass centralised power. While each branch performs several different functions, each also plays a watchdog role in respect of the other. This helps to ensure that public power is exercised in a manner that is accountable to the general public and following the constitution.

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

The internal limitations applicable to fundamental rights, such as the rights to freedom of expression and privacy, ought to be repealed because they weaken the rights. Instead, a general limitations clause should be introduced, providing the government with the power it needs to limit fundamental rights as reasonably necessary.

3 The media and legislation

In this section, you will learn:

- Legislation: An introduction
- Legislation governing the media generally
- Legislation governing the print media
- Legislation governing films
- Legislation governing the broadcasting media generally
- Legislation governing state broadcasting
- Legislation governing radio frequency spectrum
- Legislation governing the internet
- Legislation that threatens a journalist's duty to protect sources
- Legislation that prohibits the publication of certain kinds of information
- Legislation that specifically assists the media in performing its functions

3.1 Legislation: An introduction

3.1.1 What is legislation and how it comes into being

Legislation is a body of law consisting of acts properly passed by the legislative authority. Legislative authority in Seychelles is vested in the National Assembly. Legislation or statutes are therefore acts of the National Assembly made into law.

Article 86 of the constitution provides that all bills approved by the National Assembly must be referred to the president for assent. They become law once published in the Government Gazette. The president may withhold consent to a bill under article 87 if he or she has concerns regarding its constitutionality and informs the Speaker of National Assembly and the Constitutional Court.

The Attorney General refers the bill to court for a ruling on its constitutionality. If the court finds that the bill is not constitutional, it is returned to the National Assembly.

Article 91(2) of the Seychelles Constitution provides that two-thirds must approve any legislation amending the constitution of the National Assembly. Article 91(1) of the constitution provides that no amendments can be made to Chapter III of the constitution unless passed in a referendum that receives a minimum of 60% of the vote after which it must be passed by the National Assembly. Should the National Assembly refuse to pass an amendment voted for in a referendum, the National Assembly must be dissolved in term of article 111.

3.1.2 The difference between a bill and an act

A bill is a draft law that is debated and usually amended by parliament during the law-making process. If a bill is passed by parliament, the National Assembly, it becomes an act once it is signed by the president (signifying his assent to the bill) and published in the Government Gazette, in terms of article 86 of the Seychelles Constitution.

3.2 Legislation governing the media generally

Two acts are important in the governance of the media generally:

- Seychelles Media Commission Act, Act 36 of 2010 (SMC Act)
- Licences Act, Act 23 of 2010 (Licences Act).

3.2.1 The SMC Act

Establishment of the Seychelles Media Commission (SMC)

Section 3 of the SMC Act establishes the SMC as a body corporate. The SMC is, except as provided for in the SMC Act or any other law, not subject to direction or control of any person of authority in performing its functions.

Essentially the SMC is a media content regulator. It is not responsible for licensing or other regulatory functions.

The composition of the SMC

In terms of section 4 of the SMC Act, the SMC consists of a chairperson, who is also the chief executive officer, and seven other members all appointed by the president. Five of the members of the SMC appointed by the president must be candidates proposed by each of the following groups:

- the Seychelles Media Association or such other body as may for the time represent journalists and media professionals
- the National Assembly

- the judiciary
- the department responsible for information
- the Liaison Unit for Non-Governmental Organisations (Lungos).

The two other members must be persons of good standing appointed by the president.

The chairperson is appointed from candidates proposed by the Constitutional Appointments Authority.

In terms of section 6 of the SMC Act, the members of the SMC shall hold office for three years and are eligible for reappointment.

In terms of section 5 of the SMC Act, the president must publish the names of the members of the SMC in the Gazette.

Committees of the SMC

Section 8 empowers the SMC to establish committees to carry out specific functions. The committees shall perform only those functions that have been assigned to them by the SMC.

Powers and functions of the SMC

In terms of section 13(1) of the SMC Act, the objects of the SMC are to preserve the freedom of the media, improve and maintain high standards of journalism in Seychelles, require publishers of newspapers, radio and television broadcasters, news agencies and journalists to respect human dignity, ensure freedom from discrimination on any grounds except as are necessary in a democratic society, and to maintain high standards of integrity and good taste.

In terms of section 13(2) the SMC, in furthering is objectives, may:

- provide independent arbitration between different types of media organisations and between members of the public and media organisations
- promote the independence of the print and electronic media
- formulate, in consultation with the Seychelles Media Association, a Code of Conduct for publishers of newspapers, radio and television broadcasters, news agencies, publishers of online publications and journalists. This Code of Conduct has been formulated and is dealt with in section 4.4 below
- monitor adherence to the Code of Conduct and require compliance by all concerned
- monitor compliance by all media of constitutional and legal obligations in force in Seychelles in respect of media freedom and expression

- monitor any developments likely to restrict the dissemination of information, including expression of opinions on matters of public interest and importance, and assist in resolving them
- defend the constitutional right of the citizens to accurate, truthful and timely information
- assist journalists and broadcasters in developing and maintaining high standards of integrity in the collection and dissemination of news and information in and about Seychelles
- assist and encourage the interaction between local media organisations and foreign media organisations, including training institutions, with the object of improving the standard of journalism in Seychelles
- receive complaints from members of the public relating to any infringement of the individual's right to privacy by journalists or agents of media organisations and sanction journalists or media organisations according to law
- promote a proper functional relationship among all classes of persons engaged in print and electronic media in Seychelles
- promote the development of privately-owned print and broadcast media
- undertake such other activities within its mandate as may be assigned to the SMC by the government including, but not limited to:
    - reviewing existing legislation governing broadcasting and the print media and making recommendations to the government to bring them in line with the constitution and current trends
    - reviewing and making recommendations to open radio or television stations, or to publish newspapers and similar print publications
    - maintaining a national database of media practitioners and institutions.

SMC complaints procedure

Section 14 sets out the complaints process. If the SMC receives a complaint that a media practitioner has contravened the standards of journalistic ethics and decency embodied in the Code of Conduct or that an editor or working journalist has committed any professional misconduct, the commission may, after giving the publisher of the newspaper, broadcaster, news agency and or the editor or journalist concerned, an opportunity of being heard, hold an inquiry. If it is satisfied that it is necessary the SMC may warn or admonish the media practitioner in writing.

In terms of section 15, the SMC may hold an inquiry and in so doing it shall have the same powers and authority as a commission of enquiry established under the Commissions of Enquiry Act. It should be noted that the SMC may not compel any media practitioner to disclose the source of any news or information published or broadcast by that newspaper or broadcaster or received or reported by that news agency, editor or journalist.

Funds of the SMC

In terms of section 16 of the SMC Act, the government give the SMC grants as necessary for the performance of its functions under the SMC Act.

Making regulations concerning the SMC Act

Section 23 of the SMC Act empowers the minister responsible for media affairs, on the recommendation of the SMC, to make regulations to carry out the provisions of the SMC Act.

Is the SMC an independent regulator?

The SMC does appear to be an independent regulator, responsible for regulating media in Seychelles. The president appoints the SMC members following an appointments process from various stakeholders, including private enterprise. Regulations, while passed by the minister responsible for media affairs, can be passed only on the recommendation of the SMC, this could, of course, be improved by removing the role of the minister entirely. The SMC is also responsible for its own rules and procedures.

However, the SMC is not responsible for licensing, which is the single most critical regulatory function of a media regulator. The SMC Act ought to be amended to make licensing one of the functions of the SMC.

3.2.2 The Licences Act

Establishment of the Seychelles Licensing Authority

Section 3 of the Licences Act, Act 23 of 2010 (Licences Act) establishes the Seychelles Licensing Authority (SLA). The SLA is responsible for licences issued in Seychelles, and so its area of authority reaches far beyond the media. Media licensing (for example, print and broadcast licensing) is just one of the licensing roles that the SLA performs. Other licensing functions cover the full ambit of economic activity in Seychelles and include pig breeding, building and maintenance, tourism, health care and motor vehicle dealers. The Licences Act does not refer to the media specifically. However, and as is set out in section 4 below, regulations governing the print media require print media operators to have a licence issued by the SLA. The Broadcasting and Telecommunications Act, dealt with in paragraph 3.5 below, requires all broadcasting services to have a licence issued by the SLA.

Composition of members of the SLA

In terms of section 4 of the Licences Act, the SLA is administered by a board of not less than five members appointed by the president. The president must appoint one of the members to be the chairperson. In terms of section 5 of the Licences Act, the president must appoint a Chief Executive Officer for the SLA who is responsible for the affairs of the SLA subject to the direction of the SLA board.

Functions and powers of the SLA

In terms of section 9(1) of the Licences Act where a licence is required under the Licences Act, the SLA may:

- grant or renew a licence
- determine or amend licence conditions
- suspend or revoke a licence.

Section 9(2) empowers the SLA to consult other public authorities when deemed necessary.

Section 9(1)(c) read with section 3, empowers the SLA to suspend or revoke a licence on the recommendation of another public authority where the activity is under the control, superintendence or management of that other public authority. The effect of this is that the SMC would be the public authority responsible for managing the media and it would recommend the suspension or revocation of a media licence by the SLA if it is of the view that this is necessary for the interests of the media sector.

Following the conviction of any person by a court of law, section 9(3)(b) empowers the SLA to suspend, cancel or revoke any licence issued to that person. The court may temporarily suspend any licence issued by the SLA for 21 days and must inform the SLA of such suspension. Section 26 also empowers the SLA to revoke a licence on the conviction of a licensee.

In terms of section 10 of the Licences Act, the SLA may in the exercise of its functions:

- require any person to furnish any information on any matter relating to a licence
- summon a person to appear before the SLA to answer questions, or provide any information, as the SLA may specify
- administer an oath to a person appearing before it to allow for that person to make an affirmation or declaration
- nominate, appoint or authorise any person, or public authority, to enquire and report on:
    - a licence application
    - a breach of a licence condition
    - the renewal, suspension or revocation of a licence
    - a complaint against a licensee.

Funding for the SLA

Section 15 of the Licences Act provides that the SLA is funded by money appropriated by an Appropriation Act and paid to the SLA.

The Appeals Board

Section 18 of the Licences Act establishes the Appeals Board made up of members appointed by the president, including a chairperson, a representative of the Attorney General, a representative of the Fair Trading Commission and a representative of a non-governmental organisation that represents the interests of the private sector. In terms of section 17 of the Licences Act, any person aggrieved by a decision of the SLA may submit a notice of appeal to the Appeals Board.

In terms of section 19, the Appeals Board may confirm, vary, quash the decision of the SLA or order it to reconsider its decision.

Licences

Section 20(1) of the Licences Act prohibits any person from engaging in any activity that requires a licence under the Licences Act without a licence issued by the SLA.

In terms of section 21 of the Licences Act, applications for licences must be made to the SLA and must contain any particulars the SLA may require. Where an application for a licence is approved, section 22 provides that the fee for the first year of the licence must be paid before the licence is granted. The licence fee for every subsequent year must be paid before the start of the following year. If a licensee fails to pay the prescribed licence fee, the licence shall cease to be valid.

Offences and penalties

Section 24 of the Licences Act makes it an offence for any person to:

- fail to furnish any information required by the SLA when required to do so
- fail to comply with a summons issued by the SLA
- fail to answer a question put to the person by the SLA
- give false evidence or make a false statement to the SLA
- obstruct a member of the SLA from exercising his or her functions
- act in contempt of the SLA
- operate a business for which a licence is required under the Licences Act without a licence
- contravene any condition of a licence issued under the Licences Act.

In terms of section 25 of the Licences Act, the penalty for the above offences is a fine or imprisonment.

Making regulations under the Licences Act

Section 28 of the Licences Act empowers the minister responsible for the Licences Act to make regulations to carry out the provisions of the Licences Act.

Amending the legislation to strengthen the media generally

Given the vital role the media plays in society, it is unusual for licensing of the media to be done by a general non-sector-specific licensing authority. However, this may be a particular anomaly given that Seychelles is a country with a population of fewer than 100 000 people.

Nevertheless, it would be preferable, from a global best practice point of view, for the SMC to have licensing functions concerning the media instead of the SLA.

3.3 Legislation governing the print media

The print media in Seychelles is regulated by the Newspaper Act, Act 20 of 1935 (Newspaper Act). Unfortunately, some of the provisions of legislation place restrictions on the ability to operate as a print media publication in Seychelles.

3.3.1 Requirements associated with registration

The critical registration provisions of the Newspaper Act are as follows:

In terms of section 3 of the Newspaper Act, no person is entitled to publish a newspaper intended for public dissemination unless the newspaper proprietor, publisher and editor have all sworn before a judge and registered at the ministry an affidavit containing:

- the name of the newspaper
- the description of the building where the newspaper is to be published
- the names and addresses of the proprietor, publisher and editor of the newspaper.

Section 3 also provides that the minister may require the publisher to execute a bond to register a newspaper, guarantee by a bank or an assurance company may be accepted instead of such bond.

In terms of section 5 of the Newspaper Act, any material changes to the particulars of the newspaper, including the names or residences of the proprietor, printer, publisher or editor, the address of the newspapers, a change of the printing house, or the title of the newspaper must be registered with a new affidavit with the ministry.

Note that besides the registration requirements, print media operators also require a licence in terms of regulations published under the Newspaper Act, as is more fully dealt with in section 4 below.

3.3.2 Requirements placed on the print media

In terms of section 19 of the Newspaper Act, the editor of a newspaper must publish free of charge any official communication sent to the newspaper for publication by or on behalf of the president.

3.3.3 Penalties for non-compliance with the Newspaper Act

Section 9 of the Newspaper Act makes it an offence to print, publish or cause to be printed or published, or sell or freely distribute any newspaper that is not registered or does not have a bond or surety. On conviction, the penalty for this offence is a fine.

Section 12 of the Newspaper Act makes it an offence for any newspaper to be printed or distributed, without the name and address of the publisher, editor and printer at the foot of the last page. On conviction, the penalty for this offence is a fine.

Section 13 of the Newspaper Act makes it an offence not to file one copy of every publication printed with the ministry. On conviction, the penalty for this offence is a fine for each copy not filed.

Section 20 of the Newspaper Act makes it an offence for any editor to fail to publish any official communication sent to the newspaper for publication in terms of section 19. On conviction, the penalty for this offence is a fine.

Section 21(1) of the Newspaper Act provides that whenever a person is convicted of printing or publishing or causing to be printed or published in any newspaper any seditious or other libel, the court may, in place of any other penalty:

- prohibit the publication of the newspaper for a period not exceeding three years
- prohibit the proprietor or editor from publishing, writing editing or providing any service for any newspaper, whether for money or not, for a period not exceeding three years
- the seizure or closure of printing press used in the production of the newspaper
- the publishing of any penalty for the offence, at the convicted person's cost, if the publication of the newspaper has not been prohibited.

Section 21(2) provides that the court may impose an increase of the bond required of the newspaper up to 5 000 rupees.

It is important to note that any person who contravenes section 21 of the Newspaper Act is guilty of an offence, the penalty for which, on conviction, is a fine, imprisonment or both.

3.3.4 Making regulations concerning the Newspaper Act

In terms of section 22 of the Newspaper Act, the minister is empowered to make regulations prescribing the fees to be paid on the registration of affidavits and bonds and for generally implementing the Newspaper Act.

3.4 Legislation governing films

Film in Seychelles is governed under the Film Classification Board Act, Act 2 of 1994 (FCB Act).

3.4.1 Establishment of the FCB

Section 3 of the FCB Act establishes the Film Classification Board (the FCB) consisting of members appointed by the minister responsible for the administration of the FCB Act. The minister may designate one of the members he or she appointed to the FCB as the chairperson.

3.4.2 Functions of the FCB

In terms of section 4 of the FCB Act, the FCB must determine whether a film is suitable for viewing, either generally or subject to restrictions. In deciding whether or not a film is suitable for viewing, the FCB may:

- view the film
- test the quality of the recording
- require excisions from the film
- classify the film.

Where the FCB determines a film is suitable for viewing, it must issue a classification certificate. It should be noted that, in terms of section 4(7), the board may prescribe any necessary fees required for the classification of films, to be credited to the Consolidated Fund. The FCB may refuse to make a determination until the fee has been paid, section 4(8). In terms of section 5, classification certificates issued by the FCB must include a statement concerning whether or not the film is suitable for general viewing or is subject to a restriction.

In terms of section 6, any person who is aggrieved by a decision of the FCB may appeal to the minister. The FCB must give effect to the minister's decision.

3.4.3 Exhibiting films

In terms of section 7 of the FCB Act, any person who, in the course of their business operations, wishes to exhibit a film, or in the case of a broadcasting service wishes to broadcast a film, before exhibition or transmission must submit the film to the FCB for classification in accordance with section 4.

Section 8 prohibits any person from exhibiting, selling, hiring out or transmitting (it is assumed this includes broadcasting) a film before the FCB has decided on its suitability. Section 9 prohibits anyone from possessing, hiring, broadcasting or selling, a film to transmit that the FCB has determined is not suitable for viewing.

In terms of section 10(1), where a film has been determined suitable for viewing under an age restriction, the exhibiting, selling or hiring out of that film to a person who has not reached the required age is prohibited. Section 10(3) provides that where a film with an age restriction is broadcast to a television receiver, the film must be broadcast with a warning before the transmission.

In terms of section 11 of the FCB Act, any film that has received a classification certificate may be exhibited, sold or hired out only if the film, spool, case, thing or advertisement identifies any restrictions placed on it by the FCB, and it does not contain any false or inaccurate restriction identification.

3.4.4 Enforcement of the FCB Act

In terms of section 12, any person who contravenes section 8, 9, 10 or 11 of the FCB Act commits an offence, the penalty for which is a fine or imprisonment.

Section 13 empowers an authorised person to enter premises kept or used for exhibiting, transmitting, viewing, hiring, or selling a film to ascertain whether there is compliance with the provisions of the FCB Act. Any person who wilfully obstructs an authorised officer in the exercise of their powers commits an offence, the penalty, on conviction, is a fine or imprisonment.

3.4.5 Making regulations relating to the FCB Act

In terms of section 14 of the FCB Act, the minister may give policy directions to the FCB concerning the exercise of its functions.

In terms of section 16, the minister may make regulations for carrying out the provisions of the FCB Act.

3.4.6 Weaknesses of the FCB Act that should be amended

The FCB Act has several weaknesses that undermine the independence of the FCB and ought to be amended. The president should appoint members of the FCB following a public nominations process and in consultation with the National Assembly and not by the minister.

The FCB should make its policies concerning its functions and should be responsible for making regulations, not the minister.

3.5 Legislation governing the broadcast media generally

Broadcasting in Seychelles is governed in terms of the Broadcasting and Telecommunication Act, Act 2 of 2000 (Broadcasting Act).

3.5.1 Broadcasting licences

Section 3(1) of the Broadcasting Act prohibits any person from providing a broadcasting service without a licence issued by the SLA under the Licences Act (discussed above).

Section 3(3) of the Broadcasting Act provides that broadcasting licences may be granted only to a body corporate incorporated by or under a Seychelles Act and not the applicant:

- already holds a licence or directly or indirectly controls or is controlled by a body corporate which already holds a licence
- is a religious organisation or a body corporate which is affiliated to a religious organisation
- is a political party or body corporate which is affiliated to a political party
- has been declared insolvent or convicted of sedition or any offence involving fraud or dishonesty.

Section 5 prohibits any person from operating a radio communication network without a licence. Radio licences must specify:

- the radio frequency spectrum allocated to the licensee
- the description of the antenna and transmitter to be used
- the geographical area in which a mobile transmitter, where applicable, may be used
- the location of a fixed transmitter
- any obligation to share allocated frequency
- such particulars as the minister responsible for broadcasting and telecommunication may deem necessary.

In terms of section 7 of the Broadcasting Act, broadcasting licences issued by the SLA may be issued with such conditions as it may deem necessary and for a specified period. The SLA may revoke or suspend any licence required under the Broadcasting Act if the licensee:

- fails to pay any required fees
- fails to comply with any provision of the Broadcasting Act of the Licences Act in so far as a provision applies to the licence
- fails to comply with any term, condition or restriction of a licence.

The SLA may revoke a licence where it determines the revocation is in the national interest.

Should a licensee be aggrieved by a decision to revoke a licence by the SLA, the licensee may appeal the decision under section 15 of the Licensing Act.

Section 10 of the Broadcasting Act prohibits the transfer of a licence without the consent of the SLA.

3.5.2 Powers of the minister

In terms of section 12 of the Broadcasting Act, the minister responsible for broadcasting and telecommunication is responsible for the general supervision of all matters relating to broadcasting and telecommunication. In exercising the powers conferred by the Broadcasting Act, the minster must:

- take all reasonable measures to ensure that broadcasting services meet the demands of Seychelles
- promote the interests of consumers, purchasers and other users of broadcasting services concerning prices charged and the quality and variety of such services
- promote and maintain competition among persons engaged in commercial activities connected with broadcasting services
- promote the goals of universal services.

Section 14 of the Broadcasting Act empowers any public officer authorised in writing by the minister, to ensure the provisions of the Broadcasting Act are complied with, to:

- enter any building, place, ship or aeroplane
- inspect any broadcasting apparatus installed or used in any building, place, ship or aeroplane
- inspect any licence granted under the Broadcasting Act.

In terms of section 16 of the Broadcasting Act, if in the minister's opinion, any matter intended for broadcasting is objectionable, he or she may prohibit the broadcasting of that material.

3.5.3 Obligations of a broadcasting licensee

In terms of section 18 of the Broadcasting Act, licensees may enter any property at a reasonable time including any required preliminary surveys or for the erection of broadcasting apparatus to establish a broadcasting service.

In terms of section 29 of the Broadcasting Act, every person who provides a broadcasting service must ensure that consumers or users of the service do not suffer injury.

In terms of section 36, the minister responsible for broadcasting and telecom-

munication may order a licensee to transmit any messages and information as may be specified at a time of emergency.

3.5.4 Enforcement of the Broadcasting Act

Section 21 of the Broadcasting Act makes it an offence for any person to contravene sections 3, 4, 5 or 6 of the Licensing Act. The penalty is the confiscation of any broadcasting apparatus to be disposed of in such a manner as the minister may direct.

Section 23 makes it an offence for any person to hinder or obstruct any person from exercising their functions under the Broadcasting Act. The penalty is a fine or imprisonment.

Section 24 makes it an offence for any person to fail or refuse to comply with any order given under section 15, 16 or 36 of the Broadcasting Act. The penalty is a fine or imprisonment.

Section 25 makes it an offence for any person to destroy broadcasting apparatus. The penalty is a fine or imprisonment.

3.5.5 Making regulations relating to the Broadcasting Act

Section 38 of the Broadcasting Act empowers the minister responsible for broadcasting and telecommunication to make regulations for carrying out the provisions of the Broadcasting Act.

3.5.6 Amending the legislation to strengthen the broadcast media

The Broadcasting Act does not comply with international best practice because of the powers of the executive concerning broadcasting, including the power to make regulations. The Broadcasting Act ought to be amended to empower the SMC or a similar independent statutory body to regulate all aspects of broadcasting, including, as has already been suggested, licensing and making regulations.

3.6 Legislation governing state broadcasting

State broadcasting in Seychelles is governed by the Seychelles Broadcasting Corporation Act, Act 2 of 2011 (SBC Act).

3.6.1 Establishment of the Seychelles Broadcasting Corporation (SBC)

Section 3 of the SBC Act establishes the Seychelles Broadcasting Corporation as an independent corporation that shall operate separately from the state and political or other influence from persons or political parties.

3.6.2 The SBC board

In terms of section 4 of the SBC Act, the direction and management of the affairs of the SBC are to be vested in a board which may exercise the powers provided for under the SBC Act.

The SBC board consists of a chairperson, and six other members appointed by the president. The chairperson and two of the members appointed by the president must be selected from three candidates proposed by the Constitutional Appointments Authority. The chairperson must have special knowledge or experience in matters relating to administration, management, broadcasting, education, literature or culture. One member must have special knowledge or practical experience of the media, and one member must have special knowledge or practical experience of financial matters. Section 5(1) of the SBC Act provides that the appointment of the SBC board chairperson and members must be published in the Gazette.

In terms section 5(3) and (4) of the SBC Act, the president must appoint a chief executive officer of the SBC who, subject to the direction of the SBC board, must discharge such functions of the board as it may delegate to him.

Section 6 of the SBC Act provides that the term of office for a member of the SBC board is six years.

3.6.3 Functions and powers of the SBC board

In terms of section 9(1) of the SBC Act, the primary function of the SBC board is to organise and conduct public broadcasting services to inform, educate and entertain the public and ensure a balanced development of broadcasting on radio and television. In performing its functions, section 9(2) provides that the objectives that guide the SBC board are to:

- uphold the unity and integrity of the country and the values enshrined in the constitution
- safeguard the right of citizens to be informed freely, truthfully and objectively on all matters of public, national and international interest and must present a fair and balanced flow of information with contrasting views, without advocating a position or ideology
- provide adequate coverage in the fields of literacy, agriculture, community development, the environment, health, family values, science and technology
- provide adequate coverage of educational programmes
- provide adequate coverage of sports and games and encourage healthy competition and a spirit of sportsmanship
- provide appropriate programmes for the youth
- safeguard the rights of citizens and advance their welfare
- protect the interests of the elderly, children, persons with disabilities and other vulnerable sections of the community
- provide comprehensive broadcast coverage using appropriate technology and radio frequency spectrum

- promote research and development and keep radio and television broadcasts up to date
- expand broadcasting facilities and establish additional channels
- ensure programmes are of a high standard and cover a wide range of subjects
- ensure that programmes do not offend decency, offend public morality, outrage the public or create ill will between different groups.

Section 9(3) of the SBC Act empowers the SBC board to take such action as it sees fit to:

- ensure that broadcasting is conducted as a public service
- establish a system for gathering news for radio and television
- negotiate for purchase or otherwise acquire programmes and rights concerning a wide range of programming, including sports, film, functions, serials, incidents or public interest among others
- establish and maintain libraries of radio, television and other materials
- the conduct or commission audience research
- provide any other service specified in the regulations.

3.6.4 Funds of the SBC

Section 12 of the SBC Act provides that the funds for the SBC shall consist of:

- money appropriated by an Appropriation Act
- money lawfully charged or borrowed by the SBC
- money due to any investments made by the SBC
- money legally received by the SBC for the SBC, for example, advertising income.

In terms of section 16 of the SBC Act, the SBC board must prepare an annual report to be given to the minister responsible for information which must be tabled before the National Assembly.

3.6.5 Complaints handling concerning the SBC

In terms of section 22, any person or group alleging that a specific programme or broadcast, or the functioning of the SBC is not following the objectives for which it was established, or any person, other than officers or employees of the SBC, claiming to have been unfairly or unjustly treated in connection with any broadcast by the SBC, may complain to the SMC in terms of the SMC Act.

3.6.6 Enforcement of the SBC Act

Section 23 of the SBC Act makes it an offence for any person to enter or refuse to leave any premises belonging to the SBC without permission or hinder any member or employee of the SBC from performing his or her functions. The penalty, on conviction, is a fine.

3.6.7 Making rules and regulations in terms of the SBC Act

Section 21 empowers the Minister of Information to make rules for carrying out the provisions of the SBC Act. The rules which the minister may provide relate to:

- the conditions on which the SBC may appoint its employees
- how the SBC may invest its money
- the form and manner in which the annual statements, accounts and report must be prepared
- any other matter which is required to be prescribed.

In terms of section 26 of the SBC Act, the minister, in consultation with the SBC, is empowered to make regulations to carry out the provisions of the SBC Act.

3.6.8 Weaknesses in the SBC Act that should be amended

Several weaknesses ought to be addressed in the SBC Act these include:

- the public ought to be involved in making board nominations
- there ought to be a public interview process for short-listed candidates
- the role of the minister in the making rules and regulations ought to be removed as the role played by the minister undermines the independence of the SBC and this function ought to be performed by the SMC
- the annual report and accounts ought to be provided directly to the National Assembly to whom the SBC should be accountable and not to the Minister of Information.

3.7 Legislation governing radio frequency spectrum

Section 37 of the Broadcasting Act empowers the minister responsible for broadcasting and telecommunication to:

- establish and maintain a national radio frequency plan designed to secure the rational use of radio spectrum in Seychelles
- ensure the needs of all radio communication licensees are met
- ensure the monitoring of radio frequency spectrum

- allocate radio frequency spectrum in such a manner that harmful interference is avoided.

These ought to be functions of an independent regulatory body such as the SMC.

3.8 Legislation governing the internet

Internet-related regulatory provisions are contained in section 13(2) of the SMC Act, which specifically includes internet content providers among the media practitioners for whom the SMC must create a code of conduct. The effect of this is that internet content providers in Seychelles are required to comply with that code and have complaints on their content adjudicated by the SMC.

3.9 Legislation that undermines a journalist's duty to protect his or her sources

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

In terms of section 126 of the Criminal Procedure Code, 1955 (CPC), a presiding officer in a court is empowered to call any person who is likely to give material or relevant information as to any alleged offence to come before him or her and to be examined by the public prosecutor or the defendant or his or her advocate. Thus, if a public prosecutor, defendant or his or her advocate suspects that a journalist knows something about a crime such journalist might be ordered to reveal his or her sources of information relating to that crime.

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

3.10 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 such information. These statutes are targeted and prohibit the following:

- publication or possession of seditious material
- publication of certain information relating to criminal proceedings
- publication of false news
- publication of defamation of the president
- publication of material that defames foreign princes
- incitement to violence
- the importation or possession of prohibited publications
- publication of material with the intent to wound religious feelings
- defamation.

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

3.10.1 Prohibition on the publication or possession of seditious material

In terms of article 54 of the Penal Code, 1955 (Penal Code) a seditious intention is defined as the intent to bring the president into hatred or contempt, or to excite disaffection against the government, the constitution or the National Assembly, or to seek an alteration to a law by non-legal means, excite disaffection against the administration of justice, raise discontent among the people of Seychelles or promote feelings of ill-will and hostility between parts of the population of Seychelles.

In terms of section 55 of the Penal Code, any person who prints, publishes, sells, offers for sale, distributes or reproduces any seditious publication or imports any seditious publication commits an offence. On conviction, the penalty for this offence is a fine, imprisonment or both.

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

In terms of section 58C of the Criminal Procedure Code, 1955 (CPC), concerning criminal proceedings being held *in camera*, a court may direct that a newspaper shall not reveal the name, address or any other particular, including a photograph or drawing, that might identify an accused or a witness in the proceeding, except as may be permitted by the court. Any person who contravenes this section of the CPC commits an offence and, on conviction, the penalty is a fine or imprisonment.

3.10.3 Prohibition on the publication of false news

Section 62 of the Penal Code provides that any person who publishes, whether orally, in writing or otherwise, any statement, rumour or report which is likely to cause fear and alarm to the public or to disturb the public peace, knowing it is false, is guilty of an offence and the penalty is imprisonment.

3.10.4 Prohibition on the publication of defamation of the president

Section 62A of the Penal Code provides that any person who publishes any defamatory or insulting matter intended to bring the president into hatred, ridicule or contempt whether in writing, print, word of mouth or in any other manner, is guilty of an offence. The penalty is imprisonment.

3.10.5 Prohibition on the publication of material that defames foreign princes

Section 63 of the Penal Code provides that any person who, without such justification or excuse as would be sufficient in the case of the defamation of a private person, publishes anything intended to be read, or any sign or visible representation, tending to degrade, revile or expose to hatred or contempt, any foreign prince, potentate, ambassador or other foreign dignitaries with intent to disturb peace and friendship between Seychelles and the country to which such prince, potentate, ambassador or dignitary belongs, is guilty of a misdemeanour. The section is silent on the penalty, but the Third Schedule to the Criminal Procedure Code stipulates imprisonment on conviction for the offence.

3.10.6 Prohibition on incitement to violence

Section 89A of the Penal Code makes it a misdemeanour offence for any person who, without lawful excuse, utters, prints or publishes any words, or does any act or thing indicating or implying that it is or might be desirable to do, or omit to do any act, the doing or omission of which is calculated to:

- bring death or physical injury to any person or any class, community or body of persons
- lead to the damage or destruction of any property
- prevent or defeat by violence or by other unlawful means the execution or enforcement of any law or to lead to defiance or disobedience of any such law or any lawful authority.

On conviction, the penalty is imprisonment.

3.10.7 Prohibition on the importation or possession of prohibited publications

Section 50(1) of the Penal Code provides that if the president feels that a publication or series of publications published outside Seychelles is contrary to the

public interest, he may, at his absolute discretion, declare the publication, series of publication or any publication made by that person or association of persons prohibited. Should the prohibited publication be a periodical, the prohibition extends to all subsequent publications unless otherwise provided, section 50(2). In terms of section 50(5), any person aggrieved by the declaration of the president may appeal to the secretary of the Council of Ministers. If the secretary refuses to repeal the prohibition, the aggrieved person can appeal to the president whose decision on the matter will then be final.

The section is silent on the penalty, but the Third Schedule to the Criminal Procedure Code stipulates imprisonment or a fine on conviction for the offence.

3.10.8 Prohibition on the publication of material with the intent to wound religious feelings

Section 128 of the Penal Code provides that any person who writes any word, utters any word or makes any sound in the hearing of any other person or makes any gesture or places any object in the sight of any other person with the deliberate intention of wounding their religious feelings is guilty of a misdemeanour. On conviction, the penalty for this offence is imprisonment.

3.10.9 Prohibition of defamation

Chapter XVIII of the Penal Code is headed Defamation. The wording is confusing, but the Chapter appears to distinguish between lawful and unlawful defamatory publication which it terms 'libel'.

In terms of section 184 of the Penal Code, libel is defined as:

> *any person who by print, writing, painting, effigy, or by any means otherwise than solely by gestures, spoken words or other sounds, unlawfully publishes any defamatory matter concerning another person, with intent to defame that other person, is guilty of a misdemeanour termed 'libel'.*

Section 185 of the Penal code defines a defamatory matter as:

> *matter likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or likely to damage any person in his profession or trade by an injury to his reputation. It is immaterial whether at the time of the publication of the defamatory matter the person concerning whom such matter is published is living or dead. Provided that no prosecution for the publication of defamatory matter concerning a dead person shall be instituted without the consent of the Attorney General.*

In terms of section 187 of the Penal Code, any publication of defamatory matter concerning a person is unlawful, unless the matter is true and it was for the public benefit that it should be published, or it is privileged.

There are two types of privilege provided for in the Penal Code, absolute and conditional.

In terms of section 188 of the Penal Code, a matter has absolute privilege when it is:

- published by the president, the Council of Ministries or the People's Assembly in any official document or proceeding
- published in the Council of Ministers or the National Assembly by the president or by any member of such council
- published in the course of any judicial proceedings by a person taking part therein as a judge, magistrate, commissioner, pleader, assessor, witness or party thereto
- published is a fair report of anything said, done, or published in the Council of Ministers or the National Assembly
- legally bound to published by the person publishing it.

Where a publication is absolutely privileged, it is immaterial whether the matter is true or false, and whether it is known or unknown or believed to be false, and whether it is published in good faith or not.

In terms of section 189 of the Penal Code, a matter has conditional privilege if it was published in good faith and the person publishing it has a legal, moral or social duty to do so. Also that the publication of the matter does not exceed what is sufficient for the occasion, namely if the matter published:

- is a fair report of anything said, done or shown in a civil or criminal inquiry or proceeding before any court, provided that, if the court prohibits the publication of anything said or shown before it, on the ground that it is seditious, immoral, or blasphemous, the publication thereof shall not be privileged
- is a copy, reproduction or a fair abstract of any matter which has been previously published, and the previous publication of which was or would have been privileged
- is an expression of opinion in good faith as to the conduct of a person in a judicial, official or other public capacity or as to his personal character so far as it appears in such conduct
- is an expression of opinion in good faith as to the conduct of a person concerning any public question or matter, or as to his personal character so far as it appears in such conduct
- is an expression of opinion in good faith as to the conduct or character of any person as disclosed by evidence given in a public legal proceeding
- is an expression of opinion in good faith as to the merits of any book, writing,

painting, speech or other work, performance or act published or done publicly

- is a censure passed by a person in good faith on the conduct or character of another person in any matter in respect of which he has authority
- is a complaint or accusation made by a person in good faith against another person concerning his conduct or character in any matter by any person having authority over that person
- is published in good faith for the protection of the rights or interests of the person who publishes it, or of the person to whom it is published, or of a person of interest to the person who published it.

It should be noted that in terms of section 190 of the Penal Code, a publication of a defamatory matter shall not be deemed to have been made in good faith by a person if:

- the matter was untrue, and that he or she did not believe it to be true
- the matter was untrue and that he or she published it without having taken reasonable care to ascertain whether it was true or false
- in publishing the matter, he or she acted with intent to injure the person defamed in a substantially greater degree than was reasonably necessary for the interest of the public or for the protection of the private right or interest of which he or she claims to be privileged.

The chapter is silent on the penalty for libel, but the Third Schedule to the Criminal Procedure Code stipulates imprisonment on conviction for the offence.

3.11 Legislation that specifically assists the media in performing its functions

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

3.11.1 Access to Information Act, Act 4 of 2018 (Access to Information Act)

The Access to Information Act was ostensibly enacted to foster good governance by enhancing transparency, accountability and integrity in public service and administration and encouraging participation by the public in matters of public affairs. The Access to Information Act recognises the right of access to information envisaged in Article 28 of the constitution.

The information commission

Section 36 of the Access to Information Act establishes the information commission as a self-governing, independent body corporate that shall not be subject to control or direction by any person or body in the performance of its functions. The information commission is made up of a Chief Information Commissioner and two other Information Commissioners. The president appoints them in consultation with the Speaker of the National Assembly from among candidates proposed by the Constitutional Appointments Authority in terms of section 37 of the Access to Information Act.

In terms of section 48 of the Access to Information Act, the information commission is empowered to:

- resolve matters by negotiation and mediation when deemed appropriate
- determine the necessity of an investigation for the determination of any matter
- authorise or undertake any action for the execution of its mandate under the Access to Information Act
- issue specific directions in matters concerning confidential information, minors or where it deems appropriate
- issue written orders requiring information to be produced
- require information to which access has been refused to be produced
- limit access to information
- take any action it deems appropriate for the resolution of any matter before it.

In terms of section 50 of the Access to Information Act, the information commission is required to promote awareness, educate and popularise the right of access to information.

Section 56 of the Access to Information Act empowers the information commission to audit any information holder to ensure compliance with the Access to Information Act.

Any person requesting information, or any third party connected with a request for information, may appeal to the information commission, in writing, concerning matters involving the decisions made by the heads of information holders in terms of section 58 of the Access to Information Act.

In terms of section 63 of the Access to Information Act, in concluding matters before it, the information commission may issue orders:

- affirming or setting aside the decision of the information holder
- varying the type of access initially granted

- requiring the information holder to take any necessary action to bring it into compliance with the Access to Information Act
- mandating negotiation conciliation or arbitration
- imposing a fine on the information holder where it has refused access to information without reasonable cause.

Requests for access to information

In terms of section 4 of the Access to Information Act, every public body is required to create keep, organise and maintain its information in good condition and in a form that facilitates access.

Section 5 of the Access to Information Act provides that public bodies are required to provide information following 30 days of its creation proactively. The information requiring proactive disclosure includes:

- manuals, policy procedures, rules or similar instruments that are used by officers of the body to discharge its functions and handle complaints, make recommendations or provide advice on the rights or obligations a person is entitled to or liable for
- the name and other particulars of the information officer of a public body
- any prescribed forms, procedures or rules the public body makes use of when engaging with the public
- minutes and documents from any meeting between the public body and the public
- detailed information on how public funds are used, including the amounts, used
- surveys or studies undertaken by the public body
- the particulars of its organisation including its functions and duties
- interpretations of any acts or policies administered by the public body
- details of its processes for keeping and organising the public body's information
- a directory of the public body's employees including information relating to the salary band of public employees, including the system of compensation as provided for in its laws and well as the decision-making process of the public body including channels of supervision and accountability
- detailed travel and hospitality expenses of the public body's employees including any sponsorships or benefits received by each of its employees
- a description of the composition, functions and appointments procedures of any public body being managed by two or more people

- detailed financial reports
- the annual report submitted to the information commission
- any other information directed by the information commission.

Section 8 of the Access to Information Act provides that every person has the right to access information held by a public body.

Any person may request information from a public body via the information officer, in terms of section 9 of the Access to Information Act. Any request for information must be accompanied by the relevant fees associated with the request. Section 10 provides that the information officer must assist the person requesting the information.

In terms of section 13 of the Access to Information Act, where a request for information has been made to a body that does not hold that information, the information officer must forward the request to the relevant body that does hold the requested information and inform the person requesting the information of the transfer.

Section 14 of the Access to Information Act provides that, if an information officer fails to give a decision on a request for access to information following the prescribed 21 days provided for in section 11 or following an extension provided for in section 12, the request for information will be deemed to have been refused.

Section 15 provides that an information officer may defer a request for information if the information has been prepared for presentation to the National Assembly (this deferment can be for five days), or the information has been prepared to report to an official body or person acting as an officer of the state (this deferment can be for 35 days). In the event of a deferment, the information officer must inform the person requesting the information within 21 days.

Section 16 of the Access to Information Act provides that, if information cannot be found or does not exist and the information officer has taken all reasonable steps to locate or conclude that the information does not exist, he or she must inform the person requesting the information within 21 days.

Section 11(2) of the Access to Information Act provides that where requested information reasonably appears to be necessary to safeguard the life or liberty of a person, the information officer shall provide it within 48 hours.

In terms of section 20 of the Access to Information Act, an information officer may refuse a request for access to information if it is exempted. Exempted information includes:

- personal information of a third party (section 21), except where:
  - the third party has consented to its release
  - the third party has been deceased for more than ten years
  - the information is in the public domain

- the information relates to the physical and mental well-being of an individual under the care of the person requesting the information and who is:
  - under the age of 18 or
  - unable to understand the nature of the request and to give access to the information is in the best interests of the third party
- the information about a deceased person is requested by a person who is:
  - the third-party's next of kin or legal representative has such written consent from either
  - the executor of the estate
  - a trustee of a trust which can benefit from the deceased estate
- the information relates to the position or function of an individual who is or was an official of the information holder or any other public body
- the third party was given prior notice that the information may be made available to the public

- information that contains trade secrets or would prejudice a legitimate commercial interest (section 22), except where:
  - the disclosure would facilitate accountability and transparency
  - the information relates to the expenditure of public funds
  - the disclosure would reveal misconduct or deception
  - the third-party consents to the disclosure
  - the information is in the public domain
- the release of the information is likely to endanger the health, life or safety of an individual (section 23)
- the release of the information would prejudice the defence of the state (section 24)
- a foreign state or international organisation has supplied the information in terms of an international agreement (section 25(a)
- the information is required to be held in confidence by international law (section 25(b)
- the information relates to positions adopted, or to be adopted by the state or another state or international organisation for negotiations (section 25(c).
- the information constitutes diplomatic correspondence (section 25(d)
- the release of the information would prejudice the economy of the state (section 26)

- the release of the information would be prejudicial to law enforcement (section 27)
- the information is privileged, that is, constitutes communication between a health practitioner or a lawyer and his or her patient or client or confidential communication between his or her source, or is otherwise legally privileged (section 28)
- the release of the information would be prejudicial to any academic or recruitment process before the conclusion of the process (section 29)
- the information concerns a proposal submitted to the Cabinet (section 30)
- the request for information is vexatious (section 32(1))
- another law provides for the release of the requested information (section 32(2)).

It should be noted that, in terms of section 31 where part of the information requested is exempt from disclosure, that part must be removed, and the remainder of the information must be provided to the person requesting the information.

In terms of section 34, a person who has been denied access to information by an information officer may request the decision be reviewed. Should the information officer not change his or her decision following a request for review, section 35 provides that the person requesting the information may request that the head of the information holder review the decision. Should the head of the information holder fail to give a decision or uphold the denial of access to information, the person requesting the information may submit an appeal to the information commission.

Protections and offences relating to access to information

In terms of section 66 of the Access to Information Act, no person may be held civilly or criminally liable for the release of information disclosed in good faith or under the Access to Information Act. No person may be detrimentally affected in the course of his or her employment for disclosures made in good faith or in terms of the Access to Information Act.

Section 67 makes it an offence for any person to:

- destroy, damage or alter information
- conceal information
- falsify information or make a false record
- obstruct an information holder from performing his or her duties under the Access to Information Act
- interfere or obstruct the work of the information commission

- direct, propose or counsel any person to do any of the above actions.

On conviction, the penalty for these offences is a fine, imprisonment or both.

Making regulations

Section 74 of the Access to Information Act empowers the Minister for Information to make regulations relating to the provisions of the Access to Information Act.

3.11.2 National Information Services Agency Act, Act 4 of 2012 (Nisa Act)

The establishment of the National Information Service Agency (Nisa)

Section 3 of the Nisa Act establishes Nisa as a body corporate.

The Nisa board

In terms of section 6 of the Nisa Act, the board of Nisa is made up of five members appointed at the discretion of and by the president. The board is responsible for the policy and control of Nisa. The president must designate one of the members as the chairperson. The members of the Nisa board elect a vice-chairperson from among their number. In terms of section 7 of the Nisa Act, the board members serve for two years and are eligible for re-appointment.

Objects and functions of Nisa

In terms of section 4 of the Nisa Act, the objects of Nisa are to:

- operate as an agency for gathering and disseminating information efficiently, objectively, impartially and cost-effectively
- contribute to the development of mass media in Seychelles
- promote the economic, political, social and diplomatic interests of Seychelles, both nationally and internationally
- contribute to national development and nation-building
- provide information support and be an information outlet for the government, national institutions and the public.

Section 5 of the Nisa Act provides for the numerous functions of Nisa, the ones that are relevant to the media are:

- to establish and operate facilities to collect and distribute information
- enter into agreements for the supply to and dissemination from Nisa
- compile print, produce, publish and distribute the Seychelles Nation Newspaper and other publications

- provide pre-press services and products to the government and other persons and organisations.

Nisa effectively operates a state press agency concerning its media-related functions.

3.11.3 Seychelles Human Rights Commission Act, Act 7 of 2018

The Seychelles Human Rights Commission Act, Act 7 of 2018 (HRC Act) establishes the HRC, section 3(1).

The Seychelles Human Rights Commission (HRC) is an essential organisation concerning the media. In terms of section 3(2), it is a self-governing, neutral and independent body that is not subject to direction or control from any person or authority.

In terms of section 14 of the HRC Act, the powers and functions of the HRC are:

- to make recommendations to ministries at all levels of government for the promotion of human rights within the framework of the constitution and the HRC Act
- to undertake studies to report on human rights
- to request the head of any organisation or institution, or the principal secretary of any ministry to provide it with any information on legislative or executive measures it has adopted regarding human rights
- to develop, conduct or manage information and education programmes to foster understanding and awareness of Chapter III of the constitution, the HRC Act and the role and activities of the HRC
- to maintain close liaison with institutions, bodies and authorities with similar objectives to the HRC to foster common policies and practices, and to promote cooperation concerning the handling of complaints in cases of overlapping jurisdiction or other appropriate instances
- to liaise and interact with organisations that actively promote respect for human rights
- to consider the recommendation made for the advancement of human rights originating from any source
- to review government policies concerning human rights
- to monitor compliance with international and regional covenants and charters concerning the objects of the HRC
- to prepare and submit reports to the National Assembly about covenants, treaties or charters concerning the objectives of the HRC

- to carry out studies referred to it by the president concerning human rights and report on the results and make recommendations associated with such studies
- to recommend to the president the adoption of legislation which will promote respect for human rights
- to report to the president any legislation that might contravene Chapter III of the constitution or is contrary to human rights.

Section 5 of the HRC Act provides that the HRC consists of:

- a chairperson appointed by the president in consultation with the Speaker of the National Assembly
- a deputy chairperson selected from a panel of three candidates proposed by the Constitutional Appointments Authority
- three commissioners selected from a panel of three candidates for each proposed post by the Constitutional Appointments Authority.

In terms of section 7(1) of the HRC Act, the chairperson of the HRC may resign by giving the president three months written notice. In terms of section 7(2) of the HRC Act, a member of the HRC may be removed from office when:

- the term of office has expired
- the member is absent from three consecutive meetings of the HRC
- the member is adjudged bankrupt
- the member is convicted of an offence and sentenced to six months imprisonment without the option of a fine
- the member is declared of unsound mind or body
- the member dies
- the member is removed from office in terms of section 8 of the HRC Act which provides that the president may remove the member on the grounds of gross incompetence.

4 Regulations affecting the media

In this section, you will learn:

▷ the definition of regulations

- key regulations governing print media licences
- key regulations governing sound broadcasting services
- the Media Code of Conduct for Seychelles

4.1 Definition of regulations

Regulations are a type of subordinate legislation. They are legal rules that are made in terms of a statute. Regulations are a legal mechanism for allowing ministers or even organisations such as the SMC, to make legally binding rules governing an industry or sector, without parliament having to pass a specific statute.

The empowering statute will give the minister or a body such as the SMC authority to make regulations, rules or both, on particular matters within the scope of the functions and powers of that minister or body.

4.2 Key regulations governing print media licences

The Licences Act empowers the minister responsible for the administration of that act to make regulations relating to licences. Subsidiary Legislation: Licences (Newspaper Publisher and Printer) Regulations published on 31 March 1987 (Newspaper Licence Regulations) constitute the regulations associated with applying for a Newspaper Publisher's or Printer's Licence.

In terms of section 3 of the Newspaper Licence Regulations, an application for either a Newspaper Publisher's or Printer's Licence must be submitted to the Seychelles Licence Authority (SLA) on the prescribed form.

Section 4 of the Newspaper Licence Regulations provides that all applications for a newspaper licence must be accompanied by:

- the fees set out in the schedule of the Newspaper Licence Regulations
- a deposit of not less than 100,000 Rupees to be used as surety for the satisfaction of any judgments against the applicant
- a certified copy of the affidavit registered under section 3 of the Newspaper Act.

Should the application for a newspaper licence be unsuccessful, the SLA must refund the licence fees and the surety deposit to the applicant.

Section 5(1) of the Newspaper Licence Regulations requires the SLA to consult with the ministry responsible for information and the ministry responsible for defence before issuing a Newspaper Publisher's Licence.

Section 5(2) of the Newspaper Licence Regulations requires the SLA consult with

the ministry responsible for information, the ministry responsible for planning and the ministry responsible for defence before issuing a Newspaper Printer's Licence.

In terms of section 6 of the Newspaper Licence Regulations, the SLA may refuse to grant a newspaper publisher's licence if it believes that the proposed name for the newspaper is undesirable.

Section 7 of the Newspaper Licence Regulations provides that the SLA may specify licence conditions and may include that:

- the licensee complies with the provisions of the Newspaper Act
- the licensee complies with any orders issued by a court concerning the publication and printing of the newspaper
- Newspaper Printer Licensees must ensure that at the foot of the last page of each copy of the newspaper lists his or her name and address and place of printing
- licensees must display their licence at the principal place of business.

Section 8 of the Newspaper Licence Regulations provides that a newspaper licence may be granted for five years and is renewable but not transferable.

4.3 Key regulations governing sound broadcasting services

The Broadcasting and Telecommunication (Sound Broadcasting Services) Regulations, Subsidiary Legislation 21 of 1994 published on 14 February 1994, (SBS Regulations), were published in terms of section 38 of the Broadcasting and Telecommunications Act which empowers the Minister of Broadcasting and Telecommunication to make regulations.

In terms of section 3 of the SBS Regulations, an applicant wishing to establish a sound broadcasting service must apply for a licence to the Seychelles Licensing Authority (SLA) stating:

- the place at which the sound broadcasting service is to be established
- the technical characteristics and specification for an MF sound broadcasting station (these are for frequencies in the range 300 to 3000 kHz) or a VHF sound broadcasting station (these are for frequencies in the range from 30 to 300 MHz)
- where the applicant is a body corporate, the names of its directors or members of the board
- the interests of the applicant in other broadcasting or media services, if any
- expertise and experience of the applicant
- staff requirements for the operation of the service

- additional information as may be required by the SLA.

In terms of section 4 of the SBS Regulations, in granting a licence application for a sound broadcasting service, the SLA must consider:

- the orderly development of sound broadcasting services
- the spectrum available
- the character of the applicant and, where the applicant is a body corporate, the character of its directors or members of the board of management
- the adequacy of expertise and experience available to the applicant and the means and capacity of the applicant to operate a sound broadcasting service
- generality, range and type of programmes proposed to be provided by the applicant including those in national languages and those about Seychellois' culture
- the technological and radio frequency plans of the applicant
- new opportunities provided by the applicant for Seychellois talent in music, drama, entertainment and other areas of artistic endeavour
- the desirability of allowing the applicant to control communications media in Seychelles.

It should be noted that, in terms of section 4(2) of the SBS regulations, where the sound broadcasting service is intended to be broadcast only in Seychelles, licences shall be granted only to citizens of Seychelles or a body corporate established under the laws of Seychelles.

In terms of section 6 of the SBS regulations, any sound broadcasting service licensee must ensure that:

- any broadcast of news by the licensee is presented objectively and impartially without any expression of views by the holder
- any broadcast of current affairs, including matters which are either of public controversy or subject of public debate, is fair to all interests concerned and the matter is presented objectively and impartially
- a minimum of such percentage of broadcasting time as may be determined by the minister is devoted to broadcasting news and current affairs
- anything which may be reasonably regarded as offensive to good taste or decency or as being likely to incite or promote crime or tending to undermine the authority of the State is not broadcast by the holder of the licence
- programmes broadcast, or the means employed to make such programmes, do not infringe unreasonably on the privacy of individuals

- rectification of any untrue information transmitted in a programme is, if requested by any person affected by it, made within 48 hours of the request and at the same time of the day as the programme which contained the untrue information
- due and adequate consideration is given to complaints, which are not frivolous or vexatious, made by any person concerning the broadcasting service and due and proper records of such complaints and any action taken thereon are kept and is made available for inspection by the minister if required
- programmes broadcast have respect for human personality, individual privacy, human rights, ideals of democracy, good taste and decency and maintain a high standard of national languages
- compliance with the standards and practices laid down by the minister concerning advertisements, sponsorship of advertising or programmes based on sports or other events
- broadcast of advertisements does not exceed such percentage of daily broadcasting time as may be determined by the minister or do not exceed seven minutes in an hour
- not less than 15% of the weekly programming is dedicated to local information or non-commercial programmes concerning Seychelles.

4.4 The Media Code of Conduct for Seychelles

In terms of section 13(2) of the SMC Act, the SMC, in consultation with the Seychelles Media Association, has developed the Code of Conduct for Media in Seychelles (the Code). According to the preamble, the purposes of the Code are to:

- protect freedom of expression and promote responsible journalism
- define, guide and promote ethical behaviour in the media profession
- ensure respect for human dignity and freedom from discrimination
- maintain high standards of integrity and good taste
- safeguard the rights of the public to accurate and truthful information
- enhance responsibility and accountability on the part of media practitioners
- resolve conflicts between the public and the media.

To achieve the above purposes, the provisions of the Code are summarised as follows:

4.4.1 Accuracy

The press should not publish inaccurate, misleading or distorted information, including pictures.

Once a significant inaccuracy, misleading statement or distortion is recognized, it must be corrected promptly and with due prominence and, where appropriate, an apology published.

The press shall clearly distinguish between news, infomercials and advertisements.

The press, whilst free to take a partisan stance, should distinguish between opinion, comment, conjecture and fact.

A publication must report fairly and accurately the outcome of an action for defamation to which it has been a party, unless an agreed settlement states otherwise, or an agreed statement is published.

4.4.2 Opportunity to reply

A fair opportunity for reply to inaccuracies must be given when reasonably requested.

4.4.3 Privacy

Everyone is entitled to respect for his or her private and family life, home, health and correspondence, including digital communications.

It is unacceptable to photograph individuals in private places without their consent.

4.4.4 Defamation

The press shall not engage in character assassination or defamation, which could result in an action for slander or libel.

4.4.5 Harassment

Journalists should not engage in intimidation, harassment or persistent pursuit of private individuals in their daily life.

They should not persist in questioning, telephoning, pursuing or photographing private individuals once asked to desist; nor remain on their property when asked to leave and must not follow them.

Editors should ensure these principles are observed by those working for them and take care not to use non-compliant material from other sources.

4.4.6 Intrusion into grief or shock

In cases involving personal grief or shock, enquiries and approaches must be made with sympathy and discretion, and publication handled sensitively. This should not restrict the right to report legal proceedings.

Photographs and video from conflicts, accidents and crime or disaster scenes shall be used with sensitivity and not add further suffering to victims and relatives and with due regard to the public interest and good taste.

4.4.7 Children

Young people should be free to complete their time at school without unnecessary intrusion.

A child under 18 must not be interviewed or photographed on issues involving their own or another child's welfare unless a custodial parent or similarly responsible adult consents or is present.

Pupils must not be approached or photographed at school without the permission of the school authorities.

Minors must not be paid for material involving children's welfare, nor parents or guardians for material about their children or wards unless it is established that this would not harm the child's interest.

Editors must not use the fame, notoriety or position of a parent or guardian as the sole justification for publishing details of a child's private life.

4.4.8 Children in sex offences cases

The press must not identify children under 18 who are victims or witnesses in cases involving sex offences.

In any press report of a case involving a sexual offence against a child:

- the child must not be identified
- the adult may be identified if a guilty verdict is handed down
- the word 'incest' must not be used where a child victim might be identified; the offence should be described as 'serious offence against young children' or similar appropriate wording
- care must be taken that nothing in the report implies the relationship between the accused and the child.

4.4.9 Hospitals

Journalists must identify themselves and obtain permission from a responsible executive before entering non-public areas of hospitals or similar institutions to pursue enquiries.

The restrictions on intruding into privacy are particularly relevant to enquiries about individuals in hospitals or similar institutions.

4.4.10 Reporting of crime, violence or hatred

Generally, relatives or friends of persons convicted or accused of a crime should not be identified unless they are genuinely relevant to the story.

Particular regard should be paid to the potentially vulnerable position of children who witness or are victims of, crime. This should not restrict the right to report legal proceedings.

The press should not publish material that may encourage or glorify violence, terrorist activities, ethnic, racial or religious hostilities and xenophobia.

4.4.11 Harm and offensiveness

The press should avoid prejudicial or pejorative reference to an individual's race, colour, religion, gender, sexual orientation or to any physical or mental illness or disability unless genuinely relevant to the story.

The press should avoid the use of offensive language, violence, sex, humiliation and expressions that violate human dignity.

The press shall not encourage, glamourise or condone the use of illegal drugs, the abuse of drugs, smoking, solvent abuse and the misuse of alcohol.

4.4.12 Victims of sexual assault

The press should not identify victims of sexual assault or publish material likely to contribute to such identification unless there is adequate justification, and they are legally free to do so.

4.4.13 Financial journalism

Journalists must not use the financial information they receive in advance of its general publication for their profit, nor pass such information to others for their profit.

4.4.14 News and information sources

Journalists have a moral obligation to protect confidential sources of information.

Except for confidential sources, publishers and broadcasters must acknowledge sources wherever and whenever possible and refrain from plagiarism.

As a matter of courtesy, journalists and broadcasters should identify themselves when gathering news and opinions, unless doing so will place them in danger or it is impractical.

Clandestine devices and subterfuge should not be used. The Press should not seek to obtain or publish material acquired by using hidden cameras or clandestine listening devices or by intercepting private or mobile telephone calls, messages or e-mails or by the unauthorised or illegal removal of documents or photographs. Engaging in misrepresentation or subterfuge can generally be justified only in the public interest and then only when the material cannot be obtained by other means.

4.4.15 Reporting on judicial proceedings

Sub judice cases:

- In the interest of justice, the Press shall refrain from publishing detailed accounts of evidence in on-going cases, especially in criminal cases, so that upcoming witness evidence is not influenced.
- The Press shall not publish interviews of lawyers in a *sub judice* case.
- The Press can report what is being said in open court to the judge and reserve direct interviews with lawyers until after the verdict has been delivered.

Witness payments in criminal trials:

- No payment or offer of payment to a witness, or any person who may reasonably be expected to be called as a witness, should be made in any case once proceedings are active. This prohibition lasts until the suspect has been freed unconditionally by police without charge or bail or the proceedings are otherwise discontinued, or the suspect has entered a guilty plea to the court or, in the event of a not guilty plea, the court has announced its verdict.
- Where proceedings are not yet active but are likely and foreseeable, editors must not make or offer payment to any person who may reasonably be expected to be called as a witness, unless the information concerned ought demonstrably to be published in the public interest, and there is an over-riding need to make or promise payment for this to be done, and all reasonable steps have been taken to ensure no financial dealings influence the evidence those witnesses give. In no circumstances should such payment be conditional on the outcome of a trial.
- Any payment or offer of payment made to a person later cited to give evidence in proceedings must be disclosed to the prosecution and defence. The witness must be advised of this requirement.

4.4.16 Payment to criminals

Payment or offers of payment for stories, pictures or information which seek to exploit a particular crime or to glorify or glamourise crime in general, should not be made directly or via agents to convicted or confessed criminals or to their associates, including family, friends and colleagues.

Editors invoking the public interest to justify payment or offers would need to demonstrate that there was good reason to believe the public interest would be served. If despite payment, no public interest emerged, then the material should not be published.

4.4.17 Gender sensitivity

The press should be gender-sensitive and avoid stereotyping when reporting.

4.4.18 Official national languages

While no quotas are prescribed, the Press must note that Seychelles has three official national languages. If any other language is used, except for songs and similar artistic work, it should be accompanied by a translation in one of the national languages.

4.4.19 Elections

Once elections have been officially announced, the Electoral Commission is mandated with special powers concerning publications and broadcasts by law.

The Press shall abide by the provisions laid down by the Electoral Commission in its pursuit of free and fair elections and a responsible media landscape.

The Electoral Commission shall publish any special provisions and requirements so that the Press is fully aware of them.

4.4.20 General definitions in the Code of Conduct

Key concepts often relating to the press and the media are:

- Freedom of expression:
  - Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This shall not prevent the State from requiring the licensing of publishing, broadcasting, television or cinema enterprises.
  - The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and independence of the courts or the National Assembly.
- The public interest:
  - detecting or exposing crime or a serious misdemeanour
  - protecting public health and safety
  - preventing the public from being misled by some statement or action of an individual or organisation.

  Where the public interest is invoked, the editor will be required to explain and demonstrate how the public interest was served.

In cases involving children, editors must demonstrate an exceptional public interest to override the normally paramount interests of the child.

- Defamation:
  - Defamation is the publication of a statement which tends to lower a person in the estimation of right-thinking members of society generally or which tends to make them shun or avoid that person. A statement is defamatory if it exposes a person to hatred, ridicule, contempt or disparages him in his office, profession or trade. A defamatory statement is libellous or slanderous.
  - Libels are generally written or printed but not necessarily; the defamatory matter may be conveyed in some other permanent form. For instance, a statue, a caricature, an effigy, chalk marks on a wall, songs, pictures or even a waxwork figure may constitute a libel.
  - Slander is defamation in a transient form, such as the spoken word.
  - Whether a person has been defamed is a matter to be determined by a court of law.

5 Media self-regulation

The media in Seychelles currently lacks a self-regulatory body and is without self-regulatory mechanisms for dispute resolution.

It should be noted that the Seychelles Media Association, in consultation with the Seychelles Media Commission (SMC), is involved in developing the Code of Conduct for the Media in Seychelles (discussed immediately above) as provided for in section 13(2)(b) of the SMC Act.

However, the Seychelles Media Association plays no role in enforcing the provisions of the Code of Conduct for the Media in Seychelles.

6 Case law and the media

In this section, you will learn about:

▷ common law

▷ legislation that was held to contravene the constitution

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

In this section, we focus on two cases that were heard together, and a single judgment was drawn up due to their similarity and by agreement of counsel and all parties involved.

6.2 Legislation that was held to contravene the constitution

The Constitutional Court of Seychelles heard two cases concerning the constitutionality of certain provisions of the Public Order Act, Act 22 of 2013 (Public Order Act). The first was *The Seychelles National Party and Others vs The Government of Seychelles*, CC No 02/2014 heard on 14 March 2014, and the second was *Viral Dhanjee vs Mr James Alix Michel and others*, CC No 03/2014 heard on 27 March 2014. Due to the similar nature of both cases, the cases were heard together and a single judgment given with the agreement of all parties involved.

The Public Order Act signed into law by the president on 31 December 2013 sought to grant the Commissioner of Police certain powers to control public gatherings, public meetings and public processions to maintain law and order during non-emergency and non-war times.

Due to the broad nature of the judgment, we detail those parts of the judgment that are relevant to the media.

The Constitutional Court found that, in many instances, the Public Order Act contravened article 22, Freedom of Expression, and article 23, Freedom of Association, among other rights. The result was that many of the provisions of the Public Order Act were judged void by the Constitutional Court, including all of the provisions relevant to the media.

As a result of the judgment, the Registrar of the Supreme Court was ordered to transmit certified copies of the judgment to the president of the Republic and to the Speaker of the National Assembly under article 46(6) of the constitution. No order to costs was made.

Notes

1 https://www.worldometers.info/world-population/seychelles-population/#:~:text=Seychelles%20 2020%20population%20is%20estimated,(and%20dependencies)%20by%20population. [Last accessed on 5 December 2020].

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South Africa

1 Introduction

The Republic of South Africa officially institutionalised a system of racial segregation, known as apartheid, in 1948, although racial segregation had always been a feature of colonial rule. The country's first democratic election was held in 1994 following the passage of the Interim Constitution, 1993, which was a negotiated constitution. In 1996 the first democratically elected parliament, acting as the Constitutional Assembly, enacted the final constitution. Both the interim and final constitutions protected fundamental civil rights, such as freedom of expression, but the final constitution is particularly noteworthy because it provides for independent regulation of the broadcasting sector.

A feature of the apartheid era was extensive state regulation and censorship of the media. The only broadcast media that was freely available in the country was the South African Broadcasting Corporation (SABC), which provided both radio and television services. The SABC was a state broadcaster, which was subject to government control and manipulation. The only other broadcast service that was allowed in South Africa was a subscription television service, M-Net, which was explicitly prohibited from broadcasting news. Some radio and television services did, however, transmit from the so-called independent states, particularly from Bophuthatswana and Ciskei, but their reach was limited.

The apartheid-era also saw the imposition of severe restrictions on the reporting of news and current affairs by the print media. This was particularly relevant during states of emergency, such as those which were in place during much of the 1980s.

The advent of democracy after 1994 brought about significant improvements in the media environment in South Africa. The broadcast media sector bourgeoned as commercial, and community sound and television broadcast media (including both free-to-air and subscription television broadcasters) were licensed by the independent regulator. The SABC was transformed into a public, as opposed to a state, broadcaster. In the print media sector, black economic empowerment imperatives have broadened print media ownership, and there are several commercial and community newspapers.

South Africa has recently seen some potential threats to the media. The public broadcaster has been in crisis for some years, and at one point there were clear signs that it was in danger of shifting back to the era of state, as opposed to public, broadcasting for the SABC. However, several important court and regulator rulings re-affirmed the importance of a public broadcaster independent of the government of the day. Nevertheless, there remains a level of risk as to whether or not the SABC will stay on course to being a genuine public broadcaster.

The government has battled to give effect to new policy; many bills have been withdrawn in the past couple of years due to constitutionality, and other concerns and the country has floundered in switching to Digital Terrestrial Television (DTT) which is now years behind the June 2015 deadline set by the International Telecommunications Union (ITU).

Access to the internet is increasing, thanks mostly to access to smartphones and the rollout of mobile internet access. The current internet penetration is 53%,[1] but there are glaring inequalities in such access. Poorer, more rural provinces have low rates (for example, 25% for the Eastern Cape and 26% for Mpumalanga) while the urban, more affluent provinces of Gauteng and the Western Cape have penetration rates of 54% and 75% respectively.[2]

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

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

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

2.1 Definition of a constitution

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

The South African Constitution sets out the foundational rules of the South African state. These are the rules on which the entire country operates. The constitution contains the underlying principles, values and laws of the Republic of South Africa. A key constitutional provision in this regard is section 1, which states:

> ***The Republic of South Africa is one sovereign, democratic state founded on the following values:***
>
> ***(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms;***
>
> ***(b) Non-racialism and non-sexism;***
>
> ***(c) Supremacy of the constitution and the rule of law;***
>
> ***(d) Universal adult suffrage, a national common voters' roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.***

2.2 Definition of constitutional supremacy

Constitutional supremacy means that the constitution takes precedence over all other law in a particular country, for example, legislation or case law. It is important to ensure that a constitution has legal supremacy if a government passed a law that violated the constitution (was not in accordance with or conflicted with a

constitutional provision) such legislation could be challenged in a court of law and could be overturned on the ground that it is unconstitutional.

The South African Constitution makes provision for constitutional supremacy. Section 2 specifically states: 'This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.'

2.3 Definition of a limitations clause

It is clear that rights are not absolute as society would not be able to function. For example, if the right to freedom of movement were absolute, society would not be able to imprison convicted criminals. Similarly, if the right to freedom of expression were absolute, the state would not be able to protect its citizens from hate speech or false, defamatory statements made with reckless disregard for the truth. 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 in accordance with the constitution.

The Constitution of South Africa makes provision for three types of legal limitations on the exercise and protection of rights contained in Chapter 2, Bill of Rights.

2.3.1 Internal limitations

There are limitations that are right specific and contain limitations or qualifications to the particular right that is dealt with in a particular section of the Bill of Rights. As discussed later, the right to freedom of expression contains such an internal limitations clause.

2.3.2 Constitutional limitations

Section 36(2) of the constitution makes it clear that a law may limit any right entrenched in the Bill of Rights if this is allowed in terms of any provision of the constitution. See, for example, section 37 of the constitution, which deals with states of emergency. Section 37(4) specifically allows for emergency legislation to provide for derogations from the Bill of Rights in certain circumstances. These circumstances include where the derogation is strictly required by the emergency, and that certain rights cannot be derogated from, namely, the rights to dignity and life. Importantly, section 37 specifically allows for emergency legislation to provide for the derogation of rights laid down in the Bill of Rights (including all of the rights that are important to the media, such as the right to freedom of expression, privacy, access to information, administrative justice and so on), where this is strictly required by the emergency.

The process of declaring a state of emergency is set out in section 37(2)(b) of the constitution. It may be done only through an act of parliament and for no more than 21 days. It can be extended for no more than three months at a time with the first extension requiring a majority of the votes in parliament and any subsequent extension requiring a 60% majority of the votes in parliament.

Parliament has enacted the State of Emergency Act, Act 64 of 1997, to give effect to section 37 of the constitution.

2.3.3 General limitations

The last type of limitation is a general limitations provision. General limitations provisions apply to the provisions of a bill of rights or other statement setting out the fundamental rights. These types of clauses allow a government to pass laws limiting rights, provided this is done in accordance with the constitution. One can find the general limitations clause applicable to the South African Bill of Rights in section 36 of the South African Constitution, headed Limitations of Rights. Section 36(1) provides that the rights in the Bill of Rights may be limited only:

- in terms of a law of general application. This means that the law may not single out particular individuals and deny them their rights
- to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:
  - the nature of the right;
  - the importance of the purpose of the limitation;
  - the nature and extent of the limitation;
  - the relation between the limitation and its purpose; and
  - less restrictive means to achieve the purpose.

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

It is not always clear why it is necessary to have internal limitations clauses if there is a general limitations clause as well. Sometimes, internal limitations clauses are indicators of rights which appear to be substantive but which are actually not very effective.

2.4 Constitutional provisions that protect the media

The South African Constitution contains several important provisions in Chapter 2, the Bill of Rights, that protect the media, including publishers, broadcasters, journalists, editors and producers. There are, however, provisions elsewhere in the constitution that assist the media as it goes about its work of reporting on issues in the public interest, and we include these in this section as well.

2.4.1 Rights that protect the media

Freedom of expression

The most important provision that protects the media is section 16(1), part of the section headed Freedom of Expression, which states:

> *Everyone has the right to freedom of expression, which includes —*
>
> *(a) freedom of the press and other media;*
>
> *(b) freedom to receive or impart information or ideas;*
>
> *(c) freedom of artistic creativity; and*
>
> *(d) academic freedom and freedom of scientific research.*

This provision needs some detailed explanation.

- This freedom applies to everyone and not just to certain people, such as citizens.
- The freedom is not limited to speech (whether oral or written) but extends to non-verbal or non-written expression. There are many different examples of this, including physical expression (such as mime or dance), photography or art.
- Section 16(1)(a) specifies that the right to freedom of expression includes 'freedom of the press and other media'. This is very important for two reasons.
  - It makes it clear that this right can apply to corporate entities such as media houses, newspapers or broadcasters, as well as to individuals.
  - It makes it clear that the right extends to both the press and other media. Thus, the section distinguishes between the press, with its connotations of the news media, and other media, which could include fashion, sports, gardening or business publications or television channels, thereby protecting all media.
- Section 16(2)(b) specifically enshrines the freedom 'to receive or impart information and ideas'. This right of everyone's to receive information is a fundamental aspect of freedom of expression, and this subsection enshrines the right to the free flow of information. Thus, the information rights of audiences, for example, as well as the expression rights of the media are protected. This right is important because it also protects organisations that foster media development. These organisations facilitate public access to different sources and types of information, particularly in rural areas that traditionally have limited access to the media.

Right of access to information

Another critically important provision that protects the media is section 32, which

enshrines the right of access to information. Section 32(1) provides that everyone has the right to access to:

> *(a) any information held by the state; and*
>
> *(b) any information that is held by another person and that is required for the exercise or protection of any rights.*

This right requires some explanation.

Section 32 essentially provides for two types of rights of access to information:

- The first is a general right of access to any information held by the state. There are no prerequisites for this right; everyone has the right to any information held by the state.
- The second right is, paradoxically, both broader and narrower. It is broader because it grants everyone the right to information 'held by any other person' other than the state that is. Essentially, this gives everyone the right to information held by all private persons, whether individuals or institutions. However, this right is more narrowly tailored as one has the right to information held by non-state persons only where access to the information is 'required for the exercise or protection of any rights'. Thus one needs to demonstrate that the information is required to protect or exercise a right.

The right of access to information is vital in the information age in which we live. When states wield enormous power, particularly with regard to the distribution of resources, the right of access to information is one of the most important rights in ensuring transparency and holding government accountable. If one considers that the media plays an enormous role in ensuring transparency and government accountability by providing the public with information, having this right of access to information is critical to enable the media to perform its functions properly.

Importantly, section 32(2) provides that national legislation must be enacted to give effect to the right of access to information. This has been done by the Promotion of Access to Information Act, 2000, which is dealt with in more detail in the legislation section below.

Right to just administrative action

Another important provision that protects the media is section 33, Just Administrative Action. Section 33(1) provides that everyone 'has the right to administrative action that is lawful, reasonable and procedurally fair', and section 33(2) provides that everyone 'whose rights have been adversely affected by administrative action has the right to be given written reasons'.

This right requires explanation. The reason why this provision is important for journalists and the media is that it protects them (as it does all people) from administrative officials who act unfairly and unreasonably and who do not comply with legal requirements. It also entitles journalists and the media to written reasons

when administrative action results in their rights being adversely affected.

An administrative body is not necessarily a state body; these bodies are often private or quasi-private institutions. These constitutional requirements would, therefore, apply to non-state bodies as well.

Many decisions taken by bodies are administrative in nature, and this requirement of administrative justice is a powerful one that prevents or corrects unfair and unreasonable conduct on the part of administrative officials. Furthermore, having a constitutional right to written reasons is a powerful tool in ensuring rational and reasonable behaviour on the part of administrative bodies, and aids in ensuring transparency and, ultimately, accountability.

Importantly, section 33(3) provides that national legislation must be enacted to give effect to the right to just administrative action. This has been done in the Promotion of Administrative Justice Act, 2000.

Privacy

A fourth protection is contained in section 14, Privacy. Section 14 specifies that everyone has the right to privacy, which includes the right not to have their person, home or property searched, their possessions seized or the privacy of their communications infringed on. This protection of communications (including letters, emails, telefaxes and telephone conversations) is an important right for working journalists.

Freedom of religion, belief and opinion

A fifth protection is contained in section 15(1), which guarantees everyone the right to freedom of, among other things 'thought, belief and opinion'. Freedom of opinion is important for the media as it protects media commentary on public issues of importance.

Freedom of association

A sixth protection is provided for in section 18, which grants everyone the right to freedom of association, thereby guaranteeing the rights of the press to form press associations, but also to form media houses and conduct media operations.

Freedom of trade, occupation and profession

Section 22 guarantees everyone the right to choose their profession freely; however, this right is subject to the internal limitation that the practice of a profession, such as journalism, may be regulated by law.

This is not a suspect internal limitation, it merely allows for appropriate regulation to protect the public, such as ensuring against malpractice by members of the medical profession, or unethical behaviour by lawyers.

2.4.2 Other constitutional provisions that assist the media

It is important to note that there are provisions in the South African Constitution, apart from the Bill of Rights provisions, that are important and assist the media in performing its functions.

Provisions regarding the functioning of parliament

A number of provisions in the constitution regarding the functioning of parliament are important for the media, including the following:

- Sections 58 and 71, which specifically protect freedom of speech in the National Assembly or the National Council of Provinces (NCOP) of the president, Cabinet members, deputy minister and members of the National Assembly and delegates to the NCOP. They cannot be arrested, charged or sued either civilly or criminally in respect of speeches made or documents produced in the National Assembly or NCOP.

- Sections 59(1) and 72(1), which provide that the National Assembly and NCOP are required to conduct their business in an open manner and must hold their sittings as well as committee sittings in public, although reasonable measures may be taken to refuse entry to any person.

- Importantly, sections 59(2) and 72(1) specifically provide that the National Assembly and NCOP may not exclude the media from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society.

These provisions assist the media in two important ways. First, they ensure that the media has a great deal of access to the workings of parliament by being physically able to be in parliament. Second, they protect parliamentarians by allowing members of parliament (MPs) to speak freely and in front of the media, without facing arrest or charges for what they say.

Provisions regarding public administration

Section 195 is headed Basic Values and Principles Governing Public Administration. Section 195(1) provides that public administration must be governed by the democratic values and principles enshrined in the constitution, and includes several principles. Some of these have particular importance for the media, namely:

> *a) people's needs must be responded to, and the public must be encouraged to participate in policy-making;*
>
> *b) public administration must be accountable; and*
>
> *c) transparency must be fostered by providing the public with timely, accessible and accurate information.*

There can be little doubt that the media plays a crucial role in educating the

population, enabling citizens to participate meaningfully in a democracy. These provisions could, therefore, be interpreted as requiring media-friendly policies on the part of the state.

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

Just as there are certain rights or freedoms that protect the media, other rights or freedoms can protect individuals and institutions from the media. It is important for journalists to understand which provisions in the constitution can be used against the media. There are several these.

2.5.1 Right to human dignity

The right to human dignity is provided for in section 10, which states that 'everyone has inherent dignity and the right to have their dignity respected and protected'. Dignity is a right that is often raised in defamation cases because defamation, by definition, undermines the dignity of the person being defamed. This right is often set up against the right to freedom of the press, requiring a balancing of constitutional rights.

2.5.2 Right to privacy

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

2.5.3 Internal limitation to the right to freedom of expression

It is important to note that the right to freedom of expression is one of the few rights in the Bill of Rights that is subject to an internal limitation. Section 16(1) sets out the content of the right to freedom of expression, and section 16(2) provides that the right to freedom of expression does not extend to three types of expression, namely propaganda for war, incitement to imminent violence or advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

It is important to understand the nature of the provisions of section 16(2). There is a misconception that the constitution outlaws or makes this kind of expression illegal. This is not correct. What the constitution does say is that these three types of expression do not fall within the right to freedom of expression. In other words, they are simply not constitutionally protected.

The effect of this is that the government may prohibit this kind of expression without needing to meet any of the requirements contained in the general limitations clause. As there is no right to make these three types of expression, there is no need to justify limitations on them. The danger in this, of course, is that the government is free to be heavy-handed and to legislate in a disproportionate manner when regulating such expression. A more thorny issue is that the government is tempted to regulate an issue dealt with in section 16(2), for example, hate speech, in an overbroad manner, that is defining hate speech more broadly than the constitution does in section 16(2)(c) when regulating it.

2.5.4 States of emergency provisions

These have been dealt with in paragraph 2.3.2 above.

2.5.5 The judiciary

In terms of section 165(1) of the South African 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 of Appeal, the apex court in respect of non-constitutional matters; the High Courts, the magistrates' courts and any other court established in terms of an act of parliament.

The judiciary is an essential 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. 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 former from unlawful action by the state and unfair damages claims by litigants.

Section 165(2) specifically provides that the courts 'are independent and subject only to the Constitution and to the law, which they must apply impartially and without fear, favour or prejudice'. Judges are appointed by the president, acting on the recommendation of the Judicial Service Commission (JSC) and after consultation with the Chief Justice and leaders of all political parties represented in parliament. Judges are removed by the president, who must act on a finding by the JSC that the particular judge suffers from incapacity, is grossly incompetent or is guilty of gross misconduct. In addition, a resolution must be passed by two-thirds in the National Assembly calling for the judge to be removed.

2.5.6 The Judicial Service Commission

The JSC is a constitutional body established to participate in the appointment and removal of judges. Many would query why the JSC is relevant to the media. The answer is because of the JSC's critical role in the judiciary, the proper functioning and independence of which are essential for democracy. In terms of section 178, the JSC comprises the Chief Justice, the president of the Supreme Court of Appeal, one judge president designated by all the judge presidents, two practising advocates and two practising attorneys nominated by their respective professions, all of

whom are appointed by the president; one law teacher designated by the universities, six members of the National Assembly, three of whom represent opposition parties; four permanent delegates to the NCOP and four persons designated by the state president after consultation with the leaders of all political parties represented in the National Assembly. Also, when considering matters relating to a specific high court, both the judge president and the premier of that province are part of the JSC.

Unfortunately, it appears that the JSC is becoming increasingly politicised and its credibility among many legal practitioners, including some members of the judiciary, has been dented. An example is the generally slow pace of the JSC's misconduct enquiries which have been known to drag on for over a decade.[3]

2.5.7 The Public Protector

The Public Protector's Office is an important office for the media because it, too, is aimed at holding public power accountable. The Public Protector is established in terms of section 182 of the Constitution. It is part of Chapter 9 of the constitution, State Institutions Supporting Constitutional Democracy. The main power of the Public Protector is to investigate and, if necessary, act on any conduct in state affairs or the public administration in any sphere of government that is alleged or suspected to be improper, or to result in any impropriety or prejudice.

The Public Protector is governed by the Public Protector Act, Act 23 of 1994. In terms of section 1A(2) of this act, read with section 193 of the constitution, the Public Protector is appointed by the president on the recommendation of the National Assembly. Note that the Public Protector can be removed only on the grounds of misconduct, incapacity or incompetence, in terms of section 194 of the constitution.

At the time of writing, recent holders of the office have managed the position very differently. One has been recognised globally for her ground-breaking work in holding former President Zuma to account in respect of public monies having been lavished on his private homestead which she insisted must be paid back. The other, the present incumbent, has been sharply criticised by the courts regarding her lack of candour and competence. She has had many personal costs orders awarded against her, including by the Constitutional Court,[4] in respect of several of her investigations which have been set aside on review.

2.5.8 The Human Rights Commission of South Africa

The Human Rights Commission of South Africa is an important organisation in respect of the media. It is also a so-called Chapter 9 body, that is, a state institution supporting constitutional democracy. In terms of section 184 of the constitution, the brief of the Human Rights Commission is to promote respect for human rights, as well as to promote the protection, development and attainment of human rights, including monitoring and assessing the observance of human rights in South Africa.

The Human Rights Commission is governed by the Human Rights Commission Act, 2013. Members of the Human Rights Commission are appointed by the president on the recommendation of the National Assembly. As with the Public Protector, the commissioners can be removed only on the grounds of misconduct, incapacity or incompetence, in terms of section 194 of the constitution.

2.5.9 The independent authority to regulate broadcasting

Section 192 of the constitution is critically important for the broadcast media. It requires that national legislation be passed to establish an independent authority to regulate broadcasting in the public interest and to ensure fairness and a diversity of views broadly representing South African society. It is also a Chapter 9 body.

The independent broadcasting authority required by section 192 of the constitution was established in terms of the Independent Communications Authority of South Africa Act, 2000. It is called the Independent Communications Authority of South Africa (Icasa) and is dealt with in more detail elsewhere in this chapter.

Section 192 clearly articulates constitutional values for the broadcasting sector, namely, that broadcasting is to be regulated in the public interest and that a diversity of views in the broadcasting sector is important.

Questions have been raised about the level of protection given to the independent broadcasting regulator because the provisions that deal with the general principles applicable to Chapter 9 and the appointment and removal of their members do not mention the broadcasting regulator. To date, no court has had the opportunity of considering the implications of this *lacuna* or gap in the constitutional provisions.

2.6 Enforcing rights under the constitution

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

Section 7(2) of the constitution requires the state to 'respect, protect, promote and fulfil the rights in the Bill of Rights'. Section 8(1) of the constitution makes it clear that the Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and all organs of state. Furthermore, section 8(2) makes it clear that the Bill of Rights also binds a natural (individual) or juristic person (such as a company) if a particular right is applicable in the circumstances. What this means is that the Bill of Rights has horizontal (between individuals) as well as vertical (between the state and individuals) application.

Although rights are generally enforceable by the courts, the constitution itself also envisages the right of people, including the media, to approach a body such as the Public Protector or the Human Rights Commission to assist in the enforcement of rights.

Perhaps one of the most effective ways in which rights are protected under the

constitution is by the provisions that entrench Chapter 2, the Bill of Rights. Section 74(2) of the constitution requires that a constitutional amendment to Chapter 2 be passed by two-thirds of the members of the National Assembly and by six of the nine provinces in the NCOP, thereby providing significant protection for the Bill of Rights provisions.

2.7 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.

2.7.1 Branches of government

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

The executive

In terms of section 85(1) of the constitution, executive power in South Africa is vested in the president. Executive power is exercised by the president, together with Cabinet, in terms of section 85(2) of the constitution. In terms of section 91(1) of the constitution, the Cabinet comprises the president, a deputy president and ministers appointed by the president, all but two of whom must be selected from the members of the National Assembly.

Section 85 sets out several functions of the president acting with members of the Cabinet. These include:

- implementing national legislation
- developing and implementing national policy
- coordinating functions of state departments and administrations
- preparing and initiating legislation
- performing any other executive function in terms of the Constitution or legislation.

Essentially, it can be said that the role of the executive is to administer or enforce laws, make government policy and propose new laws.

The legislature

In terms of section 43(a) of the constitution, legislative power in South Africa is vested in parliament. In terms of section 42(1) of the constitution, parliament consists of the National Assembly and the NCOP. In terms of section 44, this legislative

authority has the power to amend the constitution and pass and amend legislation. The National Assembly also fulfils other essential functions, including, in terms of section 55(2), holding the executive accountable for its operations. It does this by playing an oversight role in terms of the workings of the executive branch of government.

In terms of section 46, the National Assembly is made up of between 350 and 400 people, elected in terms of a common voters' roll and in accordance with national legislation. In terms of section 60, the NCOP comprises nine delegations of 10 people, one delegation from each of country's nine provinces.

The judiciary

As described above, judicial power is vested in the courts. The role of the judiciary is to interpret the law and to adjudicate legal disputes in accordance with the law.

2.7.2 Separation of powers

It is essential in a functioning democracy 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 is to separate the functions of the three branches of government, the executive, the legislature and the judiciary so that no single office can operate alone, assume complete state control and amass centralised power. Each branch performs many different functions, and also plays a watchdog role in respect of the other, helping to ensure that public power is exercised in a manner that is accountable to the general public and per the constitution.

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

There are some weaknesses in the South African Constitution. If these provisions were strengthened, there would be specific benefits for the South African media.

2.8.1 Remove internal constitutional limitation

The internal limitation contained in section 16(2) of the constitution and applicable to the right to freedom of expression ought to be repealed. These provisions are unnecessary because the provisions of the general limitations clause give the government the powers it needs to limit fundamental rights reasonably. Consequently, the legislature already has the power to pass legislation limiting hate speech and other kinds of expression, which is the subject of the internal qualifiers found in section 16(2).

2.8.2 Bolster independence of the broadcasting regulator

It is disappointing that the constitution does not provide the independent broadcasting regulator, established in terms of section 192, the same degree of

institutional protection against political and other interference that is offered to all other Chapter 9 bodies (state institutions supporting constitutional democracy). The broad provisions that protect the independence of Chapter 9 bodies generally should be amended so that they apply specifically to the broadcasting regulator, as well as to all the other Chapter 9 bodies. These provisions are:

- section 181 — Establishment and Governing Principles
- section 193 — Appointments
- section 194 — Removal from Office.

2.8.3 Constitutional protections for the public broadcaster

It has become clear that the public broadcaster, the SABC, is increasingly threatened by political interference. Most South Africans get their news and current affairs information from the SABC. The constitution should, therefore, specifically protect its independence and ensure that it operates in the public interest.

This is important to guarantee impartiality and to be sure that the South African public is exposed to a variety of views. Chapter 9 of the constitution ought to be amended specifically to include the SABC as a state institution supporting constitutional democracy.

3 The media and legislation

In this section, you will learn:

- ▷ what legislation is and how it comes into being
- ▷ legislation governing the print media
- ▷ legislation governing the broadcasting media in general
- ▷ legislation governing the public broadcasting sector
- ▷ legislation governing broadcasting signal distribution
- ▷ legislation governing the internet
- ▷ legislation that threatens a journalist's duty to protect 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 parliament, which is the legislative authority. As discussed, legislative authority in South Africa is vested in parliament, which, in terms of the constitution, is made up of the National Assembly and the NCOP. Consequently, both houses of parliament are involved in passing legislation.

Detailed rules in sections 73 – 82 of the constitution set out the law-making processes that apply to different types of legislation. It is important for journalists and others in the media to be aware that the constitution requires different types of legislation to be passed in accordance with particular procedures. The procedures are complicated and need not be explained here. Journalists should, however, be aware that, in terms of the constitution, there are four kinds of legislation, each of which has particular procedures or rules or both applicable to it. These are:

- legislation that amends the constitution, the procedures or applicable rules or both are set out in section 74 of the constitution
- legislation that does not deal with provincial-related issues, the procedures or applicable rules or both are set out in section 75 of the constitution
- legislation that deals with provincial issues, the procedures or applicable rules or both are set out in sections 76 and 78 of the constitution
- legislation that deals with taxation issues, the procedures or applicable rules or both are set out in section 77 of the constitution.

3.1.2 The difference between a bill and an act

A bill is a draft law that is debated and usually amended by parliament during the law-making process. If a bill is passed by parliament in accordance with the various applicable procedures required for different types of bills as set out above, it is sent to the president. Once it is signed by the president (signifying his assent to the bill), it becomes an act (in terms of section 81 of the constitution). An act must be published promptly and takes effect or comes into force when it is published or on a date specified in the act itself (in terms of section 81 of the constitution).

Besides the checks 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:

- Presidential review: If the president has reservations about the constitutionality of any bill passed by parliament, he or she may refer it back to the National Assembly for reconsideration, in terms of section 79 of the constitution. Note that the NCOP must also participate in such reconsideration if the president is concerned about a procedural matter involving the NCOP, or if the bill is one which amends the constitution or deals with provincial matters. After the reconsideration, the president must either accept the bill, that is, sign it such that it becomes an act, or it to the Constitutional Court for a ruling on its constitutionality. If the Constitutional Court rules that the bill is constitutional, section 79(5) requires the president to assent to and sign the bill.
- Review by the National Assembly: It is interesting that the constitution, in section 80, provides for a procedure to test the constitutionality of a recently enacted act of parliament by members of the National Assembly. In terms of section 80, members of the National Assembly may apply to the Constitutional Court for an order declaring that all or part of an act of parliament is unconstitutional, provided that:
  - at least one-third of the members of the National Assembly support the application. The reason for this requirement is to prevent small minority parties (less than a third of the MPs) from disrupting the democratic process by challenging laws by unnecessary allegations of unconstitutionality
  - the act of parliament was assented to and signed by the president within the previous 30 days. The reason for this requirement is to try to discourage parliament from causing legal chaos by challenging its own legislation after the legislation has long been settled

3.2 Legislation governing the print media

Since the advent of democracy, South Africa's print media has enjoyed a level of media freedom that is unprecedented in its history. South Africa's print media environment is undoubtedly the freest, most robust and critical on the continent. There are very few limitations on the ability to operate as a print media publication. Most of the laws setting down specific obligations on the print media are reasonable and justifiable and do not impinge in any way on the public's right to know.

3.2.1 Imprint Act, Act 43 of 1993

There are certain crucial requirements laid down by the Imprint Act in respect of printed material, the definition of which would include a newspaper, newspaper poster, magazine or periodical:

- Section 2 requires printers of publications intended for public sale or distribution to put their full name and full address in one of the official languages on any such publication. Note that it is possible for a registered abbreviation to be used, in terms of section 3.

- Section 4 provides that no person may distribute any publication that is printed outside the country unless the name of the country of origin is affixed to the publication.
- In terms of section 7, failure to comply with sections 2 or 4 is an offence and, on conviction, a person would be liable to a fine or imprisonment not exceeding one year.

3.3 Legislation governing both print and broadcast media

3.3.1 Legal Deposit Act, Act 54 of 1997

The Legal Deposit Act aims to preserve South Africa's documentary heritage. Section 2, read with sections 3 and 4, requires a publisher, at its own cost, to supply up to five copies of each published document (which obviously includes newspapers, magazines and periodicals but is defined so broadly as to include sound and video broadcasts as well as material published online) to a prescribed place of legal deposit (these are large libraries based in the major cities), and to provide the State Library with prescribed information regarding that document within 14 days of publication. Failure to do so is an offence punishable by a fine. However, it seems that, in practice, the Legal Deposit Act is complied with only by print publications, that is, newspapers, magazines and periodicals and not by broadcast or online media.

3.3.2 The Media Development and Diversity Agency (MDDA) Act, Act 14 of 2002

The MDDA Act creates the Media Development and Diversity Agency as a juristic person, whose main objective is to promote development and diversity in the media throughout the country, in terms of section 3 of the MDDA Act. The main source of funding for the MDDA is by financial contributions made by broadcasters and print media outlets. This funding is used for a range of projects, including providing financial support to community and small commercial media. Note that support is given to both print and broadcast media. Important aspects of the MDDA Act are as follows:

Establishment of the MDDA

The MDDA Act establishes the MMA which operates through a board, in terms of 2.

Main functions of the MDDA

The MDDA Act, at section 3, provides that its main objective is to promote development and diversity in the South African media and for that purpose, among other things, to:

- encourage media ownership by historically disadvantaged communities

- encourage the channeling of resources to the community media and small commercial media sectors.

Section 17 sets out the nature of the support that the MDDA can give to the community and small commercial media. This includes:

- direct cash grants and emergency funding
- training and capacity building
- media research.

Appointment of MDDA board members

In terms of section 4 of the MDDA Act, the MDDA board is made up of nine members, all of whom are appointed by the president. However, of the nine members:

- six are appointed on the recommendation of the National Assembly. Section 4(1)(b) of the MDDA Act requires that the appointment process must include a public nominations process, be transparent and open, and include the publication of a shortlist of candidates.
- The president appoints three without the intervention of the National Assembly 'taking into account section 15', in terms of section 4(1)(c) of the MDDA Act. Section 15 deals with the funding of the MDDA, and this is a pointed reference to the fact that the majority of funding for the MDDA currently derives from voluntary contributions made by the media. Indeed, section 4(1)(c) specifies that one of the three purely presidential appointees must be from the commercial print media and another from the commercial broadcast media. Section 4(4) read with section 4(5) of the MDDA Act sets out criteria for appointment. These include a commitment to 'fairness, freedom of expression, openness and accountability' as well as technical competencies. Section 5 of the MDDA Act sets out grounds for disqualification of MDDA board members, and these include being foreign, holding elective office, holding political party office and prior criminal convictions.

Funding of the MDDA

In terms of section 15 of the MDDA Act, the funds of the MDDA consist of money appropriated by parliament, that is, specifically set aside in the national budget for that purpose; money received in terms of voluntary agreements with any organisation (note that this includes several print and broadcast media entities); domestic and foreign grants, investment interest and sums of money lawfully obtained from any other source.

3.4 Legislation governing the broadcast media generally

3.4.1 Statutes regulating broadcasting generally

Broadcasting in South Africa is regulated in terms of several different pieces of legislation.

- *Broadcasting Act, Act 4 of 1999:* The Broadcasting Act, apart from a few sections which are still generally applicable to all broadcasters, is essentially an act that regulates the public broadcaster, the SABC, as is dealt with in more detail below.
- *Independent Communications Authority of South Africa Act, Act 13 of 2000:* The Icasa Act establishes and empowers Icasa, which is the authority that regulates electronic communications, broadcasting and postal services in South Africa. Thus Icasa is the independent authority to regulate broadcasting as is constitutionally required in terms of section 192 of the constitution as is more fully dealt with above.
- *Electronic Communications Act, Act 36 of 2005 (ECA):* The ECA provides for several specific powers and functions of Icasa concerning the entire electronic communications and broadcasting sectors in South Africa. Chapter 9 of the ECA, Broadcasting Services, regulates the broadcasting industry in South Africa.

3.4.2 Establishment of Icasa

The Icasa Act establishes Icasa which operates via a council, in terms of section 3.

3.4.3 Main functions of Icasa

In terms of section 2 of the Icasa Act, Icasa is established to regulate electronic communications, postal matters and, importantly, in terms of section 2(a) 'to regulate broadcasting in the public interest to ensure fairness and a diversity of views broadly representing South African society, as required by section 192 of the constitution'.

Section 4(1)(a) of the Icasa Act requires Icasa to exercise the powers and perform the duties conferred or imposed on it by the Icasa Act, but also by other relevant statutes, including the Broadcasting Act, the Postal Services Act[5] and the Electronic Communications Act. Consequently, the mandate and powers of Icasa derive from several different statutes.

If one looks at all the broadcasting-related statutes (the Icasa Act, the Broadcasting Act and the ECA), it is clear that the main functions of Icasa concerning broadcasting include licensing of various broadcasting services, in three tiers of broadcasting services commercial, community and public; spectrum management and licensing; regulation of ownership and control of broadcasting services and content regulation. These are dealt with in more detail below.

3.4.4 Appointment of Icasa councillors

In terms of section 5 of the Icasa Act, the Icasa Council consists of nine people, the chairperson and eight other councillors. They are all appointed by the Minister of Communications and Digital Technologies on the advice of the National Assembly.

Section 5(1) requires that the appointment procedure include a public nominations process, be transparent and open and include the publication of a shortlist of candidates. The process set out in section 5 requires the National Assembly to come up with a shortlist of suitable candidates of 30% more than the number of councillors to be appointed, and the minister must make his or her choice of councillors from that list. Note that in terms of section 5(1B), the National Assembly may request the minister to review his or her choice of councillors if it is not satisfied with the minister's proposed choices.

Section 5(3) of the Icasa Act sets out the criteria for appointment. Importantly, these include a commitment to 'fairness, freedom of expression, openness and accountability' as well as technical competencies. Section 6(1) of the Icasa Act sets out grounds for disqualification of Icasa councillors, and these include being foreign, being a public servant, holding political office, conflicts of interest, being an unrehabilitated insolvent and prior criminal convictions.

The chairperson holds office for five years and can be reappointed for one additional term of five years only, in terms of section 7(1) of the Icasa Act. Other councillors hold office for four years and may be reappointed for one additional term of four years only in terms of section 7(2) and (5).

The grounds for removing an Icasa councillor are set out in section 8 of the Icasa Act. They are all objective, such as misconduct, inability to perform duties efficiently, conflicts of interest, and being absent without good cause. To remove a councillor requires a finding on the grounds of removal and a resolution adopted by the National Assembly calling for the councillor's removal from office. The minister has to remove a councillor in accordance with a National Assembly resolution.

3.4.5 Funding for Icasa

In terms of section 15 of the Icasa Act, Icasa is funded from money appropriated by parliament. In other words, funding for Icasa must be provided for in the national budget. Section 15(1A) also allows Icasa to be funded from other sources, as may be agreed between the Minister of Communications and Digital Technologies and the Minister of Finance, and as approved by Cabinet.

It is important to note that Icasa is not permitted to keep any licence or regulatory fees paid to it by the broadcasting, electronic communications or postal industries, and section 15(3) requires Icasa to pay such fees and other revenue into the National Revenue Fund within 30 days of receipt.

3.4.6 Making broadcasting regulations

Both the Icasa Act and the ECA empower Icasa to make regulations.

- Section 4(3)(j) of the Icasa Act provides that Icasa may make regulations on any matter consistent with the objects of the Icasa Act and the underlying statutes (that is the ECA, the Broadcasting Act and the Postal Services Act). Section 4(k) of the Icasa Act specifically empowers Icasa to make regulations on empowerment requirements to promote broad-based black economic empowerment (BBBEE).

- The ECA, at section 4, sets out a regulation-making process and procedure for Icasa. Again, Icasa is given wide powers to make regulations. When Icasa intends making a regulation, it must give the public at least 30 days' notice of such intention and a draft regulation must be published for public notice and comment. Importantly, section 4(5) of the ECA requires Icasa to notify the Minister of Communications and Digital Technologies in writing of its intention to make a regulation and provide the minister with a copy of the proposed regulation. Section 4(6) allows for Icasa to conduct public hearings concerning proposed regulations but does not require these.

3.4.7 Enforcement of compliance

The Complaints and Compliance Committee (CCC) is central to the enforcement of compliance with broadcasting-related laws, regulations and licence conditions. Section 17A of the Icasa Act deals with the establishment of the CC and provides that it is a committee of Icasa which made up of seven members, only one of whom is an Icasa councillor. The chairperson of the CCC is required to be a judge or experienced advocate, attorney or magistrate. There are eligibility requirements for the other five members who must all have relevant qualifications and experience and not be subject to any disqualifying criteria.

The role of the CCC is to investigate, hear and make a finding on matters referred to it by Icasa, complaints received and allegations of non-compliance with the Icasa Act or the underlying statutes. Problematically, the recommendations for remedial action that the CCC is required to make to Icasa and the remedial action that Icasa is entitled to take relate, in terms of the wording of sections 17D and 17E, only to action is to be taken 'against a licensee' which undermines the seemingly broad powers of the CCC to investigate any allegations of non-compliance including by non-licensees. The actions that Icasa is empowered to take against a licensee range from cease and desist orders, to the imposition of a fine to the suspension or even revocation of a licence.

The Icasa Act also provides for the appointment of inspectors to monitor compliance by licensees and the act grants inspectors broad powers of entry and search and seizure in the course of carrying out its responsibilities, sections 17F and 17G.

3.4.8 The licensing regime for broadcasters in South Africa

Categories of broadcasting services

Section 5(1) of the Broadcasting Act provides that there are three categories of broadcasting services:

- *Public:* These are the radio and television services provided by the public broadcaster, the South African Broadcasting Corporation (SABC).

- *Community:* These are radio or television services provided by non-profit entities in the interests of a community, either a geographic community or a community of interest (such as a religious broadcaster or a student radio station).

- *Commercial:* These are both radio and television services provided on a commercial basis, that is, operated for profit. Note that commercial broadcasters operate on a free-to-air basis (their revenue is derived from advertising alone) or on a subscription basis (their revenue is derived from subscription income and advertising). Note that only subscription television (as opposed to sound) broadcasters have been licensed to date.

Types of broadcasting licences

In terms of section 5 of the ECA, Icasa is empowered to grant licences for the different categories of broadcasting services. There are two types of broadcasting licences available:

- *Individual licences:* For commercial and public broadcasting services of national or provincial scope, section 5(3)(b). In terms of section 5(10) of the ECA, an individual licence may be granted for a period not exceeding 20 years and can be renewed. However, as a matter of practice, the licence periods have been prescribed to be shorter (see in the regulations section below).

- *Class licences:* For community broadcasting services or for low-power services (such as radio stations used by drive-in cinema operators), section 5(5)(b). In terms of section 19(1) of the ECA, a class licence has a term of validity not exceeding ten years and may be renewed. However, as a matter of practice, the licence periods have been prescribed to be shorter (see in the regulations section below).

Frequency spectrum licensing

Section 31(1) of the ECA provides that, as a general rule, any person who transmits a signal by radio must have a radio frequency spectrum licence granted by Icasa. As broadcasters in South Africa make use of radio frequencies to transmit their broadcasting signals, all broadcasters are required to have a frequency spectrum licence in addition to their broadcasting service licences (whether class or individual) in terms of section 31(2) of the ECA.

Digital broadcasting

As South Africa falls in Region 1 of the International Telecommunications Union (the ITU), it was to have migrated its analogue terrestrial television signal to digital terrestrial television (DTT) signal by 17 June 2015. The country failed to meet the ITU deadline and, although the dual illumination period began on 1 February

2016,[6] the migration to DTT has not progressed further, and a switch-off date for analogue terrestrial television signal has not been set.

For television, South Africa has adopted the DVB-T standard for DTT and the DVB-S standard for digital satellite television.[7] For sound, South Africa has adopted the DAB (including the DAB+) and DRM standards for digital sound broadcasting.[8] South Africa has made no plans to switch off the AM and FM analogue signals for sound broadcasting.

3.4.9 Responsibilities of broadcasters in South Africa

Adherence to licence conditions

Section 4(3)(d) of the Icasa Act specifically requires Icasa to develop and enforce licence conditions. In terms of section 8(1) of the ECA, Icasa must pass regulations setting out standard terms and conditions for individual and class licences and, in terms of section 8(3) of the ECA, may prescribe additional terms applicable to any individual or class licence. The prescribed standard terms are set out in the regulations section below.

Adherence to content requirements or restrictions

Although all broadcasters enjoy the constitutional right to freedom of expression, this right is not absolute, and broadcasters are subject to a range of content regulation concerning what they may or may not broadcast. These regulations include the following.

Adherence to a broadcasting code of conduct

In terms of section 54 of the ECA, Icasa must prescribe a code of conduct for broadcasting services. Broadcasters must comply either with the Icasa code or with the code of a self-regulatory body of which the broadcaster is a member, provided that Icasa has approved the code of that self-regulatory body. Almost all broadcasters (public, commercial or community) are members of the National Association of Broadcasters (NAB).

The NAB has established a self-regulatory mechanism in respect of broadcasting content, namely the Broadcasting Complaints Commission of South Africa (BCCSA), which has its own Icasa-approved codes of conduct for both free-to-air and subscription broadcasters. Most broadcasters are, therefore, governed by and adhere to the BCCSA's codes. The BCCSA's code of conduct for free-to-air broadcasters is very similar to that of Icasa.

The codes are dealt with in more detail in the regulations and self-regulation sections below.

Adherence to an advertising code

In terms of section 55 of the ECA, all broadcasting service licensees must adhere to the Code of Advertising Practice of the Advertising Standards Authority of South

Africa. Note that this body was recently liquidated and now the Code of Advertising Practice is generally administered by the Advertising Regulatory Board (ARB) which is in the process of revising the Code of Advertising Practice.[9] If a broadcaster is found to have breached the code (irrespective of whether that finding was made by the ARB, for member broadcasters, or by Icasa's Complaints and Compliance Committee (CCC) for non-ARB broadcast members), any punitive measures are to be imposed by the CCC in terms of section 55(3) of the Icasa Act. The code is dealt with in more detail in the self-regulation section below.

Adherence to local content quotas

Section 61 of the ECA deals with the preservation of South African programming, and empowers Icasa to make regulations and licence conditions on:

- local television content quotas for television broadcasting services
- independent television production quotas for television broadcasting services
- South African music quotas for sound broadcasting services.

The requirements of the local content regulations are set out in more detail in the regulations section below.

National sporting events

Section 60(1) of the ECA prohibits subscription broadcasting services from acquiring exclusive rights that prevent or hinder the free-to-air broadcasting of national sporting events, as identified in the public interest by Icasa, after consultation with the ministers of communications and sports. The requirements of the sports broadcasting regulations are set out in more detail in the regulations section below.

Political broadcasting restrictions

Section 56 of the ECA prohibits the broadcasting of all party election broadcasts and political advertising except during an election period. During an election period, Icasa's elections-related broadcasting regulations apply. These are dealt with in the regulations section below and have been prescribed by Icasa in accordance with the following requirements of section 57 of the ECA:

- party election broadcasts cannot be broadcast within the 48-hour period prior to an election
- no commercial or community broadcaster is obliged to carry party election broadcasts, although the public broadcaster is so obliged
- Icasa is to determine the duration and scheduling of party election broadcasts, having regard to the principle that all parties are to be treated equitably. Note that equitable treatment does not mean that all parties are required to be given equal time for party election broadcasts.

Political advertising is governed by section 58 of the ECA, which provides that:

- political advertisements cannot be broadcast within the 48-hour period prior to an election
- no broadcaster (public, commercial or community) is obliged to carry political advertising, but if it chooses to do so it must afford all political parties an equal opportunity
- broadcasters may not discriminate against or give preference to any political party in respect of political advertising.

Section 59 of the ECA requires equitable treatment of political parties by broadcasters during an election period:

- all parties must be treated equitably, and there must be reasonable opportunities for the discussion of conflicting views
- there must be adherence to the principle of the right of reply to criticism of a political party.

Must Carry Requirements

Section 61(3) of the ECA requires Icasa to prescribe regulations regarding the extent to which subscription broadcasting services must carry, subject to commercially negotiable terms, the television programmes provided by the SABC. Icasa has prescribed 'must carry' regulations and these are dealt with in the regulations section below.

Keeping records of programmes broadcast

Section 53 of the ECA requires all broadcasters to keep a recording of every programme broadcast for 60 days from the date of broadcast and to produce a script or transcript of a programme on demand by Icasa's CCC after the broadcast thereof. Importantly, section 53(2) specifically provides that Icasa is not authorised to view programmes prior to their being broadcast.

Adherence to ownership and control requirements

Regulating ownership and control of broadcasting licences is an important part of Icasa's regulatory work. Ensuring diversity of ownership is an important part of guaranteeing that there is genuine diversity of views expressed over the airwaves. Section 66(5) of the ECA provides that a 20% shareholding in a commercial broadcasting service, television or sound, constitutes control of that service.

Icasa has six important areas of supervision concerning ownership and control:

Approval of transfers of licences or changes in ownership or control

Section 13(1) of the ECA provides that an individual licence (all commercial sound

and television licences are individual licences) may not be let, sub-let, assigned, ceded or in any way transferred, and control of an individual licence may not be assigned, ceded or in any way transferred, to any other person without the prior written permission of Icasa.

The process of obtaining Icasa's permission to the transferring of a licence or control thereof is subject to a public notice and comment procedure.

No party political broadcasters

Section 52 of the ECA prohibits any broadcasting licence to be given to any party, movement, organisation or like body which is of a party political nature.

Limitations on foreign ownership and control of commercial broadcasting services

Section 64 of the ECA prohibits:

- a foreign person from controlling a commercial broadcasting licensee
- a foreign person from having a financial interest or voting interest exceeding 20% in a commercial broadcasting licensee
- foreigners from constituting more than 20% of directors of a commercial broadcasting licensee.

Limitations on the number of commercial broadcasting services a single entity can control

Section 65 of the ECA sets limits on the number and type of commercial broadcasting services a single entity can control. In summary, the limitations are as follows:

- no person can control more than one commercial television service. Note that acting in terms of section 92(3) of the ECA, Icasa recommended that this provision not apply to subscription broadcasters, thus allowing a single entity to control more than one subscription television broadcasting service
- no person may control more than two FM sound broadcasting services or more than one in the same coverage area
- no person may control more than two AM sound broadcasting services or more than one in the same coverage area.

However, Icasa may grant exemptions from all of these requirements if good cause is shown. It is important to note that AM transmission is extremely unpopular for commercial services, and currently, there is only one licensed AM commercial broadcaster. Consequently, for practical purposes, a commercial sound broadcaster is essentially limited to two FM sound broadcasting services.

Limitation on cross-media control of commercial broadcasting services

Section 66 of the ECA sets limits on cross-media control. Cross-media ownership and control is an issue where a single entity owns or controls both print and broadcast media. In summary, section 66 prohibits:

- an entity from controlling a newspaper, a sound broadcasting service and a television broadcasting service, section 66(2).
- An entity which controls a newspaper from also controlling a sound or television broadcasting service if:
  - the newspaper has an ABC (Audit Bureau of Circulations, a print media industry body responsible for calculating circulation and readership figures accurately) circulation that is equal to 20% of the entire newspaper readership in the area; and
  - the circulation area of the newspaper substantially overlaps (by 50% or more) with the broadcast coverage area of the sound or television broadcasting service, section 66(3).

It is important to point out that section 66(3) is extremely poorly drafted as it confuses circulation and readership. At the time of writing, not a single newspaper in the country had a circulation equal to 20% of the entire newspaper readership in any area. So section 66(3) has no practical value as a means of preventing the concentration of print and broadcast media ownership.

Ownership and control of individual licences by persons from historically disadvantaged groups

There are no set requirements for ownership and control of licences by persons from historically disadvantaged groups in the ECA. However,

- Section 9(2)(b) of the ECA specifies that Icasa must set out the percentage of equity ownership required to be held by persons from historically disadvantaged groups whenever it issues an invitation to apply for an individual licence (public and commercial). Importantly, section 9(2)(b) stipulates that such percentage cannot be less than 30%.
- Icasa has also passed regulations in terms of which its approval of transfers of licences, including transfers of control in individual licences (public and commercial), is subject to the transferee meeting the 30% threshold of ownership by persons from historically disadvantaged groups. This is dealt with in the regulations section below.

3.4.10 Is Icasa an independent regulator?

Icasa has a huge advantage over many other broadcasting regulators in the southern African region, namely that its independence is constitutionally mandated in terms of section 192 of the South African Constitution.

Furthermore, the Icasa Act contains specific statements about Icasa's independence. Section 3(3) of the Icasa Act states that Icasa 'is independent, and subject only to the Constitution and the law, and must be impartial and must perform its functions without fear, favour or prejudice'. Section 3(4) of the Icasa Act states specifically that Icasa 'must function without any political or commercial interference'.

Besides these important statements, Icasa does have substantive independence concerning its main regulatory functions, particularly concerning broadcasting:

- *Licensing:* Icasa is entitled to issue invitations to apply for individual broadcasting licences and to license such broadcasters on its own without any role being played by the executive. It is likewise entitled to issue class broadcasting licences on its own. In both cases, Icasa makes licence conditions without any role being played by the executive (see sections 5 and 9 of the ECA).

- *Regulation making:* Although Icasa is required to inform the minister of proposed regulations, the minister's consent to such regulations is not required (see section 4 of the ECA).

- *Ministerial policy directions:* Although the minister is entitled to make policy directions on any matter of national policy applicable to the information and communication technology sector, he or she may not do so if this will affect licensing, section (3)(3) of the ECA. Furthermore, Icasa is only required to consider such ministerial policy directions and is not required to act in accordance with them (see section 3(4) of the ECA).

However, there are certain regulatory functions that Icasa is not entirely free to regulate.

- *Frequency spectrum management:* Importantly, the ECA at section 34(2) provides for ministerial approval of the National Radio Frequency Spectrum Band Plan, which is to be developed by Icasa. The ECA is silent on what would occur if the minister did not approve the band plan, but it is clear that Icasa may proceed to publish the final band plan in the Government Gazette only once such approval has been obtained, see section 34(12) of the ECA.

- Concerning appointments, already mentioned above, Icasa's councillors are appointed by the minister on the recommendation of the National Assembly. It is important that the National Assembly is involved because this is a representative body comprising members of various political parties. However, concerns have been raised about the fact that the minister makes the final appointments. In the 2007 Report of the *ad hoc* Committee on the Review of Chapter 9 and Associated Institutions,[10] the committee recommended to parliament that changes be made in this regard. The committee recommended that Icasa councillors be appointed by the president, rather than the minister, on the recommendation of the National Assembly. To date, however, the recommendations of the committee have not been implemented by parliament.

- Regarding performance management, section 6A of the Icasa Act was introduced in 2006 to provide for a performance management system to monitor

and evaluate the performance of Icasa council members. The performance management system is established by the minister in consultation with the National Assembly, in terms of section 6A(1) of the Icasa Act. In the 2007 Report of the *ad hoc* Committee on the Review of Chapter 9 and Associated Institutions, the committee recommended to parliament that changes be made in this regard. The committee bluntly recommended that the performance management system be revised to remove the role of the minister. To date, the recommendations of the committee have not been implemented by parliament. However, at the time of writing, the performance management system has also never been implemented, and so it remains to be seen what actual impact it will have on the independence of Icasa if any.

3.4.11 Amending the legislation to strengthen the broadcast media generally

There are two broad problems with the current and proposed legislative framework for the regulation of broadcasting generally.

- *Provisions that undermine the constitutionally required independence of Icasa:*
  - The Icasa Act ought to be amended to provide that:
    - the president is the member of the executive who is the formal authority responsible for Icasa council appointments and removals and not the minister. This is because ministerial appointments lack credibility from an independence point of view;
    - the National Assembly is responsible for developing and ensuring compliance with a performance management system in respect of Icasa councillors and not the minister.
  - The ECA ought to be amended to make it clear that Icasa can develop the national radio frequency band plan on its own, and this should not require the prior consent of the minister.

3.5 Legislation governing the public broadcasting sector

3.5.1 Introduction

The SABC is South Africa's public broadcaster. It has three free-to-air television services as well as Channel Africa, which is broadcast on a satellite platform. The SABC has 18 radio stations, some of which are regional and some national. The SABC has been in a state of severe crisis since 2007, although, at the time of writing, it now has a stable board and good executive management.

The main statute governing the affairs of the SABC is the Broadcasting Act, although there are also relevant provisions in the ECA.

3.5.2 Establishment of the SABC

The SABC was corporatised (that is converted from a statutory body into a public company incorporated in terms of the Companies Act, 1973, and having a share capital) in terms of section 8A(1) and (2) of the Broadcasting Act. In terms of section 8A(2), the state is the sole shareholder of the SABC. The Broadcasting Act provides, at section 9, that the SABC consists of two separate operating divisions, a public and a commercial service division. However, that separation into two operating divisions has never been effected in practice.

3.5.3 The mandate of the SABC

The exact mandate of the SABC is very unclear. Chapter IV of the Broadcasting Act is headed Public Broadcasting Service and Charter of the Corporation, but it contains several provisions that have nothing to do with the public broadcasting mandate. Indeed, the Broadcasting Act has been criticised for some time because the actual public mandate appears to consist of provisions found in many different sections of the Broadcasting Act, and it is difficult to say with any legal certainty precisely what the public mandate is.

It appears that the public mandate of the SABC is currently contained in several disparate provisions of the Broadcasting Act and the ECA, and includes the following.

- Taking into account the needs of language, cultural and religious groups as well as constituent regions and local communities, and the need for educational programming, section 2(u) of the ECA.
- Developing South African expression by providing a range of programming in official languages that reflect South African attitudes, opinions and values; displaying South African talent in education and entertainment programmes; offering a plurality of views and a variety of news, information and analysis from a South African point of view and advancing the national and public interest, section 6(4) of the Broadcasting Act.
- Providing radio and television programming that informs, educates and entertains, section 8(d) of the Broadcasting Act.
- Being responsive to audience needs, including the needs of the deaf and the blind, section 8(e) of the Broadcasting Act.
- Providing a public service that makes services available in all official languages; reflects both the unity and diverse cultural and multilingual nature of South Africa; strives to be of high quality; provides significant news and public affairs programming; includes significant amounts of educational programming; enriches South Africa's cultural heritage; commissions programming from within the corporation and from the independent production sector and includes national sports programming as well as developmental and minority sports, section 10(1) of the Broadcasting Act.
- Providing a commercial service that is subject to the same policy and regulatory

structures as outlined for commercial services; complies with the values of the public programming service; commissions from the independent production sector; subsidises the public service and is operated efficiently, section 11(1) of the Broadcasting Act.

3.5.4 Appointment of the SABC Board

The SABC is controlled by a board of 12 non-executive and three executive members (the group chief executive officer, the chief operations officer and the chief financial officer), in terms of section 12 of the Broadcasting Act.

The non-executive members are appointed by the president on the advice of the National Assembly, in terms of Section 13(1) of the Broadcasting Act. Furthermore, section 13(2) of the Broadcasting Act requires that the appointment process must include a public nominations process, be transparent and open and include the publication of a short-list of candidates.

Unfortunately, the Broadcasting Act is silent on who appoints the executive members of the board, the minister or the non-executive members of the board. This gap in the law has led to a great deal of conflict and litigation. However, it has now been determined by the High Court that 'the executive members of the Board are to be appointed solely by the non-executive members of the Board and without any requirement for approval by the Minister'.[11]

Section 13(4) of the Broadcasting Act sets out the criteria for board appointments. These include a commitment to 'fairness, freedom of expression, openness and accountability' as well as technical competencies. Section 16(1) of the Broadcasting Act sets out grounds for disqualification of board members, and these include being foreign and having conflicts of interest or prior criminal convictions.

The appointment process of the SABC Board has come under intense public scrutiny over the past few years. A decade ago, parliament passed a Broadcasting Amendment Act[12] which resulted in several crucial changes to the Broadcasting Act. These changes include the introduction of section 15A of the Broadcasting Act, which allows for parliament to:

- recommend the dissolution of the entire board if it has failed to discharge its fiduciary duties or adhere to the charter
- recommend the appointment of an interim board to replace a dissolved board. This interim board consists of the three executive and five non-executive board members appointed by the president on the advice of the National Assembly. Note that there are no requirements in respect of public nominations or transparency or the development of a short-list *vis-à-vis* recommendations for interim board members.

Parliament has appointed an interim board on two occasions since then, in 2009 and again in 2017.

3.5.5 Funding for the SABC

The Broadcasting Act does not contain a single clear statement on how the SABC is funded. The SABC is required to keep separate accounts for its public services and public, commercial services divisions, in terms of section 9 of the Broadcasting Act. Its public services division is entitled to draw revenue from a range of sources, including advertising and sponsorships, grants and donations, licence fees and state grants, in terms of section 10(2) of the Broadcasting Act.

Unfortunately, the Broadcasting Act is silent on the sources of revenue for the public, commercial services division, although section 11(1)(d) does make it clear that it is to subsidise the public services division.

Section 27 of the Broadcasting Act provides for a television licence fee, to be determined by the minister. Television licence fees account for approximately 14% of the SABC's total revenue, and advertising and sponsorship make up the bulk of its revenue at 77% for the 2017/8 financial year.[13] The balance is made up of other sources of income with direct government funding accounting for approximately 2%.

3.5.6 SABC: public or state broadcaster?

There is no doubt that whether or not the SABC is a genuinely public, as opposed to a state, broadcaster has been under question for many years. From a legal point of view, the role of the minister has been particularly problematic concerning his or her development of company articles of association and memoranda of incorporation, as well as the appointment of executive management, leading to fears of ruling party deployment. However, this has now been settled in the High Court in favour of the independence of the SABC in a case brought by civil society groupings, strengthening its status as a public broadcaster. The case is dealt with under the case law section below.

However, the SABC remains vulnerable to political pressures.

3.5.7 Amending the legislation to strengthen the public broadcaster

The government has recognised that the current crises involving the SABC are at least partly as a result of legislative weaknesses. There are currently two main weaknesses in the existing Broadcasting Act, namely:

- The SABC's public mandate is not set out in a single, clear, coherent statement. Consequently, the board and senior management struggle to define their roles properly, and the public has little idea about what they should expect from the public broadcaster. This makes it extremely difficult to hold the SABC accountable for meeting its public mandate.

- The SABC has a range of programming obligations, including in all 11 official languages, yet its funding model appears to be unsustainable. The SABC is overwhelmingly dependent on commercial sources of funding, and there is insufficient public funding of the broadcaster's public mandate.

3.6 Legislation governing broadcasting signal distribution

Broadcasting signal distribution is the technical process of ensuring that the content-carrying signal of a broadcaster is distributed such that it can be heard, viewed by its intended audience. Two statutes are of particular relevance here, namely the ECA and the Sentech Act, Act 63 of 1996.

3.6.1 Licences required by broadcasting signal distribution providers

The ECA makes it clear that broadcasting signal distribution is a form of electronic communications network service (ECNS), which is defined, in its relevant part, in section 1 as:

> *a service whereby a person makes available an electronic communications network, whether by sale, lease or otherwise:*
>
> *(a) for that person's own use for the provision of … [a] broadcasting service;*
>
> *(b) to another person for that other's use in the provision of a … broadcasting service;*
>
> *or*
>
> *(c) for resale to a … broadcasting service licensee*

Consequently, all broadcasting signal distributors must have an ECNS licence to provide ECNS.

As is the case with broadcasting licences, there are two types of ECNS licences, individual and class licences. In terms of section 5(3) of the ECA, an ECNS of provincial and national scope operated for commercial purposes must hold an individual licence. In terms of section 5(5)(a) of the ECA, an ECNS of district municipality or local municipal scope operated for commercial purposes is required to hold only a class licence.

3.6.2 The regulatory framework for an ECNS

The ECA, at sections 62 and 63, sets out the regulatory framework for ECNSs that provide broadcasting signal distribution.

The main obligations upon an ECNS licensee that provides signal distribution are to:

- prioritise South African broadcasting channels, section 62(1)(a)
- provide all South Africans with universal access to broadcasting services, section 62(1)(b)
- ensure that it provides signal distribution only to licensed broadcasters, section 62(2)(b).

3.6.3 Types of broadcasting signal distribution ECNSs

It is important to note that the ECA distinguishes between types of signal distribution ECNSs, although it is not clear on this point. The lack of clarity is because the provisions of the ECA on this issue were not fully carried over from the previously applicable, and now repealed, Independent Broadcasting Authority (IBA) Act, 1993.

The ECA specifies two types of signal distribution ECNSs, but there is also a third:

- Section 62(3) of the ECA refers to a 'common carrier' ECNS, which is defined as an ECNS provider 'who is obliged to provide signal distribution for broadcasting services on a non-discriminatory and non-exclusive basis'. Sentech is the only common carrier ECNS.
- In section 63(1) of the ECA, reference is made to self-provisioning of broadcasting signal distribution. This means that a broadcaster is entitled to distribute its own signal provided it has an ECNS licence to do so. There are some community broadcasting services that have a class ECNS licence to provide their own signal distribution services.
- There is, in practice, a third type of ECNS signal distribution service that is neither a self-provider nor a common carrier. This is a commercial signal distributor, which can choose whether or not to provide signal distribution services to one or more broadcasting licensees. An example of this kind of ECNS licensee is Orbicom, the company that distributes the M-Net terrestrial signals and the terrestrial segment of DStv's subscription satellite broadcasting services signals.

3.6.4 Legal provisions governing Sentech

Sentech Limited is the only common carrier signal distributor in South Africa. It is a public company established in terms of the Sentech Act,[14] with the state as the sole shareholder, section 6(1). The Minister of Communications and Digital Technologies exercises the rights of the state in respect of the state's shares in Sentech, section 6(3). This includes appointing the board. Consequently, the executive effectively controls the activities of Sentech.

The Sentech Act provides, at section 5, that the main object and business of Sentech is to provide electronic communications services and ECNS in accordance with the ECA.

3.7 Legislation governing the internet

The ECA in section 1 specifies that broadcasting is a form of 'unidirectional electronic communications' in its definition of broadcasting. It also specifies in the definition of 'electronic communications' that this 'does not include a content service'. So where does that leave Over the Top (OTT) services? Icasa has developed a position paper on Internet Protocol Television (IP TV) and Video-On-Demand (VOD) Services in Notice 770 published in Government Gazette 33436 dated 3 August

2010 (the VOD Position Paper). Although the paper is now outdated, Icasa made several different determinations regarding OTT Services in it.

- Internet Protocol Television Services which provide 'scheduled television programming over a managed data network' are broadcasting services as determined by Icasa, requiring compliance with licensing, local content and other regulatory strictures applicable to all other broadcasting services (at paragraph 72.3). Consequently, the licensing provisions set out above for broadcasting apply.

- Push and Pull VOD Services and Pay-Per-View Services which are downloaded onto a person's electronic device allowing the user to select from a defined list of programming are Electronic Communications Services (at paragraph 72.4). Consequently, the licensing provisions set out above for telecommunications apply.

- OTT services provided over the public internet (such as a broadcaster live-streaming over the internet or Netflix providing internet-based services) are content services and are unregulated by Icasa.

Recently, an amendment to the Films and Publications Act, 1996 has been promulgated but, at the time of writing, is yet to come into operation. In brief, key provisions of amended provisions that relate to the internet include:

- The definition of 'film' is expanded to include 'any sequence of visual images ... capable of being seen as a moving picture and includes any picture intended for exhibition through any medium including the internet'.

- The definitions of 'distributor', 'distribute' and 'commercial distributor' are extremely broad and, in relation to film distributed online include: 'to stream content through the internet, social media or other electronic mediums' and 'to sell, hire out or offer [the film], including using the internet'.

- These definitions then significantly broadens the scope of the existing Act to cover films made available over the public internet and not only those distributed physically in cinemas or via DVD rental/sales outlets. Consequently, the provisions of the Films and Publications Act dealt with in paragraphs 3.9.4 and 3.9.5 regarding obscene or racist expression, and how such expression is regulated and by which structures, apply equally to films distributed over the internet.

- Section 18C introduces a new feature of the Films and Publications Act and that is that it allows commercial online distributors of film to be accredited to conduct self-classification of films distributed via the internet. However, the Film and Publications Board still requires its guidelines for classification to be used and for its logo to appear on the film. It remains to be seen whether or not such provisions will be able to be enforced on the large multi-national online film distributors such as Netflix, Amazon Prime, Google Play and the like once the Amendment Act is in force.

- Section 18D is also of use of online film distributors — it introduces another new feature of the Film and Publications Act and that is that it empowers the council approve the use of classification ratings of a foreign or international film classification body by an online film distributor.
- Section 24C contains several obligations applicable to persons providing child-oriented contact or content service, including internet chat-rooms, via mobile cellular telephones or the internet. These are not set out in detail, but they relate to:
  - displaying safety messages
  - moderating services to ensure that offences are not being committed against children through the use thereof
  - mechanisms for children to report suspicious behaviour
  - reporting obligations to the police.

Failure to comply with these is an offence with a fine, imprisonment, or both, as the penalty upon conviction.

3.8 Legislation that undermines a journalist's duty to protect his or her sources

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

3.8.1 Criminal Procedure Act, Act 51 of 1977

Section 205 of the Criminal Procedure Act (CPA) empowers a presiding officer to call any person who is likely to give material or relevant information as to any alleged offence to come before him or her and to be examined by the public prosecutor, at the request of the director of public prosecutions or any public prosecutor so authorised by the director. Thus, if a public prosecutor suspects that a journalist knows something about a crime; such journalist might be ordered, in terms of section 205 of the CPA, to reveal his or her sources of information relating to that crime.

3.8.2 National Prosecuting Authority Act, Act 32 of 1998

Section 28, read with sections 1 and 7(1), empowers an investigating director in the

National Prosecuting Authority to conduct investigations into specific offences, as set out in a proclamation by the president. These are known as specified offences. Section 28(6) specifically empowers any investigating director who is looking into such specified offences to summon any person who it is believed can furnish any information on the subject of the investigation for questioning, or require such person to produce any book, document or object. It is an offence to refuse to appear before the investigating director or to provide the book, document or object.

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

3.9 Legislation that prohibits the publication of certain kinds of information

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

- identities of minors in court proceedings
- certain kinds of information regarding legal proceedings
- information regarding defence, security, prisons and the administration of justice
- obscene materials
- racist expression
- election-related information
- information regarding state procurement
- financial intelligence information
- certain advertising restrictions.

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

3.9.1 Prohibition on the publication of the identity of a minor in legal proceedings

Criminal Procedure Act, Act 51 of 1977

Section 154(3) of the CPA prohibits the publication of the identity of an accused person or a witness in criminal proceedings if that accused person or witness is under 18 years of age unless the court rules that such publication would be just and equitable.

In terms of section 154(5), such publication is an offence with a penalty of a fine or imprisonment of not more than five years or both.

Child Justice Act, Act 75 of 2008

Section 45 specifically makes the provisions of section 154 of the Criminal Procedure Act (set out immediately above) applicable to minors in preliminary inquiries, that is, before criminal proceedings even start.

Children's Act, Act 38 of 2005

Section 74 of the Children's Act prohibits the publication 'in any manner' of any information relating to the proceedings of a children's court (a court specifically established under the act), which may reveal the name or identity of a child who is a party or a witness to a proceeding, without the permission of the court.

Anyone contravening section 74 commits an offence in terms of section 305(1)(b) of the Children's Act and is liable to a fine, imprisonment or both, in terms of section 305(6) of the Children's Act.

3.9.2 Prohibition on the publication of certain information relating to legal proceedings

Criminal Procedure Act, Act 51 1977

The CPA, at section 154, read with section 153, sets out circumstances in which a court may direct that no information relating to certain criminal proceedings may be published. These circumstances include:

- in the interests of the security of the state or of good order, public morals or the administration of justice
- to protect the identity of witnesses in criminal proceedings
- to protect the identity of minors in criminal proceedings
- to protect the identity of a complainant in relation to a charge involving extortion or sexual offences.

In terms of section 154(5) of the CPA, any such publication is an offence with a

penalty of a fine or imprisonment of not more than one year or both. Importantly, section 154(6) read with section 300 of the CPA specifically allows the court to award civil compensation for such publication in the case of a complainant concerning a charge involving sexual offences. In other words, to also require damages to be paid to such a person whose identity is revealed.

Divorce Act, Act 70 of 1979 and Mediation In Certain Divorce Matters Act, Act 24 of 1987

Section 12(1) of the Divorce Act makes it an offence to 'publish for the information of the public' any particulars of a divorce action or any information which comes to light in the course of a divorce action other than the names of the parties to a divorce action or the judgment or order of the court. A person found guilty of such an offence is liable to a fine not exceeding R1 000 or to imprisonment not exceeding one year or both, in terms of section 12(4).

The provisions of section 12(1) of the Divorce Act (set out immediately above) also apply to any enquiry instituted by the Family Advocate in terms of the Mediation in Certain Divorce Matters Act and in terms of section 12(3) of the Divorce Act.

3.9.3 Prohibition on the publication of state security-related information and the administration of justice

Defence Act, Act 42 of 2002

Section 104(7) of the Defence Act makes it an offence to, without authority, disclose or publish any information (whether in the print or electronic media, verbally or by gesture) that has been classified in terms of the Defence Act. Any person found guilty of such an offence is liable to a fine or imprisonment not exceeding five years. Importantly, this provision is subject to the Promotion of Access to Information Act, Act 2 of 2000. However, as there are exceptions to the requirement of granting access to information based on national defence and security grounds in that Act, this may not be particularly helpful.

It is also important for journalists to be aware of the provisions of section 104(19)(1), which makes it an offence even to gain access to classified information from specific classified facilities, installations or instruments of the Department of Defence. Any person found guilty of such an offence is liable to a fine or imprisonment not exceeding 25 years. Note that there is no public interest override in relationship to this offence.

Protection Of Information Act, Act 84 of 1982

The Protection of Information Act at section 4 sets out several provisions relating to the disclosure of security-related information and essentially makes it an offence to publish a range of security-related information, such as official codes or passwords, or confidential information that has been entrusted to a person by the government. The penalty for such disclosure is a fine not exceeding R10 000 or imprisonment not exceeding ten years, or both. This Act is currently under review

and is to be repealed under the new legislation, but this has not yet come into force, and so we do not deal with its provisions here.

National Key Points Act, Act 102 of 1980

Section 2 of the National Key Points Act allows the minister of defence, whenever he or she thinks it necessary for the safety of South Africa or in the public interest, to declare any place a national key point. In terms of section 10(2) of the National Key Points Act, any person who provides any information relating to security measures about a national key point or to any incident that took place at such national key point without being legally obliged or entitled to do so, or without the authority of the minister of defence, is guilty of an offence. On conviction for such an offence, the person would be liable to a fine not exceeding R10 000, or to imprisonment not exceeding three years, or both.

Correctional Services Act, Act 111 of 1998

The Correctional Services Act contains restrictions on the publication of issues relating to prisons. Section 123(1) prohibits the publication of any account of prison life or of conditions that may identify a specific prisoner unless the prisoner concerned has granted permission for such publication.

Section 123(2) requires permission from the commissioner of correctional services to publish an account of an offence for which a prisoner or person who is subject to community corrections is serving a sentence unless the information is part of the official court record. Note that the commissioner may only refuse permission if, in his or her opinion, the objectives of the incarceration or community service would be undermined, in terms of section 123(3).

A person who contravenes these provisions is guilty of an offence and may be liable to a fine or imprisonment for up to two years, or both, in terms of section 123(6).

South African Police Service Act, Act 68 of 1995

In terms of section 69(2) of the Police Service Act, any person who, without the permission of the national or provincial police commissioner, publishes a photograph or sketch of a person, including on television, who is in police custody and:

- who is suspected of having committed an offence and a decision on prosecution is pending;
- the commencement of criminal proceedings at which he or she is an accused is pending; or
- who is a witness in criminal proceedings, pending the commencement of his or her testimony in those proceedings,

commits an offence, and on conviction is liable to a fine or imprisonment not exceeding 12 months, in terms of section 69(3).

National Prosecuting Authority Act, Act 32 of 1998

Section 41(6) read with section 28(1) makes it an offence to disclose the record of any investigation into any specified offence as gazetted by the president without the permission of the national director of public prosecutions.

On conviction, a person would be liable to a fine, imprisonment not exceeding 15 years, or both.

3.9.4 Prohibition on the publication of obscene materials

The Films and Publications Act, Act 65 of 1996 is a post-constitutional piece of legislation that is the main mechanism for regulating obscene materials in South Africa. Recently, a Films and Publications Amendment Act, Act 11 of 2019, was enacted, but the president has yet to publish the date of its commencement, and so it is not yet in force. Nevertheless, we include reference to key aspects to the amendments as, the Amendment Act is likely to have a significant impact on the media landscape, once it is in force, as it contains several provisions regarding internet content.

Materials not regulated under the Films And Publications Act

The Films and Publications Act appears to regulate a wide range of materials, including films, most publications, games and certain services provided over the internet or on mobile telephones.

While it seems that the Films and Publications Act has an enormous impact on, and relevance to, the media, this is not necessarily the case because it has two important exceptions to its application:

- *Publications:* Section 16(1) of the Films and Publications Act specifically exempts all publications published by a member of the Press Council and there are indications that audio-visual content produced by a member of the Press Council might likewise be exempted in practice.
- *Broadcasters:* Section 18(6) of the Films and Publications Act exempts broadcasters regulated by Icasa from the obligation of applying for classifications for films broadcast or from being subject to film classifications made in terms of the act, except in respect of a film that is subject to an XX or X18 classification, or which has been refused classification by the Film and Publication Board.

In dealing with the Films and Publications Act, we generally focus only on those provisions affecting publications and films (note this includes films distributed over the internet as is more fully set out in paragraph 3.7 above) and in this section we focus on obscene materials as the provisions regarding hate speech are dealt with in paragraph 3.9.5 below.

Bodies established under the act, appointment of members and functions

The Films and Publications Act establishes four important bodies in section 3:

- *The Film and Publication Board,* in terms of section 9A:
  - The board consists of the chief executive officer and such number of officers as determined by the council.
  - The functions of the board are to:
    - appoint classification committees to classify films or publications submitted by the board
    - determine applications for exemptions in respect of any film or publication
    - determine applications for registration as a distributor or exhibitor of films or publications
    - accredit commercial online distributors to conduct classifications of its own films.
- *The Council:*
  - In terms of section 4, the council consists of a chairperson and deputy chairperson appointed by the minister responsible for the administration of the act (being the Minister of Communications and Digital Technologies at the time of writing) and such other members, not exceeding seven, as the minister may appoint, having regard to the need to ensure that the South African community of relevant stakeholders is represented, as well as the chief executive officer appointed by the council in consultation with the minister.
  - In terms of section 6, the minister is to consult with Cabinet before making such appointments.
  - In terms of section 4A, the council issues directives of general application, including classification guidelines and approving foreign classification systems, reviews the functioning of the board and appoints the enforcement committee.
- *The Enforcement Committee:*
  - In terms of section 6A, the enforcement committee consists of four members plus a chairperson who must be a retired judge of the High Court, appointed by the council.
  - The role of the enforcement committee is, in terms of section 6B, to investigate and adjudicate cases referred to it by the board in respect of non-compliance with the act (subject to certain exceptions). It may impose a fine and may refer cases to the law enforcement authorities for prosecution.
- *The Appeal Tribunal:*
  - In terms of sections 5 and 6, the appeal tribunal consists of a chairperson and eight other members appointed by the minister after consultation with Cabinet.

- In terms of section 20, the role of the appeal tribunal is to hear appeals in respect of classification-related decisions taken by the board.

Classification of publications

There are two mechanisms for classifying publications:

- *Request mechanism:* Any person may request that a publication (other than an exempted publication) be classified — section 16(1).
- *Prior classification:* Publications (other than an exempted publication) that are required to undergo pre-distribution classification are, in terms of section 16(2) publications that constitute propaganda for war, incitement of imminent violence and advocacy of hatred based on group characteristics, which constitutes incitement to cause harm. Note that these particular provisions appear to have been tailored to meet the requirements of unprotected expression, as laid down in section 16(2) (the internal limitation to the right to freedom of expression) of the Bill of Rights in the Constitution.

Section 16(4) contains the following types of publication classifications or rulings by the Film and Publication Board's Classification Committee:

- *Refused classification:* Those publications involving child pornography. There are no exemptions in respect of child pornography.
- *XX classification:* This generally relates to publications containing explicit and degrading adult sexual conduct or extreme violence. Note that *bona fide* documentaries or publications of scientific, literary or artistic merit, or which are on a matter of public interest will be entitled to an X18 classification or other condition, ensuring that children do not have access to the publication.
- *X18 classification:* This relates to explicit adult sexual conduct that is not degrading and does not contain extreme violence. Note that *bona fide* documentaries or publications of scientific, literary or artistic merit, or which are on a matter of public interest will not be classified as X18, but instead will be subject to other conditions, ensuring that children do not have access to the publication.
- Publications that do not fall within the above categories may still be subject to conditions, ensuring that children do not have access to them.

With regard to any publication that contains child pornography, the matter will be handed over to the police for investigation and prosecution. Notice must be given in the Government Gazette of all publications that have been classified as refused classification, XX or X18.

How are films classified?

Section 18(1) of the act provides that any person who intends to exhibit or distribute any film, including to be distributed online, (other than broadcasters or, it

seems, members of the Press Council, as discussed above) must submit the film to the board for classification, unless accredited to self-classify or to use a foreign classification system.

Section 18(3) contains the following types of film classifications by the Board's Classification Committee:

- *Refused classification:* Those films involving child pornography. There are no exceptions to this classification in respect of child pornography.
- *XX classification:* This generally relates to films containing explicit and degrading adult sexual conduct or extreme violence. Note that *bona fide* documentaries or films of scientific, dramatic or artistic merit will not be classified XX but will be classified with reference to the relevant guidelines relating to the protection of children from exposure to disturbing, harmful or age-inappropriate materials.
- *X18 classification:* This relates to explicit adult sexual conduct. Note that *bona fide* documentaries or films or games of scientific, dramatic or artistic merit will not be classified X18 but be classified with reference to the relevant guidelines relating to the protection of children from exposure to disturbing, harmful or age-inappropriate materials.
- Films that do not fall within the above categories may still be subject to conditions, ensuring that children do not have access to them.

With regard to any film that contains child pornography, the matter will be handed over to the police for investigation and prosecution. Notice must be given in the Government Gazette of all films that have been classified as refused classification, XX or X18.

Penalties for contravening the provisions of the legislation

The offences and enforcement provisions in the Films and Publications Act are found in sections 24A – 30B of the act. The following offences carry various penalties ranging from the imposition of a fine to imprisonment or both:

- distributing: XX classified publications and films, X18 publications and films (unless the distributor is licensed adult premises), publications or films not in accordance with conditions of distribution, unclassified films, films without being a registered distributor
- possessing, creating or importing child pornography
- producing a film or photograph depicting scenes of sexual assault or violence against children
- advertising films without indicating the classification, age restriction or other consumer advice, or showing a trailer of a film with a more restrictive classification

- knowingly distributing a film or publication classified as X18 or which contains explicit sexual conduct which would have justified an X18 classification, to a person who is under the age of 18
- failing to report suspected child pornography offences to the South African Police Service
- facilitating financial transactions relating to child pornography.

3.9.5 Prohibition on the publication of racist expression

Promotion of Equality and Prevention of Unfair Discrimination, Act 4 of 2000

The Equality Act is a piece of legislation that is required to have been passed in terms of the right to equality provisions in the Bill of Rights. Most of the provisions in the Equality Act relate to unfair discrimination. However, several provisions also relate to hate speech and directly prohibit the publication of certain types of expression:

- Section 10 of the Equality Act prohibits the publication, propagation, advocacy or communication of words based on one or more of the prohibited grounds (these are defined in section 1 as being race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth, or indeed any other ground that undermines human dignity and causes or perpetuates systemic disadvantage), which could reasonably be construed to demonstrate a clear intention to be hurtful, harmful or incite harm, or promote or propagate hatred.
- Section 12(1) of the Equality Act prohibits the dissemination or broadcast of any information or the publication or display of any advertisement or notice that could reasonably be understood as demonstrating a clear intention to unfairly discriminate (on the prohibited grounds set out immediately above) against any person.

Both sections 10 and 12(1) are subject to the exceptions contained in section 12(2), namely:

- *bona fide* engagement in artistic creativity, academic or scientific enquiry
- publication of any information, advertisement or notice in accordance with section 16 of the constitution
- fair and accurate reporting in the public interest.

The provisions of the Equality Act are enforced by specialised equality courts established in terms of the act. Such courts can impose damages awards, including in respect of impairment of dignity, pain and suffering, or emotional and psychological suffering (section 21(2)(d)). In respect of hate speech, the matter may also be sent to the director of public prosecutions for the institution of criminal proceedings under the common law or other legislation (section 10).

Note that a particular weakness of the Equality Act is that its hate speech provisions are not tailored to match the type of hate speech referred to in 16(2)(c) of the constitution. This means that the prohibitions contained in sections 10 and 12(1) of the Equality Act extend far beyond the unprotected hate speech provided for in section 16(2)(c) of the constitution.

This is a problem because some of the speech or expression prohibited under the Equality Act is actually protected expression under the constitution and will require a decision by the courts as to whether or not prohibitions meet the standards of the limitations clause contained in the constitution. This would not be necessary if the hate speech prohibitions in the Equality Act matched the wording of the constitutionally unprotected hate speech provisions found in section 16(2)(c) of the constitution. These provisions are the subject of a Constitutional Court case but, at the time of writing, judgment had yet to be handed down.

Films And Publications Act, Act 65 of 1996

Section 16(4) of the Films and Publications Act (which is dealt with in more detail in paragraph 3.9.4 above regarding its structures and processes, so please refer to that paragraph) provides that the Film and Publication Board's Classification Committee may give a 'refused classification' classification to publications containing advocacy of hatred based on any identifiable group characteristics,[15] which constitute an incitement to cause harm. There are exceptions to the 'refused classification' category of publications, namely if the publication is a *bona fide* documentary or is a publication of scientific, literary or artistic merit, or is on a matter of public interest. In such case, the publication shall be classified with reference to the guidelines relating to the protection of children from exposure to disturbing, harmful or age-inappropriate materials.

Similarly, section 18(3) of the Films and Publications Act provides that the Film and Publication Board's Classification Committee may give a 'refused' classification to those films constituting propaganda for war, incitement of violence, or the advocacy of hatred based on group characteristics, which constitute an incitement to cause harm. There are exceptions to this category of films, namely if the film is a *bona fide* documentary or is a film of scientific, literary or artistic merit, or is on a matter of public interest. In such case, the film shall be classified with reference to the guidelines relating to the protection of children from exposure to disturbing, harmful or age inappropriate materials.

Note that a particular weakness of the Films and Publications Act is that its hate speech provisions are not tailored to match the type of hate speech referred to in 16(2)(c) of the constitution. This means that the prohibitions on classifying publications and films contained in sections 16(4) and 18(3) of the Films and Publications Act extend significantly beyond unprotected hate speech provided for in section 16(2)(c) of the constitution by including many more group characteristics than is provided for in the hate speech provisions in the constitution.

This is a problem because some of the publications and films effectively prohibited under the Films and Publications Act may contain expression which is protected

under the constitution and will require a decision by the courts as to whether or not the act's prohibitions meet the standards of the general limitations clause contained in the constitution. This would not be necessary if the hate speech prohibitions in the Film and Publications Act matched the wording of the constitutionally unprotected hate speech provisions found in section 16(2)(c) of the constitution.

Distributing a 'refused' classification publication or film is an offence in terms of section 24A(2) of the Film and Publications Act and the penalty, on conviction, is a fine, imprisonment or both.

3.9.6 Prohibition on the publication of election-related information

Section 89(2) read with section 98(a) of the Electoral Act, Act 73 of 1998, makes it an offence to publish any false information with the intention of disrupting or preventing an election; creating fear or hostility to influence the conduct or outcome of an election, or influencing the conduct or outcome of an election. The penalty, on conviction, is a fine or imprisonment for up to 10 years.

Section 90(2) read with section 98(a) makes it an offence to disclose any information about voting or the counting of votes except as permitted in terms of the act. The penalty, on conviction, is a fine or imprisonment for up to ten years.

Section 109 read with section 98(b) specifically makes it an offence to publish exit polls during the prescribed hours for an election, that is, while voting is actually taking place. The penalty, on conviction, is a fine or imprisonment for up to five years.

Note that this prohibition applies in addition to the broadcasting-related election coverage provisions set out above in the sections relating specifically to broadcasting legislation.

3.9.7 Prohibition on the publication of state procurement-related information

The National Supplies Procurement Act, Act 89 of 1970, is an old apartheid-era statute. Sections 2 and 3(1) of the act are extremely broad, all-encompassing provisions, which give the Minister of Trade and Industry vast powers to bypass tender and procurement board procedures, and to insist on delivery of goods or services if the minister 'deems it necessary or expedient for the security of the Republic'.

Furthermore, section 8A prohibits the disclosure of any information relating to any such goods or service without the permission of the Minister of Trade and Industry or a controller acting in accordance with the minister's directions.

Much more generally, section 8B also empowers the Minister of Trade and Industry to issue a notice in the Government Gazette prohibiting the disclosure of any information concerning any goods or service. Any contravention of the above provisions is an offence and, on conviction, the penalty is a fine, imprisonment or both. Several of the provisions of the National Supplies Procurement Act are unlikely to withstand constitutional scrutiny.

3.9.8 Prohibition on the disclosure of financial intelligence centre information

Section 41 read with section 60(1) of the Financial Intelligence Centre Act, Act 38 of 2001, makes it an offence to disclose confidential information held by or obtained from the Financial Intelligence Centre (established in terms of the act to counter money laundering activities) without the permission of the centre, unless empowered to do so in terms of the act.

Section 60(2) of the Financial Intelligence Centre Act makes it an offence to disclose any information that is likely to prejudice an investigation being conducted by the Financial Intelligence Centre.

Section 68(1) provides that the penalty for the offences set out above is imprisonment or a fine.

3.9.9 Prohibition on roadside advertising

The provisions of the Advertising on Roads and Ribbon Development Act, Act 21 of 1940, are probably of more interest to media owners than media practitioners. Still, it is important to note that this Act allows for local government to regulate certain forms of advertising on roadsides, such as billboards.

3.10 Legislation prohibiting the interception of communication

The legality of monitoring, recording and intercepting communications by and of the media has been heard in South Africa's court cases. This issue is governed by the Regulation of Interception of Communications and Provision of Communication-related Information Act, Act 70 of 2002.

Section 2 of the Interception Act prohibits the intentional interception of a communication in the course of its transmission subject to specific exceptions, particularly for law enforcement purposes. For the purposes of the Interception Act, interception is defined in section 1 as acquiring the content of any communication to make it available to a person other than the sender and recipient of the communication. Interception includes monitoring, recording or viewing the content or diverting it away from its intended destination.

There are certain important exceptions to the general prohibition in section 2, of which journalists need to be aware. Section 4 specifically allows a person to intercept (note the definition of this includes recording the content thereof) communication if he or she is a party to the communication (unless the purpose of the interception is to commit an offence). In this regard, it is important to note that a party to communication means a person:

- actually participating in the communication

- in whose immediate presence the communication occurs and is audible to the person concerned, whether or not the communication is specifically directed to him or her
- in relation to indirect communication (making use of a telecommunications system such as a telephone or email), any person who is in the immediate presence of the sender or recipient of the indirect communication.

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

Several of the provisions of the Interception Act have been declared unconstitutional as is dealt with more fully in the Cases section below.

3.11 Legislation that protects personal information

The media needs to be aware of the provisions of the Protection of Personal Information Act, Act 4 of 2013, (POPIA) most of which came into force by 1 July 2020. It contains several detailed provisions regarding how personal information is to be collected, stored and used.

Importantly for the media's purposes, section 7 of POPIA specifically grants an exemption from compliance with the provisions of POPIA for journalistic, literary or artistic purposes. Section 7(1) specifically provides, in its relevant part, that POPIA 'does not apply to the processing of personal information for exclusively journalistic … expression to the extent that such exclusion is necessary to reconcile, as a matter of public interest, the right to privacy with the right to freedom of expression'.

This exemption is cemented by a further exemption for journalists; section 7(2) of POPIA provides that:

> ***Where a responsible party who processes personal information for exclusively journalistic purposes is, by virtue of office, employment or profession, subject to a code of ethics that provides adequate safeguards for the protection of personal information, such code will apply to the processing concerned to the exclusion of this Act and any alleged interference with the protection of the personal information of a data subject that may arise as a result of such processing must be adjudicated as provided for in terms of that code.***

This is significant because organisations such as the Press Council, which is governed by a self-regulatory code that includes safeguards to protect personal information, may then adjudicate on allegations of non-compliance with their code

instead of being subject to the adjudicatory procedures provided for in POPIA.

Section 7(3) of POPIA sets out the criteria that must inform an assessment of whether or not a journalistic code provides adequate safeguards for the protection of personal information. These are:

- the special importance of the public interest in freedom of expression
- domestic and international standards balancing the public interest in:
  - allowing for the free flow of information to the public
  - the safeguarding the protection of personal information of data subjects
- the need to secure the integrity of personal information
- domestic and international standards of professional integrity for journalists
- the nature and ambit of self-regulatory forms of supervision provided by the profession.

Chapter 7 of POPIA has the heading Codes of Conduct, and it empowers the Information Regulator established in terms of POPIA (the Regulator) to, among other things, issue codes of conduct and develop written guidelines for assisting bodies to develop their codes of conduct. The provisions of the Press Council's code of conduct are dealt with in the Self-Regulation section below.

3.12 Legislation that specifically assists the media in performing its functions

In countries that are committed to democracy, governments pass legislation which specifically promotes the accountability and transparency of public and private institutions. Such statutes, while not specifically designed for use by the media, can be, and often are used by the media to uncover and publicise information in the public interest. South Africa has passed three important pieces of legislation of this kind.

3.12.1 Promotion of Access to Information Act, Act 2 of 2000

The Promotion of Access to Information Act (PAIA) was passed in accordance with the requirements of section 32 of the constitution, to facilitate and give effect to the right of access to information provision in the Bill of Rights. It has been amended numerous times.

Section 3 of PAIA stipulates that the act extends to records of both:

- Public bodies — note that this includes:
  - government departments (national, provincial or local)
  - functionaries and institutions exercising public powers, such as parastatals

or statutory bodies such as Icasa and the SABC.

- private bodies — that is, individuals or juristic persons such as a company.

Section 11 of PAIA provides that any person requesting information from a public body must be given access to the records of such body, provided:

- the requester has complied with the relevant procedural requirements
- access to the record is not refused on a ground of refusal recognised by PAIA.

Importantly, section 11(3) specifically provides that the reason for requesting information from a public body is irrelevant to a consideration of whether or not there is a right of access to the information requested.

Section 50 of PAIA provides that any person requesting information from a private body must be given access to the records of such body, provided:

- the record is required for the exercise or protection of any rights
- the requester has complied with the relevant procedural requirements
- access to the record is not refused on a ground of refusal recognised by the act.

Section 33 of PAIA makes it clear that there are grounds for refusing access which is mandatory (access must be denied), and grounds for refusing access which is discretionary (access may be denied):

- *Mandatory grounds for refusing access to information applicable to both public and private bodies:*
  - protection of privacy of a third party who is a natural person, where the access would result in unreasonable disclosure of personal information about an individual, sections 34 (public bodies) and 63 (private bodies)
  - protection of commercial information of third parties, sections 36 (public bodies) and 64 (private bodies)
  - protection of confidential information of third parties, sections 37 (public bodies) and 65 (private bodies)
  - protection of the safety of individuals and property, sections 38 (public bodies) and 66 (private bodies)
  - protection of legally privileged information, sections 40 (public bodies) and 67 (private bodies)
  - protection of research information of third parties and of public or private bodies, sections 43 (public bodies) and 69 (private bodies).
- *Mandatory grounds for refusing access to information applicable to public bodies only:*

- protection of certain records of the South African Revenue Service, section 35
- protection of police dockets and law enforcement and legal proceedings, section 39.

- *Discretionary grounds for refusing access to information applicable to public bodies only:*
  - protection of defence, security and international relations, section 41
  - economic interests and financial welfare of South Africa, section 42
  - operations of public bodies with respect to pre-decision policy formulation and deliberative processes, section 44
  - manifestly frivolous or vexatious requests, section 45.
- Discretionary ground for refusing access to information applicable to private bodies only: Commercial activities of private bodies, section 68.

Note that there are no discretionary grounds for refusing access that are applicable to both public and private bodies.

Two similar and important provisions in PAIA are sections 46 (in relation to public bodies) and 70 (in relation to private bodies), which require even mandatory grounds of refusal to be overridden when the public interest demands this, and where the record would reveal evidence of a substantial contravention of the law or would reveal any imminent and serious public safety or environmental risk.

In terms of section 90, any person who, while trying to deny a right of access destroys, damages, alters, conceals or falsifies a record, commits an offence. On conviction, the person is liable to a fine or imprisonment for a period not exceeding two years.

PAIA is critically important for the media. If used properly, particularly in respect of ongoing investigative journalism, it can provide access to extremely valuable information. Much of what the public knows about South Africa's notorious arms deal has come to light as a result of access to information held by public bodies, particularly documents obtained from the Auditor General's office under PAIA.

3.12.2 Protected Disclosures Act, Act 26 of 2000

The Protected Disclosures Act (PDA) makes provision for procedures for both private and public sector employees to disclose information regarding unlawful or irregular conduct by their employers, or indeed other employees, and to be protected concerning such disclosures.

Section 3 is at the heart of the PDA. It provides that no employee or worker (whether of a public body or private person or body) may be subjected to any occupational detriment for having made a protected disclosure.

- Occupational detriment includes among other things, any disciplinary action, being dismissed, suspended, demoted, intimidated, transferred unwillingly or refused promotion or appointment and being subjected to any civil claim for a breach of a duty of confidentiality arising out of the disclosure of a criminal offence or information which shows a substantial contravention of the law, section 1.

- A protected disclosure is a disclosure made in good faith to the Public Protector, the SAHRC, the Commission for Gender Equality, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Public Services Commission or to a person prescribed for the purposes of making protected disclosures to or to any other person (including the media) if exceptionally serious, sections 1, 8 and 9.

- Section 1 defines 'disclosure' as the disclosure of information regarding the conduct of an employer or another employee or worker, which shows or tends to show that:
  - a criminal offence has been committed or is likely to be committed
  - a legal obligation has not been complied with
  - a miscarriage of justice is happening
  - the health and safety of an individual is endangered
  - the environment is being damaged
  - unfair discrimination
  - any of the above is being concealed.

The effect of the PDA is that in serious cases it will be competent for an employee to make a protected disclosure to the media if bodies that are supposed to address such issues (such as the Public Protector) have failed to act in the past. This legislation assists the media in working with whistleblowers both in government and the private sector to make information regarding corruption and other illegal or damaging conduct public.

3.12.3 Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act, Act 4 of 2004

The Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act (Powers Act) confirms and adds to the privileges and immunities that are given to parliament and provincial legislatures by the constitution. As the preamble to the Powers Act provides, furthering privileges and immunities is essential 'in order to protect the authority, independence and dignity of the legislatures and their members'.

- Section 6 of the Powers Act extends the constitutional privilege of free speech to the president, members of the National Assembly and delegates to the NCOP, as well as to joint sittings of the National Assembly and the NCOP.

- Section 18 of the Powers Act is critical for the press because it provides that no person (including, of course, the media) is liable to civil or criminal proceedings in respect of the publication of any report, paper or minutes that have been submitted to parliament, including committees thereof. However, section 19 prohibits the willful publication of documents that have been prohibited in parliament or which falsely purport to have been published under the authority of parliament or to be a verbatim account of proceedings.
- Section 21 allows for the broadcasting of parliamentary proceedings only with the permission of the authority of the body (for example, a committee chair) concerned. Once authority is granted, no person is liable to civil or criminal proceedings in respect of such broadcast.
- All of the above provisions apply to provincial legislatures equally (section 28) with the notable exception of section 6, which is an astonishing omission as that is the crux of the act.

3.12.4 Protection from Harassment Act, Act 27 of 2011

The Protection from Harassment Act (the PFHA) is a useful statute for journalists to be aware of in the age of stalking and violent threats made against journalists online, particularly on social media platforms such as Twitter and Facebook. This is particularly so of female journalists who have been subjected to death threats and threats of assault, including sexual assault, on social media platforms.

In brief, it makes it an offence to engage in harassment. The definition of harassment in section 1(a)(ii) of the PFHA includes 'engaging in conduct that the respondent knows or ought to know causes harm or inspires the reasonable belief that harm may be caused to the complainant … by unreasonably engaging in electronic communication aimed at the complainant.'

The PFHA makes provision for someone who is subjected to online harassment to apply to the courts for a protection order in terms of section 10. Anyone who violates a protection order can be sentenced, on conviction, to a fine or imprisonment in terms of section 18(1).

3.12.5 Electoral Act, Act 73 of 1998

The Electoral Act is a useful statute for journalists, during election periods which are always politically charged. Section 97 and 98, read with section 94 of the Electoral Act makes it an offence, punishable by a fine or imprisonment, for a person or party bound by the Electoral Code to fail to comply with its provisions.

The Electoral Code is set out in Schedule 2 to the Electoral Act, and its purpose is to 'promote conditions for free and fair elections'. Section 8 of the Electoral Code is headed Role of the Media, and it requires every registered party and every candidate to:

- respect the role of the media before, during and after an election

- not prevent access by members of the media to public political meetings, marches, demonstrations and rallies
- take all reasonable steps to ensure that journalists are not subjected to harassment, intimidation, hazard, threat or physical assault by any of their representatives or supporters.

Consequently, political parties, candidates or both, who fail to take reasonable steps to prevent their supporters from harassing or intimidating journalists during election periods are committing a criminal offence.

4 Regulations affecting the media

In this section, you will learn:

▷ what regulations are

▷ key regulations governing broadcasting content

▷ other key aspects of broadcasting-related regulations

4.1 Definition of regulations

Regulations are subordinate legislation. They are legal rules made in terms of a statute. Regulations are a legal mechanism for allowing ministers or organisations such as Icasa to make legally binding rules governing an industry or sector, without requiring parliament to pass a specific statute thereon.

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

4.2 Key regulations governing broadcasting content

4.2.1 Regulation setting out the Code of Conduct for Broadcasters

The Code of Conduct for Broadcasters — Notice 958 published in Government Gazette 32381 dated 6 July 2009, applies to all broadcasters except those governed by an Icasa-approved code of conduct enforced by a self-regulatory body (see the section below on self-regulatory codes).

The Code of Conduct for Broadcasters:

- Prohibits the broadcasting of:
  - unnecessary or explicit extreme violence or explicit infliction of domestic violence
  - propaganda for war
  - incitement of imminent violence
  - advocacy of hate speech based on race, ethnicity, religion or gender and which constitutes incitement to cause harm
  - certain types of sexual conduct, child pornography, bestiality, sexual conduct which advocates hatred based on gender that constitutes incitement to cause harm; explicit sexual conduct.

  Note that there are exceptions for *bona fide* scientific, documentary, dramatic, artistic or religious broadcasts, which amount to a discussion, argument or opinion about religion, belief or conscience, or on a matter of public interest. There are also exceptions for material broadcast during the watershed period (between 21h00 and 05h00 for free-to-air broadcasters, and between 20h00 and 05h00 for subscription broadcasters), with relevant warnings.
- Requires particular care when children are likely to be part of the audience. There are specific requirements for children's programming, including in respect of the portrayal of violence, safety matters and issues which could threaten a sense of security such as death, domestic conflict, the use of drugs or alcohol, and so on and the use of offensive language.
- Provides that programming which contains scenes of explicit violence, sexual conduct or nudity, or offensive language may be broadcast only during the watershed period.
- Specifies that television broadcasting licensees must provide advisory assistance, including age guidelines, where broadcasts contain violence, sex, nudity or offensive language.
- Requires that news be truthful, accurate and fair without intentional or negligent departure from the facts:
  - where a report is based on opinion, rumours or allegations, this must be clearly presented
  - where there is reason to doubt the correctness of a report, verification should take place
  - when a broadcast report is known to have been incorrect, this must be rectified quickly and fairly
  - the identity of rape victims and other victims of sexual violence must not be divulged without their consent
  - there must be warnings for reports involving graphic violence or sexual assault.

- Requires that comment be honest, clearly presented and based on facts.
- Requires that when presenting programming in which controversial issues of public importance are discussed, reasonable efforts must be made to present opposing views and to ensure a right of reply.
- Requires that broadcasters exercise exceptional care in matters involving the privacy, dignity and reputation of individuals (particularly in respect of people who are bereaved and children, the aged and the disabled), subject to a legitimate public interest.
- Requires, when audiences are invited to react to a programme or competition, that broadcasters broadcast:
  - the full cost of the telephone call or SMS, and must specify what percentage thereof is intended for a charitable cause if any
  - the rules of any competition, including the closing date and the manner in which the winner is determined.

4.2.2 Must Carry regulations — subscription broadcasters' obligation to carry SABC channels

The regulations on the extent to which subscription broadcasting services must carry the television programmes provided by the public broadcasting service licensee (Must Carry), notice 1271 published in Government Gazette 31500 dated 10 October 2008, oblige certain subscription television broadcasters to carry SABC television channels.

The obligations are as follows:

- Only subscription broadcasters providing 30 or more television channels are obliged to carry SABC channels.
- Every 20th channel above the minimum threshold of 30 channels must be a public broadcasting service channel. This means that channels 30, 50, 70, 90 and so on, will be public channels.
- The channels provided by the public services division (as opposed to the public, commercial services division) of the SABC must be prioritised for carriage.

Failure to comply with the must-carry regulations carries a fine not exceeding R1 million.

A significant problem with the Must Carry regulations is that section 6(1) thereof requires the SABC to offer its television programmes 'at no cost' to the subscription broadcaster on request. This is *ultra vires* or at odds with the relevant provisions of the ECA which requires Must Carry to be subject to 'commercially negotiable terms'. The current Must Carry Regulations effectively allow the subscription broadcaster with significant market power, DStv, to access the SABC's television channels free, to the public broadcaster's financial disadvantage.

4.2.3 Local content and independent commissioning regulations

The Local Content Regulations, Notices 344 and 346 published in Government Gazette 39844 dated 23 March 2016, set out South African programming and independent television production requirements for radio and television licensees, respectively, in three licence categories, public, commercial (both free to air and subscription) and community.

Local content requirements are important because they ensure that South African television content (including independently produced content) and music is produced and broadcast when it is often cheaper and easier to import poor quality foreign content. It is also important to note that the Local Content Regulations represent a floor and not a ceiling in respect of local content; the local content requirements may well be higher for specific broadcasters depending on their licence conditions. The regulations are, in places, extremely technical, particularly in respect of applying format factors for genres, language, repeats and so on. It is also possible, in terms of section 4 of the Local Content Music Regulations, to apply to Icasa for an exemption from complying with the regulations and applicants must submit proof that there is a limited local music content supply in its defined format. Below is a summary of the basic local content requirements.

Television

Nature of television service	Local television content to be broadcast as a percentage of programming	Percentage of local content to be independently produced
Public services	Overall total and primetime percentage required: 65%, and of this: ▸ 35% drama ▸ 80% current affairs ▸ 50% documentary ▸ 50% informal knowledge building ▸ 60% educational programming ▸ 55% children's programming	40% and of this, 50% of the independent production budget is to be spent on previously marginalised African languages and/or programmes commissioned from regions outside Durban, Cape Town and the Johannesburg Metropolitan cities.

Nature of television service	Local television content to be broadcast as a percentage of programming	Percentage of local content to be independently produced
Commercial and public commercial services	45% of programming broadcast during the South African performance period (05h00 to 23h00 daily) and of this: ▸ 20% drama ▸ 50% current affairs ▸ 30% documentary ▸ 30% informal knowledge building ▸ 25% children's programming	40% and of this, 50% of the independent production budget is to be spent on previously marginalised African languages and/or programmes commissioned from regions outside Durban, Cape Town and the Johannesburg Metropolitan cities.
Community services	65% of programming broadcast spread evenly over the South African performance period (05h00 to 23h00 daily) and during prime time and of this 50% of the quota must be produced within the licensee's coverage area	40%
Satellite subscription services	At least 15% of the annual content acquisition budget is to be spent local television content. At least 15% of the total annual channel acquisition budget is to be spent on channels with local television content that are compiled and uplinked from South Africa. Note that carrying the channels of existing television licensees does not count towards meeting local content requirements.	40% and of this, 50% of the independent production budget is to be spent on previously marginalised African languages and/or programmes commissioned from regions outside Durban, Cape Town and the Johannesburg Metropolitan cities.

Radio

Nature of the radio/sound service	South African music requirement as a percentage of total music broadcast spread evenly throughout the performance period (05h00 to 11h00 daily)
Public sound services	70%
Commercial and public commercial sound services	35%
Community sound services	80%
Subscription sound services	30% of the bouquet is to consist of channels made up of South African music content.

Icasa has also prescribed Independent Commissioning Regulations in Notice 1598 published in Government Gazette 32767 dated 1 December 2007 (the Independent Commissioning Regulations) which requires all television broadcasters to compile commissioning protocols for independently produced South African programming, section 3.

The Independent Commissioning Regulations, at section 4, also require television licensees to submit an annual report setting out its procurement activities from independent producers.

Section 2 of the Independent Commissioning Regulations requires commissioning practices to be, among other things, fair, transparent and non-discriminatory and not to hamper independent producers' control.

4.2.4 Sports broadcasting rights regulations

The current Sports Broadcasting Rights Regulations — Notice 275 published in Government Gazette 33079 dated 7 April 2010, contain a list of specified national sporting events to which subscription broadcasters who have acquired the rights thereto are required to invite free-to-air broadcasters to tender. They can be broadcast live, delayed live or delayed by a free-to-air television broadcaster. The regulations are problematic in that they clearly envisage that free-to-air and subscription broadcasters are to enter into commercial agreements regarding the broadcasting of national sporting events.

The effect of this is that there is no guarantee of the public having access to premium sports content where the rights are held by subscription broadcasters if they cannot reach an agreement with a free-to-air broadcaster on the commercial terms. Although these Sports Broadcasting Regulations are in the process of being reviewed, this process has yet to be finalised. It is clear that the Sports Broadcasting Rights Regulations have not resulted in all national sporting events being broadcast on free-to-air television and free-to-air broadcasters, particularly

the SABC, have battled to afford the rising cost of premium sports content.

4.2.5 Advertising, infomercials and programme sponsorships

Icasa has passed the regulations relating to the Definition of Advertising, and the Regulation of Infomercials and Programme Sponsorship in respect of Broadcasting Activities are contained in Notice 426 published in government Gazette 19922 dated 1 April 1999 (the Advertising Regulations). In brief, important aspects include:

- infomercials may not be broadcast during primetime children's programming
- infomercials must be presented such that it will be clear to the audience that infomercials do not constitute programme material
- no television channel (unless it is a dedicated infomercial channel) may transmit infomercials for more than 2 hours during the performance period (05h00 to 11h00) per day
- where a broadcaster derives benefit from a programme sponsorship, it must retain editorial control and control over the scheduling of the sponsored programme
- television news and current affairs programming may not be sponsored however, this prohibition does not apply to radio news and current affairs. No product placement is permitted during news and current affairs programming
- product placements in programming must be subordinate to the content of the programme material
- in all cases of programme sponsorship, the broadcaster must state the nature of the sponsors association with the relevant sponsored programme clearly before and after the transmission of the sponsored programme.

4.3 Other important broadcasting-related regulations

Icasa has passed dozens of regulations governing different non-content aspects of broadcasting, signal distribution and radio frequency spectrum management, including in respect of licence fees, administrative procedures and record-keeping. We set out below particularly important ones.

4.3.1 Standard Terms and Conditions Regulations

Icasa has prescribed Regulations on Standard Terms and Conditions for both class licences, namely community broadcasting licences (Notice 525 published in Government Gazette 33296 dated 14 June 2010, as amended) and for individual licences, including public and commercial broadcasting licences, (Notice 523 published in Government Gazette 33294 dated 14 June 2010, as amended).

In brief, both sets of Standard Terms Regulations deal with several critical issues such as:

- licence terms:
  - fifteen years for all public and commercial television licences, whether free to air or subscription
  - ten years for all public and commercial sound licences
  - seven years for community television licences
  - five years for community sound and all low-power licences
  - forty-five days for special event licences.
- When broadcasting services must commence after being licensed:
  - twenty-four months for public and commercial television licensees
  - twelve months for community licensees and public and commercial sound broadcasting services.
- hours of operation are 24 hours a day for all broadcasting licensees
- logs must be kept and information provided by a licensee to Icasa upon request.

Furthermore, the standard terms for individual licences (commercial and public broadcasters) provide for a maximum of 20% syndicated programming to be broadcast during the performance period, that is, between the hours of 05h00 and 23h00 daily.

4.3.2 Licensing Processes and Procedures Regulations

Icasa has prescribed Regulations on Licensing Processes and Procedures for both class licences, namely community broadcasting licences (Notice 526 published in Government Gazette 33297 dated 14 June 2010, as amended) and individual licences, including public and commercial broadcasting licences, (Notice 522 published in Government Gazette 33293 dated 14 June 2010, as amended).

In brief, both sets of regulations deal with several important issues such as prescribing forms for the application, amendment, renewal, surrender or transfer (including the transfer of control) of a licence, the notification of changes in information relating to the licensee and the number of copies required. There are also forms for test and low-power licences.

In the Licensing Processes Regulations for individual licences, section 12(1)(c) read with section 12(2) specifies that an application to transfer a licence or control thereof will be refused if less than 30% of the ownership of transferee is held by historically disadvantaged persons unless there are management and control by black persons of at least 60% or the transferee has the status of 'facilitator' of Broad-based Black Economic Empowerment.

4.3.3 Community Broadcasting Regulations

Icasa prescribed the Community Broadcasting Services Regulations in Notice 439 published in Government Gazette 42323 dated 22 March 2019 (the Community Regulations).

The purposes of the Community Regulations are set out in section 3, and essentially these are to provide for:

- the framework under which community broadcasting licensees will operate
- requirements for the registration, renewal, transfer and amendment of community broadcasting licences
- governance and management structure requirements
- basic principles of community participation.

Section 4 of the Community Regulations set out detailed requirements for those entities wishing to apply to register as a community broadcasting service licensee, including:

- having been registered as a non-profit entity for at least two years
- demonstrating community development and empowerment.

Section 5 deals with the Icasa requirements for governance and management of community broadcasters, and these include:

- defining distinct roles for management and the board
- ensuring that the board excludes immediate family members.

Section 9 deals with prohibited office bearers and tries to ensure that political parties (and their allies or youth or women's organisation affiliates) do not endeavour to control community broadcasting services by holding office on the board, management or staff of a community broadcasting service.

Section 10 deals with programming and includes requirements on local origination, limiting programme syndication or programme sharing to 20% and requiring policies on language and format as well as on mechanisms for community participation.

Section 11 requires all surplus funds to be utilised in the community for community development and for reports on this to be submitted annually.

To combat the phenomenon of community broadcasters being managed by commercial entities, section 12 deals with management contracts and contains several restrictions on management contracts involving community broadcasters to ensure that editorial control remains in the hands of the community broadcaster.

Section 13 contains requirements for community participation which is to be involved in management and programming selection, including by community participation committees.

4.3.4 Subscription broadcasting

Icasa prescribed Subscription Broadcasting Service Regulations in Notice 152 published in Government Gazette 48452 dated 31 January 2006 (the Subscription Regulations).

An important issue dealt with in these regulations is the process for channel authorisations which are provided for in section 3.

4.3.5 Record-keeping and reporting

There are several different types of record-keeping and reporting requirements. The most comprehensive is the Compliance Procedure Manual Regulations prescribed by Icasa in Notice 902 published in Government Gazette 34363 dated 15 December 2011 (the Compliance Manual Regulations).

The Compliance Manual Regulations contain several forms which have to be submitted, including financial information as well as ownership and control reporting and programming reporting, including, news, programming and local content and music logs.

4.3.6 Fees payable

Icasa has prescribed the Licence Fees Regulations for broadcasting licence fees as well as for administrative fees (for applications, transfers, amendments and the like) in Notice 299 published in Government Gazette 36323 dated 28 March 2013 (the Licence Fees Regulations).

Section 4 of the Licensee Fees Regulations exempts community and public broadcasters from paying annual licence fees. For commercial broadcasters, the annual licence fee is a percentage of revenue on a sliding scale from 0.15% to 0.35%, Schedule 2 to the Licence Fees Regulations.

Further, Icasa has prescribed the Regulations for the Annual Contributions to the Universal Service and Access Fund in Notice 93 published in Government Gazette 34010 dated 10 February 2011 (the USAF Regulations).

All broadcasting licences (except for community licences which are exempt from making USAF contributions in terms of section 89 of the ECA) are required to contribute 0.2% of annual turnover to the USAF, in terms of section 3 of the USAF Regulations. However, if broadcasters have contributed to the MDDA in terms of the MDDA Act (dealt with in section 3 above), then that contribution can be set off against the required contributions to the USAF.

4.3.7 Election regulations

Icasa has prescribed regulations on Party Election Broadcasts, Political Advertisements and the Equitable Treatment of Political Parties by Broadcasting Licensees in Notice 101 published in Government Gazette 37350 dated 17 February 2014, as amended (the Elections Regulations).

The Elections Regulations apply to election periods and prescribe a framework and guidelines under which party election broadcasts and political advertisements are to be carried by broadcasting licensees during national and provincial elections. The guidelines (contained in Annexure B) essentially summarise the elections-related provisions of the ECA which have been dealt with in the statutory section above.

Party election broadcasts are dealt with in section 4 of the Elections Regulations. Only a public broadcasting service is required to carry party election broadcasts. Commercial and community broadcasters may, but are not required, to do so. Party election broadcasts must not exceed 50 seconds in duration and must be broadcast in a sequence and timing determined by Icasa on the allocation of time slots to the broadcaster in terms of Annexure A to the Election Regulations.

Political advertisements are dealt with in section 6 of the Election Regulations. No broadcaster is required to broadcast political advertising, but if they do choose to do so, they must comply with the Election Regulations' provisions on political advertisements.

Section 7 of the Elections Regulations provides for a complaints procedure (complaints are to be made to the Icasa CCC), and a failure to comply with the Election Regulations is sanctioned by the imposition of a significant fine.

4.3.8 People with disabilities

Icasa has prescribed regulations on a Code on People with Disabilities — Notice 1613 published in Government Gazette 30441 dated 7 November 2007. Note these are due to be amended by this has yet to be finalised.

The Disability Code requires all broadcasters to report annually on their progress in implementing the following:

- All broadcasting licensees must ensure that their services are available and accessible to people with disabilities, including by:
  - the use of sign language and sub-titles
  - programme support such as fact sheets
  - websites that offer a range of formats, such as audiotape
  - the use of spoken languages, where materials such as weather forecasts or economic indicators are shown on screen.
- Broadcasting licensees must have surveys and contact with disability organisations regarding their services.
- Broadcasting licensees must ensure that their programming does not stereotype disabled people or disability, and must involve disabled people as part of a studio audience and in-programming storylines.

5 Media self-regulation

Four principal self-regulatory codes affect the media in South Africa

- The Code of Advertising Practice governs advertising; it was developed by the Advertising Standards Authority which has since ceased to exist and has been replaced by the Advertising Regulatory Board (the ARB). The ARB is in the process of revising and updating the Code of Advertising Practice but, at the time of writing, this process had not been completed, and so we refer to provisions in the current Code.
- The Broadcasting Complaints Commission of South Africa (BCCSA) has two Codes of Conduct for Broadcasters, one for free-to-air broadcasters and one for subscription broadcasters.
- The Press Code of Ethics and Conduct for South African Print and Online Media (the Press Code), which was developed by the Press Council of South Africa and the Interactive Advertising Bureau of South Africa for their members, is enforced by the Press Ombudsman and the South African Press Appeals Panel.

5.1 The Code of Advertising Practice

The essence of the Code of Advertising Practice is that advertising should be legal, decent, honest and truthful and have a sense of responsibility to the consumer. Some key topics that the code addresses are the following:

- no offensive advertising
- advertisements must not abuse the trust of the consumer
- no unacceptable advertisements containing the following:
  - fear
  - violence
  - illegality
  - discrimination
  - gender stereotyping
- advertisements must be truthful
- advertisements must not be misleading
- no comparative advertising unless these are factual comparisons
- no imitation of an existing advertisement
- no advertisement may refer to a living person unless their express prior permission has been obtained

- advertisements must be clearly recognisable as such and must be distinguishable from news, editorial or programme matter
- no advertising that is harmful to children or that exploits or portrays them in a sexually provocative manner
- no animals may be harmed in advertisements
- there are particular provisions regarding the advertising of prices.

5.2 The BCCSA Code of Conduct for Free-to-Air Broadcasters

The BCCSA Code for Free-to-Air Broadcasters is very similar to the Icasa Code of Conduct set out under the regulations section above.

The BCCSA Code of Conduct for Free-to-Air Broadcasters:

- prohibits the broadcasting of the following:
  - unnecessary violence, particularly concerning violence against women
  - propaganda for war
  - incitement of imminent violence
  - advocacy of hate speech based on race, ethnicity, religion or gender and which constitutes incitement to cause harm
  - certain kinds of sexual conduct, child pornography, bestiality, sexual conduct which advocates hatred based on gender and which constitutes incitement to cause harm, explicit sexual conduct.

  Note that there are exceptions for *bona fide* scientific, documentary, dramatic, artistic or religious broadcasts, or which amounts to a discussion, argument or opinion about religion, belief or conscience, or on a matter of public interest. There are also exceptions for material broadcast during the watershed period (between 21h00 and 05h00 for free-to-air broadcasters) with relevant warnings.
- requires particular care when children are likely to be part of the audience. There are specific requirements for children's programming, including in respect of the portrayal of violence, safety matters, issues which could threaten a sense of security, such as death, domestic conflict, the use of drugs or alcohol and the use of offensive language
- provides that programming which contains scenes of explicit violence, sexual conduct, nudity or grossly offensive language may be broadcast only during the watershed period (between 21h00 and 05h00)
- specifies that television broadcasting licensees must provide advisory assistance, including age guidelines, where broadcasts contain violence, sex, nudity or offensive language

- requires that news be truthful, accurate and fair without intentional or negligent departures from the facts. In this regard:
  - where a report is based on opinion, rumour or allegation, this must be clearly presented
  - where there is reason to doubt the correctness of a report, verification should take place
  - when a broadcast report is known to have been incorrect, this must be rectified quickly and fairly
  - the identity of rape victims and other victims of sexual violence must not be divulged without consent
  - there must be warnings for reports involving graphic violence or sexual assault.
- requires that comment be honest, presented clearly as comment and must be based on facts
- requires that when presenting programming in which controversial issues of public importance are discussed, a reasonable effort must be made to present opposing views and to ensure a right of reply
- requires that broadcasters exercise exceptional care in matters involving the privacy and dignity of individuals (particularly, children, the aged and the disabled), subject to a legitimate public interest
- contains specific provisions regarding competitions, including regarding the publication of the costs of participating via SMS or calls and that the public must be made aware of the rules of the competition on air.

5.3 The BCCSA Code of Conduct for Subscription Broadcasters

The BCCSA Code of Conduct for Subscription Broadcasters is virtually identical to the Code of Conduct for Free-to-Air Broadcasters set out above. There are, however, some small differences:

- there are no special provisions regarding children and children's programming, undoubtedly due to the parental control mechanisms which are to be in place
- subscription broadcasters are under an obligation to, where practical, implement parental control mechanisms to enable a subscriber to block a programme based on its classification and to provide its subscribers with a parental control guide and a call centre facility
- the watershed period is an hour longer, and is from 20h00 to 05h00.

5.4 The Press Code

The Press Code[16] governs both print and online media published by members of the Press Council and of the Interactive Advertising Bureau of South Africa. It states as part of its preamble that:

> ***The media exist to serve society. Their freedom provides the independent scrutiny of the forces that shape society,and is essential to realising the promise of democracy. It enables citizens to make informed judgements on the issues of the day, a role whose centrality is recognised in the South African Constitution.***

Below are some key topics that the code addresses:

- Gathering and reporting of news must be:
  - truthful, accurate and fair
  - contextual and balanced with no departure from the facts
  - only what is reasonably true may be presented as fact
  - opinions, allegations and rumours to be clearly indicated as such
  - verification of accuracy if possible
  - seek the views of the subject of critical reporting where possible
  - publish retractions and apologies for inaccuracies promptly
  - identities of victims of sexual violence not to be published without consent
  - no publication of news obtained by dishonest or unfair means
  - respect privacy, unless there is an overriding public interest
  - avoid content which depicts violent crime or other violence or explicit sex unless the public interest dictates otherwise and, if so, provide warnings.
- Independence:
  - No commercial, political, personal or other non-professional considerations to influence reporting.
  - Indicate clearly when an outside organisation has contributed to the cost of newsgathering.
  - Keep editorial material distinct from advertising and sponsored events.
- Protect personal information under the media's control from misuse, loss and unauthorised access.
- Discrimination and hate speech:
  - The press must avoid discriminatory or derogatory references.
  - The press should not refer to a person's race, colour, ethnicity, gender, sexual orientation or physical or mental illness in a prejudicial or pejorative

context, except where strictly relevant to the story.

- The press must not publish material amounting to hate speech.

- Advocacy, a publication may strongly advocate its views provided it:
  - distinguishes between fact and opinion
  - does not misrepresent facts.
- Comment:
  - must be made fairly and honestly
  - must clearly appear as commentary and be based on facts
  - must be an honest expression of opinion.
- Headlines, posters, pictures and captions:
  - must be reasonably reflective of the contents of the report or picture in question
  - posters and pictures must not be misleading.
- Children:
  - the media must exercise exceptional care and consideration when reporting on children
  - no child pornography
- Protect confidential sources of information and avoid the use of anonymous sources as far as possible.
- Avoid payments for information, particularly to criminals, except in the public interest.
- User-Generated Content (UGC) (this is particularly relevant to online publications and for engagements through social media platforms). The media:
  - is not obliged to moderate all UGC
  - must develop a UGC policy which is publicly available online and which deals with:
    - › authorisation processes, if any
    - › prohibited content (incitement of violence, propaganda for war and hate speech)
    - › encouraging the reporting of policy-violating content
    - › complaints procedures.
  - may remove any UGC in accordance with their policy and note that if the media does not remove any UGC in response to a complaint, it then becomes liable for the content of such UGC before the Press Council.

6 Case law and the media

In this section, you will learn:

- common law
- defamation
- contempt of court
- other media-related court rulings on:
  - broadcast of legal and parliamentary proceedings
  - the statutory crime of intimidation
  - the independence of the SABC
  - the technical standards for DTT
  - the unlawful surveillance of journalists
  - political parties' responsibilities regarding the harassment of journalists during elections

6.1 Definition of common law

The common law is judge-made law. 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 South Africa's, judges are bound by the decisions of higher courts and also by the rules of precedent, which require rules laid down by the court in previous cases to be followed unless they were obviously wrongly decided. Legal rules and principles are, therefore decided on an incremental, case-by-case basis.

This section focuses on three areas of common law which are of particular relevance to the media, namely, defamation, contempt of court and the broadcasting of legal proceedings.

The section also focuses on important cases which have clarified the proper interpretation of several statutory provisions that are relevant to journalists and the media.

6.2 Defamation

6.2.1 Definition of defamation

Defamation is part of the common law of South Africa. It is the unlawful publication of a statement about a person, which lowers his or her standing in the mind of an ordinary, reasonable and sensible person. An action for defamation 'seeks to protect one of the personal rights to which every person is entitled, that is, the right to a good name, unimpaired reputation and esteem by others'.[17] Once it is proved that a defamatory statement has been published, two legal presumptions arise:

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

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

6.2.2 Defences to an action for defamation

There are several defences to a claim based on defamation, namely:[18]

- truth in the public interest
- absolute privilege, for example, a member of the National Assembly speaking in parliament
- statements made in the discharge of a duty, for example, the duty to provide information in connection with the investigation of a crime, enquiries as to the creditworthiness of a person, and so on
- statements made in judicial or quasi-judicial proceedings
- reporting on proceedings of a court, parliament or of certain public bodies
- fair comment on actual facts and which are matters of public interest
- self-defence (to defend one's character, reputation or conduct)
- consent.

The most relevant here is the defence of truth in the public interest. Truth in the public interest is where an action for damages is defended by asserting that the defamatory statement was true and, furthermore, that it is in the public interest to publicise the information. It is important to note that public interest does not mean what is interesting to the public, but rather what contributes to the greater public good. Therefore, it may be in the public interest to publish true, albeit defamatory, material about public representatives. This is due to the importance of the public having accurate information to engage in democratic practices, such as voting, effectively.

Before South Africa transitioned to democracy and a new constitutional order, the media (publishers, printers, editors, newspaper owners and broadcasting companies) were strictly liable for the publication of defamatory material. This meant that in the absence of one of the recognised defences set out above (for example, truth in the public interest), the media was not entitled to raise a lack of intention, or absence of negligence, argument. In other words, the courts were not required to find fault on the part of the media in the publication of a defamatory statement.[19] In the groundbreaking case of *National Media Ltd and Others v Bogoshi* [1998] 4 All SA 347 (A), the Appellate Division (as it was then called) overruled its earlier *Pakendorf* decision as being clearly wrong and adopted the approach taken in England, Australia and the Netherlands.

The new legal principle is stated at pages 361–362 of the *Bogoshi* judgment:

> ***The publication in the press of false, defamatory allegations of fact will not be regarded as unlawful if, upon a consideration of all the circumstances of the case, it is found to have been reasonable to publish the particular facts in the particular way and at the particular time. In considering the reasonableness of the publication, account must obviously be taken of the nature, extent and tone of the allegations. We know that greater latitude is usually allowed in respect of political discussion … and that the tone in which a newspaper article is written, or the way in which it is presented, sometimes provides additional, and perhaps unnecessary, sting. What will also figure prominently, is the nature of the information on which the allegations were based and the reliability of their source as well as the steps taken to verify the information. Ultimately there can be no justification for the publication of untruths, and members of the press should not be left with the impression that they have a licence to lower the standards of care which must be observed before defamatory matter is published in a newspaper.***

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

- the nature and tone of the allegations
- the nature of the information on which the allegations were based, for example, if the information is related to an important political issue or not
- the reliability of the source of the allegations
- steps taken to verify the allegations
- the general standard of care adopted by the media in the particular circumstances.

In a critically important case, the High Court has held that the reasonableness test set out above is applicable, not only to the media but to ordinary people in relation to defamatory statements made on Twitter about others, *Manuel v EFF and Others*.[20]

6.2.3 Remedies for defamation

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

- *The publication of a retraction and an apology by the media organisation concerned:* Where it has published a false, defamatory statement, a newspaper or broadcaster will often publish a retraction of a story or allegation in a story, together with an apology. Whether or not this satisfies the person who has been defamed will depend on several factors, including the seriousness of the defamation, how quickly the retraction and apology are published and the prominence given to the retraction and apology (this is a combination of the size of the retraction, but also the position in the paper).

- *An action for damages:* This is where a person who has been defamed sues for monetary compensation. This takes place after publication. Damages (money) are paid to compensate for the reputational damage caused by the defamation in circumstances where there are no defences to defamation. The amount to be paid in compensation will depend on several factors, including whether or not an apology or retraction was published, as well as the standing or position in society of the person being defamed.

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

6.2.4 The crime of defamation

In South Africa defamation is usually dealt with as a civil matter, that is, as a dispute between two parties (see above). However, criminal defamation is also a feature of South African law.

In *Hoho v S*,[21] the Supreme Court of Appeal confirmed that the common law: 'crime of defamation consists of the unlawful and intentional publication of matter concerning another which tends to injure his reputation'.[22] The court confirmed that the crime of defamation still existed under South African law[23] and that it was not inconsistent with the Constitution.[24]

6.3 Contempt of court

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

6.3.1 The *sub judice* rule

The *sub judice* rule guards against people trying to influence the outcome of court proceedings while legal proceedings are underway: 'It is contempt of court to publish information or comment regarding a case which is pending and which may tend to prejudice the outcome of the case'.[25]

6.3.2 Scandalising the court

The reason why scandalising the court is criminalised is to protect the institution of the judiciary. The point is to prevent the public from undermining the dignity of the courts. In *S v Mamabolo (eTV, Business Day and the Freedom of Expression Institute Intervening)*,[26] the Constitutional Court held at paragraph 19 that:

> ***Because of the importance of preserving public trust in the judiciary and because of the reticence required for it to perform its arbitral role, special safeguards have been in existence for many centuries to protect the judiciary against vilification. One of the protective devices is to deter disparaging remarks calculated to bring the judicial process into disrepute.***

The court held that the test is 'that the offending conduct, viewed contextually, really was likely to damage the administration of justice' [at paragraph 50].

6.4 Court rulings on the broadcasting of court and parliamentary proceedings

6.4.1 Court proceedings

South Africa is not the only country in Africa that has allowed the broadcasting of legal proceedings, but it undoubtedly has the most developed case law on the subject. Given the importance of the broadcast media in ensuring that news and information, particularly concerning legal matters, is disseminated to the public, the issue of broadcasting court proceedings is extremely important. While our courts have long held that broadcasting of non-criminal proceedings is uncontroversial, the broadcasting of criminal proceedings has remained subject to conflicting concerns regarding the requirements of justice for the accused. The latest case to deal with the issue is *Van Breda v Media 24 Ltd and Others and NDPP v Media 24 Ltd and Others*[27] in which the Supreme Court of Appeal unanimously held that:

> ***The default position has to be that there can be no objection in principle to the media recording broadcasting counsel's address and***

> ***all rulings and judgment (in respect to both conviction and sentence) delivered in open court. When a witness objects to coverage of his or her testimony, such witness shall be required to assert such objection before the trial judge, specifying the grounds before and the effects he or she asserts such coverage would have upon his or her testimony … Under this approach, cameras are permitted to film or televise all non-objecting witnesses …***
>
> ***If the judge determines that the witness has a valid objection to cameras, alternatives to regular photographic or television coverage could be explored that might assuage the witness' fears …***
>
> ***The courts will not restrict the nature and scope of the broadcast unless the prejudice is demonstrable, and there is a real risk that such prejudice will occur. Mere conjecture was speculation that prejudice might occur or to not to be enough.***[28]

This case represents a significant step in securing open justice by ensuring that even criminal proceedings are broadcast unless there is a real risk of demonstrable prejudice occurring.

6.4.2 Parliamentary proceedings

In *Primedia Broadcasting and Others v the Speaker of the National Assembly and Others*,[29] a case which concerned the non-broadcasting of the violent disruption of the then president's State of the Nation address to parliament and the jamming of journalists' cell phones to prevent them reporting on the proceedings, the Supreme Court of Appeal unanimously declared, among other things:

- Clause 8.3.3.2 of Parliament's Policy on Broadcasting and Rule 2 of Parliament's Television Broadcasting Rules of Coverage unconstitutional and unlawful for violating the right to an open parliament (they prohibited the broadcast of scenes of 'disorder on the floor of the house')
- The manner in which the State of the Nation proceedings was broadcast (where the broadcast showed only the speaker's face and none of the violence/disorder that was actually taking place in the chamber) was unconstitutional and unlawful.
- The use of a jamming device in parliament (such that journalists were unable to use their cell phones to report on proceedings) was unlawful.

This case is an important case on ensuring public access to what is happening in parliament by outlawing the censorship of disorderliness in the chamber and protecting journalists' rights not to have their cell phone signals jammed while covering parliament.

6.5 Court rulings on the statutory crime of intimidation

Section 1(1)(b) of the Intimidation Act, Act 72 of 1982, made it an offence to publish words

> ***that have the effect … that a person receiving the … publication fears for his own safety or the safety of his property or the security of his livelihood, or the safety of any other person or the safety of the property of any other person or the security of the livelihood of any other person.***

The punishment, on conviction, was a fine or imprisonment or both. However, this provision was ruled unconstitutional and invalid in the case of *General Alfred Moyo and Another v Minister of Police and Others*.[30] The reason for the ruling of the Constitutional Court was that the absence of wording in section 1(1)(b) confining the intimidation to incitement of imminent violence, criminalised protected free speech.[31]

6.6 Court rulings on the independence of the SABC

The SABC's independence has been the source of much conflict between the government and civil society for over a decade. However, the High Court has now ruled on several crucial issues regarding the relationship between the SABC and the executive branch of government in two cases *SOS Support Public Broadcasting Coalition and Others v the SABC and Others*.[32] In brief, the court's main findings in these cases include:

- Because the SABC is the medium that should allow the free flow of ideas that is necessary for our democracy to function, the state must ensure that it has the necessary structural and operational independence. The SABC will only have such independence if there are entrenched mechanisms to ensure that it provides accurate, neutral and pluralistic content. — at paragraph [52].
- The effect of section 13(11) [of the Broadcasting Act] therefore is to confer on the Board the exclusive power to control the affairs of the SABC. The Minister is accordingly precluded from exercising any powers by which she may control the directors in how they control the affairs of the SABC:
    - The executive members of the board to be appointed solely by their non-executive members of the board and without any requirement of approval by the Minister — at paragraphs [127] and [146].
    - Sections 15 and 15A of the Broadcasting Act ensure that there is a level of oversight in the removal of an SABC director, neither the Minister nor the Board can remove a director unilaterally. Removal requires an enquiry and must be based on specified, objective grounds for removal and where the National Assembly recommends removal, the president has no discretion and must remove the director from office.

      The threat of removal without any oversight, on any ground, and without

undue enquiry, would render Board members not likely to express views not aligned with that of the government or the majority Board members — at paragraphs [139] and [143].

This case has been ground-breaking in its protection of the independence of the public broadcaster and in thwarting attempts by the executive branch of government to interfere directly in the operations of the SABC both at the board and senior management level.

6.7 Court rulings on the minister's powers to change technical standards of her digital migration policy

In a split decision (5-4) of the Constitutional Court, in *Electronic Media Network Ltd and Others v eTV (Pty) Ltd and Others*[33] the majority upheld the Minister of Communications and Digital Technologies' right to amend her Digital Migration Policy without having to subject her proposed amendments to a public notice and comments procedure or to consult with other bodies such as Icasa. The effect of the ruling is that the minister's change in policy which ruled out decryption capabilities as an integral part of government-supplied set-top boxes for DTT was upheld.

6.8 Court rulings on the unlawful surveillance of journalists

In *Amabhungane Centre for Investigative Journalism NPC and Another v Minister for Correctional Services and Others*,[34] the High Court held that several provisions of the Regulation of Interception of Communications and Provision of Communication Related Information Act (RICA) were unconstitutional in that they violated the rights to privacy, freedom of expression, access to court and to a fair trial. The case involved the surveillance of a well-known investigative journalist. In coming to its decision on the unconstitutionality of several provisions of RICA (the reasons for which were not all media-related), the court noted 'it is hypocritical to both laud the press and ignore their special needs to be an effective prop of the democratic process'.[35] In brief, the court made the following orders:

- The provisions of RICA that fail to prescribe a procedure for notifying the subject of interception unconstitutional and invalid.
- The provisions of RICA that failed to prescribe an appointment mechanism and terms for the 'designated judge' (to grant interception orders) as defined in section 1 which ensure the designated judge's independence are unconstitutional and invalid.
- The provisions of RICA that fail to provide adequately for a system and appropriate safeguards to deal with the fact that interception orders granted *ex parte* [that is, without the subject being party to the proceedings], are unconstitutional and invalid.
- The provisions of RICA that fail to prescribe proper procedures to be followed when state officials are examining, copying, sharing, sorting through, using,

destroying or storing the data obtained from interceptions, are unconstitutional and invalid.

- The provisions of RICA that fail to address the circumstances where a subject of surveillance is either a practising lawyer or a journalist are unconstitutional and invalid.
- Bulk surveillance activities and foreign signals interception undertaken by the National Communications Centre is unlawful and invalid.

In respect of several of the above orders, the court gave the legislature time to correct the relevant defect.

6.9 Court rulings on political parties' responsibilities regarding the harassment of journalists

The case of *Brown v Economic Freedom Fighters and Others*[36] is a precedent-setting ruling of the High Court concerning the obligations of political parties and their leaders under the Electoral Code of Conduct. Ms Brown, who hosts a television show on the free-to-air commercial TV station, erroneously sent a WhatsApp message to the Economic Freedom Fighters (EFF) WhatsApp group instead of to a group of colleagues asking them to keep a watching brief on the EFF. In response, the EFF published her cell phone number and Tweeted that she was 'sending moles to EFF events'. It was undisputed that Ms Brown was then subject to 'a barrage of anonymous threatening phone calls and written threats on Twitter and WhatsApp from self-professed EFF supporters. These included deplorable insults and threats of rape, violence and death'.[37]

In finding that the EFF had violated the Electoral Code during the 2019 General Elections, the court referred to sections of the Electoral Code which require every registered party to, among other things, instruct its supporters to comply with the code, respect the right of women to communicate freely with parties and candidates and take all reasonable steps to ensure that journalists are not subjected to harassment, intimidation, hazard, threat or physical assault by any of their representatives or supporters.[38] The court found that the EFF and its leader, Mr Malema, ignored requests to intervene and instruct their followers on Twitter to stop their harassment of Ms Brown[39] and therefore failed to comply with their obligations under the Electoral Code.[40] The court issued a formal warning to the respondents which:

> ***would serve as a guideline … for their obligations and future conduct. It would also serve as an effective deterrent against any future transgressions as in any future proceedings the existence of a prior sanction to infringement would be taken into account in imposing any appropriate sanction.***

While the above case demonstrates that there are effective remedies to prevent the harassment and abuse of journalists by political parties and their members

and supporters in an election period, harassment and abuse of journalists outside an election period remains an ongoing problem.

In the case of the *South African National Editors' Forum and Others v The Economic Freedom Fighters and Others*,[41] the Equality Court was faced with an attempt by Sanef and some journalists to prevent the harassment and hate being meted out to them by the EFF and its supporters by arguing that such conduct constituted hate speech under the Promotion of Equality and Protection against Unfair Discrimination Act (the Equality Act). Sanef and the journalists were unsuccessful. The Equality Court held that the hate speech prohibition in section 10 of the Equality Act applies only to prohibited grounds as defined in the Equality Act or grounds analogous to it. The court found that journalism:

> ***is a profession and not a characteristic comparable to the grants listed in section 10 of the Equality Act … is not based on attributes which have the potential to impair their fundamental dignity as human beings or affect them adversely … journalism is not an inherent and immutable quality. It is a career choice for which an individual opts [and it does not] constitute a protectable interest'.***[42]

Consequently, Sanef's application was dismissed.

Notes

1 https://www.internetworldstats.com/africa.htm#za [accessed 3 May 2019]

2 Provincial figures are from 2017. See: https://techcentral.co.za/internet-access-sa-rural-areas-falling-far-behind/75789/ [accessed 3 May 2019]

3 https://www.businesslive.co.za/bd/national/2018-11-26-mogoeng-mogoeng--warns-john-hlophes-misconduct-matter-will-take-very-long/ [accessed 3 May 2019] and https://www.news24.com/SouthAfrica/News/jsc-finds-motata-guilty-of-misconduct-fines-him-more-than-r1m-20191010 [accessed 25 October 2019

4 Public Protector v South African Reserve Bank [2019] ZACC 29. Available at: http://www.saflii.org/za/cases/ZACC/2019/29.html [accessed 25 October 2019]

5 Act 124 of 1998.

6 Notice 87 published in Government Gazette 39642 dated 1 February 2016.

7 Notice 958 in Government Gazette 31408 dated 8 September 2008 (as amended).

8 Notice 164 in Government Gazette 42337 dated 29 March 2019.

9 http://arb.org.za [accessed 4 May 2019]

10 https://www.sahrc.org.za/home/21/files/Reports/Report%20of%20the%20Ad%20Hoc%20Committee%20of%20chapter%209.%202007.pdf [accessed 4 May 2019]

11 *SOS and Others v SABC and Others* Case No 81056/14 at paragraph [146] of the judgment. http://www.saflii.org/za/cases/ZAGPJHC/2017/289.pdf [accessed 4 May 2019]

12 Act 4 of 2009.

13 https://www.dailymaverick.co.za/article/2018-09-26-sabcs-rescue-plan-a-lithe-and-lean-revenue-generating-peoples-machine/ [accessed 4 May 2019]

14 Act 63 of 1996.

15 Defined in section 1 as: '…a characteristic that identifies an individual as a member of a group identified by race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth and nationality'.

16 The latest version came into effect on 1 January 2020.

17 See FDJ Brand, Defamation, *LAWSA*, 2nd ed, Volume 7, para 232 citing *Argus Printing & Publishing Co Ltd v Esselen's Estate* 1994 (2) SA 1 (A) at 23D-I.

18 Ibid, paras 245ff.

19 See *Pakendorf en Andere v De Flamingh* 1982 (3) SA 146 (A).

20 [2019] ZAGPJHC 157, at paragraph [67].

21 [2008] SASCA 98.

22 Ibid at paragraph [23].

23 Ibid at paragraph [15].

24 Ibid at paragraph [36].

25 See generally, *LAWSA*, 2nd ed, Volume 6, para 199.

26 2001 (5) BCLR 449 (CC).

27 [2017] ZASCA 97.

28 Ibid at paragraphs [72] to [75].

29 [2016] ZASCA 142.

30 CCT 174/18 available at: http://www.saflii.org/za/cases/ZACC/2019/40.html [accessed 8 December 2020]

31 Ibid at paragraph [69].

32 [2017] ZAGPJHC 289.

33 [2017] ZACC 17.

34 [2019] ZAGPPHC 341.

35 At paragraph [131].

36 [2019] ZAGPJHC 166.

37 Ibid at paragraph [8].

38 Ibid at paragraph [44].

39 Ibid at paragraph [76].

40 Ibid at paragraph [82].

41 Case No 90405/18.

42 Ibid at paragraphs [43] and [44].