

Media Law Handbook for Southern Africa

Volume 3

Justine Limpitlaw





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: A member of Niger's special forces stands guard as journalists gather around President Mahamadou Issoufou (not seen) as he leaves the Hotel de Ville (City Hall) in Niamey during the country's presidential and legislative elections on 21 February 2016. Voters in Niger went to the polls in an election in which Issoufou has promised a "knockout" blow to his opponents, one of whom is behind bars on baby-trafficking charges. (ISSOUF SANOGO/AFP via Getty Images)

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Acknowledgements

It has been nearly ten years since the first edition of the Media Law Handbook for Southern Africa 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 Radhakisson (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.

I also need to thank:

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- ▶ Lynne McNamara for careful editing of the final text
- ▶ Heath White for the handbooks' design and typesetting.

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 Media Law Handbook for Southern Africa 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

Tanzania and Zanzibar

Bassfu	Zanzibar Arts and Censorship Council
CCM	Chama Cha Mapinduzi
EPC	Electronic and Postal Communications
HRGG	Human Rights and Good Governance
IMC	Independent Media Council
JAB	Journalists Accreditation Board
JSC	Judicial Service Commission
MCT	Media Council of Tanzania
TCRA	Tanzania Communications Regulatory Authority
ZBC	Zanzibar Broadcasting Corporation

Zambia

IBA	Independent Broadcasting Authority
ICT	Information and Communications Technologies
JSC	Judicial Service Commission
MMD	Movement for Multi-party Democracy
Zamec	Zambia Media Council
Zicta	Zambia Information and Communications Technology Authority
ZNBC	Zambian National Broadcasting Corporation

Zimbabwe

BAZ	Broadcasting Authority of Zimbabwe
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CCZ	Constitutional Court of Zimbabwe
GDP	gross domestic product
MCC	Media Complaints Committee
PTC	Posts and Telecommunications Corporation
VMCZ	Voluntary Media Council of Zimbabwe
Zanu-PF	Zimbabwe African National Union – Patriotic Front
ZBC	Zimbabwe Broadcasting Corporation
ZMC	Zimbabwe Media Commission

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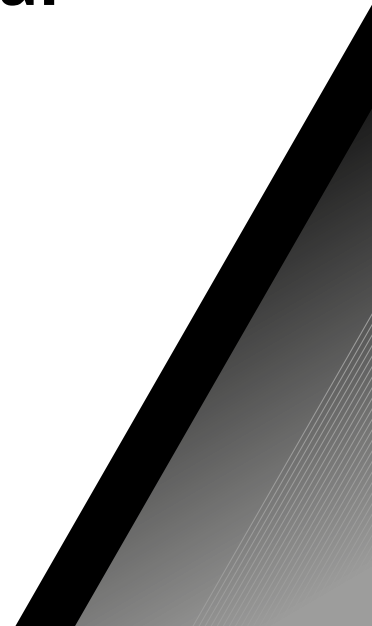
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14

Tanzania and Zanzibar



1 Introduction

The United Republic of Tanzania was created from the union of two former colonial territories, Tanganyika and Zanzibar, in 1964. It consists of mainland Tanzania, which is predominantly Christian, and the island of Zanzibar, which is predominantly Muslim. The country has had multiparty elections since 1992 and has been governed by the Chama Cha Mapinduzi (CCM) party since 1977.

Tanzania has a federal system of government, and Zanzibar is given a great deal of autonomy to determine its laws and legal institutions, including its constitution. Consequently, the media in Tanzania is governed by different laws, depending on whether it operates in mainland Tanzania or on the island of Zanzibar. This extends to constitutional provisions, and so this chapter is effectively two chapters in one, with corresponding provisions for mainland Tanzania and the island of Zanzibar.

Tanzania has a population of approximately 60 million people, the rural population of about 38 million people outnumbers the urban population of about 21 million people.¹ Roughly 38% of the people of Tanzania have access to electricity, but it is important to note the disparity between the urban and rural populations. Approximately 68% of the urban population has access to electricity against 18% of the rural population, highlighting vast inequalities in the country.²

Tanzania has completed its migration to Digital Terrestrial Television using the DVB-T2 standard for broadcasting,³ and roughly 10% of households in Tanzania have access to television.⁴ Internet access in Tanzania reaches approximately 38% of the population, but only 7% have a Facebook page.⁵ It is important to note that, for this chapter, we deal with the laws and institutions applicable to both mainland Tanzania and Zanzibar. The chapter is divided into parts with sections two to six addressing mainland Tanzania and sections seven to eleven addressing Zanzibar.

According to the self-regulatory Media Council of Tanzania, violations of press freedom were three times more prevalent in 2019 than in 2015.⁶ This indicates that the media environment in Tanzania has become more restrictive since President John Magufuli was inaugurated in 2015. He was re-elected in 2020.

In this chapter, working journalists and other media practitioners will be introduced to the legal environment governing media operations in mainland Tanzania, referred to as Tanzania and Zanzibar. Where there is mention of the United Republic, this refers to the United Republic of Tanzania which includes both Tanzania and Zanzibar. The chapter is divided into five sections for each of Tanzania and Zanzibar:

- ▶ 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 the United Republic. Critical weaknesses and deficiencies in these laws will also be identified. The hope is to encourage media law reform in the United Republic, 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 — Tanzania

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
- ▷ how rights are enforced under the constitution
- ▷ the ‘three branches of government’ and ‘separation of powers’
- ▷ weaknesses in the 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.

Such constitutions set out the rules by which members of the organisation agree to operate. However, constitutions can also govern much larger entities, indeed, entire nations. The Constitution of Tanzania (CAP.2) of 1977, as amended, sets out the country's founding values and principles in its preamble and other provisions. The following values and principles on which Tanzania is said to be founded are significant for the media, and are summarised below:

From the Preamble:

freedom, justice ... [and] a democratic society in which the Executive is accountable to the Legislature composed of elected members and representatives of the people, and also a Judiciary which is independent and which dispenses justice without fear or favour, thereby ensuring that all human rights are preserved and protected

Article 8, The Government and the People: article 8(1) — 'The United Republic of Tanzania is a state which adheres to the principles of democracy and social justice and accordingly':

- ▶ sovereignty resides in the people
- ▶ the primary objective of the government shall be the welfare of the people,
- ▶ the government shall be accountable to the people,
- ▶ the people shall participate in the affairs of government per the constitution.

Article 9, Object of the Constitution:

The object of this Constitution is to facilitate the building of the United Republic as a nation of equal and free individuals enjoying freedom, justice, fraternity and accord, through the pursuit of the policy of Socialism and Self-Reliance ... Therefore, the state authority and all its agencies are obliged to direct their policies and programmes towards ensuring ...

What follows is a list of 11 laudable objectives, including respecting dignity, human rights, the rule of law and equality and eradicating injustice, corruption and discrimination and avoiding wealth concentration.

However, it is essential to note that both articles 8 and 9 are in Part II of Chapter One, headed Fundamental Objectives and Directive Principles of State Policy. Article 7(2) of the constitution specifically provides that the provisions of this Part are not enforceable by a court, and no court may determine whether any act or omission by any person complied with the provisions of this Part. The effect of this is that no one can be held to account for failure to comply with the founding principles enunciated in Part II of Chapter One.

2.2 Definition of constitutional supremacy

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

The Tanzania Constitution makes provision for constitutional supremacy somewhat obliquely. Article 4 deals with the exercise of state authority by various organs. It is important to note that article 4(4) provides that each organ specified in article 4 'shall be established and shall discharge its functions in accordance with the other provisions of this Constitution'. The effect of this is that the constitution binds legislative, executive and judicial organs of state.

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 only be done following the constitution.

The Constitution of Tanzania makes provision for three types of legal limitations on the exercise and protection of rights contained in Part III of Chapter One, Basic Rights and Duties, namely, state of emergency, general and internal limitations.

2.3.1 State of emergency limitations

Article 32 of the Tanzania Constitution, read with article 31, makes it clear that the fundamental rights set out in Part III of Chapter One of the Constitution may be limited by a presidential proclamation of a state of emergency. Note that these even include the right to life (article 14), although this is limited to deaths resulting from acts of war, article 31(3). Note in terms of article 32(2) of the constitution, a state of emergency can be declared only in the following cases:

- ▶ war
- ▶ the danger of invasion or state of war
- ▶ breakdown of public order
- ▶ the imminent occurrence of danger, disaster or environmental calamity
- ▶ a danger which constitutes a threat to the state.

Note further that, in terms of article 32(5), a proclamation of a state of emergency ceases to have effect:

- ▶ if revoked by the president
- ▶ within 14 days, if parliament has not resolved to support the presidential proclamation, which resolution requires a two-thirds majority vote
- ▶ after six months, if parliament has not extended the operation of the proclamation for further periods of six months by a resolution with a two-thirds majority vote
- ▶ if revoked by parliament by a resolution with a two-thirds majority vote,

2.3.2 General limitations

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

One can find the general limitations clause applicable to Part III of Chapter One, Basic Rights and Duties, in article 30 of the Tanzania Constitution, headed Limitations Upon, and Enforcement and Preservation of Basic Rights, Freedoms and Duties.

Article 30(2) is drafted in a very legalistic fashion, but essentially it provides that rights can be limited by legislation that has one or more of the following extremely broad purposes:

- ▶ to ensure that the rights of others are not prejudiced
- ▶ to ensure the defence, public safety, public peace, public morality, public health, rural and urban development planning, the exploitation and utilisation of minerals, property development or any other interests for enhancing the public benefit
- ▶ to ensure the execution of a court order
- ▶ to protect the reputation, rights and freedom of others, the privacy of persons in court proceedings, prohibiting the disclosure of confidential information or safeguarding the dignity, authority and independence of the courts
- ▶ to impose restrictions on, or supervise or control, the formation, management and activities of private societies and organisations
- ▶ to enable any other thing to be done, which promotes or preserves the national interest.

Further, article 30(1) states explicitly that human rights 'shall not be exercised by a person in a manner that causes interference with or curtailment of the rights and freedoms of other persons or of the public interest'.

These provisions need some detailed explanation.

The general limitations clause is problematic because of the very wide grounds on which rights can be limited and because there are no requirements such as proportionality, justifiability, reasonableness or least restrictive means. This means that once a ground of justification has been provided, and these are extremely wide and include grounds such as furthering the national interest or supervising the activities of private organisations, basic rights can be limited.

The effect of this is that, in many instances, rights can be limited very easily. All too often legislation will, in effect, trump basic rights, despite the provisions of the supremacy clause of the constitution.

2.3.3 Internal limitations

The Tanzania Constitution also has several so-called internal limitations; these are limitations to specific rights. These are dealt with below concerning the respective rights to which they apply.

2.4 Constitutional provisions that protect the media

The Tanzania Constitution contains several important provisions in Part III of Chapter One, Basic Rights and Freedoms, which directly protect the media, including publishers, broadcasters, journalists, editors and producers.

There are also provisions elsewhere in the constitution that assist the media as it goes about its work of reporting on issues in the public interest. These are included in this section too.

2.4.1 Freedom of expression

The most critical section that protects the media is article 18, which sets out several detailed and important provisions protecting freedom of expression. Article 18 provides that:

- ▶ Every person:
 - ▶ has freedom of opinion and expression of his ideas
 - ▶ has the right to seek, receive, disseminate, or both, information regardless of national boundaries
 - ▶ has the freedom to communicate and freedom with protection from interference from his communication
 - ▶ has a right to be informed of various important events of life and activities of the people and also of issues of importance to society at all times.

These provisions need some explanation.

The rights and freedoms apply to every person and not just to certain people, such as citizens. Hence, all persons, everybody, enjoys these rights and freedoms.

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

The right in article 18 specifically enshrines the freedom ‘to seek, receive and, or disseminate information regardless of national boundaries’. This right of everyone to receive information is a fundamental aspect of freedom of expression, and this article enshrines the right to the free flow of information. Thus, the information rights of media audiences, for example, are protected. This right is crucial because it also protects organisations which foster media development. These organisations facilitate public access to different sources and types of information, particularly in rural areas that traditionally have little access to the media.

Note, however, that nowhere in this article is freedom of the media, the press, or both specifically mentioned, although it is implied in the right to freedom of expression.

2.4.2 Privacy and personal security

A second protection is contained in article 16, headed Right to Privacy and Personal Security. Article 16 specifies that every person ‘is entitled to respect and protection of his person, the privacy of his own person, his family and of his matrimonial life, and respect and protection of his residence and private communications.’

Note that this protection of private communications (which would include emails, SMS, mail and telephone conversations) is a fundamental right for working journalists.

Note further, however, that this right is subject to an internal limitation. This is dealt with in section 2.5 of this chapter.

2.4.3 Freedom of association

A third protection is provided for in article 20(1), which grants every person the freedom to freely and peacefully assemble, associate and cooperate with other persons and, for that purpose, express views publicly and to form and join with associations or organisations formed for purposes of preserving or furthering his beliefs or interests or any other interests.

The right provides protection for journalists to form organisations, including trade unions. It also protects people to form media houses and for media houses to form self-regulatory bodies, press associations and the like.

It is important to note that article 20 is a right which is subject to an internal limitation. However, the internal limitation in article 20(2) pertains to grounds on which political parties can be refused registration and does not have direct implications for journalists or the media.

2.4.4 Freedom to participate in public affairs

A fairly uncommon right is provided for in article 21(2) of the Tanzania Constitution. This article provides that every citizen has the right and the freedom to participate fully in the process leading to the decision on matters affecting him or her wellbeing and the nation; this requires some discussion.

First, this right is available only to citizens. Second, the right is a right to participation. This is important because it provides for a right to be heard on important matters. Furthermore, it can be argued that participation is meaningful when it is informed. Taken together, these indicate that citizens have a right to be informed about key issues and to be heard thereon. Such rights are meaningless without a free press, which is essential for providing information to the citizenry. Consequently, this right is one which is premised on a free press.

2.4.5 Provisions regarding the functioning of parliament

Apart from the rights discussed above, there are provisions in the Tanzania Constitution which are important and assist the media in performing its functions. Article 100 of the Tanzania Constitution is headed Freedom and Immunity from Proceedings. In brief, article 100(1) provides for freedom of opinion and debate in the National Assembly. Article 100(2) essentially provides that a member of parliament (MP) shall not be prosecuted and no civil proceedings may be instituted against him or her in a court concerning anything which he or she has said or done in the National Assembly.

These provisions assist the media by protecting parliamentarians; they allow MPs to speak freely without facing arrest or charges for what they say.

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

Just as 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 of Tanzania can be used against the media. Several of these exist.

2.5.1 Right to dignity

The right to dignity provided for in article 12(2) states 'Every person is entitled to recognition and respect for his dignity.' Note that in the Tanzania Constitution, the right to dignity falls under the general right to equality (article 12). Dignity is a right that is often raised in defamation cases because defamation, by definition, undermines the dignity of the person being defamed. This right is often set up against the right to freedom of the press, requiring a balancing of constitutional rights.

2.5.2 Right to privacy

Similarly, the right to privacy in article 16 (discussed above) is often raised in litigation involving the media, with the subjects of press attention asserting their rights not to be photographed, written about, followed in public and so on. The media has to be careful and should be aware that there are always boundaries of privacy, depending 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, that need to be respected.

It is also critical to note that article 16 is subject to a limitation clause. This may well be used against journalists by denying them their right to privacy, particularly in respect of the privacy of their communications. Article 16(2) entitles the state to lay down legal procedures regarding the circumstances, manner and extent to which the right to privacy, the security of his person, property and residence may be infringed upon.

Ostensibly, this is to 'preserve the person's right in accordance with this Article'; in reality, however, the wording gives the state a limitless discretion when infringing on the right to privacy and personal security. The effect of this provision is that the constitutional right becomes subordinate to legislation and other legal mechanisms limiting the right.

2.5.3 States of emergency provisions

These have already been noted above in the discussion on limitations clauses.

2.5.4 Fundamental duties

The Tanzania Constitution contains several duties, which are not commonly found in constitutional provisions and which could arguably be used against journalists and media houses when reporting. For example, article 29(5) provides that: 'every person has the duty to conduct himself and his affairs in a manner that does not infringe upon the rights and freedoms of others or the public interest'.

This provision is echoed in article 30(1), which provides that 'human rights and freedoms ... shall not be exercised by a person in a manner that causes interference with or curtailment of the rights and freedoms of other persons or of the public interest'.

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

There several important institutions concerning the media that are established under the Tanzania Constitution, namely, the judiciary, the Judicial Service Commission, and the Commission for Human Rights and Good Governance.

2.6.1 The judiciary

In terms of article 107A(1) of the Tanzania Constitution, the judiciary is the ‘authority with final decision in dispensation of justice in the United Republic of Tanzania’. The judicial authority of the Republic is vested in the courts, which are required to observe the following principles, in terms of article 107A(2):

- ▶ impartiality to all without due regard to one’s social or economic status
- ▶ not to delay dispensation of justice without reasonable grounds
- ▶ to award reasonable compensation to victims of wrongdoing committed by other persons, following laws enacted by parliament
- ▶ to promote and enhance dispute resolution among persons involved in the disputes
- ▶ to dispense justice without being tied up with technicalities which may obstruct the dispensation of justice.

The general apex court in Tanzania is the Court of Appeal of the United Republic, article 117(3). Note that article 125 establishes a Special Constitutional Court of the United Republic, whose sole function, in terms of article 126(1), is:

to hear and give a conciliatory opinion on the interpretation or application of the Constitution where such interpretation or application is in dispute between the Government of the United Republic and the Revolutionary Government of Zanzibar.

Other courts include the High Court and such other courts as are established by legislation.

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

Important judicial appointment procedures are as follows:

- ▶ In terms of article 112(1) of the Tanzania Constitution, the Judicial Service Commission (JSC) is an appointed advisory commission for High Court judges and magistrates.
- ▶ Half of the judges of the Special Constitutional Court are appointed by the Government of the United Republic and the other half by the Revolutionary Government of Zanzibar, article 127(1). Note that decisions of this court must be taken by two-thirds of the members appointed by the Government

of the United Republic and by two-thirds of the members appointed by the Revolutionary Government of Zanzibar, article 128(3).

- ▶ In terms of article 118(3), Appeal Court judges are appointed by the president after consultation with the Chief Justice. Note that the JSC is not involved.
- ▶ Judges of the High Court are appointed by the president after consultation with the JSC, in terms of article 109(1).

Note that judges are removed by the president acting on the advice of a tribunal appointed by the president, article 110A and see article 120A(2). Grounds for removal are inability to perform the functions of the office, behaviour inconsistent with the ethics of office of a judge or with the law concerning the ethics of office of public leaders, articles 110A(2) and 120A(2).

In terms of article 113(4), magistrates are appointed, disciplined and removed by the JSC.

The Tanzania Constitution recognises the right of Zanzibar to establish its court structures with their jurisdictions under the 1984 Constitution of Zanzibar, see Part IV, High Court of Zanzibar, of Chapter Five of the Tanzania Constitution; this is discussed in section 7 of this chapter.

2.6.2 The Judicial Service Commission

The JSC for Tanzania is a constitutional body established in terms of article 112 of the Tanzania Constitution which specifies that the JSC for Tanzania shall serve as an appointments advisory board for judges and magistrates in Tanzania. Article 113(1) sets out the functions of the JSC for Tanzania. These include:

- ▶ advising the president on appointments of judges of the High Court
- ▶ advising the president on matters relating to discipline of judges
- ▶ advising the president concerning the appointment and discipline of registrars of the High Court and Court of Appeal
- ▶ appointing and disciplining magistrates
- ▶ establishing committees to implement its functions.

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

In terms of article 112(1), the JSC for Tanzania is made up of the Chief Justice of the Court of Appeal (chairman of the JSC), the Attorney General, a justice of appeal appointed by the president after consultation with the Chief Justice, the principal judge of the High Court and two members appointed by the president.

2.6.3 The Commission on Human Rights and Good Governance

The Commission for Human Rights and Good Governance (HRGG Commission) is an essential organisation for the media. In terms of article 130(1) of the Tanzania Constitution, its brief is wide and includes:

- ▶ sensitising the public about the preservation of human rights and duties
- ▶ receiving complaints concerning violations of human rights in general
- ▶ conducting enquiries on matters concerning the infringement of human rights and violations of principles of good governance
- ▶ conducting research and disseminating the results thereof on the infringement of human rights and violations of principles of good governance
- ▶ enquiring into the conduct of any person or institution concerning the ordinary performance of functions or abuses of office
- ▶ advising government, other public institutions and the private sector on human rights and good governance
- ▶ taking the necessary action to promote and enhance conciliation, reconciliation among persons and various institutions appearing before the HRGG Commission.

It is important to note that, in terms of article 130(6) of the Constitution of Tanzania, the HRGG Commission applies to both the government of the United Republic and the Revolutionary Government of Zanzibar. However, the HRGG Commission may not undertake activity concerning the president or the leader of the Revolutionary Government of Zanzibar. Further, the HRGG Commission may not enquire into:

- ▶ matters before a court or tribunal
- ▶ matters concerning the relationship between the government and a foreign government or international organisation
- ▶ matters concerning the presidential power to award remissions
- ▶ any other matter mentioned in law.

This last provision is troubling as it completely undermines the ability of the HRGG Commission to act in the face of countermanding legislation.

Unfortunately, there are contradictory statements regarding the independence of the HRGG Commission. In article 130(2) of the constitution, the HRGG Commission is said to be:

an autonomous department ... in exercising its powers ... the Commission shall not be bound to comply with directives or orders of any person or department of government, or any opinion of any political party or of any public or private sector institution.

However, the very next sub-article (article 130(3)) provides that the above provisions:

shall not be construed as restricting the President from giving directives or orders to the Commission, nor are they conferring a right to the Commission of not complying with directives or orders, if the President is satisfied that in respect of any matter or any state of affairs, public interest so requires.

The effect is that the president can give directives or orders to the HRGG Commission, with which it is bound to comply, and this undermines the independence of the HRGG Commission.

Article 129(2) provides that the HRGG Commission comprises:

- ▶ a chairman, who must possess qualifications for appointment as a judge
- ▶ a vice-chairman, who is appointed on the basis that if the chairman is from the mainland, the vice-chairman is to be from Zanzibar, and vice versa
- ▶ up to five other commissioners, who are appointed from among persons who possess skills, experience and broad knowledge in matters relating to human rights, law, administration, political or social affairs
- ▶ assistant commissioners.

In terms of article 129(3), commissioners and assistant commissioners are appointed by the president after consultation with the Nominations Committee, which consists of the Chief Justice of the Court of Appeal, the speaker of the National Assembly, the Chief Justice of Zanzibar, the speaker of the House of Representatives and the deputy-Attorney General, who is the secretary of the Nominations Committee.

In terms of article 129(7), a member of the HRGG Commission or a deputy commissioner can be removed only on the grounds of misconduct or inability to perform the functions of his or her office.

2.7 Enforcing rights under the constitution

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

Article 30(3) of the Tanzania Constitution provides that:

any person claiming that any provision of this Part of this Chapter (that is, Part III dealing with Basic Rights and Duties) ... concerning his right or duty owed to him has been, is being or is likely to be violated by any person anywhere in the United Republic, may institute proceedings

for redress in the High Court. 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 power is exercised by three branches of government, namely: the executive, the legislature and the judiciary.

The executive

It is essential to bear in mind that the Constitution of Tanzania makes provision for two executives: the Executive of the United Republic (Chapter 2) and the Executive of the Revolutionary Government of Zanzibar (Chapter 4). Provisions relating to Zanzibar are discussed in section 7 of this chapter. Article 35(1) specifies that all executive functions of the government of the United Republic discharged by officers of the government are done on behalf of the president. Also, article 34(3) provides that, subject to the constitution, all the authority of the Government of the United Republic over all Union matters [a list of 22 of these is set out in the First Schedule to the constitution and they include constitutional matters, foreign affairs, defence and security] in the United Republic and also over all other matters concerning Tanzania shall be vested in the president.

Clearly then, executive authority is vested in the president.

It is important to note, however, that Tanzania also has a prime minister who, in terms of article 52(1), has authority over the control, supervision and execution over the day to day functions and affairs of the government of the United Republic. Still, he or she does so under the direction of the president, in terms of article 52(3).

The Cabinet of Tanzania is made up of the president, the vice-president, the prime minister and ministers appointed by the president, see article 54. Note that article 54(3) provides that the Cabinet is the principal organ for advising the president regarding all matters concerning the exercise of his powers.

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

The legislature

Legislative power concerning all Union matters (a list of 22 of these is set out in the First Schedule to the constitution and they include constitutional matters, foreign affairs, defence and security) and also concerning all other matters concerning Tanzania is vested in parliament, in terms of article 64(1) of the Tanzania Constitution.

In terms of article 62(1), the parliament of the United Republic consists of the

president and the National Assembly. Importantly, critical functions of the National Assembly include:

- ▶ asking ‘any question to any Minister concerning public affairs in the United Republic which are within his responsibility’, article 63(3)(a)
- ▶ debating ‘the performance of each Ministry during the annual budget session of the National Assembly’, article 63(3)(b)
- ▶ enacting law ‘where implementation requires legislation’, article 63(3)(d).

In terms of article 66(1), the National Assembly shall consist of the following categories of members:

- ▶ members elected to represent constituencies determined by the Electoral Commission
- ▶ women members proposed by political parties based on proportional representation, making up at least 30% of the members of the National Assembly
- ▶ five members elected by the House of Representatives of Zanzibar from among its members
- ▶ the attorney general
- ▶ up to ten members appointed by the president, at least five of whom shall be women
- ▶ the speaker, if not elected from among the members.

The judiciary

Judicial power, as already discussed in this chapter, 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

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 abuses of power. This is known as the separation of powers doctrine. The aim is to separate the functions of the three branches of government, the executive, the legislature and the judiciary so that no single branch 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.

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

There are several significant weaknesses in the Tanzania Constitution, which, if improved, would create a more conducive environment for, among other things, media freedom.

2.8.1 Remove internal constitutional limitations on the right to privacy

Concern has already been expressed about the fact that article 16, the right to privacy, is subject to a limitation clause. This may well be used against journalists by denying them their rights to privacy, particularly in respect to their communications. Article 16(2) entitles the state to:

lay down legal procedures regarding the circumstances, manner and extent to which the right to privacy, the security of his person, his property and residence may be infringed without prejudice to the provisions of this article.

Ostensibly, this is to 'preserve the person's right in accordance with this Article'; but in reality, the wording gives the state unlimited discretion when infringing on the right to privacy and personal security. The effect of this provision is that the constitutional right becomes subordinate to legislation and other legal mechanisms limiting the right.

2.8.2 Improve the general limitations clause

As already set out above, the general limitations clause is extremely problematic owing to the very wide grounds on which rights can be limited and, more problematically, because there are no requirements such as proportionality, justifiability, reasonableness or least restrictive means.

This means that, once a ground of justification has been provided (and these are extremely wide and include grounds such as furthering the national interest or supervising the activities of private organisations), basic rights can be limited. The effect of this is that, in many instances, rights could be easily limited. All too often legislation will trump basic rights, despite the provisions of the constitution's supremacy clause.

2.8.3 Improve independence of the HRGG Commission

As already pointed out, there are contradictory constitutional provisions regarding the independence of the HRGG Commission. In article 130(2) of the constitution, the HRGG Commission is said to be:

an autonomous department ... in exercising its powers ... the Commission shall not be bound to comply with directives or orders of any person or department of government, or any opinion of any political party or of any public or private sector institution.

However, the very next sub-article, article 130(3), provides that the above provisions:

shall not be construed as restricting the president from giving directives or orders to the Commission, nor are they conferring a right to the Commission of not complying with directives or orders, if the president is satisfied that in respect of any matter or any state of affairs, public interest so requires.

The effect of this is that the president can give directives or orders to the HRGG Commission, with which it is bound to comply; this obviously undermines the independence and, potentially, the effectiveness of the HRGG Commission.

2.8.4 Provide constitutional protection for the broadcasting regulator

The broadcasting environment in Tanzania would be significantly improved if an independent authority to regulate broadcasting in the public interest was required to be established by law in the Tanzania Constitution.

2.8.5 Provide constitutional protection for the public broadcaster

The broadcasting environment in Tanzania would be significantly improved if constitutional provisions required the establishment of a public broadcaster with a public interest mandate and an independent board to provide public broadcasting services.

3 The media and legislation — Tanzania

In this section, you will learn:

- ▷ what legislation is and how it comes into being
- ▷ legislation governing films
- ▷ legislation governing the media generally
- ▷ legislation governing the print media
- ▷ legislation governing the broadcasting media in general
- ▷ legislation governing the public broadcasting sector
- ▷ legislation governing broadcasting signal distribution

- ▷ 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 What is legislation and how it comes into being

3.1.1 What is legislation?

Legislation is a body of law consisting of acts properly passed by the Parliament of Tanzania, that is, the president and National Assembly. It is important to note that legislation passed by parliament does not, as a general rule, apply to Zanzibar. Legislation that applies to Zanzibar is discussed below in section 8 of this chapter.

Chapter Three of the Tanzania Constitution deals with the legislature of the United Republic, and Part III thereof deals with its procedure, powers and privileges. Articles 97-99 are particularly important in respect of legislation.

There are detailed rules in articles 98–99 of the Tanzania Constitution which set out the different law-making processes that apply to different types of legislation. Journalists and others in the media need to be aware that the constitution requires different kinds of legislation to be passed following particular procedures. The procedures are complicated and need not be explained here. Journalists should, however, be aware that, in terms of the Constitution of Tanzania, there are three kinds of legislation, each of which has particular procedures and or rules applicable to it. These are:

- ▶ legislation that amends the constitution — the procedures and applicable rules are set out in article 98 of the Tanzania Constitution
- ▶ ordinary legislation — the procedures and applicable rules are set out in article 94 of the constitution. Essentially, decisions (including the decision to pass legislation) are to be taken by majority vote, with the presiding officer having a casting vote
- ▶ legislation that deals with taxation or national debt issues — the procedures and applicable rules are set out in article 99 of the Tanzania Constitution.

3.1.2 The difference between a bill and an act

A bill is a piece of draft legislation that is debated and usually amended by the National Assembly during the law-making process. In terms of article 97(1) of the Tanzania Constitution, if the parliament passes a bill following the various

applicable procedures required for different types of bills, it becomes an act (and therefore law) once it has been assented to by the president.

If the president withholds his consent, he may refer a bill back to the National Assembly, together with a statement of his reasons for withholding consent, for reconsideration, in terms of article 97(2) of the constitution. The bill cannot be presented to the president again by the National Assembly until six months have elapsed unless it has been passed by at least two-thirds of all the members of the National Assembly, in which case the president must assent to it within 21 days, article 97(4).

3.2 Legislation governing films

The Films and Stage Plays Act, 1976, governs, among other things, the making of films in Tanzania; this has an impact on the film and video media in Tanzania.

In terms of section 3 of the Films Act, no person may direct, take part in or assist in the making of a film (except for a film by an amateur for private exhibition to family or friends) except under and in accordance with a permit granted by the minister responsible for censorship of films and stage plays, unless he has exempted such film from the provisions of this part of the Films Act, in terms of section 8 of the Films Act.

Failure to comply with section 3 is an offence, and on conviction, a person would be liable to a fine, imprisonment or both. Further, the film in question could be subject to a court confiscation and destruction order, sections 7 and 34.

Section 4 of the Films Act requires an application for a film permit to be made in writing to the minister. It is to be accompanied by a full description of the scenes and the full text of the spoken parts (if any) of the entire film that is to be made. If these are to be amended from time to time, new notifications are required.

Section 5 of the Films Act empowers the minister to issue a film permit subject to conditions as he may impose, including that a bond is paid, the repayment of which is conditional on the film being made in accordance with the conditions of the film permit. The minister may order a public officer to be present at the making of the film. Section 5(3) of the Films Act provides that any public officer required to be present at the making of a film has the authority to intervene and order the cessation of any scene which, in his opinion, is objectionable, endangers any person or property (other than the film producer's property) or is cruel to animals.

3.3 Legislation governing the media generally

Two statutes govern the media in Tanzania:

- ▶ The Media Services Act, Act 12 of 2016 (Media Services Act)
- ▶ The Electronic and Postal Communications Act, Act 3 of 2010 (EPC Act)

3.3.1 The Media Services Act

The Media Services Act was enacted to govern the media in Tanzania by promoting professionalism in the media industry, providing provisions regarding the ownership, rights and obligations of media houses (which includes print media, radio and television broadcasters and online content providers) establish the Independent Media Council (IMC) and the Journalists Accreditation Board (JAB). Interestingly the Media Services Act provides for the licensing of the print media sector in Tanzania, separately from other forms of media, by the Information Services Department.

The Information Services Department

Section 4 of the Media Services Act provides that there shall be a Director of Information Services, who is appointed by the president. The Director of Information Services is the: principal advisor to the government on all matters related to strategic communication, the publication of news and the functioning of the media industry.

The Director of Information Services has numerous functions as set out in section 5 of the Media Services Act, these include:

- ▶ licensing print media
- ▶ co-ordinating government advertising, which is important as much of the media depends on government advertising for revenue.

The role and functions of the Director of Information Services are problematic as it places a large amount of control of the media, particularly print media, in the hands of the Government. This practice is not in accordance with international best practice and is a threat to the freedom of the print media in Tanzania.

The Independent Media Council (IMC)

Section 24 of the Media Services Act establishes the Independent Media Council (IMC) which is responsible for developing and enforcing a professional code of ethics for journalists, in terms of section 26.

In terms of section 25(1) of the Media Services Act, every accredited journalist is required to be a member of the IMC. Section 25(3) provides that the leadership of the IMC, which appears to be appointed by the membership of the IMC, comprises:

- ▶ the chairman
- ▶ the vice-chairman
- ▶ two accredited journalists nominated by media associations.

In terms of section 25(2) of the Media Services Act, the minister responsible for content must publish a notice in the Gazette to convene the first meeting of the IMC to elect members of the IMC to leadership positions; this appears not to have occurred as yet and, thus, the IMC appears not to have been established.

Journalists Accreditation Board (JAB)

Section 11 of the Media Services Act establishes the JAB, which is made up of seven members who are appointed by the minister responsible for content and which is responsible for:

- ▶ accrediting journalists and issuing press cards
- ▶ enforcing the journalist's code of ethics
- ▶ maintaining a roll of accredited journalists
- ▶ suspending or expunging accredited journalists from the accreditation roll
- ▶ setting fees for accreditation
- ▶ any other function the minister responsible for content may direct.

Section 19 of the Media Services Act prohibits any person from practising as a journalist without accreditation from the JAB.

Despite section 11 of the Media Services Act establishing the JAB and section 12 providing that the minister responsible for content must appoint the members of the JAB, it appears to have not yet occurred. It is currently unclear who accredits local journalists operating in Tanzania; however, it seems that foreign journalists are accredited to work in Tanzania by the National Film Censorship Board.

3.3.2 The Electronic and Postal Communications Act

The EPC Act was enacted to provide a comprehensive regulatory regime for electronic communications service providers, including the issuing of content service licences. A content service licence is defined in the EPC Act as a transmission service 'offered for speech or other sound, text or image, whether moving or still, except where transmitted in private communications'. It appears to include online content, although this is not explicitly stated.

3.3.3 Ownership of Media Houses

Section 6 of the Media Services Act provides that, to license under the Media Services Act and the Electronic and Postal Communications Act, there are two categories of media houses, public-owned (owned by the state) and private-owned (non-state-owned media). Conditions for the ownership of media houses are regulated by regulations dealt with in section 4 below.

Section 7(1) of the Media Services Act provides that all journalists and media houses shall enjoy the following rights:

- ▶ the freedom to collect and gather information
- ▶ the freedom to process and edit information following professional ethics governing journalists

- ▶ the freedom to publish or broadcast news.

Section 7(2) sets out obligations with which media houses must comply.

- ▶ Section 7(2)(a) provides for the obligations of public media houses, these include:
 - ▶ observing universal service obligations
 - ▶ providing media services to the public and government
 - ▶ upholding the professional code of ethics
 - ▶ enhancing communication within and between the government and the public
 - ▶ maintaining accountability and transparency of funding.
- ▶ Section 7(2)(b) of the Media Services Act provides for the obligations of private media houses; these include:
 - ▶ providing media services to the public per their licensed service areas;
 - ▶ upholding the professional code of ethics
 - ▶ promoting public awareness in various issues of national interest by disseminating information
 - ▶ broadcasting or publishing news or matters of national importance as the government may direct
 - ▶ maintaining accountability and transparency in funding.

3.3.4 Making regulations

Section 65 of the Media Services Act empowers the minister responsible for content to make regulations to carry out the provisions of this Act. It should be noted that the minister may also make regulations for:

- ▶ the terms and conditions for the operation of licensed media houses
- ▶ procedure for appeal against decisions of the JAB
- ▶ prescription of shareholding requirements by foreign media owners
- ▶ prescription of fines
- ▶ requirement and procedure for accreditation of journalists and issuance of press cards
- ▶ reporting the sources of funding by media houses and media associations.

3.4 Legislation governing print media

Print media in Tanzania is governed in terms of the Media Services Act of 2016. The

Media Services Act requires that any person wishing to operate in print media must be licensed to do so. There are several crucial provisions of the Media Services Act which impact on the media and the practice of journalism in Tanzania.

3.4.1 Licensing of the Print Media

Section 8 of the Media Services Act prohibits the printing, publishing, selling, importing, distributing or producing of any print media which is defined in section 2 as 'newspapers, journals, magazines, newsletters and any other related print intended for mass media', unless it is licensed per the Media Services Act.

In terms of sections 5 of the Media Services Act, one of the functions of the Director of Information Services is to licence print media. Section 9 provides that the Director of Information Services, or any person acting on his or her behalf, is responsible for licensing as he or she may:

- ▶ reject any application that does not comply with the prescribed requirements for licensing; or
- ▶ suspend or cancel the licence of any licensee who fails to comply with the prescribed conditions of a licence.

Section 10(1) of the Media Service Act provides that, any person aggrieved by the decision to reject a licence application or suspend or cancel a licence may, within 30 days of the decision, appeal to the minister responsible for content. In terms of section 10(3), any person aggrieved by the decision of the minister may seek redress from the High Court.

3.4.2 Complaints Handling in the Print Media

Section 26(1)(c) of the Media Services Act provides that the Independent Media Council (IMC) is responsible for determining print media content complaints. The complaints committee of the IMC is established in accordance with section 27 of the Media Services Act. Section 28(1) provides that any person aggrieved by the content of print media may, within three months from the date of publication of the offending content, make a written complaint to the complaints committee. The IMC must prescribe the conduct and procedures to be followed in determining print media complaints and the matters to be awarded by the complaints committee, section 28(2).

In terms of section 29 of the Media Services Act, any person aggrieved by a decision of the complaints committee may appeal to the High Court in all matters save those relating to defamation.

3.5 Legislation governing the broadcast media

Broadcasting in Tanzania is regulated by several different pieces of legislation, namely the:

- ▶ Media Services Act, Act 12 of 2016 (Media Services Act) — refer to section 3.2, Key Legislative Provisions Governing the Media Generally, above
- ▶ Tanzania Communications Regulatory Authority (TCRA) Act, 2003
- ▶ Electronic and Postal Communications Act (EPC Act), 2010
- ▶ Universal Communications Service Access Act (UCSAA), 2006.

3.5.1 Establishment of the TCRA, the content committee and the council

The TCRA Act establishes several bodies which are relevant to the regulation of broadcasting.

The Tanzania Communications Regulatory Authority

The TCRA Act provides, in section 4, that the Tanzania Communications Regulatory Authority (TCRA) is established and that it is a body corporate with perpetual succession. It is important to note that the TCRA is an amalgamated body, bringing together the former Tanzania Communications Commission and the former Tanzania Broadcasting Commission, section 6(1)(e) of the TCRA Act.

The content committee

The TCRA Act provides, in sections 25 and 26, that a content committee is established, which is responsible for the regulation of broadcast content transmitted by any broadcasting station or any electronic communication media as a broadcasting service.

The TCRA consumer consultative council

The TCRA consumer consultative council is a body established by section 37 of the TCRA Act and whose primary function is to represent the interests of consumers.

3.5.2 Main functions of the TCRA, the content committee and the council

The TCRA

The TCRA Act distinguishes between the duties and functions of the TCRA. In terms of section 5 of the TCRA Act, the TCRA must strive to enhance the welfare of Tanzanian society in carrying out its functions, by:

- ▶ promoting effective competition and economic efficiency
- ▶ protecting the interests of consumers
- ▶ protecting the financial viability of efficient suppliers
- ▶ promoting the availability of regulated services to all consumers, including low income, rural and disadvantaged consumers

- ▶ enhancing public knowledge, awareness and understanding of regulated sectors including
- ▶ rights and obligations of consumers and regulated suppliers
- ▶ ways in which complaints and disputes may be initiated and resolved
- ▶ the duties, functions and activities of the TCRA
- ▶ taking into account the need to protect and preserve the environment.

Section 6 of the TCRA Act sets out the functions of the TCRA. These include:

- ▶ performing the functions conferred on it by sector legislation, that is, legislation related to the ‘regulated sector’, which in turn is defined in section 3 as telecommunications, broadcasting, postal services, allocation and management of radio spectrum and converging electronic technologies, including the internet and other information and communication technology applications
- ▶ issuing, renewing and cancelling licences
- ▶ regulating rates and charges
- ▶ making rules for carrying out the purposes and provisions of the TCRA Act and sector legislation
- ▶ monitoring the performance of the regulated sectors, including:
 - ▶ levels of investment
 - ▶ availability, quality and standards of service
 - ▶ cost of services
 - ▶ the efficiency of production and distribution of services
 - ▶ other matters relevant to the TCRA
- ▶ establishing standards for regulated goods and services. These are defined as equipment produced, supplied or offered for use, or services supplied or offered for use, in a regulated sector
- ▶ facilitating the resolution of complaints and disputes
- ▶ taking over and continuing to carry out the functions formerly of the Tanzania Communications Commission and the Tanzania Broadcasting Commission
- ▶ disseminating information about matters relevant to the functions of the TCRA
- ▶ consulting with other regulatory authorities or institutions discharging functions similar to those of the TCRA in Tanzania and elsewhere
- ▶ administering the TCRA Act

- ▶ performing such other functions as may be conferred by law.

It is also important to note that, in terms of section 34 of the TCRA Act, the TCRA has specific functions concerning the Tanzania Broadcasting Service, which are dealt with elsewhere in this chapter.

The content committee

In terms of section 27(1) of the TCRA Act, the content committee shall have such powers and functions as the TCRA may determine and, in particular, shall:

- ▶ advise the sector minister on broadcasting policy
- ▶ monitor and regulate broadcast content
- ▶ handle complaints from operators and consumers
- ▶ monitor broadcasting ethics compliance.

However, section 27(4) provides that in determining the powers of the content committee, the TCRA must have regard to the desirability of ensuring that the Committee has at least a significant influence on decisions which relate, among other things, to matters concerning the content of anything broadcast or otherwise transmitted using electronic communication networks.

The TCRA consumer consultative council

The TCRA has, in terms of section 38 of the TCRA Act, the power to:

- ▶ represent the interests of consumers by making submissions to, and consulting with, the TCRA, the minister responsible for communications and the sector ministers (that is, telecommunications, broadcasting and postal services and so on)
- ▶ disseminate information and views on matters of interest to consumers of regulated equipment and services
- ▶ establish local, regional and sector consumer committees and to consult with them
- ▶ consult with industry, government and other consumer groups on matters of interest to consumers of regulated equipment and services.

3.5.3 Appointment of TCRA board, content committee and Council members

The TCRA board

In terms of section 7 of the TCRA Act, the TCRA board, which is the governing body of the TCRA, consists of seven members. A member must meet the sole criterion

that he or she does not hold an office which he or she could use to exert influence on the TCRA. The members include:

- ▶ A non-executive chairman and vice-chairman who are appointed by the president on the basis that if one comes from one part of the Union (for example, Tanzania), the other shall come from the other part of the Union (for example, Zanzibar).
- ▶ Four non-executive members. These are appointed by the Minister of Communications, after consultation with sector ministers, that is the ministers responsible for the different sectors, telecommunications, broadcasting, postal services and so on. The members are selected from short-listed candidates who apply for positions in response to public advertisements. The lists are submitted by the Nominations Committee, which itself comprises:
 - ▶ the permanent secretary for the ministry responsible for communications, who shall be the chairman of the committee
 - ▶ the permanent secretary responsible for public broadcasting and content matters
 - ▶ two other persons representing the private sector. One nominated from a legally recognised body representative of the private sector and the other nominated by the Council.
- ▶ a person representing the public sector nominated by the minister responsible for communications
- ▶ the director-general of the TCRA appointed by the minister responsible for communications from a list of names submitted by the Nominations Committee.

The content committee

In terms of section 26(2) of the TCRA Act, the content committee consists of not more than five members, namely:

- ▶ the vice-chairman of the TCRA Board, who shall be the content committee chairman
- ▶ four members appointed by the Minister for Communications, on consultation with the chairperson of the TCRA board
- ▶ other members co-opted by the content committee as an expert or as necessary.

Note that it is not clear how many co-opted members can be appointed, given the limit of five members provided for above.

The TCRA consumer consultative council

In terms of section 37(2) of the TCRA Act, the council consists of between seven and ten members appointed by the Minister of Communications from a list of names

provided by members of the business community or by organisation(s) legally recognised as being representative of private sector interests. The minister appoints the chairperson of the council and the vice-chairman is elected by the council members.

Notably, the minister is required, in terms of section 37(4), to call for nominations and to publish the names of proposed members (after public nominations) in the Gazette and newspapers, and to invite written comments thereon. Further, in terms of section 37(5) of the TCRA Act, the minister has to have regard to the desirability of the council, having knowledge and understanding of consumers and the regulated industries, including:

- ▶ low-income, rural and disadvantaged persons
- ▶ industrial and business users
- ▶ government and community organisations.

3.5.4 Funding for the TCRA, the content committee and the council

The TCRA

In terms of section 49(1) of the TCRA Act, the TCRA funds consist of:

- ▶ fees collected by the TCRA, including for the granting and renewal of licences
- ▶ levies collected from regulated suppliers (that is in the telecommunications, broadcasting and postal sectors)
- ▶ all payments or property due to the TCRA in respect of its functions
- ▶ any grants, donations, bequests or other contributions made to the TCRA.

The content committee

Note that no specific funding mechanisms for the content committee are provided for in the TCRA Act. However, section 29(3) provides that its members are to be paid such allowances and fees as the Minister of Communications shall determine on the advice of the TCRA.

The TCRA consumer consultative council

In terms of section 39(1) of the TCRA Act, the council funds consist of:

- ▶ such sums as may be appropriated by parliament that is, provided for in the national budget, for the council during the first three years of its existence
- ▶ such sums as may be appropriated from the funds of the TCRA for the council
- ▶ grants, donations, bequests or other contributions.

3.5.5 Making broadcasting regulations

In terms of section 47(1), the Minister of Communications is empowered to make regulations, rules, or both which are not inconsistent with the TCRA Act or with sector legislation as he or she considers necessary or desirable to give effect to the provisions of this act.

However, it is essential to note that, in terms of section 47(2) of the TCRA Act, the TCRA also has rule-making powers (provided these are made in consultation with the Minister of Communications) concerning:

- ▶ a code of conduct
- ▶ records to be kept, including the form and content of accounting records, and information and documents to be supplied to the TCRA by regulated suppliers
- ▶ standards of regulated equipment and services
- ▶ terms and conditions of supply of regulated goods and services
- ▶ conduct in connection with the production, distribution and supply of regulated goods and services
- ▶ complaint handling procedures
- ▶ rates and charges for regulated goods and services
- ▶ levies and fees payable to the TCRA
- ▶ circumstances in which, and the terms and conditions upon which, a supplier of regulated goods and services shall be able to gain access to facilities owned or controlled by another person
- ▶ such other matters as the TCRA considers desirable or necessary to give effect to the TCRA Act.

Note that in terms of section 47(4), any person who contravenes a rule made under section 47 is guilty of an offence and, on conviction, is liable to a fine.

Note further that section 103 of the EPC Act provides that the minister may make content-related regulations and that the TCRA may make content-related rules on the recommendation of the content committee.

3.5.6 Licensing regime for broadcasters in Tanzania

Categories of broadcasting services

Section 13(3) of the Electronic and Postal Communications Act (EPC Act) provides seven categories of so-called content services, which are defined in section 3 of the EPC Act as a 'service offered for speech or other sound, text or images whether still or moving except where transmitted in private communications'. Although the EPC

Act does refer to broadcasting services, it is clear that a content service includes a broadcasting service. The seven categories of content services are listed (without being defined in the EPC Act) as follows:

- ▶ public service
- ▶ commercial service
- ▶ community service
- ▶ non-commercial service
- ▶ subscription broadcasting service
- ▶ support service for subscription content service
- ▶ any other licence as may be determined by the TCRA.

In terms of section 6(1) of the ECP Act, a person wishing to operate a content service shall apply to the TCRA for a licence. Section 13(1) of the EPC Act prohibits a person from providing a content service without a licence. The EPC Act refers to a content service being provided under an individual or a class licence but is unclear as to when a content service would require an individual as opposed to a class licence. Subsections 6(2) and (3) of the EPC Act set out the application requirements for an individual licence, and these include:

- ▶ business plans
- ▶ technical proposals
- ▶ shareholder information
- ▶ proof of financial capacity
- ▶ previous experience
- ▶ technical specifications where the licensee intends to use competitive frequency bands.

Section 116(3)(b) of the EPC Act makes it an offence to provide a content service without having first obtained the necessary licence. The penalty on conviction is a fine, imprisonment or both.

Frequency spectrum licensing

Section 71(1) of the EPC Act provides that the TCRA has the powers to manage and control all radio communication frequencies spectrum or frequency channels, and to provide mechanisms governing the allocation and assignment to persons by issuing licences under conditions determined by the TCRA. A broadcaster intending to make use of the radio frequency spectrum must have a spectrum licence in addition to a content service licence.

Indeed, section 117(1) makes it an offence to use radio frequency spectrum without obtaining an individual assignment. The penalty on conviction is a fine, imprisonment or both.

3.5.7 Responsibilities of broadcasters in Tanzania

Adherence to licence conditions

Section 152(3) of the EPC Act provides that any person who contravenes or fails to comply with any licence condition 'without lawful excuse' is guilty of an offence and on conviction, is liable for a fine.

Furthermore, section 117(2) of the EPC Act provides that, if a person wilfully fails to adhere to the conditions of a spectrum licence, the licence will be cancelled.

Adherence To Content Requirements Or Restrictions

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

Prohibitions against transmitting certain types of information communication

In terms of section 118(a) of the EPC Act, a person who uses a content service to transmit any communication which is obscene, indecent, false, menacing or offensive with the intent to annoy, abuse, threaten or harass another person is guilty of an offence. The penalty on conviction is a fine, imprisonment or both.

Adherence to a code of conduct

Section 104 of the EPC Act refers to a code of conduct which is to be binding on all content service licensees and which is to prohibit the provision of content which is indecent, obscene, false, menacing or otherwise offensive. The code of conduct has to achieve several objectives. Briefly, these include:

- ▶ protecting children
- ▶ excluding material likely to incite the commission of a crime
- ▶ comprehensive, accurate and impartial news
- ▶ presenting religious material in a balanced and responsible manner
- ▶ protecting the public against offensive and harmful content
- ▶ regulating advertising and sponsorships appropriately
- ▶ preventing subliminal messaging.

Requirements regarding events of national interest

Section 105(1) of the EPC Act requires that regulations on the provision of content relating to events of national interest (note that section 105(2) provides that events of national interest include, but are not restricted to 'significant sporting events that are of interest or importance to a substantial proportion of Tanzanian society') shall:

- ▶ be designed to ensure that the content is reasonably accessible to members of the public simultaneously and without undue delay
- ▶ identify the nature of events that fall within the category of events of national interest. The effect of this is that the regulations must define what an event of national interest is
- ▶ not interfere unduly with the commercial affairs of content service licensees.

It is also important to note that subscription content service providers are prohibited from acquiring exclusive rights that prevent or hinder the public broadcaster from broadcasting sporting events that are of national interest.

Requirements regarding news and current affairs

Section 106(1) of the EPC Act requires that regulations relating to news and current affairs shall be made to ensure that the content service licensee provides news and information on current affairs:

- ▶ regularly
- ▶ that it is accurate, balanced, impartial and fair
- ▶ that it deals with international, regional, national and, where appropriate, local matters.

Adherence to local content quotas

Section 107(1) of the EPC Act deals with the original and independent production of local content and requires that regulations dealing with local content and independent and original productions be made to:

- ▶ stimulate the production of content in Tanzania
- ▶ prevent the excessive provision by content service licensees of:
 - ▶ content that is not relevant or conducive to the development of Tanzanian society
 - ▶ content that has previously been made available to the public
- ▶ specify:
 - ▶ the extent to which content service licensees shall include content

produced in Tanzania, and content produced by independent producers and original content

- ▶ the times of the day or week when such content is to be provided.

Official languages

Section 108 of the EPC Act empowers the minister responsible for content and broadcasting services to make regulations on the use and promotion of official languages in content provided by a content service licensee.

Advertising and sponsorship

Although the TCRA is empowered to make rules regarding advertising and sponsorships, section 109 of the EPC Act specifies that such rules may include:

- ▶ prohibiting, restricting or regulating advertisements of specified goods, products, services and activities
- ▶ prohibiting, restricting or regulating specified forms and methods of advertising or sponsorship
- ▶ prohibiting, restricting or regulating political advertisements
- ▶ restricting, or otherwise regulating, the extent of advertising and sponsorship a content licensee may have, including:
 - ▶ the maximum amount of time to be allocated to advertisements in any hour
 - ▶ the minimum interval which can elapse between any two periods allocated to advertising
 - ▶ number of such periods to be allowed in any hour or day
 - ▶ the prominence that may be given to advertisements or sponsorships
 - ▶ exclusion of advertisements or sponsorships from a specified part of a licensed service.

Educational content

Section 110 of the EPC Act empowers the TCRA to make rules concerning educational content that impose obligations on all or some content service licensees to ensure that a specified proportion of content provided by each one of them constitutes content of an educational nature and shall include:

- ▶ a definition of educational content
- ▶ the extent to which a content service licensee:
 - ▶ shall be obliged to finance the production of educational content
 - ▶ may acquire and provide educational content produced by other persons

- ▶ provisions to ensure that a content service licensee provides educational content
- ▶ provisions to ensure that educational content provided is:
 - ▶ of high quality
 - ▶ suitable to meet the requirements of Tanzanian society
- ▶ different categories of educational content, and impose differential obligations of content service licensees, concerning such categories.

Content for the visually- and hearing-impaired

Section 111 of the EPC Act empowers the minister, when making content regulations, or the TCRA, when making rules, to cater to the needs and interests of the visually- or hearing-impaired, including:

- ▶ the extent to which all or any content service licensees shall promote the understanding and enjoyment of content by persons who are hearing- visually- or both, impaired
- ▶ how such understanding and enjoyment should be promoted, such as subtitling, audio-description for the blind or the use of sign language
- ▶ different classes of content to which such regulations apply.

Political content

Section 112 of the EPC Act requires the minister when making content regulations concerning the provision of political content (other than political advertising):

- ▶ not to prohibit content service licensees from providing political content
- ▶ to regulate political content consistent with the constitution.

Counter versions or right of reply

Section 113 of the EPC Act requires a content services licensee to broadcast a counter- version presented by any person affected by an assertion of fact in any programme broadcast if the person concerned claims that the assertion of fact is false. Note that the various subsections set out this requirement in some detail, including the circumstances in which a broadcaster is not required to broadcast a counter version.

Adherence to ownership and control requirements

Section 26(1)(b) of the EPC Act provides that the holder of content service licence is required to have a minimum of 51% local shareholding.

Adherence to pricing and billing requirements

Section 31 of the EPC Act provides that licensees may set and revise prices charged for content services offered to the public; this applies only to subscription broadcasting and would not apply to free-to-air services. However, section 31(2) requires that in determining such prices, licensees must respect the following principles:

- ▶ be transparent, based on objective criteria, and non-discriminatory
- ▶ not contain discounts that unreasonably prejudice competitive opportunities of other licensees
- ▶ take account of regulations and recommendations of international organisations of which Tanzania is a member.

Section 31(3) requires licensees to:

- ▶ file price determinations with the TCRA two weeks before introduction
- ▶ publish its prices in the public media at its own expense at least one week before introduction.

Section 31(6) requires licensees to provide sufficiently detailed billing information so that customers can determine if they are being billed correctly.

Adherence to duty of customer confidentiality

Section 97 of the EPC Act prohibits the disclosure of any information of a customer, except where authorised by law.

Adherence to access requirements

Section 13 of the Universal Service Act provides that broadcasters are obliged to ensure that their services are accessible to rural and urban under-served areas in the service area provided for in their licence.

Payment of Universal Service Levy

Section 18(7) of the Universal Service Access Act makes it an offence for the holder of a communications licence to fail to pay the applicable universal service levy. The penalty, on conviction, is a fine. Section 18(2) provides that this is to be calculated based on the licensee's eligible revenue and section 18(5) provides that the minister is to make regulations on the procedure to be followed to determine the levy.

3.5.8 Is the TCRA an independent regulator?

The TCRA does not meet international standards as an independent regulator. The TCRA Act does not even claim that the TCRA is an independent regulator. The minister has significant powers concerning the process of appointing board members and also in regulatory functions, including the power to make broadcasting-related content regulations.

3.5.9 Amending the legislation to strengthen the broadcast media generally

The single most significant problem is that the legislation ought to provide for the independence of the broadcasting regulator, that is the TCRA. In our view, the legislation ought to be amended such that the National Assembly is responsible for calling for public nominations of candidates to serve on the TCRA Board and for developing the short-list of suitably qualified candidates. The TCRA Act ought to set out detailed provisions regarding the qualities, expertise and qualifications required of a TCRA board member. After that, the president ought to formally appoint all TCRA board members.

Furthermore, the TCRA ought to have full powers in respect of regulating the broadcasting sector, that is, making rules, regulations and so on, and the minister ought not to have regulation-making powers concerning broadcasting matters.

Also, the EPC Act does not clarify the differences between various categories of content that is, broadcasting services, sufficiently. The legislation ought to set out in some detail what the differences are between the various categories and the requirements, for example, for community broadcasting services as opposed to commercial services.

3.6 Legislation that regulates the public broadcast sector

3.6.1 Introduction

The Tanzania Broadcasting Corporation (TBC) is Tanzania's national broadcaster. It includes a national radio station, a national television station and an international radio station with a reach beyond the borders of Tanzania. It is important to note that the African Commission on Human and People's Rights has called on Tanzania to transform the TBC into a public broadcaster.⁷

The principal statutes governing the affairs of the TBC are the Public Corporations Act, 1992, the Public Corporation (The Tanzania Broadcasting Corporation — TBC) (Establishment) Order, 2007, and the Tanzania Communications Regulatory Authority Act, 2003.

3.6.2 Establishment of the TBC

The TBC was established under section 4 of the Public Corporations Act. Section 4 provides that the president may establish a public corporation by an order published in the Gazette. The TBC was established in terms of the TBC Order

3.6.3 The mandate of the TBC

Section 4 of the TBC Order provides that its mandate is to encourage Tanzanian expression by offering a wide range of programmes that:

- ▶ reflect Tanzanian attitudes, opinions, ideas, values and artistic creativity

- ▶ display Tanzanian talent in educational and entertaining programmes
- ▶ offer a plurality and variety of news, information and analysis from a Tanzanian point of view
- ▶ advance the national and public interest.

Section 5 of the TBC Order sets out a list of functions of the TBC, and these include providing public service broadcasting using radio and television, and responding to audience needs.

Note that both section 7 of the TBC Order and section 32 of the TCRA Act require the TCRA to ensure that a charter is developed by the TBC and the minister responsible for broadcasting services and that the charter ‘empowers the [TBC] to become a public service broadcaster’. It appears that such a charter has not been developed yet.

In terms of section 32(2) of the TCRA Act, the TBC charter prescribes categories of services provided by the TBC. These can include public, commercial and community broadcasting services, as well as any other broadcasting service which the minister may determine. Presumably, these are not, strictly speaking, community or commercial services but public services provided to a localised community or on a commercial basis.

3.6.4 Appointment of the TBC board

In terms of section 9 of the TBC Order, the TBC board consists of nine members. The president appoints the chairperson. The minister responsible for broadcasting appoints the other eight board members.

Section 11 of the Public Corporations Act sets out the criteria for TBC board appointments; board members must be of sound integrity, properly qualified and appropriately experienced concerning the public corporation in question, or public affairs.

Notably, the TBC board does not appoint the director-general of the TBC. In terms of section 8(1), the president appoints the director-general of the TBC. The director-general is the chief executive and the coordinating officer of the TBC. He or she is responsible to the TBC board for the day to day functioning of the TBC, in terms of section 8(2) of the TBC Order.

3.6.5 Funding for the TBC

In terms of section 16(1) of the TBC Order, the funds of the TBC consist of:

- ▶ sums appropriated by parliament — that is, provided for in the national budget
- ▶ fees and charges levied for goods and services provided
- ▶ monies borrowed by or grants made available to the TBC

- ▶ monies received for commercial activities, such as consulting, or leasing property or equipment
- ▶ monies received from government levies
- ▶ monies from government funds established for the functioning of the TBC.

3.6.6 The TBC: Public or state broadcaster?

There is little doubt that the TBC remains a state broadcaster. From a legal perspective, the TBC remains an extension of the ministry responsible for broadcasting and content services; this is based mainly on the role of the minister in appointing the TBC board members.

3.6.7 Weaknesses in the legislation which should be addressed to strengthen the TBC

The government has recognised the concept of public broadcasting and the need to transform the TBC into a genuine public broadcaster; however, it has failed to enact laws that would set the legal foundation for such transformation.

There are several weaknesses, these include:

- ▶ the legislation ought to set out what the charter of the TBC is to be, rather than leaving this up to the TBC and the minister to develop
- ▶ legislation ought to be developed to provide for the independence of the TBC board
- ▶ the legislation ought to be amended such that the National Assembly is responsible for calling for public nominations of candidates to serve on the TBC board and for developing the short-list of suitably qualified candidates. In this regard, the legislation ought to set out detailed provisions regarding the qualities, expertise and qualifications required of a TBC board member. After that, the president ought to appoint all TBC board members formally. The TBC board ought to appoint the Chief Executive of the TBC and the board ought to be solely responsible for regulating the activities of the TBC with no role for the minister. Lastly, the TBC ought to be accountable directly to the National Assembly and not via the minister.

3.7 Legislation governing broadcasting signal distribution

Relevant provisions in international instruments

The Electronic and Postal Communications Act (EPC Act) is the critical statute for broadcasting signal distribution (the technical process of ensuring that the content-carrying signal of a broadcaster is distributed such that it can be heard, viewed, or both, by its intended audience).

The EPC Act makes it clear that broadcasting signal distribution is a form of network

service, which is defined in section 3 as ‘a service for the carrying of information in the form of speech or other sound, data, text or images, using guided or unguided electronic energy but does not include services provided solely on the customer side of the network boundary’.

Consequently, all broadcasting signal distributors must have a network service licence to provide network service.

3.8 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 so-called whistle-blowers, inside sources who can provide journalists with information regarding illegal activities, whether by company or government personnel. Consequently, democratic countries often provide special protection for journalists’ sources. It is recognised that without such protection, information that the public needs to know would not be given to journalists.

3.8.1 Criminal Procedure Act [CAP 20 R.E. 2002]

Sections 142 and 195 of the Criminal Procedure Act (CPA) empower a court to issue a summons to compel any person who is likely to give material evidence to come before the court and bring and produce all documents and writings in his possession, which are specified in the summons. Thus, if a court believes that a journalist knows something that could constitute material evidence about a crime, the journalist might be ordered to reveal sources of information relating to that crime in terms of sections 142 or 195 of the CPA.

Note, failure to comply with a summons can result in an arrest warrant being issued and being detained until the person consents to do what is required in terms of section 199.

3.8.2 Public Leadership Code of Ethics Act, Act 13 of 1995

Section 25 empowers the Ethics Tribunal established under the Public Leadership Code of Ethics Act to require any person who, in its opinion, can give any information relating to any enquiry being conducted by the tribunal to appear before it to answer questions or to produce any document.

3.8.3 Penal Code [Cap 16]

Section 114(1)(b) of the Penal Code makes it an offence to refuse to answer a question in a judicial proceeding without lawful excuse. The penalty, on conviction, is a fine or imprisonment. In the absence of a recognised qualified privilege for

journalists, this subsection might be used to force a journalist to reveal his or her sources of information.

3.8.4 The Cyber Crimes Act, Act 14 of 2015

Section 32 of the Cyber Crimes Act provides that, where the disclosure of data is required for a criminal investigation or the prosecution of an offence, a police officer in charge of a police station or a law enforcement officer of similar rank may issue an order to any person to disclose any such information in his or her possession.

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.

3.9 Legislation that prohibits the publication of certain kinds of information

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

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

- ▶ prohibition on the publication of information prejudicial to a child
- ▶ prohibition on the publication of certain types of information regarding legal proceedings
- ▶ prohibition on the publication of information that discloses the proceedings of the Cabinet
- ▶ prohibition on the publication of hate speech
- ▶ prohibition on the publication of information that could endanger the safety or life of any person
- ▶ prohibition on the publication of information that encourages the commission of an offence;
- ▶ prohibition on the publication of information that invades privacy
- ▶ prohibition on the publication of information that infringes commercial interests
- ▶ prohibition on the publication of information that could harm the economy

- ▶ prohibition on the publication of state security-related information
- ▶ prohibition on publications which promote ill-will or hostility between classes of the population
- ▶ prohibition on obscene publications
- ▶ prohibition on the publication of incitement to violence
- ▶ prohibition on the publication of extreme violence involving children
- ▶ prohibition on the publication of false news
- ▶ prohibition on the publication of misleading information regarding HIV and Aids
- ▶ prohibition on the publication of information regarding the civil service
- ▶ prohibition on the publication of election-related information
- ▶ prohibition on the publication of material concerning genocides or crimes against humanity
- ▶ prohibition on the publication of criminal defamation.

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

3.9.1 Prohibition on the publication of information prejudicial to a child

Section 158 of the Law of the Child Act, Act 21 of 2009, makes it an offence to publish any information which is prejudicial to the best interests of a child. The penalty on conviction is a fine, imprisonment or both.

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

Law of the Child Act, Act 21 of 2009

Section 33 of the Law of the Child Act makes it an offence to publish any information or a photograph that may lead to the identification of a child in any matter before the court without the permission of the court. The penalty is a fine, imprisonment or both.

Criminal Procedure Act [CAP 20 R.E. 2002]

Section 186(3) of the CPA prohibits the publication in any newspaper or other media of the evidence of any person in a trial involving sexual offences. Note that the prohibition does not apply to law reports or periodicals of a technical nature intended for circulation to lawyers or member of the medical profession.

Section 188 of the CPA empowers a court to prohibit the publication of the names or identities of parties or witnesses in the interests of the administration of justice.

Penal Code [CAP 16]

Section 114(1)(d) of the Penal Code makes it an offence to publish writing capable of prejudicing any person in favour of, or against, any party to the proceeding, or which lowers the authority of the court, that is, the presiding officer. This provision includes both aspects of contempt of court — that is, the *sub judice* rule and the rule against ‘scandalising’ the court.

Section 55 of the Penal Code deals with seditious intentions. Section 55(1)(c) states that a seditious intention is an intention to, among other things ‘bring into hatred or contempt or to excite disaffection against the administration of justice in the United Republic’. Note, however, that in terms of section 55(2)(b), an act, speech or publication is not seditious by reason only that it intends to point out errors or defects in the administration of justice with a view to the remedying of such errors or defects.

Note that in determining whether or not the intention with which any act was done, any words spoken or document published is seditious, every person is deemed to intend the consequences that would naturally follow from his or her conduct at the time and in the circumstances in which he or she so conducted him or herself, section 55(3).

The Media Service Act, Act 12 OF 2016

The Media Services Act contains the same definition of seditious intention as is contained in the Penal Code, set out immediately above. It further provides, in section 53, that any person who publishes, sells, offers for sale, reproduces or imports a seditious publication is guilty of an offence and liable, on conviction, to a fine, imprisonment or both.

Section 7(3) of the Media Services Act provides that media houses must ensure they do not disseminate information that could:

- ▶ undermine lawful investigations being conducted by a law enforcement agent
- ▶ impede due process of the law
- ▶ damage the information holder’s position in any actual or contemplated legal proceedings or infringe professional privilege
- ▶ significantly undermine a person’s ability to give adequate and judicious consideration to a matter of which no final decision has been taken and which remains the subject of consideration.

The Cyber Crimes Act, Act 14 of 2015

Section 21 of the Cyber Crimes Act makes it an offence for any person to knowingly

and unlawfully disclose details of a criminal investigation which requires confidentiality. The penalty for this offence, on conviction, is a fine, imprisonment or both.

3.9.3 Prohibition on the publication of information that discloses the proceedings of Cabinet

Section 7(3) of the Media Services Act provides that media houses must ensure they do not disseminate information that could disclose the proceedings of the Cabinet.

3.9.4 Prohibition on the publication of hate speech

Section 7(3) of the Media Services Act provides that media houses must ensure they do not disseminate information that could constitute hate speech.

3.9.5 Prohibition on the publication of information that could endanger the safety or life of any person

Section 7(3) of the Media Services Act provides that media houses must ensure they do not disseminate information that could endanger the safety or life of any person.

3.9.6 Prohibition on the publication of information that encourages the commission of an offence

Section 7(3) of the Media Services Act provides that media houses must ensure they do not disseminate information that could facilitate or encourage the commission of an offence.

3.9.7 Prohibition on the publication of information that invades privacy

Section 7(3) of the Media Services Act provides that media houses must ensure they do not disseminate information that could involve unwarranted invasion of privacy of an individual.

3.9.8 Prohibition on the publication of information that infringes commercial interests

Section 7(3) of the Media Services Act provides that media houses must ensure they do not disseminate information that could infringe lawful commercial interests, including intellectual property rights of that information holder or a third party from whom the information was obtained.

3.9.9 Prohibition on the publication of information that could harm the economy

Section 7(3) of the Media Services Act provides that media houses must ensure they do not disseminate information that could hinder or cause substantial harm to the government to manage the economy.

3.9.10 Prohibition on the publication of state security-related information

National Security Act, 1970

Section 4 of the National Security Act contains several provisions relating to the disclosure of security-related information. The Act makes it an offence to publish a range of security-related information, such as official codes or passwords, sketches, notes or other documents which relate to protected places (as determined by the president or in terms of the Protected Places and Areas Act, 1969), or munitions information, or confidential information that has been entrusted to a person by a public official. The penalty for such publication is imprisonment.

Section 5 of the National Security Act makes it an offence to communicate any classified matter to any unauthorised person who is guilty of an offence. The penalty, upon conviction, is imprisonment.

Tanzania Intelligence and Security Service Act, 1996

Section 16 of the Tanzania Intelligence and Security Service Act makes it an offence to publish in a newspaper or other document or to broadcast the fact that a person is a member of the Tanzania Intelligence Service (other than the director-general thereof) or is in any way connected with the Tanzania Intelligence Service, without the written consent of the Minister for Intelligence and Security. The penalty, upon conviction, is a fine.

Police Force And Prisons Commission Act, Act 8 of 1990

Section 15(1) of the Police Force and Prisons (PFP) Commission Act makes it an offence for any person to publish the contents of any document, communication or information of any other kind which has come to his knowledge in the course of performing duties under the PFP Act. The penalty on conviction is a fine, imprisonment or both.

Furthermore, section 15(2) makes it an offence to publish information which a person knows has been disclosed in contravention of the provisions of the PFP Act. The penalty on conviction is a fine, imprisonment or both. These subsections severely hamper whistle-blowers and the media from reporting on information provided by whistle-blowers.

Films And Stage Plays Act, 1976

Section 15 of the Films and Stage Plays Act makes it an offence to exhibit a film unless a certificate of approval from the Censorship Board has first been obtained.

Section 18(4) prohibits the Censorship Board from approving a film which, in its opinion 'tends to prejudice the maintenance of public order ... or the public exhibition ... of which would ... be undesirable in the public interest.'

Penal Code [CAP 16]

Section 55 of the Penal Code deals with seditious intentions. Section 55(1) sets out that a seditious intention is an intention to, among other things:

- ▶ bring into hatred or contempt or to excite disaffection against the lawful authority of the Republic or its government
- ▶ excite any of the inhabitants of the United Republic to attempt to procure the alteration, other than by lawful means, of any other matter in the United Republic as established by law
- ▶ raise discontent or disaffection among any of the inhabitants of the United Republic.

Note, however, that in terms of section 55(2) an act, speech or publication is not seditious by reason only that it intends to:

- ▶ show that the government has been misled or mistaken in any of its measures
- ▶ point out errors or defects in the government or constitution as established, or in legislation, or the administration of justice with a view to the remedying of such errors or defects
- ▶ persuade inhabitants of the United Republic to attempt to procure the alteration of any matter, by lawful means.

Note that in determining whether or not the intention with which any act was done, any words spoken or document published is seditious, every person is deemed to intend the consequences that would naturally follow from his or her conduct at the time and in the circumstances in which he or she so conducted him or herself, section 55(3).

Section 89(1) of the Penal Code makes it an offence to use obscene, abusive or insulting language to any other person, in such a manner as is likely to cause a breach of the peace. The penalty is imprisonment.

The Media Service Act, Act 15 of 2016

The Media Services Act contains the same definition of seditious intention as is contained in the Penal Code, set out immediately above. It further provides, in section 53, that any person who publishes, sells, offers for sale, reproduces or imports a seditious publication is guilty of an offence and liable, on conviction, to a fine, imprisonment or both.

Section 7(3) of the Media Services Act provides that media houses must ensure they do not disseminate information that could undermine the national security of the United Republic of Tanzania.

3.9.11 Prohibition on publications which promote ill-will or hostility between classes of the population

Penal Code [CAP.16]

Section 55 of the Penal Code [Cap.16] deals with seditious intentions. Section 55(1) states that a seditious intention is an intention to, among other things, promote feelings of ill-will and hostility between different classes of the population. Note, however, that, in terms of section 55(2), an act, speech or publication is not seditious by reason only that it intends to point out any matters that produce or tend to evoke feelings of ill-will and hostility between different classes of the population of the Republic with a view to their removal.

In determining whether or not the intention with which any act was done, any words spoken or document published is seditious, every person is deemed to intend the consequences that would naturally follow from his or her conduct at the time and in the circumstances in which he or she so conducted him or herself, section 55(3).

Cyber Crimes Act, Act 14 of 2015

Section 17 of the Cyber Crimes Act makes it an offence to use a computer system to produce, offer, make available, distribute or transmit material that is racist or xenophobic. The penalty on conviction is a fine, imprisonment or both.

Section 18 of the Cyber Crimes Act makes it an offence to use a computer system to insult another person based on race, colour, descent, nationality, ethnic origin or religion. The penalty for this offence, on conviction, is a fine, imprisonment or both.

3.9.12 Prohibition on obscene publications

Law Of The Child Act, Act 21 of 2009

Section 58(1)(b) of the Law of the Child Act makes it an offence to publish a photograph of a child or a dead child in a pornographic manner. The penalty is a fine, imprisonment or both.

Penal Code [CAP 16]

Section 175 of the Penal Code makes it an offence to distribute or even possess any obscene writing, drawing, photograph or cinematograph film. The penalty on conviction is a fine or imprisonment.

Films And Stage Plays Act, 1976

Section 15 of the Films and Stage Plays Act makes it an offence to exhibit a film unless a certificate of approval has first been obtained from the Censorship Board. Section 18(4) prohibits the Censorship Board from approving a film which, in its

opinion 'tends to ... offend decency, or the public exhibition ... of which would ... be undesirable in the public interest'.

The Cyber Crimes Act, Act 14 Of 2015

Section 13 of the Cyber Crimes Act makes it an offence for any person to publish child pornography or make available or facilitate access to child pornography using a computer system. The penalty for such an offence is a fine, imprisonment or both. In addition, any person convicted of this offence may be adjudged to compensate a person injured by the offence.

Section 14 of the Cyber Crimes Act makes it an offence to publish, or cause to be published using a computer, or any other information and communication technology, pornography, or pornography which is lascivious or obscene. The penalty on conviction is a fine, imprisonment, or both.

3.9.13 Prohibition on the publication of incitement to violence

Section 37 of the Newspapers Act, Act 3 of 1976, makes it an offence, without lawful excuse, to publish a statement indicating or implying that it would be incumbent or desirable to, without lawful authority, do any act calculated to:

- ▶ bring death or physical injury to any person or category or community of persons
- ▶ lead to destruction or damage to property.

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

3.9.14 Prohibition on the publication of extreme violence involving children

Section 58(1)(b) of the Law of the Child Act, Act 21 of 2009, makes it an offence to publish a photograph of a child or a dead child containing brutal violence. The penalty is a fine, imprisonment or both.

3.9.15 Prohibition on the publication of false news

Media Services Act, Act 15 of 2016

Section 54(1) of the Media Services Act, Act 15 of 2016, makes it an offence to publish any false statement, rumour or report that is likely to cause fear and alarm to the public or to disturb the public peace. The penalty, on conviction, is a fine, imprisonment or both.

Note, however, that in terms of section 54(2), it is a defence if the accused proves that before publication he or she took reasonable steps to verify the accuracy of the statement, rumour or report as to lead him or her reasonably to believe that it was true.

Section 50(1)(a)(i) of the Media Services Act makes it an offence for any person to

publish information which is intentionally or recklessly falsified in a manner that threatens the interests of defence, public safety, public order, the economic interests of the United Republic, public morality or public health. On conviction, the penalty is a fine, imprisonment or both.

Cyber Crimes Act, Act 14 of 2015

Section 16 of the Cyber Crimes Act makes it an offence for any person to use a computer system to publish information or data presented in a picture, text, symbol or any other form, knowing that it is false, deceptive, misleading or inaccurate, and with the intent to defame, threaten, abuse, insult or otherwise deceive or mislead the public or counselling commission of an offence. The penalty for this offence is a fine, imprisonment or both.

3.9.16 Prohibition on the publication of misleading information regarding HIV and Aids

Section 27(1) of the HIV and Aids (Prevention and Control) Act, Act 28 of 2008, requires all information regarding the cure for HIV and Aids to be subjected to scientific verification before being announced. Section 27(3) makes it an offence to publish misleading information regarding curing, preventing or controlling HIV and Aids. The penalty is a fine, imprisonment or both.

3.9.17 Prohibition on the publication of information regarding the civil service

Section 16 of the Civil Service Act, Act 16 of 1989, makes it an offence for a person to publish information which, to his or her knowledge, has been disclosed in contravention of the requirement that no person may, without the written permission of the president, disclose information which has come to his or her knowledge in the course of the performance of his or her duties under the act, to an authorised person. The penalty is imprisonment.

These provisions are extraordinarily draconian and run entirely counter to the notion of a civil service that is transparent, accountable and responsive to public needs.

3.9.18 Prohibition on the publication of election-related information

Section 91A of the National Elections Act [CAP 343 R.E. 2010] makes it an offence knowingly to broadcast, print or publish a statement on the withdrawal of any candidate to promote the election of another candidate. The penalty on conviction is imprisonment.

Note that this section is exceptionally poorly drafted and it is unclear whether the statement has to be false before such publication is an offence. It would seem ludicrous to have an effective blanket prohibition of the publication of news of the withdrawal of a candidate where this has indeed happened.

3.9.19 Prohibition on the publication of material concerning genocides or crimes against humanity

Section 19 of the Cyber Crimes Act, Act 14 of 2015 makes it an offence to use a computer system to publish unlawfully, or cause to be published, material which incites, denies, minimises or justifies acts constituting genocide or crimes against humanity. The penalty for this offence, on conviction, is a fine, imprisonment or both.

3.9.20 Prohibition on the publication of criminal defamation

Criminal defamation creates a criminal offence of defamation, which is usually a civil wrong in which damages are paid to repair the reputational damage suffered by the defamed person.

Section 50(1)(a)(ii) of the Media Services Act, Act 15 of 2016, makes it an offence to use a media service to publish information which is intentionally or recklessly falsified in a manner which is injurious to the reputation, rights and freedoms of other persons. The penalty, on conviction, is a fine, imprisonment or both.

Section 35 (and section 36 for print media) provides that a person publishes a libel if he or she causes the printing, writing, painting, effigy, or other means by which the defamatory matter is conveyed, to be dealt with, either by exhibition, reading, recitation, description, delivery or otherwise so that the defamatory meaning thereof becomes known or is likely to become known to either the person defamed or any other person.

Section 37 provides that any publication of defamatory matter concerning a person will be unlawful unless:

- ▶ the matter is true, and publication is in the public interest, or
- ▶ it is privileged.

There are two types of privilege, absolute and conditional.

In terms of section 38, the publication of defamatory material is absolutely privileged in some instances. This means that it is immaterial whether or not the material was true or false, or whether or not it was published in good faith. In general, the grounds of absolute privilege are:

- ▶ the defamatory matter is published by or on the order of the president, the government, the National Assembly or the speaker of the National Assembly
- ▶ the defamatory matter is published in the course of a court-martial
- ▶ the defamatory matter is published in a judicial proceeding by a person taking part therein, that is, as a judge, assessor, magistrate, lawyer, witness or party
- ▶ the defamatory matter is a fair report of anything said, done or published in the National Assembly

- ▶ the defamatory matter is published by a person legally bound to publish it.

In terms of section 29 of the Media Services Act, the publication of defamatory material is privileged on condition that it was published in good faith, and if the relationship between the parties was such that the person publishing the matter is under some legal or moral duty to publish it or has a legitimate personal interest in publishing it, provided that the publication does not go further than what is reasonably sufficient for the occasion, and in any of the following cases:

- ▶ a fair report of court proceedings
- ▶ a copy or fair abstract of any matter that has been published previously and which was absolutely privileged when first published
- ▶ an expression of opinion in good faith as to the conduct or personal character of any person in a judicial, official or other public capacity
- ▶ an expression of opinion in good faith as to the conduct of a person concerning any public question
- ▶ an expression of opinion in good faith as to the conduct of a person disclosed by evidence given in a public legal proceeding
- ▶ an expression of opinion in good faith as to the merits of any book, art, speech, performance and the like
- ▶ a censure passed in good faith on the conduct or character of another person in respect of whom he or she has authority by contract or otherwise
- ▶ a complaint or accusation made by a person in good faith against another person in respect of his or her conduct or character to a person in authority
- ▶ if the matter is published in good faith for the protection of the rights or interests of the publisher or of the person to whom it is published.

Cyber Crimes Act, Act 14 of 2015

Section 16 of the Cyber Crimes Act makes it an offence for any person to use a computer system to publish information or data presented in picture, text, symbol or any other form, knowing that it is false, deceptive, misleading or inaccurate, and with the intent to defame, threaten, abuse, insult, or otherwise deceive or mislead the public or counselling commission of an offence. The penalty, on conviction, is fine, imprisonment or both.

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 accountability and transparency of both public and private

institutions. Such statutes, while not explicitly designed for use by the media, can and often are used by the media to uncover and publicise information in the public interest.

3.10.1 Access to information

The Access to Information Act, Act 9 of 2016, was enacted to provide access to information in Tanzania and define the scope of information which the public has the right to access. According to the preamble, the Access to Information Act is also intended to promote transparency, accountability of information holders and to provide for other related matters.

In terms of section 2(2), the Access to Information Act applies to:

- ▶ public authorities
- ▶ private bodies registered under any written law which:
 - ▶ utilise public funds
 - ▶ possess information which is of significant public interest.

Part II of the Access to Information Act relates to the Right of Access to Information.

Section 5 provides that every person has the right to access information. However, in terms of section 6(1) of the Access to Information Act, information holders may withhold information where he or she:

- ▶ is satisfied that the information is exempted in terms of section 6(2)
- ▶ determines the disclosure is not justified in the public interest.

Information is exempt from disclosure in terms of section 6(2) of the Access to Information Act if the information:

- ▶ undermines defence, national security and international relations, in terms of section 6(3)
- ▶ impedes the due process of law or endangers the safety or the life of any person
- ▶ undermines lawful investigation being conducted by law enforcement
- ▶ facilitates or encourages the commission of an offence
- ▶ involves the unwarranted invasion of an individual's privacy, other than the individual who made the request
- ▶ infringes lawful commercial interests, including the intellectual property rights of that person or a third party. In terms of section 6(4) this exemption does not apply to a request for information relating to the results of any product or environmental testing and information that reveals a serious public safety or environmental risk

- ▶ hinders or causes substantial harm to the government's ability to manage the economy. In terms of section 6(4), this exemption does not apply to a request for information relating to the results of any product or environmental testing and information that reveals a serious public safety or environmental risk
- ▶ significantly undermines the information holder's ability to give adequate judicious consideration to a matter of which no final decision has been taken and which remains the subject of active consideration. In terms of section 6(4) this exemption does not apply to a request for information relating to the results of any product or environmental testing and information that reveals a serious public safety or environmental risk
- ▶ damages the information holder's position in any legal proceedings or infringes professional privilege;
- ▶ undermines Cabinet records and those of its committees
- ▶ distorts or dramatises records or data of court proceedings before the conclusion of a case.

It should be noted that, in terms of section 6(5) of the Access to Information Act, unless it can be proven otherwise, the information shall be presumed not to be exempt if it has been held for more than 30 years.

Section 14 of the Access to Information Act provides that, if an information holder rejects a request for access to an application, he or she must notify the person requesting the information in writing and must:

- ▶ include the reason for the refusal to provide the information
- ▶ inform the person who requested the availability of review
- ▶ where the decision is because the information does not exist, the notice must state that a thorough and diligent search was done.

In terms of section 18 of the Access to Information Act, any person who receives information must not distort that information. Any person who distorts information commits an offence, the penalty for which is imprisonment.

Section 22 provides that, any person who alters, defaces, blocks, erases, destroys or conceals any information held, to prevent its disclosure, commits an offence; the penalty on conviction is a fine, imprisonment, or both.

Section 19 provides that, any person aggrieved by the decision of an information holder, relating to a request for information, may apply to the head of an institution for review which must be responded to in 30 days. Any person aggrieved by the decision of the head of an institution may appeal the decision to the minister responsible for legal affairs. Note, where the information being requested is under the authority of the minister, the minister ceases to be the appellate and any person may apply to the High Court for review.

In terms of section 23 of the Access to Information Act, a person in the service or employment of any information holder shall not be subject to any legal, administrative or employment-related sanctions for releasing information on wrongdoing such as the commission of a criminal offence, failure to comply with a legal obligation, a miscarriage of justice, corruption, dishonesty or maladministration regarding the information holder, or which discloses a serious threat to health, safety or the environment, so long as the person acted in good faith and the reasonable belief that the information was substantially correct.

Section 20 of the Access to Information Act empowers the minister responsible for legal affairs to make regulations for the carrying out of the provisions of the act.

3.10.2 Whistleblower and Witness Protection Act, Act 20 of 2015

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 them to uncover and publicise information in the public interest.

Tanzania passed the Whistleblower and Witness Protection Act (Whistleblower Act) to promote and facilitate reporting of organised crime, corruption, unethical conduct, abuse of office and illegal and dangerous activities. The Act was also passed to provide for the protection of whistleblowers and witnesses against potential retaliation or victimisation and provide for a legal mechanism to reward and compensate whistleblowers and witnesses.

Making a disclosure

Section 4(1) of the Whistleblower Act provides that any person may make a public interest disclosure, to a competent authority if he or she believes that:

- ▶ a crime has been committed, or is about to be committed
- ▶ another person has not complied with the law or is in the process of or is likely to break a law which imposes an obligation on that person
- ▶ the health or safety of an individual or community is endangered, has been or is likely to be endangered
- ▶ in a public institution, there has been, or there is likely to be waste, misappropriation or mismanagement of public resources or abuse of office
- ▶ the environment has been, is being or is likely to be degraded.

Information exempted from disclosure

Section 6 of the Whistleblowers Act exempts certain information from disclosure, and provides that no person is either required or authorised to furnish any information, answer any question, produce any document or information or render any other assistance likely to prejudice:

- ▶ the interest of the sovereignty and integrity of the United Republic of Tanzania
- ▶ the security of the state
- ▶ friendly relations with a foreign state
- ▶ public order, decency or morality or lead to committing an offence
- ▶ disclosure of proceedings of the Cabinet.

Protection of whistleblowers and witnesses

In terms of section 9 of the Whistleblower Act, whistleblowers must be protected and shall not be subjected to criminal or civil prosecution for disclosure if:

- ▶ the disclosure was made in good faith
- ▶ the whistleblower has reasonable cause to believe that the information disclosed is substantially valid
- ▶ the disclosure is made following the provisions of the Whistleblower Act.

Sections 10 and 11 provide a whistleblower must be protected if as a result of a disclosure made following the Whistleblower Act:

- ▶ he or she may be subjected to dismissal, suspension, harassment, discrimination or intimidation by his employer or members of staff
- ▶ his or her life or property, or the life or property of a person close or interpersonal relationship is endangered or is likely to be endangered.

Section 13 provides that, subject to approval from the minister responsible for legal affairs, in consultation with the minister responsible for law, may reward or compensate a whistleblower or witness for a disclosure.

Offences concerning whistleblowers and witness protection

Section 16 of the Whistleblower Act provides that any competent authority that divulges information relating to the identity of a whistleblower commits an offence, the penalty for which, on conviction, is a fine, imprisonment or both. It should also be noted that any competent authority who fails to take action concerning disclosure and as a result, he or she causes loss to a public institution, commits an offence, the penalty on conviction is a fine, imprisonment or both.

Section 17 of the Whistleblower Act provides that any person who knowingly discloses false information commits an offence, the penalty on conviction is a fine, imprisonment or both. Also, if a whistleblower, or any person to whom disclosure is made, discloses that information to a person against whom the disclosure has been made, commits an offence, the penalty on conviction is a fine, imprisonment or both.

Making regulations

Section 15 of the Whistleblower Act empowers the minister responsible for legal affairs to make regulations for carrying out the provisions of the Whistleblower Act.

4 Regulations affecting the media — Tanzania

In this section, you will learn:

- ▷ definition of regulations
- ▷ regulations governing the media generally
- ▷ regulations governing the print media
- ▷ regulations governing online media
- ▷ regulations governing broadcasters
- ▷ regulations governing broadcasting content
- ▷ regulations governing radio frequency spectrum

4.1 Definition of regulations

Regulations are a type of subordinate legislation. They are legal rules made in terms of a statute. Regulations are a legal mechanism for allowing ministers, or even organisations such as the TCRA, to make legally binding rules governing an industry or sector, without parliament having to pass a specific statute thereon. The empowering law will give the minister or a body such as the TCRA power to make regulations, rules or both, on particular matters within the scope of the functions and powers of that minister or body.

4.2 Regulations governing the media generally

Media Services Regulations regulating the media sector generally in Tanzania were published in Gazette Notice No 18 on 3 February 2017 in terms of the Media Services Act 2016.

4.2.1 Appeals relating to decisions made by the Director of Information Services

In terms of section 26(1) of the Media Services Regulations, any person aggrieved by a decision of the Director of Information Services when exercising the powers specified under Part II, Information Services, of the Media Services Act may appeal to the minister responsible for content within 30 days. Such decisions include decisions on licensing of the print media and the placing of government advertising.

4.2.2 Accreditation of the press

The Media Services Act prohibits any person from practising as a journalist without accreditation from the Journalists Accreditation Board (JAB). In terms of section 17 of the Media Services Regulations, the following people require accreditation as a journalist:

- ▶ editors, reporters, freelancers, correspondents, photographers, news producers and radio and television broadcasters working with media houses
- ▶ foreign journalists
- ▶ students pursuing media, mass communication, journalism or a related field
- ▶ members of the public with outstanding service for the media profession.

It should be noted that to be eligible for accreditation as a journalist, a person must have:

- ▶ a diploma or degree in journalism or media-related studies from a recognised institution offering journalism or such related studies
- ▶ a diploma, degree or higher in media-related studies.

It should be noted, as discussed above, the JAB does not yet appear to be established so, while there is regulation governing the accreditation of journalists, it is unclear exactly who, if anybody, is currently accrediting local journalists in Tanzania.

Foreign journalists are accredited in terms of section 20(b) by the submission of the prescribed form to the JAB.

It should be noted, as discussed above, the JAB does not yet appear to be established, so while there is regulation that governs the accreditation of journalists, foreign journalists are still accredited to operate in Tanzania by the National Film Censorship Board.

In terms of section 21, a press card may be granted to a journalist accredited by the JAB under these regulations.

In terms of section 23 the JAB may cancel an issued press card if it is satisfied that a journalist has violated:

- ▶ the professional code of ethics
- ▶ national laws and policies.

In terms of section 23, a press card is generally valid for two years.

The effect of this provision is that journalists have to apply for re-accreditation repeatedly.

4.2.3 Appeals relating to decisions made by the JAB

In terms of section 26(2) of the Media Services Regulations, any person aggrieved by the decision of the JAB when accrediting or withdrawing accreditation may appeal to the minister responsible for content within 30 days. The appellant is required to state his grievance with the decision and provide any documents necessary to enable the minister to understand and determine the matter.

4.3 Regulations governing the print media

4.3.1 Ownership of Print Media

Media Services Regulations, published in Gazette Notice No 18 on 3 February 2017 per the Media Services Act 2016, provides regulations concerning the media sector in Tanzania.

Section 4 of the Media Services Regulations regulates the ownership of print media houses. Section 4(1) provides that any person who intends to own print media must:

- ▶ in the case of a local company or sole proprietor, whether in an individual capacity or jointly, meet the requirements to own print media
- ▶ in the case where the applicant is a foreigner, have a minimum of 51% local ownership.

In terms of section 4(2) of the Media Services Regulations, a print media licensee must notify the Director of Information Services about any change in the shareholding structures. Companies with a foreign shareholder must obtain authorisation from the Director of Information Services before any change in the shareholding structures in terms of section 4(3). The above changes in shareholding are subject to the relevant fees prescribed in the First Schedule of the Media Services Regulations.

In terms of section 10 of the Media Service Regulations, any applicant or licensee for a print media licence must have a physical address in the United Republic of Tanzania and must provide the particulars of that address to the Director of Information Services. A licensee may change the physical address by submitting the prescribed change of the address form and paying the fees prescribed in the First Schedule to the Director.

Section 11 provides that a print media outlet may change its name, or any other particulars by submitting a prescribed application form, the fees prescribed in the First Schedule and other relevant documents to the Director of Information Services and any other relevant authority.

In terms of section 12 of the Media Services Regulations, print media licensees must pay both an annual fee and a licence renewal fee, prescribed for in the First Schedule to the Information Services Department.

4.3.2 Obligations of Print Media licensees

Section 6 of the Media Services Regulations obliges every print media licensee to deliver two printed and electronic copies of every issue of the print media published at his or her own expense, to the Director of Information Services and the National Archives Department, as well as a copy of every supplement.

Section 14 of the Media Services Regulations states that print media licensees are required to provide and maintain any information that the Director of Information Services requires to carry out his functions as provided for in the Media Services Act. The Director has the right to request periodic reports on statistics, other data and any additional information to assist him or her in enforcing the terms of a licence from any print media licensee.

Should the Director believe that a licensee has breached a term of his or her licence, he or she may issue a summons, warning or recommend further action to relevant bodies.

Section 15 of the Media Services Regulations prohibits a print media licensee from assigning, transferring or disposing of any rights or obligations or in any way alienating a licence or any part thereof unless the licensee applies for a new licence or other changes of particulars.

4.3.3 Print media licensing provisions

In terms of section 5(e) of the Media Services Act, the Director of Information Services is empowered to licence print media. Section 7 of the Media Services Regulations provides that the Director may delegate licensing functions to offices responsible for newspaper registration and licensing under his supervision.

Licence applications

In terms of section 8(1) of the Media Services Regulations, any person who intends to own a print media outlet in Tanzania is required to fill in an application form and accompany the form with:

- ▶ a certificate of incorporation or any other legal registration
- ▶ a business plan containing:
 - ▶ vision

- ▶ mission
 - ▶ policy
 - ▶ place and nature of business
 - ▶ *curriculum vitae* and certified copies of academic certificates and names of editors
- ▶ a dummy copy of the intended media layout
 - ▶ the prescribed fee provided for in the First Schedule of the Media Services Regulations.

In terms of section 8(5), if the Director of Information Services believes that the registration of a print media entity requires a bond, he or she may direct such a bond. The amount of such bonds is specified in the First Schedule of the Media Services regulations.

In terms of section 13 of the Media Services Regulations, the Director of Information Services must issue an invoice to successful licence applicants to pay the initial fees before the licence is granted. Should the applicant fail to pay the initial fee within one month of the issuance of the invoice, the Information Services Department may reject the application. The Director may extend the payment period by one month on the request of the applicant who must show good cause for the extension. The payment period may not be extended a second time.

Print media licence renewal

Section 8(3) of the Media Services Regulations provides that any licence granted under the Media Services Act must be renewed annually. In terms of section 8(4), application for renewals must be made to the Director of Information Services and must include:

- ▶ an application for renewal
- ▶ an annual performance report
- ▶ the prescribed renewal fee.

Print media licence suspension and cancellation

Section 9(b) of the Media Services Act empowers the Director of Information Services to suspend or cancel a licence in the event of failure by a licensee to comply with the conditions of his or her licence.

Section 27 of the Media Services Regulations provides that in performing the above function, the Director may:

- ▶ issue a default notice to the licensee and demand a written defence within a specified time

- ▶ summon the licensee to appear before him and make an oral defence.

On receiving the written or oral defence, the Director must then decide on the matter. Should the licensee fail, or refuse, to provide a defence within the prescribed time, the Director may determine the matter without one.

4.4 Regulations governing online media

The Electronic and Postal Communications (Online Content) Regulations, 2020 (Online Content Regulations), published in Gazette No 29 Vol 101 of the 17th July 2020, regulates online content creators and distributors in Tanzania under section 103, Electronic and Postal Communications Act.

4.4.1 Online content Licences

Section 4 of the Online Content Regulations make it an offence for any person to provide online content without a licence issued by the TCRA. The penalty for this offence is a fine, imprisonment or both.

In terms of section 5 of the Online Content Regulations, there are four types of licences available for online content provision in Tanzania. These include:

- ▶ a licence for the provision of predominantly news and current affairs issued to an online content service provider whose content covers news, events and current affairs
- ▶ a licence for the provision of predominantly entertainment content issued to an online content service provider whose content covers music, films, series, plays, drama, comedy, sports and any other related entertainment
- ▶ a licence for the provision of predominantly education and religious content issued to an online content service provider whose content covers religious information and content that aims to educate
- ▶ a simulcasting licence issued to a mainstream broadcasting licensee with national coverage rights.

An application for an online content licence in terms of section 6 must be made to the TCRA in the prescribed form found in the First Schedule of the Online Content Regulations and the payment of the fees prescribed in the Second Schedule. It must be accompanied by the relevant documents determined by the TCRA. A licence is valid for three years. Section 7 provides that the TCRA can either issue a licence or refuse the application request. Reasons must be provided in the event of a refusal.

Section 8 of the Online Content Regulations provides that the TCRA may suspend or revoke an online content licence should it be satisfied that the licensee has contravened the terms and conditions of the licence and must inform the licensee in writing. When an online content licence has been revoked, the licensee must surrender the licence to the TCRA within seven days.

4.4.2 Obligations of online content licensees

In terms of section 9 of the Online Content Regulations, online content licensees are obliged to comply with the terms and conditions of his or her licence and must observe the following:

- ▶ ensure that online content is safe, secure and does not contravene the provisions of any written law
- ▶ consider trends and cultural sensitivities of the general public
- ▶ establish policies or guidelines on the safe use of online content and make it available to online content users
- ▶ use moderating tools to filter prohibited content
- ▶ have mechanisms in place to identify the source of content
- ▶ take corrective measures for objectionable or prohibited content
- ▶ ensure that prohibited content, as set out in the Third Schedule to the Online Content Regulations, is removed immediately on this being ordered by the TCRA. The schedule on prohibited content is detailed and covers the following topics:
 - ▶ sexuality and decency
 - ▶ personal privacy and respect for human dignity
 - ▶ public security, violence and national safety
 - ▶ criminal activities and illegal trade activities
 - ▶ health and public safety
 - ▶ protection of intellectual property rights
 - ▶ respect for religion and personal beliefs
 - ▶ public information that may cause public havoc and disorder
 - ▶ use of bad language and disparaging words
 - ▶ false, untrue or misleading content
- ▶ be responsible and accountable for the information he or she publishes
- ▶ use passwords to protect any user equipment, access equipment or hardware to prevent unauthorised access or use by unintended persons
- ▶ pay regulatory fees
- ▶ not access, store, keep, publish, circulate or broadcast prohibited content
- ▶ cooperate with law enforcement officers in pursuing functions under these regulations.

It should be noted that mainstream content service providers with district or regional content service licenses are prohibited from simulcasting their content using an online platform.

4.4.3 Obligations of online content licensees

In terms of section 12 of the Online Content Regulations, online content licensees whose licence is specifically for online news and current affairs must:

- ▶ adhere to journalism ethics, professionalism and local content requirements
- ▶ submit proof of staff academic qualifications and human resource development plans to the regulator
- ▶ adhere to ownership and corporate obligations provided under the Electronic and Postal Communications Act.

4.4.4 Penalties for online content

In terms of section 21 of the Online Content Regulations, any person who contravenes the provisions of the Online Content Regulations commits an offence and shall, on conviction and where no specific punishment has been provided, be liable to a fine, imprisonment or both.

Where a licensee commits a breach under the Online Content Regulations, the TCRA may subject the licensee to the content committee who may take one or more of the following actions:

- ▶ issue a warning
- ▶ require the licensee to issue an apology to the public, and the victim of the content complained about
- ▶ order removal of the content
- ▶ impose a fine under the Electronic and Postal Communications Act.

4.5 Regulations governing broadcasters

4.5.1 Broadcasting licence provisions

Guidelines and procedures for licensing electronic and postal communications in Tanzania, 2005

The TCRA has made the Guidelines and Procedures for Licensing Electronic and Postal Communications in Tanzania under the Tanzania Communications Regulatory Authority Act, Act No 12 of 2003 (Licensing Guidelines) which sets out various categories of licences.

In terms of section 2.1(iv), a content service licence authorises the provision of

services such as satellite broadcasting, broadcasting terrestrial free-to-air TV, terrestrial radio broadcasting and other electronic media.

In terms of section 2.2(iii) of the Licensing Guidelines, a person granted a Radio Communications and Frequency Spectrum User Licence is authorised to use radio frequency spectrum and own a radio communication station.

Electronic And Postal Communications (Licence Procedures) Rules, 2014

Electronic and Postal Communications (Licence Procedures) Rules, 2014, were published in Gazette No 43 on the 24th October 2014, under the Electronic and Postal Communications Act, 2003. The Licence Procedures regulate the process of applying for a content services licence, other than a Community Content Service Licence.

In terms of section 4 of the Licence Procedures, the TCRA must invite applications for Content Services Licences which require spectrum and the TCRA must announce the invitation for tender. The TCRA must convene an evaluation team to evaluate all tenders submitted and must notify the bidders on the outcome of the tender evaluation in writing, section 5.

Section 6 of the Licence Procedures provides that the TCRA must publish a notice about the bidders in a widely-circulated newspaper, inviting written comments from the public. In terms of section 7, after the publication of the public notice, an applicant will be notified and invited to make a presentation before the TCRA of his or her business plan. In terms of section 8, the names of all qualified applicants must be submitted to the management for approval. The TCRA must then notify successful bidders.

4.6 Regulations governing broadcasting content

4.6.1 Electronic and Postal Communications (Radio and Television Broadcasting Content) Regulations, 2018

Broadcasting content is regulated by the Electronic and Postal Communications (Radio and Television Broadcasting Content) Regulations, 2018 published Government Gazette No 134 on 16th March 2018 (the Content Regulations). The sheer number of content-related restrictions is too large to itemise here. Suffice it to say that there are dozens of specific content-related restrictions provided for in the Content Regulations which fall into the following broad categories:

- ▶ Restrictions dependant on the nature of the content service that is public, commercial, community or subscription broadcasting services.
- ▶ General programme content requirements applicable to all content service licensees. These include:
 - ▶ prohibitions on:

- › discriminatory content and hate speech based on gender, race, disability and the like
- › content affecting individuals such as intrusions on privacy and defamatory content
- › obscenity, indecency or both
- › blasphemy
- › subliminal messaging
- › false content
- › violent content
- › content unsuitable for children
- › content that encourages the commission of a crime
- › identities of victims of sexual offences
- ▶ positive content requirements:
 - ▶ national identity
 - ▶ local content:
 - › 60% of content broadcast on free-to-air services must be local
 - › 80% of music broadcast on public or commercial content services must be local
 - › 10% of local content must be independently produced
 - ▶ sign language, audio and visual content, particularly regarding news for people with disabilities
 - ▶ educational content, 2% of programming for free-to-air service providers
 - ▶ events of national interest, including sporting and political events. Note that subscription services may not have exclusive rights to events of national interest.
 - ▶ names of programme producers
 - ▶ programme classifications
 - ▶ hourly station identification
 - ▶ electronic programme guide
 - ▶ must carry rules requiring subscription broadcasters to broadcast the programming of public broadcasting services
- ▶ restrictions, requirements or both on specific types of content:
 - ▶ broadcast outside the watershed period that is, between 22h00 to 05h30
 - ▶ children's content

- ▶ news, current affairs, judicial and parliament proceedings, election-related, advertising and infomercials, expressions of personal opinions, controversial issues of public importance, interviews, investigative reporting, live programming
- ▶ languages other than English or Kiswahili
- ▶ requiring programme schedules to be published a month in advance in a newspaper or on the content service's website
- ▶ public emergency-related.

In terms of section 45 of the Radio and Television Broadcasting Content Regulations, content service licensees who contravene any provision of the Content Regulations commit an offence and, where no penalty is expressly provided, shall, on conviction, pay a fine.

Section 48 of the Content Regulations deals with the complaints procedures concerning content.

4.6.2 The Political Party Elections Broadcasts Code, 2020

Broadcasting content related to elections in Tanzania, while briefly covered in the Radio and Television Broadcasting Content Regulations, are regulated in greater detail in the Political Party Elections Broadcasts Code, 2020 (Elections Code), published in Government Notice No 774 on the 18th September 2020, and made under section 15 of the Tanzania Communications Regulatory Authority Act.

The Elections Code applies to electronic media, including broadcast and online media. In many instances, the Elections Code repeats content-related restrictions which have been dealt with above. Requirements not previously dealt with include:

- ▶ News coverage of elections
- ▶ How candidates are to be represented
- ▶ Election results
- ▶ Political debates, including public participation
- ▶ Election broadcast slots
- ▶ Treatment of opinion polls, including a prohibition on broadcasting these within 30 days before polling day
- ▶ Content prohibited from being broadcast until after polls have closed on polling day:
 - ▶ discussion and analysis of election and referendum issues
 - ▶ the result, or purported result, of the voting in a constituency before the close of all the polling stations in that constituency

- ▶ the results of any opinion poll
- ▶ any political advertisements, political broadcasts or any other election programming produced by, or on behalf of a candidate, political party or other person or entity
- ▶ the results of previous polls
- ▶ exit polls
- ▶ Accuracy of reporting on election results and duty to inform the public of these as they become available
- ▶ Political advertisements
- ▶ Political party broadcasts
- ▶ Sales of airtime.

In terms of section 20 of the Elections Broadcasts Code, complaints must be submitted to content service licensees within 48 hours of the airing the material. Where a complainant is not satisfied with the decision of a content service licensee, he or she can lodge the complaint with the content committee of the TCRA within 48 hours of the decision.

In terms of section 22 of the Elections Broadcasts Code, a political party or candidate aggrieved by the decision of the TCRA may appeal against the decision of TCRA to the Fair Competition Tribunal under the provisions of section 45 of the Tanzania Communications Regulatory Authority Act.

4.7 Regulations governing radio frequency spectrum

Radio Frequency spectrum is regulated under the Electronic and Postal Communications Act by the Electronic and Postal Communications (Radio Communications and Frequency Spectrum) Regulations, 2011 (Radio Regulations) published in Gazette No 424 on the 9th December 2011.

No person may use radio frequency spectrum without a valid licence granted by the Tanzania Communications Regulatory Authority (TCRA). Licensed radio frequency spectrum may not be leased or transferred to a third party.

Section 40 of the Radio Communications and Frequency Spectrum Regulations makes it an offence for any person to contravene a provision of the regulations. The penalty on conviction is a fine, imprisonment or both.

5 Media self-regulation — Tanzania

In this section, you will learn:

- ▷ self-regulatory bodies
- ▷ the Media Council of Tanzania
- ▷ guidelines for media owners and publishers
- ▷ code of ethics for media managers and editors
- ▷ key provisions of the MCT codes of ethics common to all media practitioners
- ▷ media gender code of ethics

5.1 Self-regulatory bodies

There are ostensibly two self-regulatory bodies in Tanzania. The first is the Independent Media Council (IMC) which is a statutory body established by the Media Services Act, Act 12 of 2016 (and dealt with above). The second is the Media Council of Tanzania (MCT) which is a voluntary body. It should be noted that the IMC is yet to be established by the minister and so this section focuses solely on the MCT.

5.2 The Media Council of Tanzania

The MCT, a self-regulatory body, was established in 1995 and developed a Code of Ethics for Media Professionals and a Professional Code for Journalists, which was updated in 2016 and is enforced by the MCT.

The MCT has developed various codes of ethics for the different stakeholders in the media; these include codes of ethics for:

- ▶ media owners and publishers
- ▶ media managers and editors
- ▶ broadcasters
- ▶ press photographers, video producers and producers
- ▶ reporters.

Many of the provisions in the various codes of ethics are common to broadcasters, press photographers, video producers, producers and reporters. These provisions are combined under a single heading relating to media practitioners.

5.3 Guidelines for media owners and publishers

The code of ethics provides that media owners and publishers should:

- ▶ employ managers on professional merit only
- ▶ state the purpose for which the organ was established
- ▶ as a rule, not interfere with the decisions of managers in recruitment, management and disciplinary matters
- ▶ clearly state professional and non-professional interests and ambitions concerning the investment and the media organ
- ▶ allow mechanisms that monitor and respond to public opinion and concern concerning the media output and service to be established
- ▶ avoid sell-out attitudes, such as summoning the manager before a disgruntled party for redress
- ▶ carefully consider gifts and offers that may compromise the policy, objectives and integrity of the enterprise
- ▶ suggest any feelings concerning specific issues to the manager without coercion or intimidation.

5.4 Code of ethics for media managers and editors:

The code of ethics provides that media managers and editors should:

- ▶ ensure that all workers understand the organisation's objectives and how best to achieve them
- ▶ motivate personnel and plan incentives for job satisfaction
- ▶ remunerate all work done by employees fairly
- ▶ ensure that all employees are allowed to enhance their professional competence by further training
- ▶ ensure that libel is avoided and that the honour of a person is respected
- ▶ ensure that media output is distinguishable between fact and commentary that only proven and accurate stories are published and that rumours are discouraged
- ▶ ensure that information published does not incite discrimination, sexism, racism or violence

- ▶ ensure that all points of view are exposed by seeking out the main parties to a story. When a party refuses to cooperate, the organ should say so
- ▶ inform all editorial staff of important decisions that may influence the life of the enterprise
- ▶ ensure that the organ reports the outcome of an action for defamation to which it has been a party fairly and accurately
- ▶ ensure that in times of grief or shock, enquiries are made with sympathy and editing is carried out with discretion so that the concerned parties are not made to relive their agony
- ▶ ensure that children and minors are not identified in any sexual or other criminal offence
- ▶ ensure that material that would identify victims of sexual assault is not published
- ▶ ensure that derogatory references to a person's creed or racial origin are not published
- ▶ ensure that neither themselves nor anyone else takes gifts or bribes in cash or kind
- ▶ examine offers, sponsorships and attractive contracts and agreements to ensure that they have no attachments that would compromise the organisation
- ▶ not suppress useful information for any reason other than the public interest
- ▶ not entertain favouritism and greed
- ▶ ensure that the public is provided with unbiased, accurate, balanced and comprehensive information and news
- ▶ avoid violations of individual privacy and human dignity, unless necessitated by the public interest
- ▶ not use material without giving due credit to the source
- ▶ not open any underprivileged person or community to ridicule
- ▶ not, as a rule, disclose sources of information given in confidence.

5.5 Key provisions of the MCT codes of ethics common to all media practitioners

The provisions of these codes include:

5.5.1 Truth and accuracy

Seek to keep the good faith of readers by assuring them that the news is accurate, unbiased and that all sides are presented fairly. Always provide a truthful and comprehensive account of events fairly and honestly. Find the subjects of news stories and allegations and allow them to respond as a matter of right. Distinguish clearly between comment, conjecture and fact. Where a significant inaccuracy, misleading or distorted statement is published, it must be corrected promptly with due prominence and, where appropriate, an apology.

5.5.2 Right of reply

Give any individual or organisation which the newspaper or broadcasting organisation itself attacks editorially a fair opportunity to reply.

5.5.3 Privacy

Publication or broadcast of information, including pictures, about the private lives or concerns of individuals without consent, is acceptable only if a serious, legitimate public interest or where the material concerned ought to be published in the public interest, outweighs the normal human right of privacy.

Entry into public life does not disqualify individuals from the right to privacy about their private affairs, except where the circumstances of these are likely to affect their performance of, or fitness for, the public roles they hold or seek.

The overriding public interest relied on in this, and other clauses of the codes include:

- ▶ detection and exposure of crime
- ▶ protection of public health and safety
- ▶ preventing the public from being seriously misled on an important matter by a public statement or action of an individual or institution.

5.5.4 Harassment and pursuit

Avoid undercover and surreptitious methods to obtain information from sources, except where conventional means have failed, and the information is of great public interest. When used, it must be explained as part of the story. Avoid seeking interviews, information or pictures by intimidation, harassment or persistent pursuit. Do not invade an individual's privacy by deception, eavesdropping or covert technological means, unless the material sought to be published is in the public interest and could not be obtained in any other way.

5.5.5 Discrimination

Avoid discriminatory and derogatory stereotyping information or depiction by race, creed, gender, ethnicity, age, disability, geography, physical endowment or

social status. Avoid comics and jokes about physical or mental disability and real-life tragedy, which might be painful. Be extra careful when making jokes based on race, religion, sex or age and, as a rule, use gender-sensitive language. Avoid identifying people by ethnicity or colour and be sensitive to the rights and dignities of the disabled. Avoid bringing someone's sexuality into the open.

5.5.6 Children

Avoid interviewing or photographing a child under the age of 18 in the absence of, or without the consent of, a parent or other adult responsible for the child, such as a teacher.

Publication of material about a child's private life without consent cannot be justified solely by the fame, notoriety or position of his or her parents. Reports of proceedings in youth courts should leave out the names and addresses of children. Explicit sexual conduct between adults and children should not be depicted.

5.5.7 Victims in sexual cases

Avoid identifying victims of sexual assaults. Avoid identifying children under the age of 18 as victims or witnesses in sexual assault cases. Reports of cases alleging sexual offences against a child may identify an adult concerned but must avoid identifying the child.

5.5.8 Sexual relations and conduct

Avoid depictions of nudity and explicit sex.

5.5.9 Crime

Avoid glamourising crime and antisocial behaviour involving violence; issue warnings whenever a factual scene includes violence.

5.5.10 Innocent relations

Avoid implicating families of criminals in wrongdoing or guilt by association. Avoid identifying relatives of criminals unless the connection is directly relevant to the matter being reported.

5.5.11 Religion

Avoid casual use of words considered holy by believers. Journalists and broadcasters should approach and refer to religious bodies in a balanced, fair and dignified manner.

5.5.12 Grief and bereavement

Respect personal grief, taking care to make any necessary approaches and inquiries with sensitivity and discretion. When covering disasters and tragic events, care must be taken not to add to the distress of people who are already bereaved,

including pressurising them for interviews. Treat the dead with respect; close-ups should be avoided.

5.5.13 Advertising

Advertisements should not promote social disharmony. Advertisements and sponsored material must be distinguishable from general editorial and programming matter, where necessary by being clearly labelled in print or on-air as 'advertisement' or 'advertising feature'.

5.5.14 Personal interest and influence

Resist undue influence from outside sources, including owners, advertisers, story subjects, powerful individuals and interest groups. Journalists should not allow personal or family interests to influence their professional duties. Journalists must not be influenced by any consideration, gift or advantage offered to them, or by advertising or other commercial considerations. Journalists should not belong to any organisation whose activities they cover.

5.5.15 Confidential sources

Never, as a rule, disclose sources of information given in confidence unless required to do so by a legal process. All media journalists have a moral obligation to protect confidential sources of information and to respect confidences knowingly and willingly accepted.

5.5.16 Withholding information

Never suppress useful information unless it is in the public interest. The government may ask you to withhold publication of a story until it has been investigated and acted on.

Exercise caution but do not hold stories back that protect the government as opposed to the country.

5.5.17 Deceitful identification

A journalist should never falsely identify him or herself to gain access to persons or places and then write stories on the experience.

5.5.18 Freedom of the press

Defend the freedom of the media at all costs. Freedom belongs to all, and journalists must make sure that public business is conducted in public. Journalists must be vigilant against those who exploit the press for their purposes.

5.5.19 Online content and materials

When handling online content, media managers and editors must verify its context and validity, even when a broadcasting content licensee has verified it.

When traditional media outlets use online content, full identification of the author should be indicated in the story.

Traditional media outlets should give full acknowledgement for all online content used.

When used in traditional media, all online content should be bound by industry laws and regulations guiding the media outlet.

Media managers and editors should take full responsibility for the consequences resulting from online content used by their outlets.

5.6 Media gender code of ethics

The Gender Code of Ethics governs the conduct and practice of all media practitioners, media owners, publishers and media institutions that are members of the MCT and should be read in conjunction with the Media Council of Tanzania Professional Code of Ethics for Journalists.

5.6.1 Accuracy and fairness

Media houses must always give fair and equal space to men and women in their reporting.

Broadcasters shall increase the number of programmes on gender-specific topics as well as those that challenge gender stereotypes.

In their coverage of politics, economic issues or war, members must ensure that women's voices and views are heard.

Media houses must put training programmes in place to improve the knowledge of current and emerging gender issues and its various manifestations in their practitioners.

Media practitioners must be encouraged to probe and research gender issues continually to keep themselves abreast of current debates on the subject.

5.6.2 Balance, credibility and impartiality

Media houses shall take proactive steps to seek out the views of both women and men equally, regardless of their social standing.

Media practitioners shall always strive to be impartial and avoid publicity associating themselves with partisan statements or organisations.

Members shall increase programmes on gender-specific topics and encourage more women to become involved in the production of such programmes.

MCT recognises that women are not a homogenous group. Media houses will be encouraged to give inclusive coverage of all women that goes beyond differences

of class, social standing and whether they are from rural or urban areas.

5.6.3 Accountability

Journalists must hold all policymakers accountable for ensuring gender equality in their areas of work following national, regional and international commitments.

The MCT must use its mandate as a self-regulatory council for media to collaborate with media training institutions to ensure that gender is mainstreamed in their curricula.

5.6.4 Gender stereotyping

Media houses must desist from reporting stories that advocate hatred or incite violence based on gender, which could constitute an incitement to cause harm. Media houses shall, therefore, be required to refrain from:

- ▶ promoting pornography and violence against women and children
- ▶ depicting women as helpless or deserving victims of violence and abuse, unless the violence is integral to the story
- ▶ degrading or exploiting women as helpless victims of violence and abuse
- ▶ degrading or exploiting women and undermining their positive role and position in society
- ▶ reinforcing gender oppression and stereotypes
- ▶ publishing stories that might incite violence and hatred based on gender and broadcasting or publish material that glamourises violence against women.

The media has a mandate to report on all issues as thoroughly and accurately as possible. However, in pursuit of this goal, media houses shall be required to balance harm and discomfort with alternatives that maximise the goal of telling the truth.

Broadcasters shall not broadcast material, which judged in context, contains a scene or scenes, simulated or real, of any of the following:

- ▶ a person who is, or is depicted as being, under the age of 18 years, participating in sexual conduct or a lewd display of nudity
- ▶ explicit violent sexual conduct
- ▶ bestiality
- ▶ explicit sexual conduct which degrades a person in the sense that it advocates a particular form of hatred based on gender and which constitutes incitement to cause harm.

5.6.5 Language

Media houses shall prohibit the use of sexist language in their coverage.

Media practitioners shall respect the dignity of women and desist from making derogatory and discriminatory references to people based on gender.

When editing and selecting facts, headlines, news highlights, pictures, audio and graphics, media houses shall not oversimplify and report gender issues out of context.

5.6.6 Marketing and advertising

Media houses should ensure that consistent standards are applied between advertising and editorial content.

Gender stereotyping or negative gender portrayal should not be permitted in advertising.

5.6.7 Gender and sensitivity in the workplace

Media houses are encouraged to incorporate gender balance in their recruitment and selection policies to ensure equitable representation of women at all levels of decision making.

Media houses are encouraged to ensure that their employees have access to training and inclusive mentoring programmes for both female and male staff, with particular attention to female staff.

Media houses should be encouraged to adopt policies that discourage sexual harassment.

Media houses should put in place career path-planning, capacity-building, fast-tracking and promotion policies to ensure that both female and male employees have equal opportunities to specialise in reporting any beat in the newsroom.

6 Case law and the media — Tanzania

In this section, you will learn about:

- ▷ The definition of common law
- ▷ The right to freedom of expression

6.1 Definition of common law

The common law is judge-made. It is made up of judgments handed down in cases adjudicated on disputes brought by people, whether natural (individuals) or juristic (for example, companies or government departments). In common law legal systems such as in Tanzania, 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 in an incremental, case-by-case basis.

In this section, we focus on a case that is not a case from the Tanzania court system but is a judgment from an international, regional court, namely the East African Court of Justice. We include it because, although its decisions are not binding, in Tanzania, its decisions have strong persuasive value and because of the importance of the pronouncements regarding the restrictions on freedom of expression. It is noteworthy that the case was brought by, among others, the self-regulatory Media Council of Tanzania.

6.2 The right to freedom of expression

The right to freedom of expression is protected under the Constitution of Tanzania in terms of article 18. However in the case of the *Media Council of Tanzania and Others v the Attorney General of the United Republic of Tanzania [Case No 2/2017]*⁸ in the East African Court of Justice, which was decided on 28th March 2019, the MCT, the Legal Human Rights Centre and the Tanzania Human Rights and Defenders Coalition challenged the Media Services Act, Act 12 of 2016. The human rights groups argued that the Media Services Act placed an unjustified restriction on the right to freedom of expression provided for in the African Charter on Human and Peoples' Rights which Tanzania has committed to abide by in the Treaty for the Establishment of the East African Community.

The MCT argued that there were numerous aspects of the Media Services Act which violated the rights to freedom of expression, including:

- ▶ the restriction, without reasonable justification, on the types of news or content the media could distribute
- ▶ the introduction of mandatory accreditation for journalists and the power to withdraw accreditation by the Journalist's Accreditation Board
- ▶ the criminalisation of defamation, false news and seditious statements
- ▶ the conferring of absolute authority to the minister to prohibit the importation of publications and sanction media content.

The Attorney General argued that the criminal offences and the powers given to the minister did not violate freedom of expression, given that the right to freedom of expression is not absolute. Additionally, the Attorney General argued that the accreditation requirements placed on journalists provide obligations under which media houses must conduct themselves and serves as an oversight mechanism for

the journalism profession. It should be noted that the Attorney General argued the Media Services Act was justifiable in that it sought to give effect to the protection of the right of freedom of expression provided for in article 18 of the Tanzanian Constitution.

In making its judgment, the court found that the following sections of the Media Services Act violate the Treaty for the Establishment of the East African Community:

- ▶ many sub-sections of section 7(3), relating to content obligations placed on media houses
- ▶ section 19, relating to the accreditation of journalists
- ▶ section 20, relating to press cards
- ▶ section 21, relating to the journalists roll
- ▶ section 35, relating to defamation
- ▶ section 36, relating to defamation in the print media
- ▶ section 37, relating to the definition of unlawful publication
- ▶ section 38, relating to absolute privilege
- ▶ section 39, relating to conditional privilege
- ▶ section 40, relating to offers of amendment for defamation
- ▶ section 50, relating to offences concerning media services
- ▶ section 52, relating to seditious intention
- ▶ section 53, relating to seditious offences
- ▶ section 54, relating to publications likely to cause fear and alarm
- ▶ section 58, relating to the powers to prohibit the importation of publications
- ▶ section 59, relating to offences concerning publications.

It should be noted that the court found that both sections 13 and 14 of the Media Services Act, relating to the powers and functions of the Journalists Accreditation Board, were following the Treaty for the Establishment of the East African Community.

Although the East African Court does not have jurisdiction in Tanzania, and this judgment cannot be used to void any of the provisions of the Media Services Act, the judgment is important. The decision of the court places pressure on the Tanzanian Government to repeal or amend those provisions that have been declared in contravention of the Treaty for the Establishment of the East African Community to meet the requirements of the international treaties they have promised to uphold.

7 The media and the constitution — Zanzibar

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
- ▷ how rights are enforced under the constitution
- ▷ the ‘three branches of government’ and ‘separation of powers’
- ▷ weaknesses in the constitution that ought to be strengthened to protect the media

7.1 Definition of a constitution

A constitution is a set of rules that are foundational to the country, institution or organisation to which they relate. For example, you can have a constitution for a soccer club or a professional association, such as a press council.

Such constitutions set out the rules by which members of the organisation agree to operate. However, constitutions can also govern much larger entities, indeed, entire nations.

The Constitution of Zanzibar, 1984, sets out Zanzibar’s founding values and principles in its preamble and other provisions. For the media, the following values and principles on which Zanzibar is said to be founded are particularly important and are summarised below. It is important to note that many provisions of the Tanzania Constitution have been adopted by Zanzibar, albeit with different numbering.

From the preamble:

freedom, justice, fraternity and concord ... can only be realised in a democratic society in which the Executive is accountable to a House of Representatives composed of elected members and representatives of the people and also a judiciary which is independent and dispenses justice without fear or favour thereby ensuring that all human rights are preserved and protected and that the duties of every person are faithfully discharged.

- ▶ **Article 8, Fundamental Objectives of the Government:** Article 8 provides that it is the duty and responsibility of government, all its organs and all persons or authorities exercising executive, legislative or judicial functions, to observe the principles of independence, justice and peace.
- ▶ **Article 9, The Government of the People:** Article 9(1) provides that Zanzibar is a state that adheres to the principles of democracy and social justice and accordingly Article 9(2) provides that:
 - ▶ sovereignty resides in the people
 - ▶ the primary objective of the government shall be the welfare of the people
 - ▶ the government shall be accountable to the people
 - ▶ the people shall participate in the affairs of government in accordance with the constitution.
- ▶ **Article 10, Objectives of the Constitution:** Article 10 provides that the objectives of the Government of Zanzibar are to promote unity, development and social welfare of the people of the Zanzibar and it is the Revolutionary Government of Zanzibar's duty to ensure:
 - ▶ all citizens have an equal opportunity to exercise:
 - › freedom of movement
 - › the rendering of services to all
 - › the right to live anywhere in Zanzibar
 - ▶ the eradication of corruption and abuse of office against the public by a person holding public office
 - ▶ the national economy is managed and controlled in accordance with the principles and objectives laid down in the Constitution of Zanzibar
 - ▶ that, in accordance with the constitution, the economy is planned and promoted in a balanced and integrated manner, economic activities are not conducted in a manner capable of resulting in the concentration of wealth and major means of production in the hands of a few individuals or particular groups
 - ▶ that in the implementation of the policy:

- › every citizen is treated equally in terms of justice
- › every citizen is accorded equal responsibility and opportunity in accordance with the law
- › human dignity and other human rights are respected and cherished
- › freedom, absence of favouritism, the impartiality of the judiciary and opportunity of access to courts of law is guaranteed and respected
- ▶ that policy is directed to ensure every person has access to:
 - › adequate health care
 - › equal opportunity to adequate education
 - › equal opportunity to work
- ▶ that the elderly, sick, children and the disabled are assisted in earning a living
- ▶ that all posts in public offices are for the benefit of the public and those who have responsibilities of public office are directly accountable to the public or the House of Representatives
- ▶ that all government organs adhere to the international treaties on human rights and good governance.

It is important to note that articles 8, 9 and 10 are in Chapter Two of the Constitution of Zanzibar, headed Fundamental Objectives and Directive Principles of the Revolutionary Government of Zanzibar. Article 10A of the constitution specifically provides that the provisions of that chapter shall not be enforced by any court. All courts in the country shall have no power to decide any matter either to do or not to be done by any person or authority or law or any judgment which is in accordance with the provisions of that chapter. The effect of this is that no one can be held to account for failure to comply with the founding principles enunciated in Chapter Two.

7.2 Definition of constitutional supremacy

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

The Constitution of Zanzibar makes provisions for constitutional supremacy in article 4. Article 4 provides that the Constitution of Zanzibar shall have the force of law throughout Zanzibar and, if any legislation is found to conflict with the constitution, the constitution shall prevail. That law shall be null and void to the extent that it conflicts with the constitution.

7.3 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 Constitution of Zanzibar makes provision for two types of legal limitations on the exercise and protection of rights contained in Chapter Three, Protection of Fundamental Rights and Individual Freedom, namely, general limitations and internal limitations.

7.3.1 General limitations

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

One can find the general limitations clause applicable to Chapter Three, Protection of Fundamental Rights and Individual Freedom, in article 24 of the Constitution of Zanzibar, headed Limitations to the Rights and Freedoms and Safeguard to the Rights and Obligations.

Article 24(1) of the Constitution of Zanzibar, provides that the human rights and freedoms set out in the constitution, shall not be exercised by a person in a manner that causes interference with, or curtailment of, the rights and freedoms of other persons, and can be limited by the law enacted by the House of Representatives if that limitation is necessary and agreeable in the democratic system. It should be noted that such limitations may not include:

- ▶ a limitation on the right not to be tortured inhumanely punished or humiliated
- ▶ a limitation of the foundation of the right in question.

Additionally, limitations may not bring about more harm to society than is already present.

It should be noted that article 24(2) provides that any person who alleges that any provisions of this part of Chapter Three, or in any law concerning his right or duty owed to him has been, is being or is likely to be violated by any person anywhere in Zanzibar, may institute proceedings for redress in the High Court. The High Court has the power to declare and order compensation to any concerned person.

Article 25(2) provides that the provisions of Chapter Three are intended to enable the preservation of the said rights and freedoms in accordance with prescribed

limitations in respect of those rights and freedoms as provided for in the relevant articles to ensure that the enjoyment of those rights and the individual freedoms does not infringe on the rights and freedoms of others or the national interest in general.

The general limitations clause is extremely problematic because of the very wide grounds on which rights can be limited and, more problematically, because there are no requirements such as proportionality, justifiability, reasonableness or least restrictive means. This means that, once a ground of justification has been provided, basic rights can be limited. However, as mentioned above, article 24(2) does provide a measure of recourse via the High Court.

The effect of this is that, in many instances, rights can be limited very easily. All too often legislation will, in effect, trump basic rights, despite the provisions of the supremacy clause of the constitution.

7.3.2 Internal limitations

The Constitution of Zanzibar also has several so-called internal limitations. These are limitations to specific rights and are dealt with below concerning the particular rights to which they apply.

7.4 Constitutional provisions that protect the media

The Constitution of Zanzibar contains several important provisions in Chapter Three, Protection of Fundamental Rights and Individual Freedom, which directly protect the media, including publishers, broadcasters, journalists, editors and producers.

There are also provisions elsewhere in the constitution that assist the media as it goes about its work of reporting on issues in the public interest. These are included in this section.

7.4.1 Freedom of expression

The most important section that protects the media is article 18, which sets out several detailed and important provisions protecting freedom of expression. Article 18 provides that:

Every person:

- ▶ has freedom of opinion and expression of his ideas
- ▶ has the right to seek, receive, disseminate or both, information, regardless of national boundaries
- ▶ has the freedom to communicate and protection from interference with his or her communication
- ▶ has a right to be informed of various important events of life and activities of

the people and also of issues of importance to society at all times.

These provisions need some explanation.

The rights and freedoms apply to every person and not just to certain people, such as citizens. Hence, every person, everybody, enjoys these rights and freedoms.

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

The right in article 18 specifically enshrines the freedom 'to seek, receive and, or disseminate information regardless of national boundaries'. This right of everyone to receive information is a fundamental aspect of freedom of expression, and this article enshrines the right to the free flow of information. Thus, the information rights of media audiences, for example, are protected. This right is important because it also protects organisations which foster media development. These organisations facilitate public access to different sources and types of information, particularly in rural areas that traditionally have little access to the media.

Note, however, that nowhere in this article is freedom of the media, the press or both, specifically mentioned, although it is implied in the right to freedom of expression.

7.4.2 Freedom of association

Article 20(1), grants every person the freedom to assemble, associate and cooperate with other persons freely and peacefully and also to express views publicly, form and join associations or organisations formed for purposes of preserving or furthering his beliefs or interests or any other interests.

The right provides protection for journalists to form organisations, including trade unions. It also provides protection of people to create media houses and for media houses to form self-regulatory bodies, press associations and the like. An interesting aspect of this right is that it includes the right to express views publicly, supporting the right to freedom of expression.

It is important to note that article 20 is a right which is subject to an internal limitation which provides that legislation that limits the right in section 20(1) is nonetheless lawful if it deals with:

- ▶ the defence and security of citizens, health aspects and those of society
- ▶ the preservation of rights and freedoms of other persons
- ▶ government officials, military personnel or any other persons appointed of their free will.

7.4.3 Privacy and personal security

Article 15(1), headed Right to Privacy and Personal Security specifies that every

person 'is entitled to respect and protection of his person, the privacy of his own person, his family and of his matrimonial life, and respect and protection of his residence and private communications.'

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

Note further that this right is subject to an internal limitation provided in article 15(2) which provides that the state must lay down procedures and circumstances under which this right may be encroached on. This is, of course, so broadly framed that the right is can be limited by almost any legislation, which undermines the nominal supremacy of the constitution.

7.4.4 Freedom to participate in public affairs

A fairly uncommon right is provided for in article 21(2) of the Zanzibar Constitution. This article provides that every citizen has the right and the freedom to participate fully in the process leading to the decision on matters affecting him or her, his or her wellbeing and the nation. This requires some discussion.

First, this is a right that is available only to citizens. Second, the right is a right to participation. This is important because it provides for a right to be heard on critical matters. Furthermore, it can be argued that participation is meaningful when it is informed. Taken together, these indicate that citizens have a right to be informed about important issues and to be heard thereon. Such rights are meaningless without a free press, which is essential for providing information to the citizenry. Consequently, this right is one which supports the need for a free press.

7.4.5 Provisions regarding the functioning of parliament

There are provisions of the Constitution of Zanzibar, apart from the rights discussed above, which are important and which assist the media in performing its functions. Article 86 of the Zanzibar Constitution is headed The House to Enact Law. In brief, article 86(3) provides that members of the House of Representatives in the due discharge of their responsibility in the House and anywhere else shall:

- ▶ have immunity from criminal charges or civil suits
- ▶ have immunity in respect of what they discuss
- ▶ not be arrested in the course of carrying out their responsibilities.

These provisions assist the media by protecting parliamentarians; they allow MPs to speak freely without facing arrest or charges for what they say.

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

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

7.5.1 Right to privacy

The right to privacy in article 15 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 and should be aware that there are always boundaries 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.

We have dealt with the internal limitations on privacy rights elsewhere in the chapter.

7.5.2 Fundamental duties

Article 25(1) of the Constitution of Zanzibar provides that every person has the right and duties to enjoy fundamental human rights and personal freedoms provided that personal freedom shall be exercised in a manner that neither infringes on the rights and freedoms of others nor the public interest.

This can be used against journalists either by individuals claiming their rights and freedoms have been infringed by a journalist in ordinary performance of his or her duties, or else on the determination that the journalist has acted against the public interest. It should be noted that the constitution does not indicate who determines what is against the public interest.

7.6 Key institutions relevant to the media

There are two important institutions concerning the media that are established under the Constitution of Zanzibar, namely, the judiciary and the Judicial Service Commission. Another important institution, the Commission for Human Rights and Good Governance, is established in terms of the Constitution of the United Republic of Tanzania but does not have jurisdiction in Zanzibar.

7.6.1 The judiciary

The Constitution of Zanzibar

Chapter Six of the Constitution of Zanzibar is titled The Judiciary. Part One of Chapter Six provides for the establishment, composition and jurisdiction of the

High Court of Zanzibar. Article 93(1) of the Constitution of Zanzibar establishes the High Court of Zanzibar as the superior court of record with unlimited jurisdiction on criminal and civil cases and other powers as may be conferred in accordance with the Constitution of Zanzibar or any other law. Article 93(2) provides that, the High Court shall comprise the Chief Justice and not less than two judges who are referred to as High Court Judges.

In terms of article 94 of the Constitution of Zanzibar, the Chief Justice and other judges of the High Court of Zanzibar are appointed by the president of Zanzibar after consultation with the Judicial Service Commission.

Article 94(3) provides the required qualifications for appointment as a judge or acting judge of the High Court of Zanzibar. These include:

- ▶ holding a law degree from a recognised university or institution
- ▶ being an advocate of Zanzibar or Tanzania for not less than seven years
- ▶ being a judge of a similar court with civil and criminal or appellate jurisdiction in Tanzania or any other place in the commonwealth
- ▶ having a combined period of experience of not less than seven years as an advocate or a judge in Tanzania or Zanzibar.

Article 99 of the Constitution of Zanzibar provides that the Appellate Court of the United Republic of Tanzania is empowered to hear appeals from the High Court of Zanzibar except in cases relating to:

- ▶ the interpretation of the Constitution of Zanzibar
- ▶ matters of Islamic law which began at the Khadi's Court (a religious or Sharia court)
- ▶ any other matters mentioned in the Constitution of Zanzibar or by any other law enacted by the House of Representatives.

Part Three of Chapter Six of the Constitution of Zanzibar is titled Other Courts. Article 100 provides that the House of Representatives may establish other courts that are subordinate to the High Court of Zanzibar with the powers and jurisdiction as provided for by law. It should be noted that, in terms of article 59 of the Constitution of Zanzibar, the president of Zanzibar may:

- ▶ pardon any person convicted of any offence
- ▶ grant temporary or permanent suspension of execution of any sentence handed down by any court;
- ▶ reduce any sentence handed down to any person in respect of an offence.

The Constitution of the United Republic of Tanzania

It is important to note that article 125 of the Constitution of the United Republic establishes a Special Constitutional Court of the United Republic, whose sole function, in terms of article 126(1), is to hear and give a conciliatory opinion on the interpretation or application of the constitution where such interpretation or application is in dispute between the Government of the United Republic and the Revolutionary Government of Zanzibar.

It is crucial to note that the Tanzania Constitution recognises the right of Zanzibar to establish its own court structures with their own jurisdictions under the 1984 Constitution of Zanzibar. Part IV of Chapter Five of the Constitution of Tanzania titled The High Court of Zanzibar provides in article 114 that no provision of Chapter Five of the Constitution of Tanzania prevents the establishment or continuance of the High Court of Zanzibar or any of its subordinate courts.

7.6.2 The Judicial Service Commission

The JSC for Zanzibar is a constitutional body established in terms of article 102 of the Constitution of Zanzibar. Article 102A sets out the main functions of the JSC for Zanzibar. These include:

- ▶ advising the president of Zanzibar on the appointment of the Chief Justice
- ▶ advising the president of Zanzibar on appointments of judges of the High Court.

Article 103 provides additional functions of the JSC for Zanzibar, these include:

- ▶ the appointment and discipline of registrars of the High Court, Regional District and subordinate court magistrates, the office of the Khadi and other officers of the courts as prescribed by the House of Representatives
- ▶ establishing committees to implement its functions.

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

In terms of article 102(1), the JSC is made up of:

- ▶ the Chief Justice appointed by the president of Zanzibar
- ▶ one judge of the High Court appointed by the president of Zanzibar
- ▶ one retired Judge of the High Court or Appellate Court of Tanzania appointed by the president of Zanzibar
- ▶ one advocate appointed by the president of Zanzibar on the recommendation of the Zanzibar law society
- ▶ the Attorney General

- ▶ the Chief Khadi
- ▶ any other person whom the president of Zanzibar sees fit to appoint.

7.6.3 The Commission on Human Rights and Good Governance

The Commission for Human Rights and Good Governance (HRGG Commission) is an important organisation concerning the media. In terms of article 130(1) of the Tanzania Constitution, its brief is extremely wide and includes:

- ▶ sensitising the public about the preservation of human rights and duties
- ▶ receiving complaints concerning violations of human rights in general
- ▶ conducting enquiries on matters relating to the infringement of human rights and violations of principles of good governance
- ▶ conducting research and disseminating the results thereof on the infringement of human rights and violations of principles of good governance
- ▶ enquiring into the conduct of any person or institution concerning the ordinary performance of functions or abuses of office
- ▶ advising government, other public institutions and the private sector on human rights and good governance
- ▶ taking the necessary action to promote and enhance conciliation among persons and various institutions appearing before the HRGG Commission.

It is important to note that, in terms of article 130(6) of the Constitution of Tanzania, the HRGG Commission has jurisdiction over both the Governments of the United Republic and Zanzibar. However, the HRGG Commission may not undertake activity concerning the president or the leader of the Revolutionary Government of Zanzibar. Further, the HRGG Commission may not enquire into:

- ▶ matters before a court or tribunal
- ▶ matters concerning the relationship between the government and a foreign government or international organisation
- ▶ matters concerning the presidential power to award remissions of sentences
- ▶ any other matter mentioned in law.

This last provision is troubling as it undermines the ability of the HRGG Commission to act in the face of countermanding legislation.

Unfortunately, there are contradictory statements regarding the independence of the HRGG Commission. In article 130(2) of the constitution, the HRGG Commission is said to be an autonomous department. In exercising its powers, the Commission shall not be bound to comply with directives or orders of any person or department

of government, or any opinion of any political party or of any public or private sector institution.

However, the very next sub-article 130(3) provides that the above provisions shall not be construed as restricting the president from giving directives or orders to the commission, nor are they conferring a right to the commission of not complying with directives or orders, if the president is satisfied that in respect of any matter or any state of affairs, public interest so requires.

The effect of this is that the president can give directives or orders to the HRGG Commission, with which it is bound to comply. This obviously undermines the independence of the HRGG Commission.

Article 129(2) provides that the HRGG Commission comprises:

- ▶ a chairman, who must possess qualifications for appointment as a judge
- ▶ a vice-chairman, who is appointed on the basis that if the chairman is from the mainland, the vice-chairman is to be from Zanzibar, and vice versa
- ▶ up to five other commissioners, who are appointed from among persons who possess skills, experience and wide knowledge in matters relating to human rights, law, administration, political or social affairs
- ▶ assistant commissioners.

In terms of article 129(3), commissioners and assistant commissioners are appointed by the president after consultation with the Nominations Committee, which consists of the Chief Justice of the Court of Appeal, the speaker of the National Assembly, the Chief Justice of Zanzibar, the speaker of the House of Representatives and the deputy-Attorney General, who is the secretary of the Nominations Committee.

In terms of article 129(7), a member of the HRGG Commission or a deputy commissioner can be removed only on the grounds of inability to perform the functions of his or her office or misconduct.

7.7 Enforcing rights under the constitution

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

Article 24(2) provides that any person who alleges that any provisions of Chapter Three protecting fundamental rights and individual freedom or in any law concerning his or her rights or duties owed to them has been or will be violated by any person anywhere in Zanzibar may institute proceedings for redress in the High Court. The High Court has the power to order compensation to any concerned person.

7.8 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.

7.8.1 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

The Constitution of Zanzibar

Chapter Four of the Constitution of Zanzibar provides for the Executive of Zanzibar. Article 51 provides that the authority of the Government of Zanzibar is vested in the president. The president may exercise the authority of the government directly or by delegating the authority to other leaders subordinate to him or herself. It should be noted that article 52 provides that the president is not obliged to take the advice given to him or her by any person in the performance of his duties.

It should be noted that any person holding office in the Revolutionary Government of Zanzibar does so at the pleasure of the president.

Article 26(1) of the Constitution of Zanzibar provides that the president of Zanzibar is the head of government of Zanzibar and Chairman of the Revolutionary Council. In terms of article 26(2), a person is eligible to be president if he or she:

- ▶ was born in Zanzibar
- ▶ is at least forty years of age
- ▶ has the necessary qualifications to be elected as a member of the House of Representatives
- ▶ is a member and a candidate nominated by a political party duly registered in accordance with the Political Parties Act, 1992.

In terms of article 28 of the Constitution of Zanzibar, the term of office of the president of Zanzibar is five years, and a president is eligible for one additional term of five years.

Article 39 of the Constitution of Zanzibar provides that there shall be a chief minister for Zanzibar appointed by the president from the members of the House of Representatives. The chief minister is the principal advisor to the president in the execution of his functions and shall have authority over the control, supervision and execution of the day-to-day functions and affairs of the Revolutionary Government of Zanzibar, and is the leader of government business of the Revolutionary Government of Zanzibar in the House of Representatives.

Article 42 provides that the president of Zanzibar is empowered to establish ministries of the Revolutionary Government of Zanzibar. The ministers for the different ministries are appointed from the House of Representatives by the president of Zanzibar in consultation with the chief minister.

Article 43 provides that a Revolutionary Council comprising the president of Zanzibar, chief minister, ministers and other members the president deems fit, is established. The members of the Revolutionary Council are appointed by the president of Zanzibar from among the members of the House of Representatives. The Attorney General shall attend the meetings of the Revolutionary Council and has the rights of a member of the Revolutionary Council.

The functions of the Revolutionary Council include:

- ▶ assisting and advising the president on all matters relating to the Revolutionary Government of Zanzibar
- ▶ coordinating the functions of the president, chief minister and the ministries of the Revolutionary Government of Zanzibar in the exercise of their functions. The Revolutionary Council shall collectively be responsible to the House of Representatives and the people in general regarding all matters implemented on the orders of the president, the chief minister or any other minister in the execution of his or her functions.

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

The Constitution of the United Republic of Tanzania

Chapter Four of Constitution of Tanzania makes provision for the Revolutionary Government of Zanzibar, the Zanzibar Revolutionary Council and the House of Representatives of Zanzibar. The provisions of the Zanzibar Constitution on these matters replicate those of the Constitution of Tanzania, and we do not repeat them here.

The legislature

The Constitution of Zanzibar

Chapter Five of the Constitution of Zanzibar titled The House of Representatives provides for the legislature of Zanzibar. Article 63(1) provides that the Legislative Council consists of two parts, the president of Zanzibar and the House of Representatives. In terms of article 63(2) any matter that requires a decision by both parts of the House of Representatives in accordance with Constitution of Zanzibar, the matter shall not have a force of law unless it is decided or done by both the members of the House of Representatives and the president of Zanzibar.

Article 64 of the Constitution of Zanzibar establishes the House of Representatives, which consists of:

- ▶ 120 elected members, elected in terms of article 65 in which one member of the House of Representatives is elected for every constituency of Zanzibar
- ▶ ten members nominated by the House of Representatives and appointed by the president of Zanzibar pursuant to article 66, it should be noted that not less than 2 of the nominated members must be appointed in consultation with the opposition leader in the House of Representatives or with other political parties if there is no opposition leader
- ▶ 30% of the members of the House of Representatives must be female in accordance with article 67
- ▶ all regional commissioners appointed in the regions of Zanzibar pursuant to article 61
- ▶ the attorney general pursuant to article 55(3).

Article 68 of the Constitution of Zanzibar provides that a person is qualified to be a member of the House of Representatives if that person:

- ▶ is a Zanzibari who has reached the age of 21
- ▶ is registered or is qualified to be registered in an election constituency as a voter in an election for a member of the House of Representatives
- ▶ can read, or in the case of impaired vision or other physical infirmity, is capable of speaking Kiswahili
- ▶ is a member and candidate proposed by a political party registered in terms of the Political Parties Registration Act, 1992
- ▶ is not disqualified from contesting elections.

Article 69 provides that a person is disqualified from being elected as a member of the House of representatives if he or she:

- ▶ has citizenship of another country
- ▶ is mentally unfit as determined by the High Court of Zanzibar
- ▶ is not a member and candidate nominated by a party
- ▶ has been convicted of a criminal offence and sent to an educational centre or prison in Tanzania for six months or more for election offences during the preceding five years
- ▶ is the Chairman of the Revolutionary Council.

In terms of article 78 of the Constitution of Zanzibar, legislative power is vested in the House of Representatives by passing bills in the House of Representatives. Where a bill is passed, it must be sent to the president of Zanzibar for assent. Once

assented to by the president, the bill becomes law following its publication in the official Gazette.

In terms of article 79 of the Constitution of Zanzibar, when a bill is presented to the president of Zanzibar for assent, he or she may either assent or withhold assent. In the event that assent is withheld, the bill must be returned to the House of Representatives together with a statement of the reasons. If a bill is returned to the House of Representatives, it may not be returned to the president for assent before six months have passed except in cases where two-thirds of the House of Representatives have voted to return the bill to the president for assent. If a bill is voted to be returned early to the president for assent by two-thirds of the House of Representatives, he or she must either assent to the bill within 21 days of it being returned, or else dissolve the House of Representatives.

Amendments of the Constitution of Zanzibar may be passed by the House of Representatives, in terms of article 80, only with the support of two-thirds of the members at both the first and second readings of the amendment.

The Constitution of the United Republic of Tanzania

Part III of Chapter Four of the Constitution of Tanzania provides for the House of Representatives of Zanzibar and its legislative functions in Zanzibar. The provisions of the Zanzibar Constitution on these matters replicate those of the Constitution of Tanzania, and we do not repeat them here.

However, it is important to note that article 106(3) of the Constitution of Tanzania invests legislative authority in Zanzibar in the House of Representatives of Zanzibar over all matters that are not Union Matters

The judiciary

Judicial power, as already discussed in this chapter, 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.

7.8.2 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 is to separate the functions of the three branches of government, the executive, the legislature and the judiciary so that no single branch is able to operate alone, assume complete state control and amass centralised power. While each branch performs 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.

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

There are several significant weaknesses in the Constitution of Zanzibar, which, if improved, would create a more conducive environment for, among other things, media freedom.

7.9.1 Provide for a right of access to information

The Constitution of Zanzibar does not provide for a right of access to information. In the information age, such a right is fundamental. It is also a critical right used by the media the world over. Constitutional protections for the media and for people generally would be greatly strengthened by a provision being made for such a right.

7.9.2 Remove internal constitutional limitations on the right to privacy

Concern has already been expressed about the fact that article 15, the right to privacy, is subject to a limitation clause. This may well be used against journalists by denying them their rights to privacy, particularly concerning their communications.

The effect of this provision is that the constitutional right becomes subordinate to legislation and other legal mechanisms limiting the right.

7.9.3 Improve the general limitations clause

As already set out above, the general limitations clause is extremely problematic owing to the very wide grounds on which rights can be limited and, more problematically, because there are no requirements such as proportionality, justifiability, reasonableness or least restrictive means.

This means that once a ground of justification has been provided (and these are extremely wide and include grounds such as furthering the national interest or supervising the activities of private organisations), basic rights can be limited. The effect of this is that, in many instances, rights could be easily limited. All too often then, the legislation will trump basic rights, despite the provisions of the constitution's supremacy clause.

7.9.4 Provide constitutional protection for the broadcasting regulator

The broadcasting environment in Zanzibar would be greatly improved if an independent authority to regulate broadcasting in the public interest was required to be established by law in the Constitution of Zanzibar itself.

7.9.5 Provide constitutional protection for the public broadcaster

The broadcasting environment in Zanzibar would be greatly improved if constitutional provisions required the establishment of a public broadcaster with a public interest mandate and an independent board to provide public broadcasting services.

8 The media and legislation — Zanzibar

In this section, you will learn:

- ▷ what is legislation
- ▷ legislation governing the publication of print media
- ▷ legislation governing films
- ▷ legislation governing the broadcasting media in general
- ▷ legislation governing the public broadcasting sector
- ▷ legislation governing radio frequency spectrum
- ▷ 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

8.1 Legislation: An introduction

8.1.1 What is legislation?

Legislation is a body of law consisting of Acts properly passed by the Legislative Council, that is, the president of Zanzibar and the members of the House of Representatives. It is important to note that legislation passed by the Legislative Council does not apply to Tanzania. Legislation that applies to Tanzania is discussed above in section 2 of this chapter.

Chapter Five of the Zanzibar Constitution deals with the legislature of Zanzibar, and Part Two thereof deals with its procedure, powers and privileges. In respect of legislation, articles 78-80 and article 108, are particularly important.

There are detailed rules in articles 78-80 and article 108 of the Constitution of Zanzibar, which set out the different law-making processes that apply to different types of legislation. It is important for journalists and others in the media to be aware that the constitution requires different types of legislation to be passed in

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

- ▶ legislation that amends the constitution; the procedures, applicable rules or both, are set out in article 80 of the Constitution of Zanzibar
- ▶ ordinary legislation, the procedures, applicable rules or both, are set out in articles 78 and 79 of the constitution. Essentially, decisions (including the decision to pass legislation) are to be taken by a majority vote of the members of the House of Representatives and the president of Zanzibar. If either party refuses to assent to any legislation, it is deemed not to have been passed
- ▶ legislation that deals with taxation or national debt issues, the procedures, applicable rules or both, are set out in article 108 of the Constitution of Zanzibar.

8.1.2 The difference between a bill and an act

A bill is a piece of draft legislation that is debated and usually amended by the House of Representatives during the law-making process. If a bill is passed by the Legislative Council in accordance with the various applicable procedures required for different types of bills, it becomes an act (and therefore law) once it has been assented to by the president of Zanzibar, in terms of article 79(1) of the Constitution of Zanzibar.

If the president of Zanzibar withholds his or her consent, a bill may be referred back to the House of Representatives, together with a statement of reasons for withholding consent, for reconsideration, in terms of article 79(1) of the constitution. The bill cannot be presented to the president of Zanzibar again by the House of Representatives until six months have elapsed unless the bill has been passed by at least two-thirds of all the members of the House of Representatives, in which case the president of Zanzibar must assent to it within 21 days or dissolve the House of Representatives, article 79(3).

8.2 Legislation governing print media

The law governing the print media in Zanzibar is archaic and is not in accordance with international norms and standards. Besides requiring registration, newspapers are also required to post bonds or sureties in certain circumstances. The Registration of Newsagents, Newspapers and Books Act, Act No 5 of 1988 (the Newspapers Act), governs newspapers in Zanzibar. There are several critical provisions of the Newspapers Act which impact on the media and the practice of journalism in Zanzibar.

8.2.1 The advisory board

In terms of section 4 of the Newspapers Act, the Advisory board is established

and consists of a chairman appointed by the president, and five other members appointed by the minister responsible for information. The functions of an advisory board are to:

- ▶ consider applications made under the Newspapers Act and advise the minister
- ▶ advise the minister on the implementation of the Newspapers Act
- ▶ perform any other work assigned by the minister concerning the Newspaper Act.

8.2.2 Registration of newspapers

Section 8 prohibits the printing or publishing of a newspaper, which is defined extremely broadly in section 2 as:

any printed matter containing news, or intelligence, or reports of occurrences of interest to the public or any section thereof, or any views, comments or observations thereon, printed for sale or distribution and published in Tanzania periodically or in parts or numbers

unless each of the proprietor, printer and publisher has registered an affidavit (sworn to before a magistrate) with the Registrar of Newspapers. The affidavit must contain:

- ▶ the correct title of the newspaper
- ▶ a true description of the house or building wherein such newspaper is intended to be printed
- ▶ the real and true names and places of residence of the persons intended to be proprietor, printer and publisher of the newspaper.

In terms of section 9, new affidavits must be registered with the Registrar in the event of any change in details.

The Registrar is appointed by the minister responsible for newspapers, in terms of section 3 of the Newspapers Act.

In terms of section 10 of the Newspapers Act, when a company is the proprietor, printer or publisher of a newspaper, the affidavit required by section 8 of this Act must be signed by the secretary or one of the directors of the company.

In terms of section 14 of the Newspapers Act, the printer and publisher of every newspaper published in Zanzibar shall deliver or send by registered post (at his or her own expense) a copy of every newspaper published and every supplement to the registrar.

Failure to comply with, among others, sections 8, 9 or 10 is an offence, and on conviction, a person would be liable to a fine, imprisonment or both, section 16.

8.2.3 Bonds to be paid by newspapers

In terms of section 18(1) of the Newspapers Act, the minister may, by written notice, require any newspaper publisher to execute and register a bond with the Registrar in the amount specified in the notice with one or more sureties as may be required by the minister.

In terms of section 18(2), such a bond may be used for the payment of:

- ▶ any monetary penalty imposed on the publisher on his or her conviction for an offence relating to the publication of the newspaper
- ▶ damages and costs awarded in any proceeding in respect of matter published in the newspaper.

Failure to comply with section 18 is an offence, and on conviction, a person would be liable to a fine, imprisonment or both, section 22.

8.2.4 Information to be published in every newspaper and copies to be kept and produced

In terms of section 25(1), each copy of every newspaper published in Zanzibar shall have the name and address of its printer and publisher, and the description of the place of printing and publication printed legibly on the first or last printed page.

Failure to comply with section 25(1) is an offence, and on conviction, a person would be liable to a fine, imprisonment or both, section 25(2).

In terms of section 26(1), every person who prints a newspaper must keep a copy for six months and produce it on written demand by the Registrar or by a court, judge or magistrate.

Failure to comply with section 26(1) is an offence, and on conviction, a person would be liable to a fine, imprisonment or both, section 26(2).

8.2.5 Seizures of newspapers, searches of premises and destruction of newspapers

In terms of section 27(1) of the Newspapers Act, any police officer may seize any newspaper he or she reasonably suspects has been printed or published in contravention of the act.

Further, in terms of section 27(2), a magistrate may, by a warrant, authorise any police officer above the rank of inspector to enter and search any place where it is reasonably suspected that any newspaper published in contravention of the act is being kept and to seize such newspaper. Note that this can be done without a warrant, where the police officer has cause to think that the delay would defeat the purposes of the act, section 27(3).

In terms of section 27(4), a magistrate may order the forfeiture or destruction of

any newspaper or thing seized in terms of section 22 if he or she is satisfied that the newspaper was published in contravention of the act or that the thing was used in the commission of an offence under the act.

8.2.6 Suspension and prohibition of the publication of a newspaper

In terms of section 30 of the Newspapers Act, where the minister responsible for information is of the opinion that it is in the public interest, he may suspend the publication of a newspaper by order.

In terms of section 31, where the minister responsible for information, with the advice of the Advisory Board, is of the opinion that prohibiting the publication of a newspaper suspended in accordance with section 30, he or she may direct that the newspaper cease publication by order published in the Gazette.

Section 33(1), makes it an offence for any person to publish, print or sell a newspaper suspended or ordered to cease publication on or after the effective date of suspension or ordered cessation, the penalty for which is a fine, imprisonment or both.

8.2.7 Prohibition on the importation of publications

Section 34 of the Newspapers Act provides that, if the president is of the opinion that the importation of any publication would be against the public interest, he or she may, in his or her absolute discretion, prohibit the importation of that publication. Such a prohibition can be made in respect of a publication produced by a particular person, regardless of the content thereof.

Section 35 of the Newspapers Act, makes it an offence for any person to import, or have in their possession, a publication prohibited under section 34, the penalty for which is a fine, imprisonment or both.

8.2.8 Restrictions on the collection and distribution of news

Section 39 of the Newspapers Act prohibits any person who does not hold a written authorisation issued by the Director of Information Services from:

- ▶ collecting, or causing to be collected any news or news material for the purpose of dissemination in Zanzibar
- ▶ distributing, or cause to be distributed, whether in or outside Zanzibar any news or news material for dissemination collected in Zanzibar.

It should be noted that the only people who can obtain such a written authorisation are:

- ▶ local news reporters
- ▶ freelance reporters
- ▶ foreign newsagents.

In terms of section 42 of the Newspapers Act, newsagents collecting, distributing or disseminating news or news material are bound by government policy and in particular must have regard to:

- ▶ the need to promote national policies and aspirations of the people of Zanzibar, Tanzania and the government
- ▶ the need to promote and maintain harmony in society.

8.2.9 Registering journalists

Section 39(2) of the Newspapers Act empowers the Director of Information Services to issue an authorisation on application. The Director may also refuse, suspend or revoke any written authorisations without providing reasons. Section 39(3) provides that any person aggrieved by the decision of the Director to refuse, suspend or revoke an authorisation, may appeal to the minister responsible for information. The decision of the minister is final and conclusive and not subject to review by any court.

Section 40 empowers the minister responsible for information to revoke any authorisation issued by the Director of Information Services if he or she is of the opinion that it would be in the public interest.

8.3 Legislation governing films

The Zanzibar Arts and Censorship Council Act, Act No 7 of 2015 (Censorship Council Act), governs, among other things, the making of films in Zanzibar. This has an impact on the film and video media in Zanzibar.

The Zanzibar Arts and Censorship Council (Bassfu)

Section 3 of the Censorship Council Act establishes Bassfu as a government agency. The members of Bassfu are appointed by the minister responsible for matters relating to culture.

The functions of Bassfu are varied, those that particularly relate to the media, in terms of section 7, are:

- ▶ to preserve, maintain and promote the values and norms of Zanzibar culture
- ▶ to promote local artistic performances and exhibitions and assist recognised bodies with training, research and publications
- ▶ to maintain the policy of the government in matters concerning arts and culture and to disseminate that policy
- ▶ to ensure that all films recorded in or outside Zanzibar are censored by Bassfu before they are presented to the public
- ▶ to censor entertainment advertisements in motor vehicles and business banners and other related material.

In terms of section 8, Bassfu has the power to:

- ▶ take disciplinary action against any person who contravenes the Censorship Council Act
- ▶ censor films, video cassettes or any other items related thereto which have been recorded in or outside Zanzibar that is intended to be presented to the public
- ▶ suspend any cinematographic exhibition, stage play and any other entertainment which is inconsistent with the righteous conduct of Zanzibar.

In terms of section 35 and 36(1) of the Censorship Council Act, any person who intends to exhibit or distribute a film, poster or advertisement in Zanzibar must apply and receive a licence from Bassfu. Bassfu must also approve and censor the material before release. Section 36(2) makes it an offence for any person to contravene these requirements, the penalty for which a fine, imprisonment or both.

Section 54 of the Censorship Council Act empowers the minister responsible for cultural matters to make regulations relating to the Censorship Council Act in consultation with Bassfu.

The Censorship Act has not been updated and amended to take account of video content distributed online or via social media, and consequently, it is not clear if its provisions are interpreted as including online content or not.

8.4 Legislation governing the broadcast media generally

Broadcasting in Zanzibar is regulated by the Zanzibar Broadcasting Commission Act, Act No 7 of 1997 (Broadcasting Commission Act).

8.4.1 Establishment of the Zanzibar Broadcasting Commission

Section 5 of the Broadcasting Commission Act establishes the Zanzibar Broadcasting Commission (the Commission) as an autonomous body corporate. In terms of section 6, the Commission is made up of the chairman and executive secretary who are appointed by the president and four to eight other members appointed by the minister responsible for information. The Commission also includes a state attorney from the Attorney General's office.

Section 6(2) empowers the Commission to elect a member from among their number to act as the vice-chairman.

In terms of section 6 (5) of the Broadcasting Commission Act, members of the Commission shall serve terms of three years and be eligible for reappointment for one more term. The chairman holds office at the pleasure of the president, section 6(6).

8.4.2 Functions of the Commission

In terms of section 7(1) and 7(2) of the Broadcasting Commission Act, the functions of the Commission, in accordance with any regulations made under the act, are:

- ▶ to issue broadcasting licences
- ▶ to regulate and supervise broadcasting activities from Zanzibar to places outside Zanzibar with the intention that such broadcasts are received regularly in the United Republic of Tanzania or any part of it
- ▶ to maintain a register of all person licensed as a broadcaster and dealers in broadcasting stations
- ▶ to regulate the activities of broadcasters and their conduct of broadcasting as well as that of dealers in broadcasting apparatus
- ▶ to be responsible for the radio frequency spectrum available for broadcasting and to allocate those resources to ensure the greatest diversity of programming and the optimal utilisation of those resources, giving priority to broadcasters transmitting the maximum number of hours per day and to community-based broadcasters where possible
- ▶ to protect the policy, security, culture and tradition of Zanzibar
- ▶ to inspect institutions which are broadcasting businesses
- ▶ to give direction to broadcasting businesses where the Commission deems necessary
- ▶ any other function assigned to it by the president in writing or under any written law.

In terms of section 7(3), the Commission shall, in the performance of its functions under the act, establish and maintain, as far as may be practicable, a system of consultation, coordination and operation with the Tanzania Telecommunications Corporation and any other body or organisation established by or under any other written law and having similar functions to those of the Commission or have functions that relate to broadcasting or radio communication generally.

8.4.3 Broadcasting licensing

Section 11 of the Broadcasting Commission Act, prohibits any person from operating a broadcasting service or permitting anything to be done that requires a licence under the Broadcasting Commission Act

Any person seeking to become a licensee under the Broadcasting Commission Act must, in terms of section 12, be:

- ▶ a Zanzibari or Tanzanian citizen

- ▶ a company registered in Zanzibar with at least 20% of the shareholding being owned by the Zanzibar Government
- ▶ a company not registered in Zanzibar but with at least 30% of the shareholding being owned by Zanzibar's Government and which is not directly or indirectly controlled by persons who are not Zanzibaris.

Any application for a licence must be made to the Commission accompanied by:

- ▶ the prescribed application fee
- ▶ the prescribed deposit
- ▶ the applicant's proposals concerning the policy and nature of the service and a programme schedule regarding the daily transmission time allocated to different programmes
- ▶ a network plan, technical specifications of the equipment and studio and installations programme
- ▶ the training programme involving local staff
- ▶ a statement of account setting out the financial resources available to the application to conduct a broadcasting service
- ▶ any other information as the Commission may deem necessary to decide on the ability of an applicant to provide a technically viable and socially acceptable broadcasting service.

The Commission must, when granting a broadcasting licence, consider:

- ▶ 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 a substantial interest in more than one broadcasting service
- ▶ compliance with the prescribed technical broadcasting standards
- ▶ whether the conditions of a broadcasting licence shall unjustly benefit one holder of a broadcasting licence above another
- ▶ the allocation of radio frequency spectrum resources in such a manner as to ensure the widest possible diversity of programming and the optimal utilisation of such resources, provide that priority may be given to broadcasters transmitting the maximum number of hours per day
- ▶ the reservation of radio frequency spectrum resources for future use
- ▶ the desirability of giving priority to community-based or national development broadcasts
- ▶ the extent to which the applicant is determined, and has planned, to train local staff in matters concerning radio or television broadcasting.

It should be noted that no person may have a licence for both radio and television but may have a licence for only one of these services.

Every application must be published by the Commission in the Gazette, and any person may lodge written representations to the Commission regarding the applicant that must be taken into account when the Commission considers any application within 14 days of the publication.

Where the Commission is satisfied that an applicant meets the requirements of the Broadcasting Commission Act, it shall grant a licence to the applicant subject to the prescribed fee. The Commission must publish a notice of the granting of a broadcasting licence in the Gazette and any newspaper published in Zanzibar and to the successful applicant. It should be noted that the Commission may attach conditions to the licence it issues in relation to:

- ▶ the frequencies, power limitations and technical servicing and inspection of a station and any other technical specifications
- ▶ the prevention of electric and other disturbances of radio reception or the transmission over any telegraph line
- ▶ the broadcasting or non-broadcasting of reports, announcements, news or other information which is required to be broadcast in the public interest
- ▶ the location of a transmitter station, when applicable, and the specific geographical area to which the broadcast may be made.

The Commission may, after giving the broadcasting licensee the opportunity to make written representations, amend any of the prescribed conditions, including adding further conditions:

- ▶ if the Commission is of the opinion that it is in the interest of orderly radio frequency spectrum management
- ▶ to give effect to any international treaty concerning broadcasting to which Zanzibar is a party
- ▶ at the request of the licence holder.

In terms of section 13(5), any person aggrieved by a decision of the Commission regarding any matter relating to broadcasting may appeal to the minister responsible for information.

In terms of section 13(6), the minister may, on the advice of the Commission, specify other matters or activities connected to broadcasting which require a licence.

Section 14 provides that broadcasting licences are issued for a period determined by the Commission but may not exceed three years in the case of radio and five years in the case of television broadcasting.

The Commission may upon application by the licensee and on the expiration of

the broadcasters' licence, renew the licence for a period not exceeding five years. Applications for licence renewal must be made within three months of the expiration of the licence. The Commission may request additional information from the licensee when considering the licence renewal, and if the renewal for the licence has not been confirmed by the date of the licence expiration, the licensee will continue to operate until such time as the licence renewal is either approved or rejected.

In terms of section 28 of the Broadcasting Commission Act, broadcasting licences may not be transferred to another person without the prior approval of the Commission. When a company is the holder of a licence, no person other than an existing shareholder may, except with the prior approval of the Commission, acquire shares or any other interest in such a company which results in that person acquiring a controlling interest in the company.

8.4.4 Rights and obligations of a broadcasting licensee

In terms of section 15 of the Broadcasting Commission Act, broadcasting licensees are obliged to comply with the conditions of their licenses. The Commission may, with the approval of the minister responsible for information and by notice published in the Gazette, specify such duties, or further duties to be discharged.

Broadcasting licensees are obliged to:

- ▶ present all news in a factually accurate, impartial and non-partisan manner
- ▶ present current affairs in a balanced, clear, factual, accurate and impartial manner
- ▶ encourage the development of Zanzibar and Zanzibari expression by providing a wide range of programming that reflects Zanzibar opinions, ideas, values and artistic creativity by displaying Zanzibar cultures and entertainment programmes
- ▶ serve the needs and interests and reflect the circumstances and aspirations of Zanzibar men, women and children in a democratic society
- ▶ produce and maintain programmes of a high standard and make maximum use of the island's creative and other resources in the creation and presentation of programming
- ▶ limit advertisements to a maximum of 30% of the total daily broadcasting time
- ▶ contribute to shared national consciousness, identity and continuity
- ▶ provide programming that caters for culture, arts, sports and education pertaining to Zanzibar and Africa
- ▶ comply with generally accepted standards of journalistic ethics in the editing of any programme to be broadcast as formulated in the Code of Conduct for the Media Professions

- ▶ keep and store sound and video recordings of all programmes broadcast for a minimum of three months after the date of transmission of the broadcast, or for such further period as the Commission may direct
- ▶ disclose the name of the producer of every programme at the end of transmission of a programme
- ▶ respect copyright and neighbouring rights and obligations in respect of any broadcast material.

Section 16 provides that the Commission must monitor compliance by broadcasting licensees and, where the Commission is of the opinion that a broadcasting licensee has breached a condition of his or her licence, it may request in writing that the licensee make written representations to the Commission regarding the breach. If thereafter, the Commission is of the opinion that a licensee has materially breached a licence condition, it may issue an order:

- ▶ warning the licence holder
- ▶ directing the licence holder to affect a programme change within a period not longer than thirty days from the date of receipt of the directions
- ▶ directing the licence holder to disclose the finding of the Commission free of charge and in such manner as the Commission may direct
- ▶ imposing a fine
- ▶ suspending the broadcasting licence for a period determined by the Commission
- ▶ revoking the broadcasting licence.

In terms of section 17 of the Broadcasting Commission Act, a broadcasting licensee must broadcast a counter version presented by any person or body of persons affected by an assertion of fact in any programme transmitted that the assertion of fact is false. It should be noted that the licensee must not transmit a counter version if:

- ▶ the person or organisation concerned has no direct interest in the transmission of the counter version
- ▶ the counter version is not of reasonable length, and in particular, if it is substantially longer than the part of the broadcast which dealt with the false assertion of fact.

Counter versions must:

- ▶ be limited to a factual account
- ▶ not contain any material which may reasonably be anticipated to expose the licence holder to legal action if such material were to be broadcast

- ▶ be made in writing
- ▶ specify the programme and the assertions to which the objection is raised
- ▶ be signed by the person affected or, in the case of an organisation, by the chief executive officer.

Requests for counter versions must be made by the person, or body of persons, affected within 30 days of the original airing of the offending programme. Licensees must:

- ▶ at the first opportunity broadcast the counter version, but not later than ten days from receipt
- ▶ broadcast the counter version in the same programme or programme section as the one in which the false assertion was made and at the same time of day or, should that not be possible, at time equal in value to that of the disputed programme
- ▶ broadcast the counter version without any omissions and interruptions
- ▶ broadcast the counter version free of charge.

On receipt of the counter version, broadcasting licensees must immediately inform the Commission and must keep and store the programme objected to and the counter version until it receives a notice to the contrary from the Commission.

Note, section 17 does not apply to a broadcast of a public meeting of the House of Representatives of Zanzibar.

Section 18 of the Broadcasting Commission Act empowers the minister to appoint inspectors.

In terms of section 27 of the Broadcasting Commission Act, the minister or any person authorised by the minister may require a broadcasting licensee to broadcast any matter for the purposes of national security, or in the public interest. If the minister is of the opinion that broadcasting any matter may be in opposition to national security or not in the public interest, he or she may prohibit the broadcasting of such matter by notice.

8.4.5 Offences under the Broadcasting Act

Section 26 of the Broadcasting Commission Act, makes it an offence for any person to:

- ▶ carry on the business of a broadcaster or a dealer in broadcasting apparatus without an appropriate licence
- ▶ contravene or fail to comply with the conditions of a broadcasting or other licence under the Broadcasting Commission Act

- ▶ fail or refuse to supply information in the manner and time prescribed
- ▶ supply false or incomplete information
- ▶ fail or refuse to produce to an inspector or a police officer a licence or a book, record or document relating to any broadcasting apparatus which is in his possession or under his control
- ▶ interfere with or obstruct the transmission or reception of any radio communication
- ▶ wilfully delay or obstruct an inspector, police officer or other authorized officer in the exercise of the powers conferred upon him or her by or under the Broadcasting Commission Act
- ▶ fail or refuse to comply with any order or direction lawfully given to him by the Commission
- ▶ fail or refuse to comply with the terms and conditions of the licence he or she holds
- ▶ make a false declaration for the purpose of obtaining a licence, whether for himself or another person.

The penalty for such an offence is a fine, imprisonment or both.

Any court that convicts a person of an offence under the Broadcasting Commission Act, may, in addition to any other penalty, order the forfeiture of any broadcasting apparatus or other material in relation to, or in connection with, committing the offence to the Government.

8.4.6 Making regulations

In terms of section 29 of the Broadcasting Commission Act, the minister responsible for information may make regulations for carrying out the provisions of the act.

8.4.7 Is the Commission an independent regulator?

The Commission does not meet international standards for an independent regulator. The Broadcasting Commission Act does not even claim that the Commission is an independent regulator. The minister responsible for information has significant powers in the process of appointing board members and in terms of regulatory functions, including the power to make broadcasting-related content regulations. Essentially, the Commission acts as an arm of the executive branch of government.

8.4.8 Amending the legislation to strengthen the broadcast media generally

The single most significant problem is that the legislation ought to provide for the independence of the broadcasting regulator, that is the Commission. In our

view, the legislation ought to be amended such that the House of Representatives is responsible for calling for public nominations for candidates to serve on the Commission and for developing the short-list of suitably qualified candidates. The Commission Act ought to set out detailed provisions regarding the qualities, expertise and qualifications required of a Commission board member. Thereafter, the president ought to formally appoint all Commission board members.

Furthermore, the Commission ought to have full powers in respect of regulating the broadcasting sector, that is, making rules, regulations and so on, and the minister ought not to have regulation-making powers in respect of broadcasting matters.

In addition, the Broadcasting Commission Act does not clarify the differences between various categories of content, that is broadcasting services, sufficiently. The legislation ought to set out in some detail what the differences are between the various categories and the requirements, for example, for community broadcasting services as opposed to commercial services.

Further, the requirement of government shareholding in broadcasting licensees undermines the right of freedom of association and expression and effectively brings all media operations under some kind of governmental control.

8.5 Legislation that regulates the public broadcast sector

8.5.1 Introduction

The Zanzibar Broadcasting Corporation (ZBC) is Zanzibar's national broadcaster. It includes a national radio and television station.

The main statute governing the affairs of the ZBC is the Zanzibar Broadcasting Corporation Act, 2013 (ZBC Act).

8.5.2 Establishment of the ZBC

The ZBC was established under section 3 of the ZBC Act. It should be noted that the ZBC is the successor of the state media known as Television Zanzibar and Radio Sauti ta Tanzania Zanzibar.

8.5.3 The ZBC mandate

Section 5 of the ZBC Act provides that the mandate of the ZBC is to:

- ▶ provide information, education and entertainment to the public
- ▶ provide radio, television broadcasting and other related services and programmes that contribute to social, economic, political and cultural development with an emphasis on national unity in cultural diversity
- ▶ run the corporation's business and commercial activities
- ▶ reflect the public vision regarding the objective composition and overall management of the broadcasting services

- ▶ provide electronic media and consultancy services that educate and guide the public.

8.5.4 Functions of the ZBC

In terms of section 6 of the ZBC Act, the functions of the ZBC are to:

- ▶ establish a sustainable system of gathering, analysing, storage and dissemination of information to the public
- ▶ produce quality local programming and adapt foreign programmes to suit the needs of Zanzibar society
- ▶ establish systems of accountability and enhance profitability in running public broadcasting services
- ▶ maintain responsible editorial independence and set national broadcasting standards by exemplary performance
- ▶ protect the public interest in rendering broadcasting services
- ▶ operate an efficient and self-sustaining corporation
- ▶ provide accurate, timely and reliable reporting of events and presentation of programmes
- ▶ carry out any other activity that may be done by a public broadcaster
- ▶ conduct research and develop programmes in pursuit of its general objectives which it may operate both in the Corporation and in collaboration with relevant institutions.

In terms of section 19 of the ZBC Act, the ZBC must have an editorial policy which conforms with the code of conduct as prescribed by the information policy and the Broadcasting Commission Act.

8.5.5 Appointment of the ZBC board

In terms of section 8 of the ZBC Act, the ZBC board consists of the following members:

- ▶ the chairperson, appointed by the president. Note that no person may be appointed chairperson unless he or she holds relevant knowledge and experience in any of the fields of broadcasting, information technology, administration, media law, business management, mass communications or other related fields
- ▶ the director-general of the ZBC
- ▶ a member of the Zanzibar chamber of commerce, appointed by the minister
- ▶ a state attorney from the attorney general's office appointed by the minister

- ▶ a member from the ministry responsible for finance appointed by the minister.

8.5.6 Functions of the ZBC board

In terms of section 10 of the ZBC Act, the functions of the ZBC board are to:

- ▶ advise the ZBC in broadcasting services
- ▶ formulate and review the policy of the ZBC with due regard to the ZBC's objectives
- ▶ approve the action plan for the ZBC and endorse the annual budgets
- ▶ establish and supervise staff regulations, financial regulations and salary structures of the employees and other benefits
- ▶ exercise supervision over the management team of the ZBC
- ▶ determine the ZBC's corporate structure, staff levels and terms and conditions of service
- ▶ perform such other functions incidental to the functions of the ZBC board.

8.5.7 Powers of the minister

In terms of section 13 of the ZBC Act, the Minister of Information and Broadcasting may:

- ▶ give the ZBC board general, or specific directions as to the performance of the functions and the exercise of the powers of the ZBC and the ZBC board must give effect to such directions
- ▶ in consultation with the minister responsible for finance, approve any major alterations in the tariffs, rates, fares and other charges made for the services provided by the ZBC (this appears to be a form of a television licence fee to fund the ZBC)
- ▶ give particular directions to the ZBC board concerning an agreement with another country or in the national interest.

8.5.8 Funding the ZBC

In terms of section 15 of the ZBC Act, the funds and resources of the ZBC consist of:

- ▶ funds from the government
- ▶ money derived from its commercial activities
- ▶ money raised by loans, donations or grants from inside or outside Zanzibar
- ▶ such sums of money or property which may become payable to, or be vested in, the ZBC for the purpose of carrying out the functions of the ZBC.

It should be noted that all funds must be placed in the ZBC's bank account and may only be used as prescribed by the ZBC board.

8.5.9 Making regulations

In terms of section 20 of the ZBC Act, the minister responsible for information and broadcasting is empowered to make regulations to carry out the ZBC Act better, acting on the advice of the ZBC board.

8.5.10 The ZBC: Public or state broadcaster?

ZBC remains a state broadcaster. From a legal perspective, the ZBC remains an extension of the ministry responsible for information and broadcasting. This is largely based on the role of the minister in appointing the ZBC board members and the regulatory powers vested in the minister.

8.5.11 Weaknesses in the broadcasting legislation which should be addressed to strengthen the ZBC

The government has not transformed the ZBC into a genuine public broadcaster. Consequently, there are several weaknesses that bedevil its governing statute. The ZBC Act ought to be amended to provide:

- ▶ for the independence of the ZBC board
- ▶ the House of Representatives being responsible for calling for public nominations of candidates to serve on the ZBC board and for developing the short-list of suitably qualified candidates
- ▶ for the qualities, expertise and qualifications required of a ZBC board member
- ▶ that the president formally appoints all ZBC board members
- ▶ the ZBC board ought to be solely responsible for managing the activities of the ZBC with no role for the minister
- ▶ that the ZBC is accountable directly to the House of Representatives and not via the minister.

8.6 Legislation that regulates radio frequency spectrum

In terms of section 7(1)(e) of the Zanzibar Broadcasting Commission Act, Act 7 of 1997, the Commission is responsible for the standardisation and management of the radio frequency spectrum available for broadcasting. The responsibilities include the allocation of radio frequency spectrum to ensure the widest possible diversity of programming and the optimal utilisation of radio frequency spectrum resources. The Commission must where possible, give priority to broadcasters transmitting the maximum number of hours per day and to community-based broadcasters.

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

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

8.7.1 Criminal Procedure Act, Act 7 of 2018

Section 132 of the Criminal Procedure Act (CPA) empowers the Director of Public Prosecutions or any competent court to determine that the production of any document or other thing is necessary or desirable for the purposes of investigation, enquiry, trial or other proceedings. The Director of Public Prosecutions or such court may issue a written order or summons to any person in whose possession such a document or thing is believed to be, requiring him or her to attend and produce it at the time and place stated in the summons.

Section 185 of the CPA provides that any person involved in any proceeding under the CPA may be summoned to appear before a magistrate and the magistrate may examine, cross-examine and re-examine any witness believed to be in possession of any information relevant to the case. Thus, if a court believes that a journalist knows something about a crime that could constitute material evidence, such journalist might be ordered to reveal sources of information relating to that crime in terms of sections 132 or 185 of the CPA.

8.7.2 Public Leaders Code of Ethics Act, Act 13 of 1995

Section 24 empowers the Zanzibar Public Leaders Code of Ethics Commission established under the Zanzibar Public Leaders Code of Ethics Act to require any person who, in its opinion, is able to give any information relating to any enquiry being conducted by the tribunal to attend before it to answer questions or to produce any document.

8.7.3 Penal Decree Act, No 6 of 2004

Section 104(1)(b) of the Penal Decree Act makes it an offence to refuse to answer a question in a judicial proceeding without lawful excuse. The penalty on conviction is a fine or imprisonment. In the absence of a recognised qualified privilege for journalists, this subsection might be used to force a journalist to reveal his or her sources of information.

8.7.4 The Zanzibar Electoral Commission Act, No 1 of 2017

Section 6 of the Zanzibar Electoral Commission Act empowers the Zanzibar Election Commission to demand any information relating to national security from any person or institution the Election Commission reasonably believes has that information. Failure to provide the Election Commission with the requested information without a reasonable excuse, or provide false information is an offence. The penalty, on conviction, is a fine, imprisonment or both.

8.7.5 The Anti-Corruption and Economic Crimes Act, No 1 of 2012

In terms of section 23(3) of the Anti-Corruption and Economic Commission Act, the Director-General of the Zanzibar Anti-Corruption and Economic Crimes Authority may by notice in writing require any person to provide, within a reasonable period of time, any information or documentation in the person's possession that relate to a person suspected of corruption or economic crime. It should be noted that section 23(5) provides that any information that is privileged under any written law is not required to be revealed, on request of the Director-General, unless a court orders that privilege be waived.

8.7.6 The Criminal Code, Act No. 17 of 2018

In terms of section 139 of the Criminal Code, if the Director of Public Prosecutions is satisfied that specified data stored in a computer system is reasonably required for the purpose of a criminal investigation or criminal proceedings, he or she may order in writing that a person in control of the computer system disclose sufficient traffic data about a specified communication to identify the service provider and the path by which the communication was transmitted.

While this does not relate directly to journalists, it is important to note that any information that is shared through a computer system can be traced and used to identify a journalist's source by tracking the communication to its origin.

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.

8.8 Legislation that prohibits the publication of certain kinds of information

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

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

- ▶ Prohibition on the publication of certain kinds of information regarding legal proceedings
- ▶ Prohibition on the publication of the identity of victims of sexual crimes
- ▶ Prohibition on the publication of treasonous material
- ▶ Prohibition on the publication of state security-related information
- ▶ Prohibition on publications which the president considers contrary to the public interest
- ▶ Prohibition on obscene publications
- ▶ Prohibition of incitement to violence
- ▶ Prohibition of false news
- ▶ Prohibition on the publication of information regarding the HIV and Aids status of children
- ▶ Prohibition on the publication of material that affects relationships with foreign states and external tranquillity
- ▶ Prohibition on the publication of libel.

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

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

The Children's Act, Act No 6 of 2011

Section 33 of the Children's Act makes it an offence to publish any information or photograph that may lead to the identification of an abused child without the permission of the court. The penalty for this offence on conviction is a fine, imprisonment or both.

Section 48 of the Children's Act provides that section 33 applies relating to the prohibition on the publication of information of photographs, with such changes as may be required in the event that the child is accused or a witness to a crime.

The Zanzibar Anti-Corruption And Economic Crimes Act, Act No 1 of 2012

Section 29 of the Zanzibar Anti-Corruption and Economic Crimes Act makes it an offence for any person to disclose any information, except with permission from the director-general of the Zanzibar Anti-Corruption and Economic Crimes Authority or with another lawful excuse, relating to an investigation, including the identity of any person being investigated. The penalty for this offence on conviction is a fine, imprisonment or both.

8.8.2 Prohibition on the publication of the identity of victims of sexual crimes

Section 165 of the Penal Decree Act makes it an offence for any person to print or publish the name or any matter which may make known the identity of any person against whom a sexual crime is alleged or found to have been committed. On conviction, the penalty for this offence is a fine or imprisonment.

8.8.3 Prohibition on the publication of treasonous material

In terms of section 28 of the Penal Decree Act any person who publishes any printing or writing or by any overt act, or does any act which is intended to bring about or cause the removal or change of the Government of Zanzibar other than by the mode and manner provided under the Constitution of Zanzibar, is guilty of the offence termed treason and shall be liable for execution.

8.8.4 Prohibition on the publication of state security-related information

National Security Act, 1970

Section 4 of the National Security Act, although being a piece of Tanzania legislation, has jurisdiction over the United Republic, and contains several provisions relating to the disclosure of security-related information. The Act makes it an offence to publish a range of security-related information, such as official codes or passwords, sketches, notes or other documents which relate to protected places (as determined by the president or in terms of the Protected Places and Areas Act, 1969), or munitions information, or confidential information that has been entrusted to a person by a public official. The penalty for such publication is imprisonment.

Section 5 of the National Security Act makes it an offence to communicate any classified matter to any unauthorised person. On conviction, the penalty is imprisonment.

Tanzania Intelligence And Security Service Act, 1996

Section 16 of the Tanzania Intelligence and Security Service Act makes it an offence to publish in a newspaper or other document or to broadcast the fact that a person is a member of the Tanzania Intelligence Service (other than the director-general thereof) or is in any way connected with the Tanzania Intelligence Service, without the written consent of the Minister for Intelligence and Security. On conviction, the penalty is a fine.

The Registration Of Newsagents, Newspapers And Books Act, Act No 5 of 1988

In terms of section 48(1) of the Newspapers Act, any person who prints, publishes, sells, offers for sale, distributes or reproduces any seditious publication, or imports any seditious publication, unless he or she has no reason to believe that it

is seditious, shall be guilty of an offence and on conviction shall be liable to a fine, imprisonment or both.

8.8.5 Prohibition on publications which the president considers to be contrary to the public interest

Section 34 read with section 28 of the Newspapers Act, makes it an offence to publish a publication which the president has prohibited the importation of, on the basis that he or she is of the opinion that its importation would be contrary to the public interest. On conviction, the penalty is a fine, imprisonment or both.

8.8.6 Prohibition on obscene publications

The Penal Decree Act, Act No 6 of 2004

Section 179(1)(a) of the Penal Decree Act makes it an offence for any person to have in his or her possession, for the purpose of dissemination or exhibition, obscene writings, drawings, prints, paintings, printed matter, pictures, posters, emblems, photographs, cinematograph films, or any other obscene objects, or any object tending to corrupt morals. This is a misdemeanour offence and, on conviction, the penalty is a fine or imprisonment.

Zanzibar And Censorship Council Act, 2015

Section 46 of the Censorship Council Act makes it an offence for any person to produce, broadcast, procure, export, sell or traffic in pornography. On conviction, the penalty is a fine or imprisonment.

Section 47 of the Censorship Council Act makes it an offence for any person to produce, participate in the production of, traffic in, publish, broadcast, procure, import or export pornography depicting images of children. On conviction, the penalty is a fine, imprisonment or both.

In terms of section 53 of the Censorship Council Act, it is an offence for any person to possess, create, produce, distribute, broadcast, export or import a film or publication which contains depictions, descriptions or scenes of pornography, or which advocates, advertises, encourages or promotes child pornography or the sexual exploitation of children. On conviction, the penalty is a fine, imprisonment or both.

8.8.7 Prohibition on the publication of incitement to violence

Section 45 of the Penal Decree Act makes it an offence for any person who prints, publishes or makes any statement indicating or implying without lawful excuse that it would be desirable to do any act calculated to bring death or physically injure any person, class of person or community, or perform any act that leads to the destruction of property is guilty of a misdemeanour. On conviction, the penalty is imprisonment.

8.8.8 Prohibition on the publication of false news

In terms of section 44 of the Penal Decree Act, any person who publishes or reproduces any false statement which is likely to cause fear and alarm to the public or disturb public peace is guilty of a misdemeanour. On conviction, the penalty is imprisonment in terms of section 396(2).

8.8.9 Prohibition on the publication of information regarding the HIV and Aids status of children

Section 114 of the Children's Act makes it an offence to reveal the HIV status of any child who is HIV-positive without consent from a child aged 16, or who is of sufficient maturity to understand the benefits, risks and social side effect of such a disclosure. Disclosures may also be made if:

- ▶ a parent or guardian of a child under the age of 16 gives consent
- ▶ the medical superintendent or person in charge of a hospital provides consent in the event that a child is under the age of consent and is not of sufficient maturity to understand the benefits, risks and social side effect of such a disclosure or the child does not have a parent or guardian
- ▶ a children's court feels that the HIV-positive status is being unreasonably withheld and the disclosure is in the best interests of the child or the child or parent or guardian is unable to give consent.

On conviction, the penalty for this offence is a fine, imprisonment or both.

It should be noted that a person can reveal the HIV-positive status of a child if the disclosure is:

- ▶ within the power and duties of a person in terms of the Children's Act or any other law
- ▶ necessary to carry out the provisions of the Children's Act
- ▶ for the purpose of legal proceedings
- ▶ in terms of a court order.

8.8.10 Prohibition on the publication of material that affects relationships with foreign states and external tranquillity

The Penal Decree Act, Act No 6 of 2004

Section 46 of the Penal Decree Act makes it an offence for any person who 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 Zanzibar and the country to which such prince, potentate, ambassador or

dignitary belongs without justification. Such a person is guilty of a misdemeanour and, on conviction, the penalty is imprisonment in terms of section 396(2).

The Registration Of News Agents, Newspapers And Books Act, Act 5 of 1988

In terms of section 61 of the Newspapers Act, any person who publishes anything intended to be read, or any sign or visible representation intended to degrade, revile or expose to hatred or contempt, a foreign sovereign ruler, ambassador or other foreign dignitaries with the intention of disturbing the peace and friendship between Tanzania and a foreign country without justification commits the offence of libel. In terms of section 62 of the Newspapers Act the penalty for the offence of libel, on conviction, is a fine, imprisonment or both

8.8.11 Prohibition on the publication of libel

Section 53 of the Newspapers Act provides for the offence of libel, that is where a person unlawfully publishes any defamatory matter concerning another person with the intent to defame that other person by means including print or writing.

Section 55 provides that a person 'publishes a libel' if he or she causes the printing, writing, painting, effigy or other means by which the defamatory matter is conveyed to be dealt with, either by exhibition, reading, recitation, description, delivery or otherwise so that the defamatory meaning thereof becomes known or is likely to become known to either the person defamed or any other person.

Section 56 provides that any publication of defamatory matter concerning a person will be unlawful unless:

- ▶ the matter is true, and publication is in the public interest, or
- ▶ it is privileged.

There are two types of privilege — absolute and conditional privilege.

In terms of section 57, the publication of defamatory material is absolutely privileged in certain cases. This means that it is immaterial whether or not the material was true or false, or whether or not it was published in good faith. In general, the grounds of absolute privilege are:

- ▶ the defamatory matter is published by or on the order of the president, the government, the National Assembly or the speaker of the National Assembly
- ▶ the defamatory matter is published in the course of a court-martial
- ▶ the defamatory matter is published in a judicial proceeding by a person taking part therein, that is, as a judge, assessor, magistrate, lawyer, witness or party
- ▶ the defamatory matter is a fair report of anything said, done or published in the National Assembly
- ▶ the defamatory matter is published by a person legally bound to publish it.

In terms of section 58 of the Newspapers Act, the publication of defamatory material is privileged on condition that it was published in good faith and if the relationship between the parties was such that the person publishing the matter is under some legal or moral duty to publish it or has a legitimate personal interest in publishing it, provided that the publication does not go further than what is reasonably sufficient for the occasion, and in any of the following cases:

- ▶ a fair report of court proceedings
- ▶ a copy or fair abstract of any matter that has been published previously and which was absolutely privileged when first published
- ▶ an expression of opinion in good faith as to the conduct or personal character of any person in a judicial, official or other public capacity
- ▶ an expression of opinion in good faith as to the conduct of a person in relation to any public question
- ▶ an expression of opinion in good faith as to the conduct of a person disclosed by evidence given in a public legal proceeding
- ▶ an expression of opinion in good faith as to the merits of any book, art, speech, performance and the like
- ▶ a censure passed in good faith on the conduct or character of another person in respect of whom he or she has authority by contract or otherwise
- ▶ a complaint or accusation made by a person in good faith against another person in respect of his or her conduct or character to a person in authority
- ▶ if the matter is published in good faith for the protection of the rights or interests of the publisher or of the person to whom it is published.

Note that while section 58 provides that good faith will be presumed in conditional privilege cases, section 59 sets out when the publication of defamatory matter will not be deemed to have been made in good faith, namely:

- ▶ if the matter was untrue and the publisher did not believe it to be true
- ▶ if the matter was untrue and the publisher did not take reasonable care to ascertain whether or not it was true or false
- ▶ if the publisher acted with intent to injure the person defamed in a substantially greater degree than was necessary for the public interest.

In terms of section 62 of the Registration of News Agents Newspapers and Books Act the penalty for the offence of libel, upon conviction is a fine, a term of imprisonment or both.

In terms of section 61 of the Newspapers Act, any person who publishes anything intended to be read or any sign or visible representation intended to degrade,

revile or expose to hatred or contempt, a foreign sovereign ruler, ambassador or other foreign dignitaries with the intention of disturbing the peace and friendship between Tanzania and a foreign country without justification commits the offence of libel. In terms of section 62 of the Registration of News Agents Newspapers and Books Act, the penalty for the offence of libel, on conviction, is a fine, imprisonment or both

8.9 Legislation that specifically assists the media in performing its functions

In countries that are committed to democracy, governments pass legislation which specifically promotes accountability and transparency of both public and private institutions. Such statutes, while not specifically designed for use by the media, can and often are used by the media to uncover and publicise information in the public interest. These would include Access to Information and Whistleblower Protection statutes. Sadly, Zanzibar has yet to pass this kind of legislation.

9 Regulations affecting the broadcast media — Zanzibar

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 Zanzibar Broadcasting Commission, to make legally binding rules governing an industry or sector, without having parliament pass a specific statute thereon. The empowering statute will empower the minister or a body such as the Zanzibar Broadcasting Commission to make regulations, rules or both, on particular matters within the scope of the functions and powers of that minister or body.

Unfortunately, we have not been provided with any regulations relating to the media environment in Zanzibar, nor are we able to locate such regulations.

10 Media self-regulation — Zanzibar

The self-regulatory body, the Media Council of Tanzania (MCT), discussed in section 5 of this chapter, operates as the self-regulatory authority for both Tanzania and Zanzibar. Please refer to section 5 of this chapter to review Media self-regulation in Zanzibar.

11 Case law and the media — Zanzibar

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

We have not been provided with Zanzibari cases.

Notes

- 1 <https://populationstat.com/tanzania/> [Last accessed on 10 November 220].
- 2 <https://data.worldbank.org/indicator/EG.ELC.ACCS.RU.ZS?locations=TZ> [Last accessed on 10 November 2020].
- 3 <https://www.itu.int/en/ITU-D/Spectrum-Broadcasting/DSO/Pages/dataminer.aspx>[Last accessed on 10 November 2020]
- 4 <https://tradingeconomics.com/tanzania/households-with-television-percent-wb-data.html> [Last accessed 10 November 2020].
- 5 <https://www.internetworldstats.com/africa.htm#tz> [Last accessed on 10 November 2020].
- 6 <https://freedomhouse.org/country/tanzania/freedom-world/2020#CL> [Last accessed on 10 November].
- 7 Concluding Observations on the Consolidated 2nd to 10th Periodic Report of the United Republic of Tanzania, p. 6, para. 34. Available online: <https://www.achpr.org/sessions/concludingobservation?id=73> [Last accessed 4 December 2020].
- 8 <https://africanlii.org/node/2905> [Last Accessed on 4 December 2020]



15

Zambia

1 Introduction¹

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

The economic pattern has continued recently. The annual GDP growth between the year 2000 and the year 2014 averaged 6.8% but, between 2015 and 2019, the GDP growth rate dropped to an average of 3.1% per annum. The pressures placed on the economy by the 2020 Covid-19 pandemic put additional pressure on the economy, resulting in a projected economic contraction of 4.5% in 2020.³ Despite the overall economic growth in Zambia, the country remains extremely poor, with 60% of the population believed to be living below the poverty line and 40% living in extreme poverty. In recent years, Zambia has seen rapid urbanisation which has resulted in roughly 70% of the urban population living in slums with inadequate access to water and sanitation.⁴

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

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

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

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

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

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

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

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

2 The media and the constitution

In this section, you will learn:

- ▷ the definition of a constitution
- ▷ what is meant by constitutional supremacy
- ▷ how a limitations clause operates
- ▷ which constitutional provisions protect the media
- ▷ which constitutional provisions might require caution from the media or might conflict with media interests
- ▷ what key institutions relevant to the media are established under the Zambian Constitution
- ▷ how rights are enforced under the constitution

- ▷ what is meant by the ‘three branches of government’ and ‘separation of powers’
- ▷ whether there are any clear weaknesses in the Zambian Constitution that ought to be amended to protect the media

2.1 Definition of a constitution

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

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

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

2.2 Definition of constitutional supremacy

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

The Zambian Constitution makes provision for constitutional supremacy. Part 1 article 1 specifically states that ‘This Constitution is the supreme law of the Republic of Zambia and any other written law, customary law and customary practice that is inconsistent with its provisions is void to the extent of the inconsistency’.

2.3 Definition of a limitations clause

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

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

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

This is an interesting provision that requires some explanation.

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

Consequently, the rights contained in Part III of the Zambian Constitution are subject to the limitations contained in the provisions of the right itself. The limitations in respect of each right are dealt with below.

2.4 Constitutional provisions that protect the media

The Zambian Constitution contains several important provisions in Part III, Protection of Fundamental Rights and Freedoms of the Individual, which directly protect the media, including publishers, broadcasters, journalists, editors and producers.

2.4.1 Freedom of expression

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

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

This provision needs some detailed explanation.

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

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

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

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

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

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

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

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

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

2.4.2 Protection for privacy of the home and other property

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

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

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

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

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

2.4.3 Protection of freedom of conscience

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

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

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

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

2.4.4 Protection of freedom of assembly and association

Article 21(1) of the Zambian Constitution provides:

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

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

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

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

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

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

2.4.5 Provisions to secure protection of the law

Article 18(10) of the Zambian Constitution provides:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.6.1 The judiciary

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

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

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

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

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

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

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

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

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

2.6.2 The Judicial Service Commission

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

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

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

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

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

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

2.6.3 The Human Rights Commission

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

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

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

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

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

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

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

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

2.6.4 The Public Protector

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

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

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

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

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

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

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

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

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

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

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

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

2.7 Enforcing rights under the constitution

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

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

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

2.8 The three branches of government and separation of powers

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

2.8.1 Branches of government

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

The executive

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

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

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

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

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

The legislature

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

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

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

The judiciary

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

2.8.2 Separation of powers

In a functioning democracy, it is important to divide government power between different organs of the state to guard against the centralisation of power, which may lead to abuse. This is known as the separation of powers doctrine. The aim, as the Zambian Constitution has done, is to separate the functions of the three branches of government, the Executive, the Legislature and the Judiciary, so that no single branch can operate alone, assume complete state control and amass centralised power. While each branch performs several different functions, each also plays a watchdog role in respect of the other. This helps to ensure that public power is exercised in a manner that is accountable to the general public and following the constitution.

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

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

2.9.1 Remove internal constitutional qualifiers to certain rights

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

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

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

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

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

2.9.2 Objective grounds for declaring a state of emergency

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

2.9.3 Independent broadcasting regulator and public broadcaster

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

2.9.4 Strengthen the independence of institutions

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

3 The media and legislation

In this section, you will learn:

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

3.1 Legislation: An introduction

3.1.1 What is legislation?

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

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

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

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

3.1.2 The difference between a bill and an act

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

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

3.2 Legislation governing the print and online media

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

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

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

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

3.3 Legislation governing the exhibition of films

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

3.4 Legislation governing the broadcast media generally

3.4.1 Legislation that regulates broadcasting generally

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

3.4.2 Establishment of the IBA

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

3.4.3 Main functions of the IBA

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

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

3.4.4 Appointment of IBA board members

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

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

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

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

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

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

3.4.5 Funding for the IBA

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

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

3.4.6 Making broadcasting regulations

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

3.4.7 Licensing regime for broadcasters in Zambia

Broadcasting licence requirement

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

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

Categories of broadcasting licences

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

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

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

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

▶ **Public**

This is defined in the IBA Act as:

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

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

Broadcasting licensing process

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

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

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

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

Frequency spectrum licensing

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

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

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

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

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

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

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

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

3.4.8 Responsibilities of broadcasters under the IBA Act

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

- ▶ transmitter sites and apparatus to be used

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

3.4.9 Is the IBA an independent regulator?

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

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

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

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

3.4.10 Amending the legislation to strengthen the broadcast media generally

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

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

3.5 Legislation governing the state broadcast media

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

3.5.1 Establishment of the ZNBC

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

3.5.2 The ZNBC's mandate

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

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

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

3.5.3 Appointment of the ZNBC board

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

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

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

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

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

3.5.4 Funding for the ZNBC

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

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

- ▶ other sums of money accruing to the ZNBC.

3.5.5 The ZNBC: Public or state broadcaster?

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

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

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

3.5.6 Weaknesses in the ZNBC Act which should be amended

Several important weaknesses ought to be addressed by legislative amendments:

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

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

A journalist's sources are the lifeblood of his or her profession. Without trusted sources, a journalist cannot obtain information that is not already in the public domain. However, sources will often be prepared to provide critical information only if they are confident that their identities will remain confidential and will be respected and protected by a journalist. This is particularly true of so-called whistleblowers, inside sources who can provide journalists with information regarding illegal activities, whether by company or government personnel.

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

3.6.1 Criminal Procedure Code, 1933

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

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

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

3.6.2 Penal Code, Act 42 of 1930

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

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

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

Punishment is imprisonment or a fine.

3.6.3 Subordinate Courts Act, 1934

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

3.6.4 High Court Act, Act 36 of 1933

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

3.6.5 Supreme Court of Zambia Act, Act 41 of 1973

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

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

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

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

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

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

3.7 Legislation that prohibits the publication of certain kinds of information

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

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

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

3.7.1 Prohibition on the publication of information relating to legal proceedings

Publication that constitutes contempt of court

Penal Code, Act 42 of 1930

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

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

Contempt of Court Act, Act 32 of 1965

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

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

Local Courts Act, 1966

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

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

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

Publication of sketches or photographs that deal with court proceedings

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

Publication of information regarding matrimonial proceedings

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

Publication of information regarding indecent matters in legal proceedings

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

3.7.2 Prohibition on the publication of state security-related information

Penal Code, Act 42 of 1930

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

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

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

Treason and other offences

Prohibited publications

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

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

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

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

Seditious publications

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

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

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

Alarming publications

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

Insulting the national anthem

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

Insulting the president

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

Offences affecting relations with foreign states and external tranquillity

Defamation of foreign princes

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

Unlawful assemblies, riots and other offences against public tranquillity

Inducing a boycott

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

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

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

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

Prisons Act, Act 56 of 1965

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

Zambian Security Intelligence Service Act, Act 14 of 1998

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

Preservation of Public Security Act, Act 5 of 1960

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

State Security Act, Act 36 of 1969

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

Activities prejudicial to Zambia

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

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

Wrongful communication of information

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

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

Protection of classified information

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

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

Penal Code, Act 42 of 1930

Public morality

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

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

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

Obscenity

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

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

3.7.4 Prohibition on the publication of expression that constitutes criminal defamation

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

What is criminal defamation?

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

When is the publication of defamatory matter unlawful?

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

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

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

Absolute privilege

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

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

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

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

Conditional privilege

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

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

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

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

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

Definition of good faith

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

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

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

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

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

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

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

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

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

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

3.7.6 Prohibition on the publication of expression that promotes hatred

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

3.7.7 Prohibition on the publication of expression that relates to corruption

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

3.7.8 Prohibition on the publication of expression relating to voting

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

3.7.9 Prohibition on the publication of information relating to parliamentary proceedings

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

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

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

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

3.8.1 Introduction

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

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

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

3.8.2 Justifications for libel or slander

Fair comment

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

Newspaper and ZNBC reportage of court proceedings absolutely privileged

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

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

Qualified privilege for newspapers and the ZNBC

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

Statements that are privileged without explanation or contradiction

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

Statements privileged subject to explanation or contradiction

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

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

The exceptions to these statements being privileged are as follows:

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

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

Limitation on privilege at elections

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

3.9 Legislation that specifically assists the media in performing its functions

3.9.1 Introduction

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

3.9.2 National Assembly (Powers and Privileges) Act, 2006

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

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

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

Institutions to which the Whistleblowers Act applies

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

Protection given to whistleblowers

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

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

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

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

Who are public interest disclosures made to?

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

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

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

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

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

Remedies to ensure that a whistleblower’s claims are investigated

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

Provisions relating to defamation in the Whistleblowers Act

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

4 Regulations affecting the media

In this section, you will learn:

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

4.1 Definition of regulations

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

4.2 Regulations governing the media when covering elections

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

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

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

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

5 Media self-regulation

In this section, you will learn:

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

5.1 Definition of self-regulation

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

5.2 The Zambia Media Council

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

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

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

5.3 Key provisions of the Zamec Draft Code of Ethics

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

▶ Reporting of news

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

▶ **Discrimination and hate speech**

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

▶ **Advocacy**

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

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

▶ **Comment**

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

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

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

▶ **Confidential sources**

The media must protect confidential sources of information.

▶ **Payment for articles**

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

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

▶ **Violence**

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

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

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

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

6 Case law and the media

In this section, you will learn:

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

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

6.1 Definition of common law

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

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

6.2 Deportation of foreign journalists

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

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

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

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

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

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

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

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

6.4 Ministerial discretion regarding appointments to independent media bodies

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

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

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

6.5 Publication of classified documents

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

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

6.6 Defamation

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

6.6.1 The defence of fair comment to an action for libel

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

Kingdom and Australia, the judge stated as follows:

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

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

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

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

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

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

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

6.6.2 Remedies for defamation

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

6.6.3 Criminal defamation

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

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

Notes

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



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Zimbabwe

1 Introduction

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

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

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

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

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

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

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

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

2 The media and the constitution

In this section, you will learn:

- ▷ the definition of a constitution
- ▷ what is meant by constitutional supremacy
- ▷ how a limitations clause operates
- ▷ which constitutional provisions protect the media
- ▷ which constitutional provisions might require caution from the media or might conflict with media interests

- ▷ what key institutions relevant to the media are established under the Constitution of Zimbabwe
- ▷ how rights are enforced under the constitution
- ▷ what is meant by the ‘three branches of government’ and ‘separation of powers’
- ▷ whether there are any weaknesses in the Constitution of Zimbabwe that ought to be strengthened to protect the media

2.1 Definition of a constitution

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

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

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

2.2 Definition of constitutional supremacy

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

The Zimbabwe Constitution does make provision for constitutional supremacy.

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

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

2.3 Definition of a limitations clause

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

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

2.3.1 Public emergency limitations

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

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

2.3.2 General limitations

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

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

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

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

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

2.4 Constitutional rights that protect the media

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

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

2.4.1 Freedom of expression and freedom of the media

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

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

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

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

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

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

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

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

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

All state-owned media of communication must:

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

These provisions require some explanation.

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

2.4.2 Right of access to information

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

Section 62(1) provides that:

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

Section 62(2) provides that:

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

Section 62(3) provides that:

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

Section 62(4) provides that:

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

This right requires some explanation.

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

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

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

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

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

2.4.3 Right to administrative justice

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

This right requires some explanation.

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

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

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

2.4.4 Right to privacy

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

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

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

2.4.5 Freedom of assembly and association

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

2.4.6 Freedom of conscience

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

2.4.7 Freedom of profession, trade or occupation

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

2.5 Other constitutional provisions that assist the media

2.5.1 Provisions regarding good governance

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.5.2 Provisions regarding the functioning of parliament

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

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

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

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

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

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

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

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

2.6.1 Right to human dignity

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

2.6.2 Right to privacy

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

2.6.3 Internal limitation on the right to freedom of expression

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

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

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

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

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

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

2.6.4 States of emergency provisions

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

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

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

2.7.1 The judiciary

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

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

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

2.7.2 The Judicial Service Commission

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

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

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

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

2.7.3 The Commission on Human Rights and Public Administration

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

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

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

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

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

2.7.4 The Zimbabwe Media Commission

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

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

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

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

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

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

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

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

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

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

2.7.5 National Peace and Reconciliation Commission

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

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

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

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

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

2.7.6 Zimbabwe Anti-Corruption Commission

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

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

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

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

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

2.7.7 Important features of the independent commissions supporting democracy

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

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

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

Section 235 states that all such commissions:

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

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

2.8 Enforcing rights under the constitution

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

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

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

2.9 The three branches of government and separation of powers

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

2.9.1 Branches of government

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

The executive

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

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

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

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

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

The legislature

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

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

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

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

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

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

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

The judiciary

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

2.9.2 Separation of powers

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

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

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

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

2.10.1 Remove internal constitutional limitations

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

2.10.2 Licensing powers to be given to the Zimbabwe Media Commission

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

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

2.10.3 Constitutional protections for the public broadcaster

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

3 The media and legislation

In this section, you will learn:

- ▷ what legislation is and how it comes into being
- ▷ legislation governing the print media
- ▷ legislation governing the media generally
- ▷ legislation governing the broadcast media in general
- ▷ legislation governing the public broadcasting sector
- ▷ legislation governing the broadcasting signal distribution
- ▷ legislation that undermines a journalist's duty to protect his or her sources
- ▷ legislation that prohibits the publication of certain kinds of information
- ▷ legislation that prohibits the interception of communication
- ▷ legislation that specifically assists the media in performing its functions

3.1 Legislation: An introduction

3.1.1 What is legislation?

Legislation is a body of law consisting of acts properly passed by the legislature, that is, the president and parliament. As already discussed, in terms of the constitution, parliament in Zimbabwe is made up of the Senate and the National Assembly.

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

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

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

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

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

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

3.1.2 The difference between a bill and an act

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

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

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

3.2 Legislation governing the print media

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

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

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

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

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

3.3 Legislation governing the media generally

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

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

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

3.4 Legislation governing the broadcast media generally

3.4.1 Statutes that regulate broadcasting generally

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

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

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

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

3.4.2 Establishment of the Broadcasting Authority of Zimbabwe

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

Main functions of the BAZ

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

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

to foster and maintain a healthy plural democracy

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

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

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

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

Appointment of the BAZ board members

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

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

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

Funding for the BAZ

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

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

3.4.3 Making broadcasting regulations

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

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

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

3.4.4 Licensing regime for broadcasters in Zimbabwe

Categories of broadcasting services

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

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

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

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

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

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

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

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

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

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

Broadcasting licensing processes

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

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

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

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

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

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

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

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

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

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

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

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

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

Frequency spectrum licensing

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

3.4.5 Responsibilities of broadcasters in Zimbabwe

Adherence to licence conditions, including statutory standard terms and conditions

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

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

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

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

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

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

Adherence to content conditions

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

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

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

Adherence to codes of conduct

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

- ▶ rules of conduct to be observed by broadcasters

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

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

Adherence to ownership and control requirements

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

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

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

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

3.4.6 Is the BAZ an independent regulator?

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

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

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

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

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

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

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

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

3.5 Legislation regulating the public broadcast media

3.5.1 Introduction

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

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

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

3.5.2 Establishment of the ZBC

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

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

3.5.3 The mandate of the ZBC

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

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

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

3.5.4 Licensing the ZBC

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

3.5.5 Appointment of the ZBC board

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

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

3.5.6 Funding for the ZBC

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

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

3.5.7 The ZBC: Public or state broadcaster?

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

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

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

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

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

3.6 Legislation governing broadcasting signal distribution

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

3.6.1 Licences required by broadcasting signal distribution providers

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

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

3.6.2 The regulatory framework for broadcasting signal distributors

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

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

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

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

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

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

3.7.1 Criminal Procedure and Evidence Act, 1927

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

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

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

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

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

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

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

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

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

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

3.8 Legislation that prohibits the publication of certain kinds of information

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

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

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

- ▶ advertising on roadsides or near railways.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.8.3 Prohibition on the publication of state security-related information

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

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

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

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

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

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

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

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

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

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

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

Prisons Act [Chap 7:11], 1956

Section 84(3) of the Prisons Act makes it an offence to publish the whole or part of a letter or document which he has reasonable cause to believe was written in prison by or on behalf of a prisoner, and which has not been endorsed by the officer in charge of the prison in terms of section 84(1) without the authority of the Minister of Justice, Legal and Parliamentary Affairs, or any other minister tasked with the administration of the Prisons Act. In terms of section 84(4) of the Prisons Act, the penalty on conviction for such publication is a fine, imprisonment or both.

3.8.4 Prohibition on the publication of false news

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

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

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

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

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

3.8.5 Prohibition on insulting the president

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

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

3.8.6 Prohibition on the publication of criminal insult

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

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

3.8.7 Prohibition on the invasion of privacy

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

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

3.8.8 Prohibition on the publication of obscenity

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

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

Materials regulated under the Censorship Act

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

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

The Censorship Act establishes two critical bodies:

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

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

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

Classification of publications

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

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

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

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

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

Classification of films

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

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

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

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

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

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

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

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

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

3.8.9 Prohibition on the publication of threats to public health

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

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

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

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

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

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

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

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

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

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

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

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

3.8.12 Prohibition on advertising on roadsides or near railways

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

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

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

3.9 Legislation prohibiting interception of communication

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

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

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

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

3.10 Legislation that specifically assists the media in performing its functions

Freedom of Information Act, Act 1 of 2020

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4 Regulations affecting the media

In this section, you will learn:

- ▷ what regulations are
- ▷ key regulations governing broadcasting

4.1 Definition of regulations

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

4.2 Regulations governing broadcasting

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

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

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

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

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

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

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

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

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

5 Media self-regulation

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

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

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

- ▶ lodging of complaints

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

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

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

▶ **General standards**

- ▶ To maintain the highest professional and ethical standards in performing their functions of informing, educating and entertaining.
- ▶ To defend the principle of freedom of the media to access, collect and disseminate information freely and to publish comments and criticisms. To oppose censorship, suppression of news and the dissemination of propaganda.

▶ **Accuracy and fairness**

- ▶ To report and interpret news with scrupulous honesty and take all reasonable steps to disseminate accurate information, to depict events fairly and without distortion.
- ▶ Never to publish information known to be false or make unfounded allegations maliciously with intent to harm reputations.
- ▶ To check facts and take care not to publish inaccurate material. Editors are to ensure that all steps that a reasonable media practitioner would take to check the accuracy of facts have been taken.
- ▶ Special care must be taken concerning stories that may cause harm to individuals, organisations or the public interest. Before publishing a story of alleged wrongdoing, all reasonable steps must be taken to obtain a

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

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

▶ **Correction of inaccuracy or distortion**

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

▶ **Right of reply**

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

▶ **Comment**

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

▶ **Bribes and inducements**

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

▶ **Pressure or influence**

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

▶ **Hatred or violence**

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

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

▶ **Intrusion into grief or shock**

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

▶ **Interviewing and photographing children**

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

▶ **Children in criminal cases**

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

▶ **Victims of crime**

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

▶ **Innocent relatives or friends**

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

▶ **Surreptitious gathering of information**

- ▶ Open methods of gathering information in which media practitioners clearly identify themselves should be used. Generally, media practitioners should not seek or obtain information by misrepresentation, deception, subterfuge or undercover techniques.
- ▶ Surreptitious methods of information gathering may be used only where open methods have failed to yield information which is in the public interest. Surreptitious methods may be used if they will help to detect or expose criminal activity or bring to light information that will protect the public against serious threats to public health and safety.

▶ **National security**

- ▶ Media institutions must not prejudice the legitimate national security interests of Zimbabwe or place members of the defence force who are on active military duty at risk.

- ▶ However, this does not prevent the media from exposing corruption in security or defence agencies, or from commenting on levels of defence expenditure.
- ▶ **Plagiarism**
Media practitioners must not engage in plagiarism. Plagiarism consists of making use of another person's words, pictures or ideas without permission and proper acknowledgement and attribution of the source of those words, pictures or ideas.
- ▶ **Protection of sources**
 - ▶ Where a person has agreed to supply information on condition of anonymity, and the media practitioner agrees to this, the media practitioner must respect this undertaking and refuse to reveal the identity of the source.
 - ▶ However, the media practitioner may tell the source that his or her identity might have to be revealed if it becomes clear that this information is needed to prevent or expose serious criminal conduct.

6 Case law and the media

In this section, you will learn:

- ▷ the definition of common law
- ▷ defamation
- ▷ unconstitutionality of offences relating to the publication of false statements
- ▷ a journalist's right to protect sources
- ▷ constitutionality of Zimbabwe Broadcasting Corporation's monopoly in respect of broadcasting

6.1 Definition of common law

The common law is judge-made. It is made up of judgments handed down in cases adjudicating on disputes brought by people, whether natural (individuals) or juristic (for example, companies).

In common law legal systems such as Zimbabwe's, judges are bound by the decisions of higher courts and also by the rules of precedent. This requires that rules laid down by the court in previous cases must be followed unless they were clearly wrongly decided. Legal rules and principles are, therefore, decided on an incremental, case-by-case basis.

Since the last publication of this chapter, there have been numerous cases challenging decisions made under the Access to Information and Protection of Privacy Act, 2002. However, as that Act has now been repealed, we have not included a reference to these cases in this section as they will not be relevant in the future.

6.2 Defamation

6.2.1 Can an organ of state sue for defamation and does a statutory corporation constitute an organ of state?

In *PTC v Modus (Pvt) Ltd 1997 (2) ZLR 492 (S)*, the issue was whether the Posts and Telecommunications Corporation (PTC), a statutory corporation incorporated under Zimbabwean law, could sue a newspaper for defamation. The Supreme Court, in a unanimous judgment, confirmed three critical issues concerning defamation.

- ▶ It confirmed that an artificial person [that is, a juristic person such as a company] can sue for defamation — at page 494.
- ▶ It held that the state cannot sue for defamation — at page 494. It is important to note that several common law jurisdictions have upheld the principle that 'it would be contrary to the public interest for the organs of government, whether central or local to have that right' [that is, the right to sue for defamation] — see page 497.
- ▶ It held that the PTC could not sue for defamation because the PTC, although having a separate legal personality, was nonetheless an organ of State and therefore had no basis to sue — at page 502.

6.2.2 Factors to be taken into account in assessing damages

In *Shamuyarira v Zimbabwe Newspapers (1980) Ltd & Another 1994 (1) ZLR (H)*, the High Court set out (at page 502) a list of relevant factors in determining damages concerning the defamation in question, many of which are of general application:

- ▶ the content of the article, which includes the defamatory matter
- ▶ the nature and extent of the publication, including the aspect of the re-publication of the defamatory matter
- ▶ the plaintiff's standing, that is, his reputation, character and status
- ▶ the nature of the defamation
- ▶ the probable consequences of the defamation

- ▶ the conduct of the defendants from the time the defamatory matter was published to the time of judgment, including:
 - ▶ their reliance on and persistence in a plea of justification
 - ▶ the question of any malice on their part
 - ▶ the question of any retraction and apology for the publication of the defamatory matter
- ▶ the recklessness of the publication
- ▶ comparable awards of damages in other defamation suits and the declining value of money.

6.2.3 Defamation and public figures

In the case of *Mushunje v Zimbabwe Newspapers (1980) Ltd* (HC 2580/16), the High Court of Zimbabwe per Charewa J made some interesting comments in finding against a plaintiff in a defamation matter, on the issue of the defamation of famous and public figures. At pages 9 – 10, the court held as follows:

I am of the firm view that persons who find themselves in the public eye must expect a certain amount of publicity and intrusion into their private and personal lives, including inaccurate statements, as long as the publicity is not malicious or reckless in its disregard of truth. This is more so when they are public or famous figures where the happenings in their lives are, after all, news for the average citizenry.

They should therefore not be thin-skinned, belligerent or litigious, but ought to have the courage to take such social blows, which go with the territory, on the chin. They must understand that once they are in the public arena, they become targets of pot-shots for real or imagined indiscretions, errors or failures.

Therefore, unless the publications about them are malicious, or reckless in their disregard of truth, or clearly intended to tarnish their reputations, such persons should not rush to court to seek damages.

6.2.4 Unconstitutionality of the crime of defamation

In the case of *Madanhire and Another v Attorney-General of Zimbabwe* (CCZ 2/14 and 2/15), the Constitutional Court of Zimbabwe struck down the crime of defamation, effectively rendering defamation a purely civil matter in terms of which damages are paid for defamation and not a criminal matter involving sanctions such as fines or imprisonment. This was done by holding that section 96 of the Criminal Law (Codification and Reform) Act [9:23] 2005 (which section provided for the offence of criminal defamation), was an unconstitutional violation of the right to freedom of expression.

6.3 Unconstitutionality of offenses relating to the publication of false statements

In the case of *Chimakure and Others v Attorney General of Zimbabwe* (SC 14/2013 and CCZ 6/2014) the Constitutional Court of Zimbabwe struck down offences criminalising the publication of false statements prejudicial to the state by ruling that section 31(a)(iii) of the Criminal Law (Codification and Reform) Act [9:23] 2005 was an unconstitutional violation of the right to freedom of expression.

6.4 A journalist's right to protect sources

In *Shamuyarira v Zimbabwe Newspapers (1980) Ltd & Another 1994 (1) ZLR (H)*, the High Court upheld the right of a journalist not to reveal his or her sources during a civil defamation trial. The High Court made the following important statement on the issue:

Unless our courts are seen to be prepared to lean over backwards to protect, in the public interest, a journalist's source where the journalist has publicly uncovered corruption or some other form of iniquity on the part of those holding high office, whether in government or elsewhere, the courts will be guilty of a grave disservice to Zimbabwean society and to the principles of democracy upon which that society is founded [at page 483].

It is, however, also important to note that the High Court did set out instances where it would be appropriate to require a journalist to reveal his or her sources.

6.5 Constitutionality of provisions granting the Zimbabwe Broadcasting Corporation a monopoly in respect of broadcasting

In *Capital Radio (Pvt) Ltd v Minister of Information (1) 2000 (2) ZLR 243 (S)*, the Supreme Court declared that section 27 of the ZBC Act [Chap 12:01], which provided that 'No person other than the [Zimbabwe Broadcasting] Corporation shall carry on a broadcasting service in Zimbabwe', was inconsistent with the freedom of expression guarantee contained in section 20(1) of the then constitution.

Notes

- 1 <https://mg.co.za/article/2017-11-19-zimbabwes-ruling-party-expels-robert-mugabe/> [Last accessed on 19 October 2020].
- 2 <https://www.bbc.com/news/world-africa-42495934> [Last accessed on 19 October 2020].
- 3 <https://www.worldometers.info/world-population/zambia-population/> [Last Accessed on 19 October 2020].

- 4 <https://www.worldbank.org/en/country/zimbabwe/overview> [Last accessed on 19 October 2020].
- 5 <https://datareportal.com/reports/digital-2020-zimbabwe> [Last accessed on 19 October 2020]
- 6 [https://tradingeconomics.com/zimbabwe/access-to-electricity-percent-of-population-wb-data.html#:~:text=Access%20to%20electricity%20\(%25%20of%20population\)%20in%20Zimbabwe%20was%20reported,compiled%20from%20officially%20recognized%20sources.](https://tradingeconomics.com/zimbabwe/access-to-electricity-percent-of-population-wb-data.html#:~:text=Access%20to%20electricity%20(%25%20of%20population)%20in%20Zimbabwe%20was%20reported,compiled%20from%20officially%20recognized%20sources.) [Last accessed 19 October 2020].
- 7 <https://datareportal.com/reports/digital-2020-zimbabwe> [Last accessed on 19 October 2020]
- 8 <https://mg.co.za/article/2018-08-27-a-new-dawn-or-more-of-the-same-for-zimbabwe/> [Last accessed on 9 November 2020]
- 9 <https://www.aljazeera.com/news/2020/11/6/zimbabwe-journalist-remains-behind-bars-over-tweet> [Last accessed on 9 November 2020]
- 10 <https://allafrica.com/stories/202010151086.html> [Last accessed on 9 November 2020]



17

**Media law in
the region**
Where to from here?

In this chapter, you will learn:

- ▷ what a bird’s-eye view of the countries surveyed reveals about compliance with:
 - › ten key principles of democratic media regulation
 - › eight key principles of democratic broadcasting regulation
 - › seven key principles of democratic internet regulation
- ▷ what international organisations on the continent are doing to promote media freedom
- ▷ what key challenges to media freedom remain

1 Introduction

Chapter 2 (found in Volume 1 of this handbook) examined the internationally accepted hallmarks of democratic media regulation; in other words, the legal regime that establishes a democratic media environment. It identified 18 instruments, charters, protocols or declarations adopted by international bodies (such as the African Union and the Southern African Development Community), civil society organisations focusing on the media (such as article 19), and at significant conferences held under the auspices of international bodies (such as the United Nations Education, Scientific and Cultural Organisation).

The 18 instruments, many of which have a particular focus on Africa, deal with various aspects of democratic media regulation, among other things. Ten key principles of general democratic media regulation and eight key principles of democratic broadcasting regulation have been identified from these instruments and are set out more fully in Chapter 2. The principles can be used as a yardstick to assess an individual country’s commitment to democratic media and broadcasting regulation and, more broadly, its commitment to the underlying principle of freedom of expression.

The information contained in this concluding chapter is derived from the country-specific chapters in Volumes 1, 2 and 3 of the handbook.

2 A bird's-eye view of country compliance with ten key principles of democratic media regulation

2.1 Principle 1: Freedom of the press and other media

In all the countries surveyed, the right to freedom of expression, the foundational right to a free press, is provided for in the constitution of that country. In some countries such as the Democratic Republic of the Congo (DRC), Malawi, Mozambique, Namibia, South Africa, eSwatini and Zimbabwe, the constitutions also expressly mention and protect the right to freedom of the press or the media, in some cases generally and, in the case of Zimbabwe, with a particular focus on the broadcast media.

However, there are instances where the constitution does not fully protect the right to freedom of expression because the right is effectively subject to legislation passed to regulate freedom of expression or the press. In the DRC, for example, the right to press freedom expressly states in section 24 of the constitution that: 'legislation is to govern the exercise of these rights'.

The constitutions of other countries are less explicit about subverting the right to press freedom. These constitutions contain broad limitations clauses (general limitations clauses or so-called internal limitations clauses that apply concerning a particular right) which give governments extensive powers to pass legislation to limit rights. Broad powers are not only given in wide grounds for restricting rights but by not having limitations requirements, such as necessity or proportionality. The DRC, Mauritius, Mozambique, Tanzania (and Zanzibar) have extremely broad limitations provisions.

Botswana, Lesotho, Malawi, Namibia, South Africa, Seychelles, eSwatini, Zambia and Zimbabwe have fairly carefully crafted limitations clauses which, in theory, allow for the appropriate limiting of rights. However, it is essential to note that certain of the internal limitations provisions to Zimbabwe's freedom of expression right are problematic (this is discussed more fully in Chapter 16).

Some countries have constitutional provisions that look extremely good on paper and appear to comply with international standards, only for the media environments to be extremely poor in reality. There is scope for the enforcement of constitutional rights to be significantly improved.

2.2 Principle 2: An independent media

In terms of an independent media environment, it is apparent from the country chapters that practice varies considerably among the different countries surveyed. South Africa and Namibia have a large number of independent media, while a

country such as Zimbabwe has almost no independent broadcasting media and a severely constrained independent print media landscape.

However, most countries do recognise the need for independent media sources and the establishment of independent (commercial or community) print and broadcast media houses. However, several countries including Mozambique, the Seychelles, eSwatini, and Zimbabwe have curtailed independent media environments and are dominated by the state media.

2.3 Principle 3: Diversity and pluralism in the media

It is also apparent from the country chapters that diversity and pluralism in the media vary significantly among the countries reviewed. South Africa has a great deal of diversity and pluralism while Zimbabwe and Mozambique, for example, have almost no independent broadcasting media and severely constrained independent print media landscapes.

One of the biggest obstacles to the creation and growth of a diverse media is the registration requirement imposed on the print media. Botswana, the DRC, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, eSwatini, Tanzania (including Zanzibar) and Zambia still require newspaper registration, and certain of these require the payment of a bond, a financial barrier to market entry by new competitors. Of the countries surveyed, only South Africa does not require the formal registration of print media publications. Even worse is that certain countries (for example, Botswana, and the DRC) also require the registration of working journalists. While not legally preventing the functioning of an independent media, these registration mechanisms discourage the development of a thriving pluralistic media environment.

2.4 Principle 4: Professional media

There is little doubt that the development of a professional corps of reporters, investigative journalists and editors has been slow in most of the countries surveyed. Until recently, many of the countries lacked tertiary educational courses or training facilities dedicated to journalism and the media, which could develop and equip journalists to practice journalism as a genuine profession. This is slowly changing; however, development is far from uniform.

While South Africa, for example, has several excellent training courses and facilities run by various institutions, ranging from universities and colleges to in-house cadet courses operated by media houses, some countries battle to provide even basic training in journalism skills and ethics. On a positive note, the establishment of self-regulatory bodies, such as media councils, in most of the countries reviewed has had an impact on the professionalisation of the media in those countries. However, there are still far too many countries which lack self-regulatory bodies for content regulation, including the DRC, eSwatini, Lesotho, Mauritius, Mozambique and Seychelles.

2.5 Principle 5: Protecting the confidentiality of sources

It is interesting to note that certain of the constitutional limitation provisions of the countries surveyed allow for limitations on the right to freedom of expression to be limited to 'protect information received in confidence'. Botswana, Lesotho, eSwatini and Zambia have these kinds of provisions. It is unclear though whether such a provision can be used by the media, or only by the government when protecting its confidential sources.

Mozambique's constitution provides specifically for the protection of journalists' confidential sources.

All thirteen countries included in the handbook have laws that could be used to compel a journalist or media house to reveal confidential sources of information. However, it is not possible to state that the law is inherently problematic. This is because each case has to be determined on its merits when considering whether or not forcing a journalist to reveal a source will, in the particular circumstance concerned, violate constitutional, international, or both, standards for such compulsion.

2.6 Principle 6: Access to information

Sadly, only a few of the countries under review, the DRC, Malawi, Seychelles South Africa and Zimbabwe, explicitly protect the right of access to information (as a right separate from the right to freedom of expression) in the constitution.

These rights are formulated in different ways:

- ▶ The DRC has a general right of access to information.
- ▶ Malawi has a right of access to government-held information, where this is required for the exercise and protection of rights.
- ▶ Seychelles has a right of access to personal information held by a public authority and the right to have inaccurate personal information corrected. It also has a general right of access to information held by a public authority performing a public function.
- ▶ South Africa has a general right of access to government-held information and a right of access to privately-held information, where required for the exercise and protection of rights.
- ▶ Zimbabwe has a right of access to government-held information, where this is required for the exercise and protection of rights or is in the interests of public accountability.

However, all of the countries surveyed (with the notable exception of Namibia) include the right to receive and impart information and ideas as part of the constitutional right to freedom of expression. Although Namibia has tabled an Access to Information bill, it has yet to be enacted as law.

Besides the constitutional provisions, several countries have enacted access to information legislation, namely Malawi, Seychelles South Africa, Tanzania (but not Zanzibar) and Zimbabwe.

2.7 Principle 7: Commitment to transparency and accountability

Transparency and accountability are very difficult to measure as these issues are more often than not reflected in political culture rather than in specific legal provisions. However, there are several legal mechanisms which infer a commitment to accountability and transparency, some of which are dealt with below.

It is important to note that the mere fact that a country has constitutional or even legal provisions regarding an accountability measure is not in itself indicative of a genuine political commitment to transparency or accountability.

A way that a commitment to transparency can be determined is from a country's commitment to access to information, as discussed above.

Only the constitutions of Malawi, South Africa, eSwatini, and Zimbabwe contain general provisions stating a commitment to transparency, accountability, or both.

The constitutions of Malawi, Namibia, eSwatini, South Africa and Zimbabwe also contain a right to administrative justice, which is a critical right for holding public power accountable. South Africa has also enacted administrative justice legislation. This legislation is extremely effective in forcing the government to engage in decision-making transparently and accountably.

Botswana, Mauritius, Namibia, South Africa, Tanzania (but not Zanzibar) and Zambia have passed whistleblower protection legislation, which is also effective in combatting corruption and other crimes that hinder transparent and accountable government. Malawi contains some legislative protections for whistleblowers in its access to information legislation.

2.8 Principle 8: Commitment to public debate and discussion

A commitment to public debate and discussion is also difficult to measure as these issues are more often than not reflected in political culture rather than in specific legal provisions. However, legal provisions dealing with freedom of expression, a free press, access to information and the establishment of a genuine public broadcaster, as opposed to a state broadcaster (all issues dealt with elsewhere in the chapter), indicate at least an ostensible commitment to public debate and discussion.

2.9 Principle 9: Availability of local content

Local content is available in the countries surveyed. In addition, Botswana, the DRC, Malawi, Mauritius, South Africa, Tanzania (but not Zanzibar) and Zimbabwe have specific local content requirements for broadcasting services.

2.10 Principle 10: Ensuring that states do not use their advertising power to influence content

This principle is not respected in the countries under review, and no statutory mechanisms have been enacted to deal with the problem. Interestingly, this practice has been successfully challenged in the courts of at least one country, Botswana, where a directive banning government advertising in two newspapers was ruled to contravene the right to freedom of expression of the newspapers. Further Tanzania (but not Zanzibar) does allow a right of appeal against a decision of the Director of Information Services concerning placing government advertising.

3 A bird's-eye view of country compliance with eight key principles of democratic broadcasting regulation

3.1 Principle 1: National frameworks for the regulation of broadcasting must be set down in law

All the countries studied have enacted national frameworks in the form of legislation to regulate the broadcasting sector as a whole, except eSwatini, as discussed in Chapter 6.

3.2 Principle 2: Independent regulation of broadcasting

Given the increasing levels of convergence between traditional broadcast and telecommunications infrastructure and services, in terms of which content is available to audiences over a range of platforms, it is not unusual to find 'converged regulators' who are responsible for electronic communications (and in some instances postal regulation) as a whole. This is not contrary to international requirements. However, what is required is that these converged regulators are independent in terms of appointments and removals processes. Converged regulators should not be accountable to the executive branch of government. They should have the authority to regulate the sector, including granting licences and making regulations, without commercial or government interference.

Countries which have converged regulators are Botswana, eSwatini (but as there isn't proper broadcasting legislation for it to regulate, this is a misnomer), Lesotho (but with the Broadcasting Disputes Resolution Panel acting as a broadcasting-specific arm of the LCA), Malawi, Namibia and Tanzania (but not Zanzibar). Countries which have broadcasting regulators are the DRC, Mauritius, Zambia, Zanzibar (but not the rest of Tanzania) and Zimbabwe.

Only the DRC and South Africa provide a level of constitutional protection for a broadcasting regulator. Other countries, including Mozambique and Zimbabwe, refer to media-related bodies in their constitutions but, in the case of Zimbabwe, this refers to a content-regulatory body only and not to a general broadcasting regulator, that is, one that grants licences and performs other regulatory functions. However, one should be aware that there is a distinction between what is provided for in a constitution and the actual practice. The cases of the DRC, Mozambique and Zimbabwe are instructive in this regard.

Of the countries reviewed, only Mauritius and South Africa could be said to have independent regulation of broadcasting. For example, the Independent Communications Authority of South Africa is:

- ▶ appointed following international best practice, namely, a public nominations process, short-listing by a multi-party body such as parliament, appointment by the president;
- ▶ generally able to regulate the sector without ministerial involvement in licensing or making regulations

Mozambique and Seychelles are particularly problematic when it comes to an independent regulator. Although Mozambique has established several media-related bodies, the actual regulator is GABINFO, effectively an arm of the relevant minister. Similarly, broadcasting in Seychelles is effectively regulated by the relevant minister.

3.3 Principle 3: Pluralistic broadcasting environment with a three-tier system for broadcasting: public, commercial and community

Most of the countries surveyed have a legislative, regulatory or both, environment that specifically provides for community, commercial and public broadcasting as three separate tiers of available broadcasting services; however, implementation is uneven.

Because eSwatini does not have legislation applicable to the broadcasting sector as a whole, it lacks the appropriate tiers of broadcasting as a matter of law or practice.

Neither the DRC nor Seychelles provides specifically for the three tiers in law.

3.4 Principle 4: Public as opposed to state broadcasting services

Most of the countries reviewed have 'state' as opposed to 'public' broadcasting services and do not provide for genuine public broadcasting in legislation:

- ▶ Some countries do not have legislation establishing a public broadcaster and operate out of the relevant ministry. These include: Botswana, Lesotho and eSwatini
- ▶ Some countries do have legislation establishing a public or national broadcaster, but these do not operate as public broadcasters because the boards of all of them are appointed by members of the Executive. These include: the DRC, Mauritius, Mozambique, Namibia Tanzania (including Zanzibar) and Zimbabwe
- ▶ Malawi's public broadcaster does have several board members who are not Executive appointees. It appears to be a hybrid state/public broadcaster due to its appointments processes on paper but operates as a state broadcaster in practice. In some ways, this is similar to the Zambian public broadcaster where the minister makes the Board appointments, but the National Assembly ratifies them. However, the Zambian national broadcaster operates as a state as opposed to a public broadcaster
- ▶ Although the Seychelles Constitution ostensibly protects the independence of the public broadcaster, the reality is somewhat different. The president has an enormous say over board appointments to the public broadcaster, and the relevant minister makes regulations and rules for the public broadcaster

Of the countries surveyed, only the South African Broadcasting Corporation is:

- ▶ appointed following international best practice, namely, a public nominations process, short-listing by a multi-party body such as parliament, appointment by the president;
- ▶ required to broadcast in the public interest in accordance with a statutory mandate.

3.5 Principle 5: Availability of community broadcasting services

Most of the countries reviewed have a legislative, regulatory or both, environment that specifically provides for community broadcasting as a separate tier of available broadcasting services, although the implementation is uneven. Countries that do not provide specifically for community broadcasting in law are the DRC, eSwatini and Seychelles, although the DRC does have licensed community broadcasters.

3.6 Principle 6: Equitable, fair, transparent and participatory licensing processes, including of frequencies

International best practice requires that an independent regulatory authority license broadcasting services and associated frequencies. As already discussed, few of the countries surveyed have genuinely independent broadcasting regulatory authorities. Very few countries allow for a genuine public notice and comment process on licensing issues for interested parties (such as competitors) or the public. It is also a feature of many countries that service licensing is carried out by a broadcasting regulator, and a separate telecommunications regulator licenses spectrum.

Of the countries surveyed, South Africa has the most transparent and independent licensing system concerning both services and frequencies. However, no invitations to apply for an individual infrastructure licence (required to provide broadcasting signal distribution) can be issued by the South African regulator in the absence of a ministerial policy direction. Theoretically, this undermines the independence of the licensing process concerning the broader landscape, even though it is limited to signal distribution.

3.7 Principle 7: Universal access to broadcasting services and equitable access to signal distribution and other infrastructure

Most of the countries included in the handbook have provisions promoting universal access to broadcasting services and equitable access to signal distribution. However, the actual realisation of universal access is still far from being achieved.

One of the biggest reasons for the lack of universal access to broadcasting services is the poor quality of electricity infrastructure.

Electricity access in southern Africa reflects vast disparities. As of 2019:¹

- ▶ four countries dealt with in this handbook had less than 25% electricity penetration: DRC, Malawi, Mozambique and Tanzania
- ▶ four countries had between 25% and 50% electricity penetration: Lesotho, Namibia, Zambia and Zimbabwe
- ▶ two countries had between 50% and 75% electricity penetration: Botswana and eSwatini
- ▶ three countries had more than 75% electricity penetration: Mauritius, Seychelles and South Africa.

Given that so many people do not have access to reliable electricity, radio (which can easily be accessed on battery-operated devices) still plays a critical role in meeting the communication needs of the populations of the countries surveyed.

3.8 Principle 8: Regulating broadcasting content in the public interest

All the countries surveyed regulate broadcasting-specific content and, although some of the restrictions or requirements are following international norms and standards, there are far too many content restrictions which fall below these standards.

Many of the countries studied regulate content (including broadcasting content) concerning legislation, some of which is extremely outdated from the colonial-era, which does not comply with international standards for limiting or prohibiting the right to freedom of expression. These are dealt with in the general content prohibitions below.

Only a few countries have a commitment to self-regulation of broadcasting content by the broadcasters themselves. South Africa and Namibia are the only countries reviewed where a commitment to self-regulation is enshrined in the governing broadcasting legislation.

However, there are still far too many countries which lack self-regulatory bodies for content regulation, including the DRC, eSwatini, Lesotho, Mauritius, Mozambique, and Seychelles.

4 A bird's-eye view of country compliance with seven key principles of democratic internet regulation

4.1 Principle 1: Internet access and affordability

Internet penetration statistics² in the different countries dealt with in this handbook vary significantly:

- ▶ The DRC, Malawi, Mozambique have less than 25% internet penetration
- ▶ Botswana, Lesotho, Tanzania (including Zanzibar) have between 25-50% internet penetration
- ▶ eSwatini, Mauritius, Namibia, Seychelles, South Africa, Zambia, and Zimbabwe have between 50% – 75% internet penetration.

For comparison, the country with the highest internet penetration is Kenya at 87%, and the African average is 39%, which means that over half of the countries surveyed in the handbook have internet penetration rates that are higher than the African average.

However, universal internet access is a long way off for every country reviewed. While some of the problems relate to general infrastructure issues such as a lack of electricity or telecommunications services generally, data costs remain stubbornly high.

A 2018 study³ comparing data costs in the SADC region found that countries with high prices include Botswana, eSwatini, Seychelles, Zambia and Zimbabwe. Countries with relatively low data costs include Mozambique, Malawi and Lesotho. South Africa and Tanzania have relatively average costs.

4.2 Principle 2: Freedom of expression and information online

None of the constitutions of the countries reviewed in this handbook specifically provide for protecting freedom of expression and access to information online or on the internet. But the rights protecting freedom of expression are sufficiently broad to cover the internet. All the constitutions reviewed protect freedom of expression, including the rights to receive information and ideas, as part of that freedom.

4.3 Principle 3: Freedom of assembly and association online

None of the constitutions of the countries reviewed in this handbook specifically provide for protecting freedom of association online or on the internet, but the rights protecting freedom of association are sufficiently broad to cover the internet.

Most of the constitutions reviewed protect freedom of assembly.

4.4 Principle 4: The right to privacy, anonymity, personal data protection and freedom from surveillance online

None of the constitutions of the countries reviewed in this handbook specifically provide for protecting the right to privacy online or on the internet. However, the rights protecting the right to privacy often specify that the right includes the privacy of communications. This is sufficiently broadly framed to include electronic communications, including those sent via the internet.

However, constitutional protections are not the end of the enquiry. Many countries have attempted to regulate internet content providers. Although many of these laws contain draconian provisions, it is very unclear to what extent they are enforced. Malawi, for example, ostensibly requires every content provider (a person who supplies content for use on a website) to have a raft of personal information (such as name, telephone, number, physical address) on their webpage. This isn't happening in practice, but the legal provisions are there, and so the threat of enforcement action is too.

4.5 Principle 5: Security, stability and resilience of the internet

There are several different aspects to internet stability and resilience. One is the technical stability, ensuring that the internet can remain accessible. All countries covered in the handbook have experienced unintentional technical blackouts or brownouts when the internet is extremely slow.

Besides these, several countries have experienced intentionally state-induced internet, social media or both, blackouts, which are designed to prevent people organising and communicating for political ends, particularly during elections and periods of sustained political protest. Countries, where the internet has been intentionally shut down, whether in whole or in part, are Malawi, Mozambique, Tanzania, Zambia and Zimbabwe.

4.6 Principle 6: democratic multi-stakeholder internet governance

No countries adhere to this principle. Very few of the countries that are attempting to regulate the internet are ensuring that it is being done by even an independent regulator, much less one that has multi-stakeholder representation. This is true from relatively low-level issues such as domain name regulation to much broader internet freedom or content regulation governance structures.

4.7 Principle 7: Equitable distribution of internet revenues.

No country has begun to grapple with how to ensure an equitable distribution of internet revenues properly. This is a significant problem on the continent, and all traditional media (print and broadcasting) are feeling the negative effects of the move to online advertising. The effect is simple; less advertising money is available for traditional print and broadcast media.⁴

Only South Africa has mooted the possibility of ensuring that the online behemoths of Amazon, Google, Netflix and the like begin to contribute to meeting social goods such as paying licence fees and contributing to local content production.⁵ But it remains to be seen if draft policy proposals will find their way into law, and, perhaps importantly, into implementable laws.

5 What are international organisations on the continent doing to promote media freedom?

In 2001, the African Commission on Human and People's Rights (ACHPR) passed Resolution 54⁶ on Freedom of Expression. The resolution expressed concern at the widespread violation of the right to freedom of expression by state parties to the African Charter on Human and People's Rights, including by:

- ▶ harassing journalists
- ▶ victimising media houses deemed critical of the establishment
- ▶ inadequate legal frameworks for regulating electronic media, especially broadcasting
- ▶ criminal and civil laws that inhibit the right to freedom of expression.

The ACHPR, in Resolution 54, decided to develop a Declaration on Principles of Freedom of Expression, which it duly adopted in 2002.

In 2004, the ACHPR established the Special Rapporteur on Freedom of Expression with a mandate to:

- ▶ analyse national media legislation, policies and practices in member states
- ▶ monitor compliance with freedom of expression standards and advise member states accordingly
- ▶ undertake investigative missions to member states, where reports of massive violations of the right to freedom of expression are made, and make appropriate recommendations to the African Commission
- ▶ undertake country missions and any other promotional activity that would strengthen the full enjoyment of the right to freedom of expression in Africa
- ▶ make public interventions where violations of the right to freedom of expression have been brought to their attention
- ▶ keep a proper record of violations of the right to freedom of expression and publish this in reports submitted to the African Commission
- ▶ submit reports at each ordinary session of the African Commission on the status of the enjoyment of the right to freedom of expression in Africa.

In 2007 this mandate was expanded, and the title of the Special Rapporteur was expanded to include Access to Information in Africa.⁷

In 2010, the ACHPR adopted Resolution 169 on Repealing Criminal Defamation Laws in Africa.⁸ The resolution calls on state parties to, among other things:

- ▶ repeal criminal defamation or insult laws which impede freedom of speech, and to adhere to the provisions of freedom of expression articulated in the African Charter, the Declaration, and other regional and international instruments
- ▶ refrain from imposing general restrictions that violate the right to freedom of expression.

At the time of writing, no country dealt with in this handbook had yet responded directly to the call to repeal criminal defamation or insult laws, which are extremely common on the continent. While South Africa's ruling party⁹ had promised to introduce a bill to do this, it was never introduced and criminal defamation, included in the common law crime of *crimen injuria*, remains a criminal offence under common law in South Africa. However, the 2014 landmark case of *Konate v Burkina Faso*¹⁰ in the African Court of Human and Peoples' Rights has fundamentally changed the impact of criminal defamation laws. This is because the court held that custodial sentences, that is imprisonment, for criminal defamation is a violation of article 9 of the African Charter on Human and Peoples' rights.

In 2013, the African Commission launched its Model Law on Access to Information,¹¹ and later that year, the Pan-African Parliament (PAP) adopted the Midrand Declaration on Press Freedom in Africa,¹² in which the PAP resolved to, among other things:

- ▶ launch a campaign titled 'Press Freedom for Development and Governance: Need for Reform in all five regions of Africa'
- ▶ establish an annual PAP Award on Media Freedom in Africa for individuals, organisations and member states
- ▶ establish an annual PAP Index on Media Freedom in Africa
- ▶ call on African Union member states to use the ACHPR Model Law on Access to Information in adopting or reviewing access to information laws.

In 2017, the African Commission launched its Guidelines on Access to Information and Elections,¹³ helping to guide countries to ensure access to information necessary to hold democratic elections.

In 2019, the African Commission adopted a revised and updated set of principles, the Declaration of Principles on Freedom of Expression and Access to Information in Africa,¹⁴ which are dealt with extensively in Chapters 2 and 3 of this handbook.

Access to Information legislation is increasingly vital as we move into the information age and it is encouraging to see how many countries have now introduced or improved access to information laws since the publication of the first edition of the handbook. These are Malawi, Tanzania (but not Zanzibar), Seychelles, South Africa

and Zimbabwe; Namibia has developed an Access to Information Bill although it has yet to be passed into law.

Looking to the future, the African Continental Free Trade Agreement (AfCFTA)¹⁵ which came into force on 30 May 2019¹⁶ has five priority sectors, one of which is communications.¹⁷ Regulatory harmonisation concerning the communications sector (including broadcasting and online or OTT services) will be vital to facilitate free trade to implement a continent-wide free trade area for Africa. This will be a real opportunity for all countries on the continent to commit to a set of regulatory ground rules for broadcasting and online or OTT services that respect democratic norms and freedoms, following international best practice standards set out in Chapter 2 of this handbook.

These are exciting developments because they are inter-governmental and are likely to have a far more significant impact than declarations on press freedom from countries or organisations outside Africa or from statements and declarations from the NGO sector.

However, the initiatives are new, and it will take years, if not decades, to rid a country of laws and practices that run contrary to the right to freedom of expression.

6 What key challenges remain to media freedom?

6.1 Introduction — the censorship legacy of colonialism

The PAP, in a statement on its Press Freedom for Development and Governance: Need for Reform campaign, believes that:

The right to freedom of the press is one of the most important human rights. It is indeed an integral part of the right to freedom of expression. It is also seen as one of the cornerstones of democracy. Unfortunately, Africa does not fare very well when it comes to press freedom. In many African countries, authorities have little or no tolerance for press freedom. The media legislation which is in place in many African countries is either inherited from the colonial times, or was instituted by former military and civilian dictatorships to clamp down on criticism and dissenting voices.¹⁸

This is harsh criticism, but it is not unfair. The Media Law Handbook for Southern Africa focuses on media law rather than on general governmental practice to journalists and media houses. Such practice has included instances of repression, threats, intimidation, arrest, torture and even murder, as numerous indices on press freedom and alerts from non-governmental organisations that support journalists indicate.

Governments and intergovernmental organisations must begin (as indeed some are starting to) the hard work of creating a genuinely free press across the continent. This press can and does champion good governance, development and the inherent dignity of African people, as well as the importance of protecting the human rights of each African person. However, this cannot happen without a wholesale updating of the continent's media laws in every country.

Seven types of media laws are dealt with below, almost all of which are colonial-era laws that need to be repealed, amended or updated to enable a professional, free African press to flourish for the benefit of all.

6.2 Media registration laws

As has been set out elsewhere in this chapter, media registration laws (whether applicable to publications or journalists) discourage the development of a thriving pluralistic media environment and ought to be abolished. They are purely mechanisms for government control and are not necessary in a democratic country.

Botswana, the DRC, Lesotho, Malawi, Namibia, eSwatini, Tanzania, Zambia and Zimbabwe still require such publication registration. Furthermore, Botswana, the DRC and Zimbabwe also require the registration of working journalists.

6.3 Broadcasting laws

As already discussed, almost every country surveyed ought to review its broadcasting laws to provide for:

- ▶ a genuinely independent broadcasting regulator (whether or not this regulator also regulates other communications services too), whose members are appointed and removed following international best practices, and who are free to regulate the sector without commercial or political interference
- ▶ a broadcasting regulator who regulates in the public interest
- ▶ a broadcasting sector that is made up of three distinct tiers of broadcasting, public, community and commercial services
- ▶ a genuinely independent public broadcaster whose board members are appointed and removed following international best practice
- ▶ a public broadcaster that provides radio and television broadcasting services in the public interest and which does so without commercial or political interference
- ▶ a public broadcaster that provides public broadcasting services following a public mandate developed by parliament.

6.4 Criminal defamation laws

The ACHPR has taken up the issue of criminal defamation. The Commission, in Resolution 169, has requested member states to repeal all criminal defamation laws.

Defamation is an issue that can and should be dealt with as a civil matter. In other words, damages, or in extreme cases prior restraints on publication, can be obtained to deal with the unlawful publication of defamatory material. To criminalise speech, that is to make defamation a crime punishable by potentially stiff prison sentences, has an unjustifiable chilling effect on journalists and media houses across the continent.

Criminal defamation laws should be repealed in their entirety and replaced with a civil action in which the rights to free speech and dignity and reputation are appropriately balanced.

Botswana, eSwatini, Malawi, Mauritius, Mozambique, Tanzania (excluding Zanzibar), Seychelles, South Africa, Tanzania, and Zambia still have criminal defamation on the statute books or as a common law crime.

6.5 Insult laws

The issue of insult laws is another that the ACHPR has taken up. In Resolution 169, it has requested member states to repeal all insult laws.

Insult laws are a particular type of law aimed at insults levelled at specific people, usually the head of state, such as the president, but also foreign dignitaries not at defamation in general. The publication of material which insults these types of people is criminalised. These laws fundamentally undermine the concept of equality before the law, placing a person above criticism, due to his or her political position. While there is no doubt that politicians have a right not to be defamed, they have access to ordinary civil remedies to defamation. Furthermore, insult laws are often abused by governments to silence legitimate criticism of political leaders concerning corruption, cronyism and other barriers to development.

Unfortunately, these laws are extremely common on the continent. Botswana, the DRC, eSwatini, Malawi, Mauritius, Mozambique, Seychelles, Tanzania (excluding Zanzibar), Zambia and Zimbabwe all have insult laws.

6.6 Obscenity laws

With the notable exceptions of Seychelles, Mauritius and South Africa, all the countries surveyed have obscenity laws that are very outdated and problematic from the point of view of freedom of expression.

- ▶ Obscenity laws are often framed subjectively. In other words, they are dependent on the viewpoint of a particular official rather than on any objective grounds that can be tested in a court of law.

- ▶ Control of obscene publications is often simple prohibitions rather than so-called time, manner and place restrictions, which would make certain content available to adults only but during times, and in a manner (opaque packaging for publications, for example) and in particular places (adult shops, for example) that does not impact unduly on the general public.
- ▶ The grounds for prohibiting publications are often far too wide, allowing for the prohibition of a comprehensive range of material when adults have a right to receive publications of their choice other than those that are harmful, such as child pornography and degrading or inhumane portrayals of explicit sex accompanied by extreme violence

A revision of these laws is long overdue given that many countries' obscenity laws date from the early decades of the last century and predate even the Universal Declaration of Human Rights.

6.7 Sedition laws

International norms on security legislation allow for restrictions on freedom of the press where a country's existence or territorial integrity is threatened. However, many of the countries surveyed have sedition or incitement laws that are overbroad and which do not relate to threats to the country itself. Furthermore, overbroad sedition laws have a chilling effect. They silence legitimate comment or reporting on maladministration, corruption and the like.

Botswana, DRC, eSwatini, Lesotho, Mauritius, Seychelles and Zambia have overbroad sedition laws.

It is important to note that many countries' sedition laws are a carryover from their colonial pasts, and a revision of these laws, in line with democratic norms and standards, is long overdue.

6.8 Other security laws

International norms on security legislation allow for restrictions on freedom of the press where a country's existence or territorial integrity is threatened. However, many of the countries reviewed have security, public order and related security laws that are overbroad and which do not relate to threats to the country itself. Furthermore, overbroad security laws have a chilling effect. They silence legitimate comment or reporting on maladministration, corruption and the like.

Every country researched for the handbook has such overbroad security laws. It is also important to note that many countries' security laws are a carryover from their colonial pasts, and a revision of these laws, in line with democratic norms and standards, is long overdue.

However, updating security laws is not an easy or smooth process. An example is South Africa. Its Protection of Information Act, 1982, is a statute from the height of Apartheid and is unconstitutional. The government is aware of this and of the

need to bring it in line with the South African Constitution. However, the Protection of State Information Bill, which is meant to repeal and replace the Protection of Information Act, has been subject to significant political protest and criticism because of draconian provisions that could be used to silence legitimate reporting. It has yet to be passed into law.

7 Conclusion

There is no doubt that democracy is deepening in post-independence Africa, and that more and more countries are at least paying lip service to a free press, access to information, a pluralistic media environment and the independent regulation of broadcasting. However, much remains to be done.

Media owners, editors and journalists as well as media activists must use the opportunities that have arisen as a result of the PAP's and the ACHPR's campaigns for media freedom and judgments from continental and regional courts for the removal of insult and criminal defamation laws. They must challenge these and other laws in court, as well as push for wholesale amendments to pernicious censorship laws that still exist across Africa.

It is perhaps instructive to consider the 2020 Reporters Without Borders Press Freedom Rankings¹⁹ cross-referenced with the 2020 Freedom House Freedom Report²⁰ on political freedom for the thirteen countries included in the handbook:

- ▶ Botswana is ranked 39th in the world (up from 44th globally in 2019) in media freedom rankings and is rated 'free' by Freedom House.
- ▶ DRC is ranked 150th in the world (up from 154th in 2019) in media freedom rankings and is rated 'not free' by Freedom House.
- ▶ eSwatini is ranked 141st in the world (up from 147th in 2019) and is rated 'not free' by Freedom House.
- ▶ Lesotho is ranked 86th in the world (down from 78th in 2019) and is rated 'partly free' by Freedom House.
- ▶ Malawi is ranked 69th in the world (down from 68th in 2019) and is rated 'partly free' by Freedom House.
- ▶ Mauritius is ranked 56th in the world (up from 58th in 2019) and is rated 'free' by Freedom House.
- ▶ Mozambique is ranked 104th in the world (down from 103rd in 2019) and is rated 'partly free' by Freedom House.
- ▶ Namibia is ranked 23rd in the world (the same position it held in 2019), it is the highest-ranked African country and is rated 'free' by Freedom House.

- ▶ Seychelles is ranked 63rd in the world (up from 69th in 2019) and is rated 'partly free' by Freedom House.
- ▶ South Africa is ranked 31st in the world (the same position it held in 2019). It is ranked the third-highest country in Africa after Namibia and Ghana) and is rated 'free' by Freedom House.
- ▶ Tanzania is ranked 124th globally (down from 118th in 2019) and is rated 'partly free' by Freedom House.
- ▶ Zambia is ranked 120th globally (down from 119th in 2019) and is rated 'partly free' by Freedom House.
- ▶ Zimbabwe is ranked 126th (up from 127th in 2019) and is rated 'partly free' by Freedom House.

Notes

- 1 <https://openknowledge.worldbank.org/bitstream/handle/10986/31333/9781464813610.pdf?seq> [accessed 20 December 2020]
- 2 <https://www.internetworldstats.com/stats1.htm> [accessed 20 December 2020]
- 3 <https://www.icasa.org.za/legislation-and-regulations/retail-tariffs-report-quarter-4-2017> [accessed 20 December 2020]
- 4 https://ap-st01.ext.exlibrisgroup.com/61USC_INST/upload/1608492846616_PDF%20-%20Published%20Version.pdf?Expires=1608492966&Signature=WGoN9aE1BqeXfbCLaH [accessed 20 December 2020]
- 5 <https://www.gov.za/documents/constitution-republic-south-africa-draft-white-paper-audio-and-audiovisual-content> [accessed 20 December 2020]
- 6 <https://www.refworld.org/docid/51949e854.html> [accessed 20 December 2020]
- 7 <https://www.achpr.org/sessions/resolutions?id=174> [accessed 20 December 2020]
- 8 <https://www.achpr.org/sessions/resolutions?id=343> [accessed 20 December 2020]
- 9 <https://www.enca.com/south-africa/criminal-defamation-unconstitutional-anc> [accessed 20 December 2020]
- 10 <https://en.african-court.org/images/Cases/Judgment/Judgment%20Appl.004-2013%20Lohe%20Issa%20Konate%20v%20Burkina%20Faso%20-English.pdf> [accessed 20 December 2020]
- 11 <https://www.achpr.org/presspublic/publication?id=82> [accessed 20 December 2020]
- 12 http://www.africanplatform.org/fileadmin/Content/PDF/Resources/Standards-and-Principles/Midrand-Declaration-on-Press-Freedom_FINAL_English.pdf [accessed 20 December 2020]
- 13 <https://www.achpr.org/presspublic/publication?id=4> [accessed 20 December 2020]
- 14 <https://www.achpr.org/presspublic/publication?id=80> [accessed 20 December 2020]
- 15 https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf [accessed 20 December 2020]
- 16 <https://www.tralac.org/resources/infographic/13795-status-of-afcfta-ratification.html> [accessed 20 December 2020]

- 17 <https://www.bilaterals.org/?trade-in-services-in-the-afcfta#:~:text=This%20newsletter%20focuses%20on%20trade,to%20make%20specific%20sector%20commitments.> [accessed 20 December 2020]
- 18 <https://www.polity.org.za/article/pap-statement-by-the-pan-african-parliament-on-world-press-freedom-day-03042011-2011-05-03> [accessed 20 December 2020]
- 19 https://rsf.org/en/ranking_table [accessed 20 December 2020]
- 20 <https://freedomhouse.org/report/freedom-world> [accessed 20 December 2020]

