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MEDIA FREEDOM AND THE LAW IN KENYA, SOUTH AFRICA AND ZAMBIA

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INTRODUCTION

This research highlights the key media laws that impact the media and the work of journalists and media organisations in Kenya, South Africa and Zambia. The overview of the legal and regulatory frameworks offers a focus on key issues of constitutional protections for freedom of the media and freedom of expression, broadcast and other licensing regimes, ownership requirements (including media and competition law requirements), defamation laws, and related case law summaries.

This research was developed as part of a two-year programme that is being implemented by the Thomson Reuters Foundation. The programme aims to foster more resilient media ecosystems in Kenya, South Africa and Zambia that are better equipped to protect local, independent media.

The Thomson Reuters Foundation uniquely uses the combined power of journalism and the law to defend and promote media freedom, which is critical to its mission of strengthening free, fair and informed societies. Our legacy of work has enabled us to develop global networks of journalists and media organisations, and of lawyers and government representatives, giving us unparalleled insights into the complexities of these growing issues – from the perspective of those at risk and from those working to provide solutions.

We hope this research will be useful for policymakers, civil society organisations and media support organisations in their efforts to understand the existing landscape so that they can identify opportunities for legal reform and track progress in preserving, advancing and upholding media freedom in their respective states.

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DISCLAIMER

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CHAPTER 1: **KENYA**

1. OPERATING ENVIRONMENT

Kenyan law has developed in recent years to extend to media freedom in both the traditional and online (including social media) spaces. The Constitution of Kenya, 2010 (the Constitution) enshrines both freedom of expression[1] and media freedom.[2] These rights allow both traditional and social media to thrive, as expression is permitted within the confines of the law. According to the 2022 Reporters Without Borders World Press Freedom Index, Kenya ranks 69th out of 180 countries. In addition to the strong legal framework on the protection of media freedom, the courts have played a big role in expanding media freedom in Kenya, particularly through constitutional cases.

However, despite the strong legal framework, Kenya has witnessed a high number of attacks against journalists. This is particularly within the context of coverage of elections and protests. In March 2023 alone, the Media Council of Kenya documented 25 cases of attacks on local and foreign journalists at the hands of state and non-state actors since the onset of demonstrations by the opposition against the high cost of living. There has also been a strained relationship between the government and the media, particularly when regulators shut down or threaten to shut down news organisations during contentious political events.

According to the 2022 State of the Media Report by the Media Council of Kenya, television and radio are the main sources of news in Kenya, followed by social media, and lastly newspapers and family/friends/colleagues. The same report notes that the key concerns when it comes to media include fake news, bias of the media and poor coverage of important issues. The most appreciated factor is the freedom of the media.

In its 2020-2021 Annual Report, the Communication Authority of Kenya (CAK)[3] reported that it issued 93 new broadcasting service licences in the financial year. Of the 93 licences, 55 were for commercial free-to-air (FTA) television; 30 for commercial FM radio; seven for community FM radio; and one for a subscription broadcasting service provider.[4] The report noted that the number of broadcasting services accessible to Kenyans increased to 323 in 2021 from 286 in 2020, which CAK said was important to ensure plurality and diversity of views in broadcasting. The number of digital terrestrial television (DTT) frequency assignments increased to 342 from 327 in 2020. According to CAK, television licences remained the most sought-after due to the availability of transmission capacity on the DTT platforms.[5]

1 Article 33 of the Constitution.

2 Article 34 of the Constitution.

3 The CAK is established under the Kenya Information and Communication Act (KICA). Its mandated in section 5 of KICA to license and regulate postal, information and communication services. It is also established in section 5A of KICA as independent and free of control by government, political or commercial interests in the exercise of its powers and in the performance of its functions.

4 CAK 2020-2021 Annual Report, page 19.

5 Ibid.

2. SOURCES OF MEDIA LAW

2.1. THE CONSTITUTION

The Constitution is the pinnacle of the Kenyan legal framework and is regarded as the supreme law of the Republic, binding all persons and all state organs at both levels of government.[6] Chapter four of the Constitution establishes the Bill of Rights, which is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies. The rights include the right to life; equality and freedom from discrimination; human dignity; freedom and security of the person; freedom from slavery; servitude and forced labour; privacy; freedom of conscience; religion; belief and opinion; freedom of expression; freedom of the media; access to information; freedom of association; right to assembly; picketing and petition; political rights; freedom of movement and residence; right to property; fair labour practices; clean environment; economic and social rights; language and culture; among others.[7]

The rights and fundamental freedoms in the Bill of Rights belong to each individual and are not granted by the state. The Bill of Rights is subject only to the limitations outlined in the Constitution.[8]

a. The right to media freedom

Article 34 of the Constitution stipulates the freedom of the media in Kenya by guaranteeing the independence of electronic, print, and all other types of media. It also prohibits the state from exercising control over or interfering with any person engaged in broadcasting, production, circulation of any publication, or the dissemination of information by any medium; or penalising any person for any opinion or view, or the content of any broadcast, publication, or dissemination.[9]

Broadcasting and other electronic media have the freedom of establishment, subject only to licensing procedures that are necessary to regulate the airwaves and other forms of signal distribution, and are independent of control by government, political interests, or commercial interests.[10] All state-owned media are free to independently determine the editorial content of their broadcasts or other communications. In addition, the state owned media are required to be impartial and afford fair opportunity for the presentation of divergent views and dissenting opinions.[11]

b. Freedom of expression

Article 33 of the Constitution provides for the right to freedom of expression including freedom to seek, receive or impart information or ideas; freedom to artistic creativity; academic freedom; and freedom of scientific research. Notwithstanding the constitutional safeguards, the right to freedom of expression does not extend to propaganda for war; incitement to violence; hate speech; or advocacy of hatred that constitutes ethnic incitement, vilification of others or incitement to cause harm; or advocacy of hatred based on any ground of discrimination as specified under the constitutional stipulation on equality and freedom from discrimination.[12]

c. Access to information

Article 35 of the Constitution stipulates the right of every citizen to access information held by the state and information held by another person and required for the exercise or protection of any right or fundamental freedom.

d. Limitation of rights

Article 24 of the Constitution, otherwise referred to as the limitation clause, provides the terms by which the rights in the Bill of Rights may be limited. Article 24 states:

Limitation of rights and fundamental freedoms

(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

2.2. LEGISLATIVE FRAMEWORK

a. Kenya Information Communications Act No. 2 of 1998 (KICA)

The KICA was enacted to facilitate the development of the information and communications sector including broadcasting, multimedia telecommunications, and postal services. A broadcasting service is defined as any service that consists of broadcasting television or radio programs to the public, sections of the public, or subscribers to such a service.

Section 3 of the Act establishes the Communications Authority of Kenya (CAK), mandated under section 5 to license postal, information and communication service providers. The KICA also provides for licensing provisions for broadcasters and radio service operators. CAK regulates media organisations by focusing on the licensing of broadcasters and granting of frequencies. This mandate is provided for under section 46A of the KICA which includes:

a. facilitating and encouraging the development of Kenyan programmes;

b. promoting the observance at all times of public interest obligations in all broadcasting categories;

c. ensuring the provision by broadcasters of appropriate internal mechanisms for disposing of complaints in relation to broadcasting services; and

d. developing media standards.

Broadcasting services are classified for specified areas according to three service categories: public; private; and community broadcasting.[13] Broadcasting service licences are categorised as follows: free-to-air radio; free-to-air television; subscription radio; subscription television; and subscription management, leaving room to create other classes of licence through regulations.[14] Section 46C prohibits any person from providing broadcasting services except in accordance with a licence issued according to the Act.

Applicants intending to apply for a free-to-air commercial broadcasting service or services are required to provide CAK with a business plan which should include evidence of technical capacity in terms of personnel and equipment to carry out the broadcasting services; evidence of relevant experience and expertise to carry out the broadcasting services; evidence of the capacity to offer broadcasting services for at least eight continuous hours in a day; programme line-up or schedule for the broadcasting services for which the licence is sought; and such other information as prescribed by CAK from time to time.

In considering applications for a broadcasting licence, CAK considers multiple factors including observance at all times of public interest obligations in all broadcasting categories; diversity and plurality of views for a competitive marketplace of ideas; availability of radio frequency spectrum including the availability of such spectrum for future use; efficiency and economy in the provision of broadcasting services; demand for the proposed broadcasting service within the proposed broadcast area; expected technical quality of the proposed service, having regard to developments in broadcasting technology; suitability, capability, experience, and expertise of the applicant in as far as carrying out such broadcast service is concerned; financial means and business record of the applicant; and any other relevant matter considered necessary by CAK.[15] Although the Kenya Information and Communication (Amendment) Bill, 2019 (commonly referred to as "the Social Media Bill") introduced the requirement for a social media licence to be obtained in respect of a social media platform which is accessible in Kenya by the social media platform operator in question, the bill was not passed into law. As such, CAK does not regulate social media platforms.

6 Article 2 (1) of the Constitution.
7 See articles 26-57 of the Constitution.
8 Article 19 of the Constitution.
9 The Constitution of Kenya 2010.
10 Article 34 (3) of the Constitution.
11 Article 34 (4) of the Constitution.
12 Article 33 (2) of the Constitution.
13 KICA section 46B (1).
14 KICA section 46B (2).
15 KICA section 46D (2).

CAK prescribes the fees payable for the broadcasting services licence, application, renewal, transfer, annual licence fee and any other fees related to the services. Upon being granted with a broadcasting licence, a licensee is to publish a notice in a newspaper of wide circulation in the licensee's coverage area containing a statement on the licensee's intention to transmit a broadcasting service from a station in the licensee's coverage area; the commencement date and time of transmissions; the assigned frequency or channel on which the station shall operate; the station programming format; a statement inviting the members of the public to contact the licensee in case any transmission by the licensee causes interference with the services provided by other licensees; and the address and telephone number of the licensee. A licensee is to commence broadcasts within 12 months after being issued with a licence.

In December 2021, CAK threatened to revoke several FM frequencies and to close television stations and digital broadcasters due to what it termed "a failure to comply with the legal requirements under the KICA".[16] CAK noted that some of the licences had expired, and that the licensees had not commenced the renewal process.

b. Kenya Broadcasting Corporation Act (CAP. 221) (KBC Act)

The KBC Act designates the Kenya Broadcasting Corporation (KBC) as the public broadcaster to provide public broadcasting services. KBC is governed by a board of directors. The board comprises a chair appointed by the president; the managing director of KBC; the permanent secretary for the ministry responsible for information and broadcasting; the permanent secretary in the office of the president; the permanent secretary in the ministry responsible for finance together with another seven members appointed by the minister[17] (now cabinet secretary). As discussed above, as state-owned media, KBC is free to determine independently the editorial content of its broadcasts or other communications, be impartial, and afford fair opportunity for the presentation of divergent views and dissenting opinions.[18]

16 "Capital FM among 102 stations with revoked licenses over non-compliance" Metropol Tv (December 22, 2021) accessible here.

17 Section 4, KBC Act.

18 See article 34 (4) of the Constitution.

c. Media Council Act, No. 46 of 2013 (MC Act)

The MC Act establishes the Media Council of Kenya (MCK) and the Media Complaints Commission. Some of the functions of MCK under section 6 of the MC Act include:

a. promoting and protecting the freedom and independence of the media;

b. prescribing standards of journalists, media practitioners and media enterprises;

c. ensuring the protection of the rights and privileges of journalists in the performance of their duties; and

d. promoting and enhancing ethical and professional standards amongst journalists and media enterprises, among others.

In practice, MCK works directly with the government and its work consists of advising the authorities that regulate the media on issues related to the education and training of journalists and other media practitioners in Kenya. In turn, MCK creates standards for the education of journalists.

Section 27 of the MC Act establishes the Media Complaints Commission, whose mandate under section 31 is to mediate and adjudicate disputes between the government and the media; between the public and the media; and intra media on ethical issues pertaining to the Code of Conduct for the Practice of Journalism in Kenya.[19]

d. Film and Stage Plays Act Chapter 222 Laws of Kenya (FSP Act)

The FSP Act establishes the Kenya Film Classification Board (KFCB), which regulates the creation, broadcasting, possession, distribution, and exhibition of films through the classification of films and posters submitted to it under the Act, imposing age restrictions on viewership and providing consumer advice on issues relating to the protection of children and women against sexual exploitation and degradation in films shown in cinemas and online. KFCB works hand-in-hand with CAK to ensure that content that is aired meets the requirements of the programming code.

19 Second Schedule, MCK Act.

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KFCB has banned several films on moral and religious grounds. Some of the banned films and music videos include:

a. *Wolf of Wall Street, Fifty Shades of Grey, Paradise Love*, among others, which have been banned for promoting what KFCB classifies as sexually explicit content; and
b. *I am Samuel, This is the End, Stories of Our Lives, Rafiki*, among others, which have been banned for promoting same-sex marriages, contrary to the Penal Code.

The High Court of Kenya upheld KFCB's ban of *Rafiki* and noted that the ban was constitutional as KFCB sought to protect the Kenyan public's moral values. However, this judgment was appealed at the Court of Appeal, and is pending determination.

e. The National Cohesion and Integration Act, No. 12 of 2008 (NCIA Act)

The NCIA Act aims to encourage national cohesion and integration. It also prohibits hate speech, which has been defined under section 2 of the Act as the publication or distribution of material that is abusive and intended to cause ethnic hatred.

The penalty for hate speech is imprisonment term of up to five years or a fine of KES 5,000,000 (approximately USD 5,000) or both. However, enforcement of the laws on hate speech continues to be a practical challenge in Kenya, as demonstrated by the "inflammatory" utterances by a senator in the wake of the election year of 2022. Despite public statements by law enforcement about alleged hate speech, the persons responsible are rarely prosecuted.

The National Cohesion and Integration Bill, 2022 (the NCIA Bill) proposes to amend section 13 of the NCIA Act to include the criminalisation of publishing hate speech in various media that include social media. Clause 10 of the NCIA Bill reads as follows:

> *Section 13 of the principal Act is amended in subsection (1) by deleting paragraph (b) and substituting therefore the following new paragraph—*
> *(b) publishes, posts or distributes material in print, electronic or social media.*

Given the increased use of social media in Kenya, this provision, if passed, will criminalise hate speech that commonly spreads through social media.

f. Computer Misuse and Cybercrimes Act (No. 5 of 2018) (CMCA)

The CMCA deals with computer crimes.[20] Some of the offences covered by the CMCA impact media freedom, such as the prohibition of the publication of false news. Section 22 of the CMCA criminalises publishing of false news and sets a sentence of a prison term of up to two years or a fine of KES 5,000,000 (approximately USD 50,000) or both a fine and imprisonment.

There has been disagreement, however, as to what constitutes "false news". In a decision of the Constitutional and Human Rights Division of the High Court of Kenya in *Bloggers Association of Kenya (BAKE) v Attorney General & 3 others; Article 19 East Africa & another (Interested Parties)* [2020] eKLR, the court rejected arguments that the provisions are unconstitutional and that media practitioners have been arrested for publishing information that the government deems "false".[21] Although the petitioners argued that the offence was too broad in its application, against the principle of legality, the court stated that:

> *"False" is a plain English word and it does not require a legal definition, the effect of the provision is to criminalize the publication of false information whose intention is to create panic, chaos or violence among the citizens of the Republic or which is likely to discredit reputation of a person.*[22]

The case is on appeal, at the Court of Appeal, pending determination.

20 The Preamble, Computer Misuse and Cyber Crimes Act
21 Petition 206 of 2019.
22 See para 50.

2.3. OTHER STATUTES

LEGISLATION	RELEVANT PROVISIONS
Access to Information Act (No. 31 of 2016)	Gives effect to article 35 of the Constitution on the right to access to information. Provides frameworks for:[23] • Proactive disclosure of information by public and private bodies. • Facilitation of access to information held by private bodies to assert any right in the Constitution. The Act also:[24] • Provides for the protection of persons who disclose information of public interest in good faith. • Exceptions to the right to access information.
Copyright Act (CAP. 130)	Principal legislation governing copyright of literature, audio-visual work, sound recordings, and broadcasts. Provides for collection and payment of royalties derived from literary and audio-visual media materials under section 30B of the Act.
Data Protection Act (No. 24 of 2019)	Section 52 of the DPA provides an exemption to the principles of processing personal data for journalistic purposes in certain circumstances where publication is in the public interest. The DPA requires the Office of the Data Commissioner to develop a guide for processing personal data for journalistic literature and art or scientific research.
Penal Code (CAP.63)	The Cabinet Secretary may prohibit the import or publication of certain publications (section 52). Criminalises: treason, including publications of imaginations of the death of the President (section 40); publication of disturbing material such as injured or dead persons, where the same is likely to cause fear or alarm to the general public (section 66A); and defamation of foreign dignitaries (section 67).

g. Proposed amendments concerning social media

Social media as a form of media is not stringently regulated. Rules on traditional formats are applied with the necessary modifications and adaptations. KFCB, for example, has cracked down on content aired on YouTube for being offensive to children. Part III of the CMCA also provides for offences related to social media, such as cyberstalking and publication of false information. The government has been accused of using these provisions to stifle free speech.

There is a drive to regulate social media in Kenya. One such attempt was through the Social Media Bill, which sought to regulate social media and bloggers. The bill was not passed into law. In addition, in 2018, KFCB issued

23 Section 3.
24 Ibid.

a public notice that required online content creators to obtain a licence before publishing video content online. This generated a heavy backlash on social media, and KFCB withdrew the notice. Additionally, the proposed amendments to the NCIA Bill will see individuals penalised for publishing hateful content on social media, if passed.[25]

2.4. OTHER SOURCES OF LAW

Other sources of law in Kenya include case law, common law, customary and international law. Customary law is only applicable to the extent it is not repugnant or contradicts the Constitution, natural justice or any written law. Kenya is party to both the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights (African Charter) whose articles 19 and 9 respectively stipulate the right to freedom of expression and access to information.

2.5. RULES AND CODES

The media sector in Kenya is regulated through law, but there are elements of self-regulation in the industry. Some of the industry players include:

a. Media Council of Kenya (MCK)

MCK is established under the MC Act as a regulator of the media. MCK enforces the Code of Conduct for the Practice of Journalism which is annexed as the Second Schedule to the MC Act. Rule 1 sets out the subject of the code as journalists, media practitioners, foreign journalists and media enterprises. The code comprises a set of agreed principles and rules which journalists are required to observe in the performance of their duties.

MCK also accredits journalists and has published its accreditation guidelines on its website. They have also published a Code of Conduct for Digital Media Practitioners. The preamble states that the purpose of the Code is to provide guidelines for digital media players with the aim of promoting self-regulation in the digital media space by empowering practitioners to adhere to set legal, professional and ethical standards.

b. Media Complaints Commission

Just like MCK, the Media Complaints Commission is established through the MC Act. Section 38 of the MC Act gives the Media Complaints Commission power to make orders to issue an apology and correction and issue fines of up to KES 500,000 (approximately USD 5,000) against media outlets and KES 100,000 (approximately USD 1,000) against journalists.

c. Communication Authority of Kenya (CAK)

CAK is mandated by the KICA (section 46H) to enforce a programming code. In line with this, CAK has developed the Programming Code for Broadcasting Services in Kenya.

d. Bloggers Association of Kenya

The Bloggers Association of Kenya (BAKE) is a community organisation that represents a group of Kenyan online content creators and seeks to improve the quality of content created on the internet.

2.6. PROTECTION OF JOURNALISTS

Journalists enjoy protection under the Bill of Rights in the Constitution like every other person in Kenya. Under article 22 of the Constitution, they can file cases in court to protect their rights if under threat or seek redress for a violation of their rights. Journalists and media outlets may institute constitutional cases in the High Court of Kenya on their own behalf or on behalf of others.

There is also a body of criminal law that may be invoked to protect journalists. This includes the Computer Misuse and Cybercrimes Act, which criminalises cyber bullying, cyber harassment, and sharing of intimate images without consent, and is an important source of law, given that journalists are often victims of online harassment. Section 238 of the penal code criminalises intimidation. Journalists may report criminal cases to law enforcement for investigation.

Section 34 of the Media Council Act allows journalists to make complaints to the Media Complaints Commission if aggrieved with any action taken against them or a media enterprise that limits or interferes with freedom of expression of the journalist or media.

25 Clause 10 of the National Cohesion and Integration (Amendment) Bill, 2022.

REUTERS/Siegfried Modola

3. MEDIA OWNERSHIP

3.1. LEGAL FRAMEWORK FOR MEDIA OWNERSHIP

a. Companies Act No. 17 of 2015 (Companies Act)

The Companies Act requires companies to maintain certain up-to-date records with the Registrar of Companies and at their head office (for example, accounting records, agreements, memoranda and similar). For publicly traded media companies, there are additional disclosure requirements under the Capital Markets Authority Act (CMA Act), requiring companies to file certain records with the Capital Markets Authority (for example, any information that may affect market activities as relates to the public company in question and the price of its securities). The Business Registration Service (BRS) established under the Business Registration Service Act, No. 15 of 2015, maintains registers that relate to companies, partnerships and individuals carrying out businesses under a business name. Ownership information on companies may be obtained from the BRS upon paying the requisite fees. The Financial Action Task Force on International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation recommended that organisations should maintain adequate and timely information on the beneficial ownership and control of legal persons. It was against this backdrop that the Statute Law (Miscellaneous Amendment Act) 2019 (SMAA) amended the Companies Act (No. 17 of 2015), to introduce section 93A which requires all companies to create a register of beneficial owners. To bring the amendment into effect, the Attorney General enacted the Companies (Beneficial Ownership Information) Regulations, 2020 on 18 February 2020. The BRS published a public notice notifying all officers of companies and authorised persons that the beneficial ownership electronic register shall be operational from 13 October 2020.

b. Kenya Information and Communications Act (No. 2 of 1998) (KICA)

Section 46D of the KICA provides conditions for granting a broadcasting licence. The following persons are not eligible to hold a broadcasting licence:

a. political parties;

b. persons adjudged bankrupt or who have entered into a composition or scheme of arrangement with their creditors;

c. persons of unsound mind;

d. a public officer or a state officer; and

e. anyone who does not fulfil such other conditions as may be prescribed.

Regulation 10 of the Kenya Information and Communications (Broadcasting) Regulations, 2009 (KICA Regulations) requires broadcasting licensees to notify the CAK should there be a change in shareholding. Under the same rule, where the change in shareholding exceeds 15% of the issued share capital or the acquisition by an existing shareholder of at least 5% of additional shares, the acquisition must be consented to by CAK.

CAK is obligated to maintain separate registers for the various licences issued, and to include particulars as may be prescribed.[26] The public may inspect any register of licences during working hours and after payment of the prescribed fee.[27] However, members of the police force or a public officer acting in the course of duty; or any persons authorised in writing by the board of CAK may inspect the register without payment of any fee.[28]

c. Competition Act (No. 12 of 2010)

Section 24 of the Competition Act prohibits the abuse of a dominant position in the market. Section 4 of the Competition Act provides that a person has a dominant position in the market if the person:

(a) produces, supplies, distributes or otherwise controls not less than one-half of the total goods of any description which are produced, supplied or distributed in Kenya or any substantial part thereof; or

(b) provides or otherwise controls not less than one-half of the services which are rendered in Kenya or any substantial part thereof.

Some of the practices that amount to abuse of a dominant position include abuse of an intellectual property right.

26 Section 83 (1) of KICA.

27 Section 83 (2) of KICA.

28 Ibid.

The Kenya Information and Communications (Fair Competition and Equality of Treatment) Regulations, 2010 (Fair Competition Regulations) deal with competition issues arising under the KICA. The Fair Competition Regulations empower CAK to pronounce on competition matters under the KICA and require CAK to cooperate with the Competition Authority of Kenya. Part of the oversight under these regulations includes developing and publishing, from time to time, guidelines to be followed when determining whether a licensee is in a dominant market position in a specific communications market.[29]

Despite these provisions, it is unclear if any sanctions have been issued to media organisations for abuse of a dominant position.

d. Local shareholding

As discussed above, the KICA Broadcast Regulations require holders of broadcasting licences to notify CAK should there be any change in their shareholding. Equally, holders of broadcasting licences are required to ensure that their shareholding complies with the government's communications sector policy, published from time to time. Ownership and control regulation of media broadcasting companies that are listed on the stock exchange is regulated under the Capital Markets Act (CAP 485A).[30]

The National Information Communications and Technology (ICT) Policy Guidelines, 2020 provide that only companies with at least 30% substantive Kenyan ownership, either corporate or individual, will be licensed to provide ICT services. However, recently the President indicated that the government would review and remove the 30% equity requirement in order to promote increased investment in this sector.[31] Notably, even before the 2020 policy review, any firm licensed to provide telecommunications and broadcasting services was required to have at least 30% Kenyan equity ownership in the National Information and Communications Technology (ICT) Policy of March 2006. In 2008, the local equity participation requirement for firms providing communication services was reduced to 20% while 30% was retained for broadcasting companies. The cabinet secretary is allowed to exceptionally grant a waiver within reason and considering all circumstances in each case.

A grace period of three years (extendable by one additional year) was afforded to companies in the sector to comply. This period is yet to lapse but does not apply to broadcasters, which are already required to have 30% local ownership by CAK.

3.2. COMMON LEGAL VEHICLES FOR MEDIA OWNERSHIP

Local investors generally opt to incorporate public or private companies which are then licensed by CAK to operate in Kenya. Foreign investors either incorporate private companies or partner with existing broadcasters to offer their content. It is noteworthy that foreign-based content is mainly offered through subscription broadcasters, where it is bundled in one package (usually by broadcasters). Where this happens, the broadcaster is required to apply for a licence to offer subscription broadcasting services to its customers.

When contemplating the establishment of a presence in Kenya, foreign media entities may incorporate a private company or may opt to establish a branch of their foreign company in Kenya. Either way, in addition to compliance with the ordinary rules governing companies in Kenya (as set out in the Companies Act, 2015), foreign companies must obtain the necessary entry permits for any foreign journalists employed by them and obtain accreditation from MCK.

Given that most (if not all) media organisations opt for incorporation, they have separate legal personality, which provides some protection to shareholders and individual journalists employed by the companies.

3.3. REGULATION OF FOREIGN MEDIA OWNERSHIP AND OPERATIONS IN KENYA

Under section 46C of the KICA, all broadcasting operations must be licensed by CAK. It follows that foreign media operations must be licensed by CAK. Equally, broadcasters must comply with the 30% local ownership requirements as discussed above. Foreign journalists must be accredited by MCK to operate in Kenya under sections 6 and 46 of the

29 Regulation 7.

30 Rule 10, Broadcast Regulations 2009.

31 "Government to remove the 30% local ownership requirement to facilitate investment in the ICT sector" KO Associates accessible here. This is yet to be announced.

REUTERS/Thomas Mukoya

Media Council Act. The MCK (Subscription and Accreditation Fees in Respect of Media Enterprises and Journalists Operating in Kenya), 2017 (MCK Regulations) outlines the fees for accreditation of both local and foreign journalists.

3.4. APPLICABILITY OF MEDIA OWNERSHIP REGULATION TO SOCIAL AND DIGITAL MEDIA

The National ICT Policy Guidelines, 2020, require 30% local ownership for all ICT licensees, although the President has indicated that the government will review and remove this requirement to promote increased investment in the sector, as discussed above. The term "ICT Services" is not defined under the KICA or the ICT Policy, although "information and communication technologies" is defined under section 2 of KICA as "technologies employed in collecting, storing, using or sending out information and include those involving the use of computers or any telecommunication system". It is arguable that any ICT entity that falls under the ambit of the KICA and requires licensing for their operations will be required to comply with the equity participation rule.

3.5. ENFORCEMENT OF MEDIA OWNERSHIP REGULATION

CAK has been at the forefront of enforcing compliance with licensing conditions and content. There is, however, unpredictability in enforcement of content as CAK has been seen to act only where there has been uproar over content disseminated by media companies (this has in the past mostly been related to what the public has deemed to be "morally depraved and/or offensive" content).[32]

CAK governs the primary licensing of broadcasters and radio operators, as well as information and communication technology service providers. The grace period to comply with the 30% local ownership stake (for information and communication technology service providers licensees, except for broadcasters, which are already subject to a 30% rule) is yet to lapse, which makes it difficult to make any useful assessment of the ownership of other licensees, with the exception of broadcasters.

32 "Mt Kenya TV under fire for obscene content targeting kids" Kenyans.co.ke (April 22, 2021) accessible here.

4. DEFAMATION

4.1. LEGAL FRAMEWORK

Defamation Act (CAP. 36) (Defamation Act)

The key law on civil defamation is the Defamation Act. For a claim of defamation to be sustained, one must establish:

a. that the statement is defamatory;

b. that the statement has been published or uttered;

c. malice; and

d. damage, or some harm caused to the person or entity who is the subject of the statement.

The Defamation Act establishes the constitutive elements of slander and libel, and provides for the exception of privilege. Some of the provisions of the Act include:

a. section 3 of the Act provides that where a person is slandered, it shall not be necessary to prove damage of reputation;

b. section 4 extends section 3 to an action for slander of women, which include words imputing unchaste conduct to women or girls;

c. section 6 provides that a fair and accurate report in any newspaper of court proceedings shall be privileged. However, this does not allow for the publication of blasphemous, seditious, or indecent information;

d. section 7 provides that newspaper publications are privileged unless such publication is made with malice.

Under the common law tort of defamation, a defendant is required to prove the following:[33]

a. existence of a defamatory statement;

b. that the defendant published or caused the publication of the defamatory statement intending to lower the claimant's reputation among right-thinking members of society; and

c. that the publication referred to the claimant.

Courts will usually apply the above three-pronged test to establish whether a particular statement was defamatory. Courts will also examine whether the defence of qualified privilege is applicable to the defendant, i.e., was there a public interest objective in making the publication? In this instance, courts mainly rely on the case of *Reynolds v Times Newspapers* [1999] 4 All ER 609, which sets out the following criteria for determining whether a publication is subject to qualified privilege:

a. the seriousness of the allegation: the more serious the charge, the more the public is misinformed, and the individual harmed, if the allegation is not true;

b. the nature of the information, and the extent to which the subject matter is a matter of public concern;

c. the source of the information;

d. the steps taken to verify the information;

e. the status of the information;

f. the urgency of the matter;

g. whether comment was sought from the plaintiff;

h. whether the article contained the gist of the plaintiff's side of the story;

i. the tone of the article; and

j. the circumstances of the publication, including the timing.

Courts will examine the alleged defamatory publication against the above principles. If the statements are defamatory, courts will usually award damages.[34]

4.2. ONLINE LEGAL THREATS

Journalists have in the past been arrested or criminally charged for conduct relating to their online journalistic activity. Some of the laws include:

a. Data protection law

In 2021, a popular blogger was arrested for publishing

33 See *Nation Media Group & Another vs. Hon. Chirau Mwakwere* – Civil Appeal No. 224 of 2010 (unreported).

34 See for example: Civil Appeal No. 156 of 2017- *Musikari Kombo v Royal Media Services Limited* [2018] eKLR.

another person's personal data without their consent.[35] The status of the case is unknown.

b. False information law

In 2020, a social media user was arrested for publishing false news on the spread of COVID-19.[36] The status of this case is unknown.

4.3. OTHER LEGAL THREATS

Other examples of legal action against journalists include:[37]

a. Journalists being arrested for covering police operations

In 2017, a group of journalists were arrested for possession of bullet-proof gear. They were covering protests and were taken to police custody for questioning. According to the police, the journalists did not have a licence to wear the body armour whilst their employer, Standard Group Limited, argued that they were properly licensed.[38]

b. Journalist arrested for taking photos at Brookside

In November 2017, a foreign journalist working for Agence France-Presse (AFP) was arrested in Nairobi and charged with trespassing at Brookside Dairy (a milk firm associated with the then-President Uhuru Kenyatta) after being found taking photographs on the premises. He was released on a KES 10,000 (approximately USD 100) police bail and this matter is still pending in court.[39]

c. Journalist arrested for "undermining the President" contrary to section 132 of the Penal Code

In 2014, blogger Robert Alai was arrested and charged with undermining the authority of a public officer contrary to section 132 of the Penal Code, based on a post on his Twitter account about the President.[40] However, the petitioner successfully argued at the High Court that the provision was unconstitutional, and he was consequently released.[41]

35 "Blogger Edgar Obare charged with illegally sharing Natalie Tewa's private documents" The Standard accessible here.

36 "Blogger Robert Alai Arrested For Allegedly Publishing False Information On Social Media" Ifree (March 23, 2020) accessible here.

37 Most criminal cases are filed in the Magistrates' Courts (lower courts in Kenya). Records in these courts are not readily available and we rely on media reports. Sometimes, the media reports are not conclusive as they do not reveal the charges under which a particular claim is brought.

38 "KTN reporter Duncan Khaemba arrested while covering Kibera protests" The Standard accessible here.

39 "Journalist in trouble for taking photos, trespassing at Brookside Dairy" The Standard accessible here.

40 "Blogger Robert Alai charged with undermining President Uhuru Kenyatta" Nation (December 17, 2014) accessible here.

41 See *Robert Alai v The Hon Attorney General & another* [2017] eKLR.

5. ESSENTIAL MEDIA FREEDOM JURISPRUDENCE

Judicial precedent has evolved with a focus on ensuring that statutory provisions align with the Constitution. Major strides have been made with several colonial statutes being declared unconstitutional for being repressive. Some of the laws include section 132 of the Penal Code and sections 29 and 84D of the KICA as discussed above. Criminal defamation has been declared unconstitutional since the advent of the Constitution of Kenya in 2010. Civil defamation remains largely regulated under the common law despite the enactment of the Defamation Act.

The Global Freedom of Expression Institute, established by Columbia University, hosts an online global database of freedom of expression case law. The database has collected 16 cases in relation to Kenya. Most of the cases deal with LGBT+ rights issues, access to information and freedom of expression. Some of the cases are discussed in this report. Most cases on media freedom are concerned with the constitutionality of provisions that bar media freedom. There are still several cases that have not been catalogued by the Institute, but there is a discernible trend towards expanding media freedom with courts declaring several laws as unconstitutional.

Kenyan judges have mainly relied on precedent from other countries in determining cases dealing with free speech. This includes the United Kingdom, South Africa, India, Canada and the United States. These decisions have had persuasive value in courts as local jurisprudence on this topic has grown tremendously. For example, in the *Robert Alai* case (above), the learned judge borrowed some jurisprudence from Canada, Swaziland, and the United Kingdom among others to explain on permissible limitation of rights under the Constitution.

a. Constitutionality of section 29 of KICA

Geoffrey Andare v Attorney General & two others [2016] eKLR

In this matter, filed at the High Court of Kenya in Nairobi, the petitioner was an individual acting in the public interest.[42] The petitioner challenged the constitutionality of section 29 of the KICA, which outlawed the use of a telecommunications network to send a message that was grossly offensive or of an indecent, obscene or menacing character. The court held that the penal provision was unconstitutional as it imposed consequences both broadly and vaguely.

b. Publication of words meant to undermine a public officer

Robert Alai v The Hon Attorney General & another [2017] eKLR

The matter was filed at the High Court of Kenya in Nairobi. The petitioner was a Kenyan blogger who uses social media and his website to communicate to the public. He challenged the constitutionality of section 132 of the Penal Code, which outlawed the publishing or uttering of words calculated at undermining the authority of a public officer. Under this provision, any person found guilty of doing so would be liable to imprisonment for three years. The court declared that the provision was unconstitutional as it violated the petitioner's right to freedom of expression.

c. Criminal defamation

Jacqueline Okuta & another v Attorney General & two others [2017] eKLR.

The petitioners were parties acting in the public interest at the High Court of Kenya in Nairobi. They challenged the constitutionality of criminal defamation law under section 194 of the Penal Code. The court held that criminal defamation was unconstitutional as it was not justifiable in a democratic society. When making this assessment, the court examined international and regional instruments alongside the Constitution and noted that section 194 of the Penal Code was not in line with these instruments and the Constitution.

d. Publication of false news

Bloggers Association of Kenya (BAKE) v Attorney General & 3 others; Article 19 East Africa & another (Interested Parties) [2020] eKLR

The petitioners challenged, among other things, the constitutionality of several provisions of CMCA including the provision that outlawed publication of false news. The High Court of Kenya dismissed the petition and noted that the provisions of the CMCA were constitutional as the wording of the statute was clear and unambiguous. The court reasoned that the wording of section 23 of the CMCA was neither broad nor vague and should be read in its proper context alongside the other words as per the rules of statutory interpretation.

e. Constitutionality of the Security Laws Amendment Act No. 19 of 2014 (SLA)

Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others [2015] eKLR

In response to increased terrorist attacks in Kenya, parliament enacted the Security Laws Amendment Act (SLA) which came into force on 22 December 2014. The SLA amended several acts of parliament concerned with matters of national security, including the Penal Code and the Prevention of Terrorism Act.

The first petitioner, the Coalition for Reforms and Democracy (CORD), a now-defunct political coalition, moved to the High Court alongside others challenging the constitutionality of some provisions.[43] Some of the key contentions by the petitioners were that an amendment to the Penal Code, criminalising the publication of information or photographs related to terrorist acts without authority from the National Police Service, was unconstitutional as it restrained media freedom and violated the rights of citizens to access information held by the state.

The court held that this amendment placed an unjustifiable restriction on freedom of expression and the media and was thus unconstitutional. The court noted that there was no justifiable or rational connection between the limitation proposed by section 12 of SLA and the stated object of the legislation, being national security and counter terrorism.

f. Searches on journalists

Standard Newspapers Limited & another v Attorney General & 4 others [2013] eKLR

The respondents raided the petitioners' offices (the Standard Newspapers Limited and KTN), vandalised equipment, and confiscated the broadcasting equipment,

42 Article 22 of the Constitution allows any person to institute proceedings claiming that a right or a fundamental freedom has been denied, violated infringed or is threatened. Further, a claim may be instituted a person acting in public interest. This has been common practice after the advent of the new Constitution where individuals have filed suits in public interest claiming the violation of the bill of rights.

43 See para 35 of the judgment for the impugned sections. Other parties were Article 19 Eastern and the Law Society of Kenya.

thus shutting down KTN's broadcastings transmissions.[44] When conducting the raids, the second respondent (the Kenyan Commissioner for Police)[45] did not have a warrant.

The petitioners contended that the searches violated their constitutional rights, including the right to privacy. The court held that the search on the petitioners' premises was arbitrary and in breach of the petitioners' rights to privacy under section 76 of the former Constitution.[46]

g. Publication of obscene images in electronic form

Cyprian Andama v Director of Public Prosecution & another; Article 19 East Africa (Interested Party) [2019] eKLR.

The petitioner challenged the constitutionality of section 84D of the KICA at the High Court on the basis that it limited his freedom of speech and expression.[47] Section 84D criminalised the publication of obscene information in electronic form. The court held that the provision was unconstitutional as the limitation did not meet the tests of rationality, reasonableness, and proportionality. As such, this section violated article 33 of the Constitution.

h. Online defamation

Shawn Bolouki & another v Dennis Owino [2019] eKLR

In this matter, the plaintiffs (Shawn Bolouki and the Aga Khan University Hospital) contended that the defendant (Dennis Owino) had published a defamatory article on his Twitter profile that had more than 65,000 followers.[48] The plaintiffs alleged that the article was injurious to their reputation and that the article did not provide proof of the allegations. The plaintiffs sought an injunction to restrain the defendant from posting on any electronic media and to take down the injurious post.

The court held that the plaintiffs had met the test for the grant of a temporary injunction as the plaintiffs proved that they would suffer irreversible harm that would not be compensated by way of damages.

Charity Wanjiku Muiruri v Standard Group Limited & 2 others [2019] eKLR

In this matter, Kenya Television Network (KTN) (owned by Standard Group Limited) aired an investigatory programme about the Artur brothers (alleged criminals) and the plaintiff (Charity Wanjiku Muiruri) was featured in the programme.

The plaintiff contended that, due to the said publication, she became a trending topic on Twitter and was insulted by the general public as they considered her as a person of loose morals. She contended that the defendants did not offer any plausible explanation as to why she was featured on the programme. The defendants argued that the publication was in the public interest.

The defendants also argued that they were not responsible for the acts of third parties in respect of social media publications. The court held that, on the balance of probabilities, the plaintiff had proved her case. Furthermore, the court noted that a reasonable person watching the programme would have perceived it as defamatory. As such, the court awarded the plaintiff KES 3,000,000 (approximately USD 30,000) in damages.[49]

i. Right to privacy v media freedom

Roshanara Ebrahim v Ashleys Kenya Limited & 3 others [2016] eKLR.

In this matter, the petitioner (Roshanara Ebrahim) was crowned Miss World (Kenya) in 2015. In 2016, Ashley's Kenya Limited and Terry Mungai (the first and second respondents) withdrew the crown from Ms Ebrahim for allegedly breaching the Miss World code of conduct. The allegation was informed by the existence of nude photographs given to the first and second respondents by Frank Zahten (the third respondent and petitioner's boyfriend).

The petitioner sought among other things a declaration that the publication of her intimate photos violated her right to privacy in the Constitution.

44 The matter was filed at the High Court.

45 Now the Inspector General for Police.

46 This matter was filed at the High Court in Kenya.

47 The petitioner had already been charged before the lower courts with an offence under this section. In this matter, Article 19 East Africa was an interested party and argued that this provision did not meet the test of legality, legitimacy, necessity and proportionality.

48 This matter was filed at the High Court.

49 This matter was also filed at the High Court.

The court held that, in forwarding the pictures to the first and second respondents, the third respondent violated the petitioner's right to privacy as the taking of nude photographs using a mobile phone did not constitute waiver of the right to privacy. The court awarded the petitioner damages of KES 1,000,000 (approximately USD 10,000) against the third respondent.

6. CONCLUSION

Kenya has a robust legal framework for media freedom, particularly in the Constitution, which guarantees the rights to freedom of expression, media freedom and access to information. Although these rights are not absolute, the scope of their enjoyment and their limitation is set out under the Constitution. There are several statutes which give effect and provide the frameworks for the enjoyment of the rights.

Through policy, all ICT service licensees, including broadcasters are required to have 30% local ownership, although the President has recently committed to revising this to attract investment in the ICT sector. The foreign ownership limitation regulation is enforced by CAK as well as through competition law. There is limited information on how CAK has regulated the local shareholding requirement for broadcast service licensees.

Despite the robust legal framework for promotion of media, some criminal provisions continue being abused to stifle free speech particularly in the cybercrime law and the Penal Code. However, notably, courts have in several cases declared problematic criminal provisions which violate the right to freedom of speech as unconstitutional.

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CHAPTER 2: **SOUTH AFRICA**

1. OPERATING ENVIRONMENT

The Constitution of the Republic of South Africa, 1996 (the Constitution) grants everyone the right to freedom of expression, which includes freedom of the press and other media.[50] The right to freedom of the media is given effect to, and in some instances limited by, several laws and policies in force in South Africa.

South Africa is a democratic republic founded on the principles of "the advancement of human rights and freedoms" and "the supremacy of the Constitution and the rule of law".[51] According to the preamble of the Constitution, South Africa is a sovereign, democratic state founded on the values of: human dignity, the achievement of equality and the advancement of rights and freedoms; non-racialism and non-sexism; the supremacy of the Constitution and the rule of law; and universal adult suffrage, a national common voters' roll, regular elections and a multiparty system of government to ensure accountability, responsiveness and openness.

The Constitution is the supreme law of South Africa. Any law or conduct inconsistent with the Constitution is invalid, and the obligations imposed by it must be fulfilled. Accordingly, legislative and executive power is subject to the Constitution. Judicial authority is vested in the courts, which are independent and subject only to the Constitution and the law. No person or organ of state may interfere with the functioning of the courts, and an order of court binds all persons (including organs of state) to whom the order applies.

Section 39 (2) of the Constitution imposes a duty on the courts to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation, the common law and customary law. Further, it provides that the courts must take into account international law and may consider foreign law when interpreting the Bill of Rights. Customary international law is also explicitly included as a source of law under section 232 of the Constitution unless it conflicts with the Constitution or statute.

According to the 2022 Reporters Without Borders World Press Freedom Index, South Africa ranks 35th out of 180 countries. South Africa has a diverse media sector, comprising a variety of state-owned and independent print publications, television and radio broadcasters, and a growing digital media sector.

In recent years, television has overtaken radio as the medium with the broadest reach. As documented by the South African Audience Research Foundation's "All Media Products Survey" in June 2022, 74% of South Africans reported watching television in the previous four weeks, 71% reported listening to the radio in the previous four weeks, and 39% reported reading a newspaper in the previous three months.[52] As of 2021, about 76% of South Africans have access to the internet through use of a smartphone, the vast majority of whom reported accessing the internet predominantly with a mobile device. 53% of South Africans reported having accessed social media in the previous four weeks.[53]

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50 Section 16 (1)(a) of the Constitution.

51 Section 1 of the Constitution of the Republic of South Africa, 1996.

52 South Africa Advertising Research Foundation, "All Media Products Survey", June 2022. A summary of the survey is accessible here (refer to slide 40).

53 South Africa Advertising Research Foundation, "All Media Products Survey", June 2022. A summary of the survey is accessible here (refer to slide 40).

South Africa's broadcast transmission infrastructure is operated mainly (but not exclusively) by Sentech Limited (Sentech), a state-owned company established by the Sentech Act 63 of 1996, which acts as a common carrier to provide broadcasting signal distribution for broadcasting licensees.

Digital terrestrial signals and digital satellite signals are predominantly used to broadcast radio and television. In his 2021 State of the Nation address, South Africa's President, Cyril Ramaphosa, indicated that the majority of the country's people accessed television networks through digital broadcasts and that government's intention was to migrate all South Africans from analogue terrestrial television to digital. While this was initially intended to be completed by the end of March 2022, it was revised to the end of 2023. Cable is not used for commercial radio or television broadcast in South Africa.

2. SOURCES OF MEDIA LAW

Media freedom in South Africa is regulated, in the first instance by the Constitution, then by applicable statutes and secondary legislation (such as regulations) promulgated thereunder, judicial precedent, the common law and customary law, customary international law (to the extent that it does not conflict with the Constitution and legislation), and finally by codes adopted by virtue of membership of voluntary associations for those who subscribe to such codes.

The legal position of journalists – traditionally understood – is no different to that of bloggers and influencers, or that of media organisations. South African law limits interference with the right to freedom of expression of all these persons. Accordingly, unless differentiated or apparent from the context, the legal framework described below applies equally to journalists, bloggers and influencers, and media organisations. Where this report refers to a "journalist" or "journalists", this is intended to include bloggers, influencers and similar persons.

2.1. THE CONSTITUTION

Chapter 2 of the Constitution (the Bill of Rights) includes, among others, the right to: privacy, including the right not to have the privacy of one's communications infringed;[54] equality including the full and equal enjoyment of all rights and freedoms;[55] freedom of expression, as set out in further detail below;[56] freedom of conscience, religion, thought, belief and opinion;[57] assemble, demonstrate, picket and present petitions peacefully and unarmed;[58] use the language and participate in the cultural life of one's choice, provided the right is exercised consistently with other provisions of the Bill of Rights;[59] make political choices, including participating in the activities or recruiting members for a political party and campaigning for a political party or cause;[60] freedom of association;[61] access information, as described in further detail below;[62] just administrative action;[63] and access to courts.[64]

The rights contained in the Bill of Rights, however, are not absolute and may be limited in terms of section 36 of the Constitution (the limitations clause). The rights most relevant to media freedom are the right to freedom of expression (section 16) and access to information (section 32).

a. Freedom of expression

Freedom of expression is protected by section 16 of the Bill of Rights. The right to freedom of expression includes freedom of the press and other media; freedom to receive or impart information or ideas; freedom of artistic creativity; and academic freedom and freedom of scientific research.

The ambit of the right contained in section 16 is broad.

54 Section 14 of the Constitution.
55 Section 9 (2) of the Constitution.
56 Section 16 (1) of the Constitution.
57 Section 15 of the Constitution.
58 Section 17 of the Constitution.
59 Section 30 of the Constitution.
60 Section 19 (1) of the Constitution.
61 Section 18 of the Constitution.
62 Section 32 of the Constitution.
63 Section 33 of the Constitution.
64 Section 34 of the Constitution.

Importantly, it protects "expression", and not just speech. Accordingly, dissemination through any medium, whether in print, by radio or digitally, is protected. Section 16 is framed as a general right to freely express views and information, granted to everyone from the commercial media industry to individuals. The right, however, is immediately circumscribed to exclude categories of expression from constitutional protection: propaganda for war; incitement of imminent violence; and the advocacy of hatred that is based on race, ethnicity, gender or religion, and which constitutes an incitement to cause harm.[65]

While recognising the inherent importance of the right to freedom of expression, the courts have also noted that this right is "part of a web of mutually supporting rights enumerated in the Constitution, including the right to freedom of conscience, religion, thought, belief and opinion, the right to privacy, and the right to dignity".[66]

b. Access to Information

The right of access to information is closely linked with the right to freedom of expression, as it is crucial for the information-gathering function of the media. Section 32 of the Bill of Rights provides that:

(1) Everyone has the right of access to:

(a) Any information held by the state; and

(b) Any information that is held by another person and that is required for the exercise or protection of any rights.

In addition, section 32(2) places an obligation on parliament to pass national legislation to give effect to the right of access to information. The Promotion of Access to Information Act 2 of 2000 (PAIA) was promulgated in fulfilment of this obligation. PAIA applies broadly to both the public and private sector and includes access to information held by the media.

c. Limiting rights in the Bill of Rights

The rights contained in the Bill of Rights may be restricted in terms of the limitations clause which requires consideration of, among other things, the conflicting rights of others. While some rights are couched in stronger terms, and while others include internal limitations, the Constitution does not prescribe a hierarchy of rights. As such, when a conflict arises between competing rights, a balancing exercise must be performed. The limitations clause (section 36) states:

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

Once an infringement of a right is alleged, the court must follow a two-stage process:

- First, it must establish whether the right has, in fact, been infringed; and
- Second, it must establish whether the infringement is permitted in terms of the limitations clause. This second stage involves weighing up competing interests in the context of each specific case.

2.2. LEGISLATIVE FRAMEWORK

This section sets out the relevant statutes and secondary legislation promulgated thereunder, such as proclamations by the President and regulations issued by a cabinet minister in terms of legislation. South Africa has promulgated a large body of legislation that affects the media both directly and indirectly. This body of law includes legislation prohibiting hate speech, regulating telecommunications and providing access to information.

As a general proposition, such legislation may not conflict with the right to freedom of expression or the right of access to information as enshrined in sections 16 and

65 Section 16 (2) of the Constitution.
66 *Mokgoro J in Case v Minister of Safety and Security* (1996) 3 SA 617 (CC) at para 27.

32 of the Constitution. The legislation applicable to the media, for the most part, is light-handed in its regulation of what content can and cannot be published; however, some statutes may, to some extent, limit the media's free publication of content by journalists, bloggers, and influencers, as well as media organisations; these limitations are highlighted as appropriate in this section.

a. Broadcasting Act 4 of 1999

The Broadcasting Act governs both public service and private commercial broadcasting.

Public broadcasting

The main focus of the Broadcasting Act is the restructuring of the national public service broadcaster, the South African Broadcasting Corporation (SABC), as a true public broadcaster in line with the Constitution.[67] SABC operates as a corporation bound by a charter (the Charter), which provides for two separate operational divisions of SABC: a public service division and a commercial service division.[68] Each division must be administered separately with separate financial accounts.

SABC is governed by a board consisting of 12 non-executive directors and three executive directors. The non-executive directors are appointed by the President on the advice of the National Assembly (one of the two national houses of South Africa's Parliament) after public participation in the nomination and shortlisting process. The Broadcasting Act requires that each member of the board be, among other things, committed to fairness, freedom of expression, the right of the public to be informed, and the openness and accountability of those in office.

The Broadcasting Act, as amended in 2009, mandates the board to remove a member from office upon the adoption of a resolution calling for such removal by the National Assembly. This is a major change to the Broadcasting Act, which previously only allowed the President to remove a director on the recommendation of the board itself. As a result, the 2009 amendment adds an extra mechanism for the National Assembly to remove board members. The National Assembly may also suggest that the entire board be dissolved if it fails to perform its fiduciary duties, adhere to the Charter, or carry out its duties under the Act.

This amendment should strengthen SABC as an institution by holding board members accountable to the board and the National Assembly for fulfilling their duties under the Act. It is also in tandem with section 192 of the Constitution which provides that broadcasting must be regulated in the public interest to ensure fairness and a diversity of views broadly representing South African society.

SABC's commercial services are subject to the same policy and regulatory structures in the Act as those governing private broadcasters in addition to laws and policies applicable to public broadcasting services, and the requirement to commission a significant amount of its programming from the independent sector.

Private broadcasting

The Broadcasting Act under section 29 provides that any person intending to offer a commercial broadcasting service must hold a licence issued by the Independent Communications Authority of South Africa (ICASA) for each service provided. The requirement for such licence is stringently enforced and must be read together with the requirements in the Electronic Communications Act 36 of 2005 (ECA), which provides – among other things – that no person may provide any service without a licence unless ICASA has exempted a person from requiring a licence (section 6 of ECA). The provision of broadcasting services is a licensable service in terms of the ECA.

There are currently no possible exemptions in terms of the exemption regulations published under ECA that would apply to broadcasters (as the exemptions relate only to telecommunications services and not to broadcasting).

b. Independent Communications Authority of South Africa Act 13 of 2000 (ICASA Act)

Section 192 of the Constitution provides that national legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society. The ICASA Act establishes ICASA as the main independent regulatory authority that monitors and ensures legal and/or regulatory compliance in line with its statutory powers and functions over electronic communications and broadcasting in South Africa as defined therein. The Act draws a distinction between public, commercial and community broadcasting. A licence must first be obtained from ICASA in order to broadcast under any one of these three categories, which requires among other things that it is in the public interest to issue the licence. ICASA may stipulate conditions for the retention of the licence, which may include adherence to the ICASA Code. ICASA's code of conduct has striking similarities to the South African Press Code.

ICASA is empowered to conduct inquiries into a wide range of affairs contemplated by the Act as read together with the Electronic Communications Act 36 of 2005 (ECA), including compliance with regulations, guidelines and licence conditions. It can issue notices to licensees, and issue enforceable orders against licensees.

c. Electronic Communications Act 36 of 2005 (ECA)

The ECA applies to telecommunications carriers and networks and (linear) broadcasting licensees and broadcasting signal distributors. The Act was intended to promote convergence in the broadcasting, broadcasting signal distribution and telecommunications sectors and to provide the legal framework for convergence of these sectors as well as make new provision for the regulation of electronic communications services, electronic communications network services and broadcasting services. The Act outlines the conditions for the granting of new licences, the control of the radio frequency spectrum and was targeted to address arising social obligations.[69] The Act also provides for the continued existence of the Universal Service Agency and the Universal Service Fund which manage the contributions by telecommunications operators and seeks to stimulate the development of services in under-served communities.[70]

It outlines the licensing framework for ICASA when granting individual and class licences and by way of example, it requires ICASA to consider certain conditions when issuing a commercial broadcast licence such as:

a. the demand for the proposed broadcasting service within the proposed licence area;

b. the need for the proposed broadcasting service within such licence area, having regard to the broadcasting services already existing in that area;

67 Preamble of the Broadcasting Act. See, generally, DM Pretorius "Ten years after the transition: The emergence of a broadcasting jurisprudence in South Africa" (2003) 19 South African Journal on Human Rights 593 at 596-597.

68 Section 6(2) of the Broadcasting Act.

69 Electronic Communications Act 36 of 2005.

70 https://www.treasury.gov.za/documents/national%20budget/2002/ene/vote_26.pdf


REUTERS/Siphiwe Sibeko

c. the expected technical quality of the proposed broadcasting service, having regard to developments in broadcasting technology;

d. the capability, expertise and experience of the applicant;

e. the financial means and business record of the applicant;

f. the business record of persons in a position to control the operations of the licensee, either in an individual capacity or directly or indirectly in relation to management or corporate structure;

g. the applicant's record and the record of persons in a position to control the operations of the licensee, either in an individual capacity or directly or indirectly in relation to management or corporate structure in relation to situations requiring trust and candour;

h. whether the applicant is precluded, in terms of section 64 from holding a broadcasting service licence; and

i. whether either the applicant or persons in a position to control the operations of the licensee, either in an individual capacity or directly or indirectly in relation to management or corporate structure have been convicted of an offence in terms of the Broadcasting Act or the related legislation.

The Act under chapter 9 regulates the conduct of broadcast licensees, for example by requiring under section 54 (2) that all broadcast service licensees adhere to the ICASA code which imposes various ethical and editorial standards. The Act also imposes controls on advertisements and political party related broadcasts while prohibiting the granting of broadcasting service licences to party-political entities under section 52.

d. Films and Publications Act 65 of 1996 (FPA)

The FPA regulates the distribution of publications (among other things) by way of a classification system. It establishes a Film and Publications Board (FPB), a Council and an Appeals Tribunal.[71] The FPB, among other things, regulates the exhibition, distribution and classification (rating) of publications, and monitors and ensures compliance with the FPA. The Appeals Tribunal adjudicates appeals against decisions of the FPB and the Council issues directives – including classification guidelines – in accordance with the FPA and monitors the implementation of the FPA and the functioning of the FPB. The contents of publications are evaluated and placed into categories, which specifies the prohibitions or restrictions on the distribution of that content.

For the purposes of the FPA a "publication" includes:[72]

- any newspaper, book, periodical, pamphlet, poster or other printed matter;
- any writing or typescript which has in any manner been duplicated;
- any drawing, picture, illustration or painting;
- any print, photograph, engraving or lithograph;
- any record, magnetic tape, soundtrack, except a soundtrack associated with a film, or any other object in or on which sound has been recorded for reproduction;
- computer software which is not a film;
- the cover or packaging of a film; and
- any figure, carving, statue or model;

"Distribution" includes, in relation to a publication and without derogating from the ordinary meaning of the word:[73]

- streaming content through the internet, social media or other electronic mediums; and
- selling, hiring out, offering or keeping for sale/hire, including using the internet.

Whereas films, videos and video games must be submitted for classification before they can be screened or distributed, arguably creating a form of "prior censorship", broadcasters regulated by ICASA are exempt from this classification procedure.

Other publications need not be classified prior to publication but any person may request that a publication be classified before or after publication. The FPB's classifications of publications have generally roused little controversy, with some exceptions, which, the treatment thereof by the relevant forums nevertheless points to the strength of media freedom in South Africa.

The FPB's website includes a platform for lodging complaints.

e. Film and Publication Amendment Act 3 of 2009 (the 2009 Amendment Act)

The Film and Publication Amendment Act 3 of 2009 (the 2009 Amendment Act) established a pre-censorship procedure for publications, which was not previously contained in the FPA. In terms of this amendment, any publication that contains certain types of sexual or violent conduct (except a publication issued by a member of the Press Council of South Africa (the Press Council) or an advertisement that falls under the jurisdiction of the Advertising Standards of South Africa) must submit the publication for classification before it may be distributed. This is a closed list that includes any publication that contains (i) sexual conduct which either violates or shows disrespect for the right to human dignity of any person, which degrades a person or constitutes incitement to cause harm; (ii) bestiality, incest, rape or conduct or an act which is degrading of human beings; (iii) explicit infliction of domestic violence; or (iv) explicit visual presentations of extreme violence. In any of these instances, a publication must be classified as "XX" in accordance with section 16 (4)(b) of the FPA, as amended by the 2019 Amendment Act on 1 March 2022.

In general, publications that (i) amount to propaganda for war; (ii) incite imminent violence; or (iii) advocate hatred based on any identifiable group characteristic that constitutes incitement to cause harm and imminent violence, must be submitted, in the prescribed manner and form, to the FPB for examination and classification. The FPB may refuse classification (which essentially amounts to banning the publication) if the publication contains (i) child pornography, propaganda for war or incitement of imminent violence; or (ii) the advocacy of hatred based on any identifiable group characteristic that constitutes incitement to cause harm (unless the publication is a documentary, serves a scientific, literary or artistic purpose or is in the public interest) in which case children should be protected from exposure to disturbing, harmful or age-inappropriate materials.

The 2019 Amendment Act extended the FPA's compliance obligations, and the FPB's compliance and monitoring functions, to online distributors. Accordingly, the FPA currently applies to on-demand content service providers (such as Netflix, Google Play, Amazon Prime, Showmax etc.).

The 2019 Amendment Act came into force on 1 March 2022. Prior to this, online distributors registered as distributors with the FPB and entered into online distribution agreements therewith in terms of which the distributor was allowed to self-classify content. As such, there are no examples of how the FPA has classified online films or content provided by on-demand content service providers.

The FPA does not currently apply to linear broadcasters which are specifically excluded from its application.

In relation to its offences and penalties for child pornography, the FPA is further amended by the Cybercrimes Act 19 of 2020 (see below).

f. Imprint Act 43 of 1993

The Imprint Act repealed the Newspaper Registration Act 63 of 1971, which required the registration of all newspapers. The Imprint Act removed this requirement and only requires that the name and address of the printer appear on any printed material for public sale or distribution (including but not limited to newspapers and magazines).

71 Section 3 of the FPA.

72 Section 1 of the FPA.

73 Section 1 of the FPA.

REUTERS/Thomas Mukoya

2.3. OTHER STATUTES

LEGISLATION	RELEVANT PROVISIONS
Children's Act 38 of 2005	The law prohibits the publication of the identity of a child in children's court proceedings save for where expressly authorised by the court's presiding officer, if they are of the opinion that the publication would be to the advantage of the child in question.
Copyright Act 98 of 1978	Broadly, the Copyright Act prohibits the reproduction of a copyrighted work. The case law, however, demonstrates a cognisance of the balance between the rights contained in the Copyright Act (and other legislation that aims to protect intellectual property) and the right to freedom of expression.
Correctional Services Act 111 of 1998	The Correctional Services Act includes various provisions which limit the media's ability to report on issues relating to prisons. • Section 122 (a) and (b) provide that nobody may enter a prison or communicate with a prisoner without authorisation from prison authorities; • Section 123 (1) prohibits publishing any account of prison life or conditions that may identify any specific prisoner without the consent of that prisoner; • Section 123 (2) prohibits publishing the details of an offence for which a prisoner is serving a sentence, unless those details are included in a court record without the consent of the Commissioner; and • Section 123 (5) provides that no prisoner may derive a profit from any published account of the offence for which they are serving their sentence.
Criminal Procedure Act No. 51 of 1977 **(CPA)**	As regards criminal cases, section 205 (1) of the CPA provides that a judge or magistrate may, upon the request of South Africa's national prosecuting authority, order any person who may have information about an alleged offence to appear before court. Should such person refuse to do so, they may be sentenced to a period of imprisonment of up to two years, or, in the case of information being sought regarding certain "serious" matters, for up to five years.[74] Section 205 has in the past been used to require journalists and media organisations to reveal the identities of confidential sources.[75] Faced with such a subpoena, a journalist or media organisation must weigh up honouring their ethical obligation to keep their source confidential and facing the possibility of imprisonment, or revealing their source in compliance with the CPA, but acting unethically. Section 205, however, is subject to the proviso that a person who refuses to give information under subpoena may not be jailed unless the court is of the opinion that the information sought is necessary for the administration of justice or the maintenance of law and order. Commentators have described the effect of this proviso, which was installed by a 1993 amendment to the CPA, as turning imprisonment for a refusal to disclose the identity of a source into "the exception rather than the rule".[76]

74 Section 189(1) of the CPA.

75 For example see *South African Broadcasting Corporation v Avusa Limited and Another (none)* [2009] ZAGPJHC 80; 2010 (1) SA 280 (GSJ) (14 October 2009).

76 G. Barker, "Media Law: Tread Cautiously with New-Found Freedom", in Mass Media towards the Millennium: the South African Handbook of Mass Communication (Pretoria: J.L. van Schaik, 1998).

LEGISLATION	RELEVANT PROVISIONS
	In addition, successfully raising a "just excuse" to providing information will allow a journalist or media organisation to avoid sanction for non-compliance with a section 205 subpoena. Since 1994, courts have been increasingly amenable to arguments that a journalist or media organisation's ethical duty to protect their source constitutes a "just excuse" for the purpose of section 205.[77] There have been no reported cases in recent years of journalists being imprisoned for refusing to comply with subpoenas under section 205 of the Criminal Procedure Act.[78] South African journalists have unsuccessfully argued that journalists should be subpoenaed to testify only as a last resort, and after all other possible witness testimony has been exhausted. However, it is reiterated that journalists in South Africa do not enjoy special legal protection against revealing their sources, and that every case is assessed on its merits. While section 205 has been subject to criticism from both journalistic and legal communities, mostly stemming from concerns that it may inhibit the free disclosure of information and potentially infringing the section 16 right to freedom of expression in the Bill of Rights, the section has not yet been challenged hence can still be enforced.[79] There appears to be an understanding between the state and various media organisations on the importance of protecting confidential sources. In 1999, the Ministers of Justice and Safety and Security, the National Director of Public Prosecutions and the South African National Editors Forum concluded a "Record of Understanding" whereby all parties agreed that there is a need to balance freedom of expression, the ethical duty of journalists to protect their sources, and the maintenance of law and order. Moreover, this memorandum provided for mechanisms whereby prosecutors and journalists may mediate disputes regarding journalists being compelled to testify as to their sources before being officially subpoenaed.
Cybercrimes Act 19 of 2020	The Cybercrimes Act was signed into law on 26 May 2021 and most of its provisions became enforceable on 1 December 2021. The Act's focus is the criminalisation of interference with computer systems and data. The Act provides that any journalist or media organisation that unlawfully accesses a computer system or data storage medium, or unlawfully intercepts data, even for journalistic purposes, will be guilty of an offence.[80] In addition, the Cybercrimes Act provides that the common law offence of theft, which previously only included the theft of corporeal (or physical) property must be interpreted to include theft of incorporeal property.[81] This Act criminalises false information published with the purpose to defraud but does not criminalise false information published without such intention. No other statute regulates the publication of false information. However, the regulations promulgated in terms of the Disaster Management Act 57 of 2002 in response to the Covid-19 pandemic (the DMA Regulations) criminalise the intentional publication of false information regarding Covid-19.[82] False information that defames is covered by the law of defamation.

77 Before 1994, courts faced with the issue of what constitutes a "just excuse" for the purposes of section 205 held that a journalist's duty to protect their source did not suffice. See for example *S v Pogrund* 1961 (3) SA 868 (T) and *S v Matisonn* 1981 (3) SA 302 (A). In *S v Cornelissen*; *Cornelissen v Zeelie* NO 1994 (2) SACR 41 (W), the Court concluded that a journalist was excused from testifying on the basis of his duty to protect his source. However, the Court did not extend a general privilege to journalists from disclosing their sources, but rather weighed up the public advantage against the public prejudice that his testifying would cause.

78 The last reported decision in which a journalist was compelled to reveal the identity of a source was *Munusamy v Hefer* NO 2004 (5) SA 112 (O). This case was considered, albeit obiter, by Poswa J in *Public Protector v M & G Media Ltd* 2009 (12) BCLR 1221 (GNP).

79 The Court in *Nel v Le Roux* No 1996 (3) SA 562 (CC) remarked, obiter, that section 205 is not unconstitutional per se and that other countries have introduced similar provisions. The Court's decision, however, did not directly concern the use of section 205 to compel journalists to reveal their sources.

80 See the prohibitions at sections 14 to 16 of the Cybercrimes Act.

81 Section 12 of the Cybercrimes Act.

LEGISLATION	RELEVANT PROVISIONS
	In addition, the transmission of "malicious communications" (i.e., the transmission of data that incites damage to property or violence; which threatens persons with damage to property or violence; or which discloses intimate images), will constitute a cybercrime under the Cybercrimes Act. Accordingly, to the extent that an online journalist, blogger or influencer's content constitutes "malicious communication", this would be unlawful under the Act. The Cybercrimes Act is a new piece of legislation, the majority of which recently became enforceable. It is yet to be seen how these provisions will work in practice.
Defence Act 42 of 2002	The Defence Act replaced its predecessor, the Defence Act of 1957, which imposed a blanket ban on reporting of military matters unless the information emanated from official state sources. The Defence Act now allows the President to make regulations restricting the freedom of the media in reporting on military matters only in certain, well-defined circumstances and in accordance with the Constitution. These regulations are promulgated on an ad hoc basis in a mission-specific context.[83] Section 83 (3)(c) provides that military records are not made public for a period of 20 years, unless otherwise authorised by the Secretary of Defence, and that it is a contravention of the Defence Act to disclose military documents in circumstances other than these, punishable by a fine or imprisonment of up to five years. Furthermore, section 89 permits the President to censor military documents in a state of national defence declared in terms of section 203 of the Constitution.[84] Lastly, section 102 provides that a board of inquiry constituted in terms of the Defence Act may summon any person to answer any question or produce any article as so ordered. This provision may be used to compel journalists to divulge the identity of sources or disclose other information.
Electoral Act No. 73 of 1998	The Electoral Act prohibits the publication, printing or distribution of the results of a poll during the prescribed hours of an election.

82 The DMA Regulations provide that:
14. (2) Any person who publishes any statement, through any medium, including social media, with the intention to deceive any other person about—
(a) COVID-19;
(d) COVID-19 infection status of any person; or
(c) any measure taken by the Government to address COVID-19, commits an offence and is liable on conviction to a fine or imprisonment for a period not exceeding six months, or both such fine and imprisonment.
On 7 April 2020, a man was arrested for circulating a misleading video clip regarding COVID-19 test kits. See the Government's media statement dated 7 April 2020, available here.

83 In July 2021, South Africa's Ministry of Defence and Military Veterans published a mission-specific code of conduct applicable to members of the South African National Defence Force (SANDF) in the context of deployed military response to nation-wide looting. The code of conduct was in force only between 12 July and 12 October 2021, and provided that, among other things, members of SANDF were not permitted to make any unauthorised statements to the media and may only speak to the media after approval of the Commanding Officer or Corporate Communication Officer.

84 South African courts have not adjudicated the issue of censorship of information under a state of national defence. However, the Military Discipline Bill, which has since been withdrawn, attempted to create an offence in the circumstance where military members disclose or publish any record or information which is classified as restricted, confidential, secret or top secret or has been unclassified, or where contents thereof are in nature of a classified character for use within designated departmental channels or authority. The extent of censored information under the Bill was extremely wide and would have negatively impacted media freedom. Its withdrawal, then, may be seen as an expansion of the right.

LEGISLATION	RELEVANT PROVISIONS
Promotion of Access to Information Act No.2 of 2000 **(PAIA)**	The purpose of the Act is to give effect to the constitutional right of access to information, subject to justifiable limitations, including those required to protect privacy, commercial confidentiality and effective governance, to promote a culture of human rights and to promote transparency and accountability. It establishes grounds for refusal to grant access to information and provides for a complaint and appeal procedure. The PAIA requires both private[85] and public bodies[86] to give members of the public access to a record of that body on request, if the request complies with the procedural requirements of the PAIA and the information requested is not exempt from disclosure. Journalists and media organisations should be aware of certain classes of data which may not be published including, with respect to third parties, private information relating to a natural person, commercial information and confidential information. Also, they should not publish information which relates to the protection of the safety of individuals and property, legally privileged police dockets in bail proceedings information, tax records held by the South African Revenue Service, and protection of defence security and international relations. Furthermore, the information officer of a public body retains the discretion to refuse access in certain other cases. The exercise of this discretion must be based on one of the grounds of economic interests or financial welfare of the country, the operations of public bodies, and the commercial activities of public bodies. Grounds for refusal may be overridden by legitimate public interest, defined in the PAIA as instances where the record would reveal either a substantial contravention of the law or an imminent and serious risk to public safety and the environment, and where the public interest in disclosure clearly outweighs the harm. The Information Regulator is an independent body with the power to enforce requests for information under the PAIA, where historically a party's strongest chance of enforcing an unlawfully refused information request was through litigation.
Promotion of Equality and Prevention of Unfair Discrimination Act No. 4 of 2000 **(PEPUDA)**	The PEPUDA includes provisions prohibiting hate speech, as follows: • Section 7 provides that nobody may discriminate against any person on the grounds of race, which includes the dissemination of propaganda to that effect; and • Section 10 prohibits the publication, propagation, advocacy or communication of words "that could reasonably be construed to demonstrate a clear intention to be hurtful, cause harm or promote hatred" on the basis of one of several listed grounds.

85 A "private body" includes both natural and juristic persons.

86 A "public body" is defined as a department of state or administration at national, provincial or local level, and any other institution exercising power in terms of the Constitution.

LEGISLATION	RELEVANT PROVISIONS
Protection of Information Act No. 84 of 1982 **(PIA)**	The PIA repealed the Official Secrets Act 16 of 1956 and is intended to protect state secrets from being disclosed. The following provisions of the PIA have the potential effect of limiting media freedom: • Section 2 makes it an offence to enter or inspect a prohibited area, which includes any military establishment, arsenal or a place declared to be a prohibited place; and • Section 3 prohibits the receipt or disclosure of official state secret information.
Protection of Personal **Information** Act No. 4 of 2013 **(POPIA)**	The POPIA's prohibition on the processing of personal information excludes: • information processed solely for the purpose of journalistic, literary or artistic expression, to the extent that such an exclusion is necessary to reconcile, as a matter of public interest, the right to privacy with the right to freedom of expression; and • where the information is processed exclusively for journalistic purposes and a code of ethics that adequately protects personal information applies, this code of ethics will apply to the exclusion of the POPIA.
South African Police Service Act No. 68 of 1995 **(SAPS Act)**	The SAPS Act makes it an offence to publish a sketch or photograph of a person who has been detained pending criminal proceedings or a decision to institute criminal proceedings, or anyone who is in custody and who may be a witness to criminal proceedings.
Uniform Rules of Court (promulgated in terms of Rules Board for Courts of Law Act No. 107 of 1985)	As a general rule, court proceedings in South Africa are conducted in public. Accordingly, any member of the public – including journalists – should be permitted to attend court proceedings. An extension of this general rule is that journalists should be able to report on any open court proceedings and that the public should have access to court records and other documents. This is subject to some exceptions. Where a judge or magistrate orders that proceedings be held in camera (i.e., where a witness gives evidence remotely and not in court), the details of proceedings may not be published without the court's permission. This restriction extends to court records, including documents used in open court as well as the publication of any witness giving evidence in camera. The court may order the removal of a person who disturbs the order of the court, and such person may be charged with the crime of contempt of court. Furthermore, a journalist may be found guilty of contempt of court for "scandalizing the court". This is conduct that undermines the dignity or authority of the court in such a way that is likely to damage the administration of justice. There are exceptions under the Children's Act, as discussed above.

REUTERS/Siphiwe Sibeko

2.4. OTHER SOURCES OF LAW

Other sources of law in South Africa include case law, common law, customary and international law. Customary law is only applicable to the extent it is not repugnant or contradicts the Constitution, natural justice or any written law. South Africa is party to both the ICCPR and the African Charter whose articles 19 and 9 respectively stipulate the right to freedom of expression and access to information.

2.5. RULES, CODES AND POLICY

2.5.1. Rules and Codes

There is no general media regulator in South Africa. The South African media industry is largely self-regulating. This concept of self-regulation is built on two propositions: first, that the press in a democracy must be free from state control and, secondly, that the press should be responsible and accountable. There are a number of professional bodies representing journalists and media industries, several of which have issued various rules and codes which regulate the content published by the media.

Three industry institutions regulate the media:

- the Press Council regulates print and online media;
- ICASA and the Broadcasting Complaints Commission of South Africa (BCCSA) regulate broadcast media; and
- the Digital Media and Marketing Association (DMMA) regulates online media.

a. The Press Council

The Press Council, the Press Ombud and the Appeals Panel are independent co-regulatory mechanisms set up by the print and online media to provide impartial, expeditious and cost-effective adjudication to settle disputes between newspapers, magazines and online publications, on the one hand, and members of the public, on the other, over the editorial content of publications. The Press Council was established by the Constituent Associations of the South African media. The Constituent Associations include the Association of Independent Publishers (AIP); the Forum of Community Journalists (FCJ); the South African National Editors' Forum (SANEF); and the Interactive Advertising Bureau South Africa (IABSA), representing online media. The Press Council has adopted the South African Press Code (the Press Code) to guide journalists in their everyday practice, as well as the Ombud and Appeals Tribunal.

The preamble of the Press Code recognises that the media exist to serve society. Further, that media freedom provides for independent scrutiny of the forces that shape society and is essential to realising the promise of democracy. The Press Code contains guidelines relating to comment, headlines, posters, pictures and captions, confidential sources, payment for articles, and violence. In so far as news reporting is concerned, the Press Code provides that:

The media shall:

a. *take care to report news truthfully, accurately and fairly;*

b. *present news in context and in a balanced manner, without any intentional or negligent departure from the facts whether by distortion, exaggeration or misrepresentation, material omissions, or summarization;*

c. *present only what may reasonably be true as fact; opinions, allegations, rumours or suppositions shall be presented clearly as such;*

d. *obtain news legally, honestly and fairly, unless public interest dictates otherwise;*

e. *use personal information for journalistic purposes only;*

f. *identify themselves as such, unless public interest or their safety dictates otherwise;*

g. *verify the accuracy of doubtful information, if practicable; if not, this shall be stated;*

h. *seek, if practicable, the views of the subject of critical reportage in advance of publication, except when they might be prevented from reporting, or evidence destroyed, or sources intimidated. Such a subject should be afforded reasonable time to respond; if unable to obtain comment, this shall be stated;*

i. *state where a report is based on limited information, and supplement it once new information becomes available;*

j. *make amends for presenting inaccurate information or comment by publishing promptly and with appropriate prominence a retraction, correction, explanation or an apology on every platform where the original content was published, such as the member's website, social media accounts or any other online platform; and*

ensure that every journalist or freelancer employed by them who shared content on their personal social media accounts also shares any retraction, correction, explanation or apology relating to that content on their personal social media accounts;

k. *prominently indicate when content that was published online has been amended or an apology or retraction published. The original content may continue to remain online but a link to the amendment, retraction or apology must be included in every version of the content which remains available online;*

l. *not be obliged to remove any content which is not unlawfully defamatory; and*

m. *not plagiarise.*

The Press Code also includes the following guidelines with regards to discrimination and hate speech:

The media shall:

a. *avoid discriminatory or denigratory references to people's race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth or other status, and not refer to such status in a prejudicial or pejorative context – and shall refer to the above only where it is strictly relevant to the matter reported, and if it is in the public interest; and*

b. *balance their right and duty to report and comment on all matters of legitimate public interest against the obligation not to publish material that amounts to propaganda for war, incitement of imminent violence or hate speech – that is, advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.*

Almost all newspapers and magazines in circulation in South Africa subscribe to the Press Code. Members of the Press Council are required to, among other things, declare their adherence to the Press Code and the Press Council's complaints procedure in published content. The Press Council's complaints procedure provides for a caution or reprimand for contravention of the Press Code, but also authorises the imposition of fines, suspension or expulsion for a failure to appear at adjudication proceedings or for repeated non-compliance. There is no information on such failure or repeated non-compliance having occurred.[87]

b. ICASA and BCCSA

Licensed public and private broadcasters who are members of the National Association of Broadcasters must subscribe to the Broadcasting Code of BCCSA (BCCSA Code), while non-member licensees are subject to the ICASA Code. The BCCSA Code and the ICASA Code are substantively identical. The discussion that follows refers to the BCCSA Code but is equally applicable to the ICASA Code.[88]

BCCSA has the power to impose sanctions – including fines – on broadcasters who subscribe to, but do not comply with, the BCCSA Code. Broadly, the BCCSA Code requires impartiality, cultural diversity, protection of minors, human dignity, and the right of reply in broadcasting. More specifically, the BCCSA Code requires broadcasters to:

a. *report the news truthfully, accurately and fairly;*

b. *present the news in the correct context and in a fair manner, without intentional or negligent departure from the facts, whether by the distortion, exaggeration, misrepresentation, omission or summarisation;*

c. *broadcast only that which is reasonably true, having reasonable regard to the source of the news, as fact;*

d. *explicitly mention where verification of fact has not been conducted;*

e. *to rectify forthwith any broadcast that is later discovered to have been incorrect in a material aspect;*

f. *not divulge the identity of rape victims or victims of sexual violence without the victim's prior consent;*

g. *advise viewers in advance of scenes or reporting of extraordinary violence, graphic reporting or delicate subject matter; and*

h. *not broadcast explicit or graphic language which could disturb children or sensitive audiences, except where it is in the public interest to include such material.*

87 See Joe Thloloe "The South African Regulatory Regime in Print, Broadcasting and Online" in Media Landscape 2012 available here (at page 117). There is little inadequate information to determine whether this has remained the case since 2012.

88 See, generally, *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC).

BCCSA has the power to caution or reprimand non-compliance with the BCCSA Code and, impose fines of up to ZAR 80,000 (approximately USD 4,300). The BCCSA does not, however, have the power to suspend or expel a broadcaster, even for repeated non-compliance.

c. Digital Media and Marketing Association (DMMA)

DMMA is an independent, voluntary, non-statutory association for members of the digital industry. According to its website, DMMA currently represents more than 250 members, including 126 local online publishers and at least 124 creative, media and digital agencies.

Broadly, the DMMA Code addresses the same editorial ethical issues as the BCCSA Code, the ICASA Code and the Press Code. DMMA is able to suspend a member "for a defined period or until such time that the member can demonstrate to it that the breach has been remedied or corrective measures have been undertaken". DMMA may also expel members.[89] In 2012 it was reported that DMMA had received "very few complaints".[90] Those complaints it did receive appear to relate to – among other things – hate speech, defamation, and incorrect quoting.

Other media bodies include:

a. South African National Editors' Forum (SANEF)

SANEF is a non-profit organisation whose members are editors, senior journalists and journalism trainers from across South African media, including from both print and digital media. As a condition of membership, SANEF members must subscribe to the Code of Ethics and Conduct for South African Print and Online Media. Non-compliance with the code may result in expulsion on a majority vote of SANEF's Editors' Council.

b. Advertising Regulatory Board (ARB)

ARB administers the widely accredited Code of Advertising Practice which regulates the content of South African advertising. ARB's Social Media Code is included in Appendix K of the code.

2.5.2. Policy

The Draft White Paper on Audio and Audiovisual Content Services Policy Framework

The Draft White Paper on Audio and Audiovisual Content Services Policy Framework[91] (the Draft White Paper), published for comment by the Minister of Communications and Digital Technologies, proposes a dual-regulatory regime in respect of on-demand content service providers. In terms of the Draft White Paper, these providers are to be subject to the regulatory overview of both ICASA and the FPB, which are intended to be merged, and an alignment in the regulation of all audio-visual media providers, whether linear or non-linear. The Draft White Paper does not detail how this will be achieved.

The Draft White Paper will need to be finalised before the relevant legislation can be amended through the parliamentary process. However, it is not clear whether the Minister of Communications and Digital Technologies wishes to proceed with the Draft White Paper.

Given that the Draft White Paper did not clarify how exactly a dual-regulatory regime would work, it is not clear how, if this draft proposal were ultimately finalised and made into law, this would impact media freedom in the future. Many interested parties have however asked the Department of Communications and Digital Technologies (DCDT) to clarify its position regarding a dual-regulatory regime and how it is expected to work in the context of on-demand content service providers specifically.

2.6. PROTECTION OF JOURNALISTS

The rights in the Bill of Rights apply equally to journalists in the traditional sense, bloggers and influencers and media organisations. The Constitutional Court of South Africa has linked the role of journalists with other important rights included in the Bill of Rights: freedom of expression; freedom of the press; and other media, and the right to access information.[92] While none of these rights are absolute, the Constitutional Court has emphasised that these rights are wholly necessary conditions of democracy and has noted the important role journalists play in upholding them.[93] In the same fashion, journalists enjoy the full benefit of the criminal laws and may report conduct

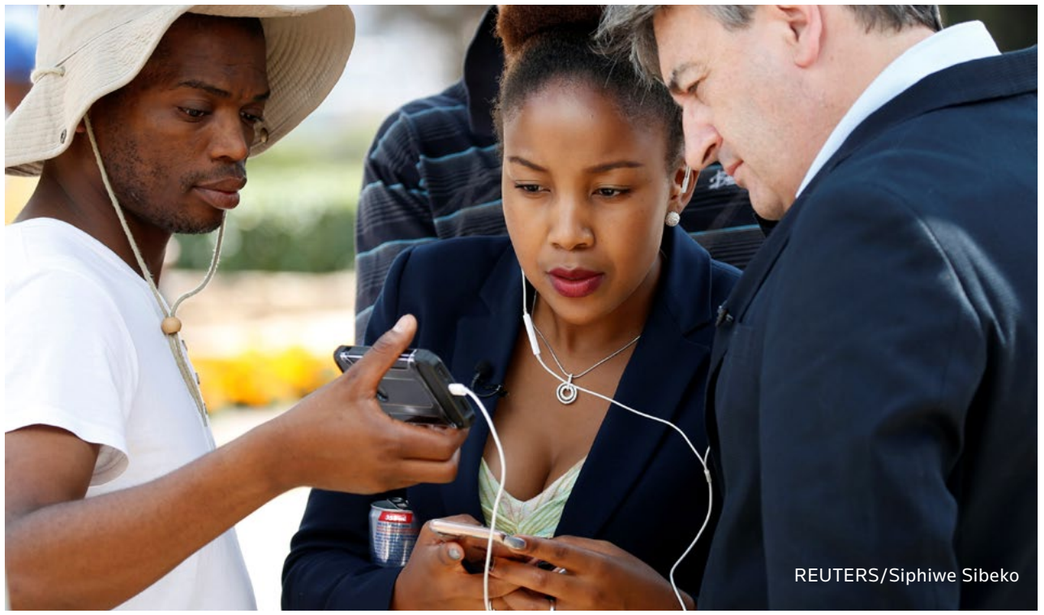
89 Items 9.6.3.2.1 and 9.6.3.2.1 of the DMMA's Code of Conduct.

90 Only 12 complaints in 2012, as reported here at page 117.

91 Published under General Notice 1081 in Government Gazette 43797 of 9 October 2020.

92 *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC).

93 *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC).


REUTERS/Siphiwe Sibeko

that constitutes criminal offences such as harassment, cyber bullying and other offences against them to the police for investigation and prosecution.

The courts, however, have rejected the notion of "press exceptionalism". South African journalists do not enjoy special status under law and are subject to the same legal protections and obligations as all citizens. Accordingly, there is nothing under South African law that grants journalists special protections or enforces journalistic standards outside of voluntary codes. For example, while the duty to protect confidential sources of information is a basic tenet of journalistic ethics, embodied in several ethics' codes applicable to journalists[94], journalists do not enjoy legal protection in this regard. Therefore, a journalist may be subpoenaed to disclose the identity of a source of information or to produce physical evidence in their possession.

There is no required or standard training or education regime in South Africa for journalists. Similarly, journalists do not need a licence to practise in South Africa. As such, any person can do the work of a journalist and there is no legal restriction on the right to work as a journalist.[95]

Journalists may apply for and be issued with press cards by Print and Digital Media South Africa (PDMSA), a voluntary association of members of the print and digital media industry, among other bodies. However, press cards like these are for identification purposes only and do not furnish the bearer with any special rights. These press cards are issued by PDMSA to journalists, either as a representative of a PDMSA member, as a representative of a non-PDMSA member or as a freelancer. If applying as a representative of a non-PDMSA member or as a freelancer, the journalist must supply proof that they are a "career journalist".[96] These press cards are recognised by the South African Police Service (SAPS). However, while it seems that a press card will in most cases gain a journalist access, a press card is not a legal requirement for access and so access cannot be refused on this basis alone. For example, for access to parliament, media representatives are not required to produce press cards but need to apply to parliament for pre-approval.[97]

94 For example, the South African Press Code (the Press Code), which automatically binds members of PDMSA, states at section 6 that "[t]he press has an obligation to protect confidential sources of information". The South African Union of Journalists and the SABC's Editorial Code of Ethics contain similar injunctions for journalists.

95 R Brand, "Media Law in South Africa" (Bedfordshire: Wolters Kluwer: 2011)

96 The PDMSA application form for a press card provides that this can be in the form of (i) a letter from the editor of the publication in question confirming the journalist is applying for the pass as a representative thereof; (ii) proof that the freelancer derives the majority of their income from the provision of services directly related to the gathering of news for written media; or (iii) proof of a diploma or certificate from a recognised college.

97 Similarly, a Standing Order to SAPS officials issued in 2003, which prescribes how SAPS officials are to interact with the media, provides that SAPS officials must allow "media representatives" to capture an event, but does not stipulate who constitutes a "media representative", and makes no mention of press cards as requisite identification for SAPS's purposes.

3. MEDIA OWNERSHIP

3.1. LEGAL FRAMEWORK FOR MEDIA OWNERSHIP

a. Communications law

The ECA, which is the primary piece of legislation which regulates the communications sector (telecommunications and broadcasting) in South Africa provides for certain limitations in respect of the ownership and control of commercial broadcasting services.

Under the ECA, the following terms are defined:

> *"broadcasting" means "any form of unidirectional electronic communications intended for reception by—*
>
> *(a) the public;*
>
> *(b) sections of the public; or*
>
> *(c) subscribers to any broadcasting service,*
>
> *whether conveyed by means of radio frequency spectrum or any electronic communications network [ECN] or any combination thereof";*
>
> *"broadcasting service" means "any service which consists of broadcasting and which is conveyed by means of an [ECN], but does not include—*
>
> *(a) a service which provides no more than data or text, whether with or without associated still images;*
>
> *(b) a service in which the provision of audio-visual material or audio material is incidental to the provision of that service; or*
>
> *(c) a service or a class of service, which the Authority [i.e., ICASA] may prescribe as not falling within this definition"; and*
>
> *"commercial broadcasting" means "a broadcasting service operating for profit or as part of a profit entity but excludes any public broadcasting service".*

ICASA is obligated to maintain a register, which is available to the public, of all class licensees containing the information on: the names and contact details of all registered licensees; the nature of the services provided; and the applicable licence terms and conditions.[98] ICASA is required to update the register at least once annually and publish the list of class licensees in the Government Gazette.[99] Licensees are obligated to ensure that the information in the register is accurate by filing and updating it.[100]

3.2. COMMON LEGAL VEHICLES FOR MEDIA OWNERSHIP

The legal vehicle most relied on by local and foreign investors to run media operations in South Africa is a private company. There are also public companies in the broadcasting market in South Africa, namely:

a. SABC which is a state-owned company, and which is the national broadcaster in South Africa; and

b. MultiChoice Group Limited, which is listed on the Johannesburg Stock Exchange (JSE), and which includes MultiChoice South Africa, MultiChoice Africa Holdings, Showmax and the various subsidiaries and affiliates within the group.

On-demand content service providers that are foreign-based are not currently required to establish any local presence in South Africa or hold any licence under the ECA (although this may change if the Draft White Paper is ultimately finalised, and legislation is enacted or amended in line with the current proposals in the Draft White Paper). For example, one particular major global content provider does not have a local presence in South Africa and provides its services to South Africa through its branch in the Netherlands.

Given that, in the case of a licensed entity, legal and regulatory advantages and/or disadvantages from a media perspective will depend on the nature of the licence and associated obligations applicable to the licensee rather than the choice of its ownership vehicle. As such, the usual legal and commercial advantages and disadvantages associated with the different legal entities would apply (for example, a private company has limited liability).

98 Section 16 of the ECA.

99 Ibid.

100 Section 17 of the ECA.

3.3. FOREIGN OWNERSHIP OF MEDIA

3.3.1. The Electronic Communications Act

The ECA provides limitations as follows:

a. The foreign control of commercial broadcasting services

A foreigner may not directly or indirectly (i) exercise control over a commercial broadcasting licensee; or (ii) have a financial interest or an interest either in the form of voting rights or capital in a commercial broadcasting licensee which exceeds 20%. In addition, no more than 20% of the members of the board of directors of a commercial broadcasting service licensee may be foreign; the control of commercial broadcasting services generally is restricted in that no person may (i) directly or indirectly exercise control over more than one commercial broadcasting service licensee in the commercial television broadcasting service; (ii) be a director of a company which is, or of two or more companies which between them are, in a position to exercise control over more than one commercial broadcasting service licensee in the commercial television broadcasting service; or (iii) be in a position to exercise control over a commercial broadcasting licensee in the commercial television broadcasting service and be a director of any company which is in a position to exercise control over any other commercial broadcasting service licensee in the commercial television broadcasting service. The same principles apply in the context of control of commercial broadcasting service licensees in the FM sound broadcasting service specifically, and the AM sound broadcasting service (i.e., a person may control no more than two FM or AM radio services).

b. The cross-media control of commercial broadcasting services

This is determined from time to time by the National Assembly of South Africa acting on the recommendation of ICASA and after consulting with the Minister of Communications and Digital Technologies. In addition, no person who controls a newspaper may acquire or retain financial control of a commercial broadcasting service licence in both television and sound broadcasting services. The same principle applies to a person who is in a position to control a newspaper in an area where the newspaper has an average circulation (as determined by the Audit Bureau of Circulation) of 20% of the total newspaper readership in the area if the licence area of the commercial broadcasting service licence overlaps substantially with this area. A "substantial overlap" in this context means an overlap by 50% or more.

While the ECA does not itself define "control", recent regulations published by ICASA (in particular the regulations in respect of the limitations of control and equity ownership by historically disadvantaged groups (HDG – see below) and the application of the ICT Sector Code, 2021 (the Ownership and Control Regulations) make it clear that ICASA follows the approach set out in the Competition Act 89 of 1998.

The Draft White Paper proposes, among other things, that the limitations on foreign ownership in respect of broadcasting services should be increased from 20% to 49%. The Draft White Paper will need to be finalised before the ECA can be amended through the parliamentary process, which will take time. The current status of the Draft White Paper is not clear.

ICASA has, in its invitation to apply for individual community broadcasting licences in the primary markets and previous invitations for applications, asked applicants to include in their applications (i) details as to whether any senior managers of the applicant were officers or employees of a political party, or whether such persons held shares in the applicant; and (ii) information relating to the applicant's shareholders, including whether these shareholders held 5% or more in any political parties, movements, bodies or alliances, local authorities and other publicly-funded bodies. Although ICASA has taken this approach in the past, it may take a different approach in the future.

3.3.2. Local equity participation rule

Under the ECA, licensable services include electronic communications services, electronic communications network services, and broadcasting services.[101] The licensing regime under the ECA is divided into two main categories: individual licences and class licences.

Individual licences are generally required in respect of services which will have a significant impact on socio-economic development[102] and individual licences are accordingly granted by ICASA pursuant to a relatively

101 Sections 5 (2) and (4) of the ECA.

102 Section 5 (3)(e) of the ECA.

extensive adjudication process. An individual licence is required to provide a commercial broadcasting service.[103] An application for an individual licence can only be made pursuant to an invitation to apply published by ICASA.[104] Alternatively, individual licences can be bought, or control of an individual licensee can be acquired, although this will trigger the requirement to obtain ICASA's prior written approval under section 13(1) of the ECA and will also require the licence-holder and the person purchasing the licence or acquiring a controlling interest in the licence-holder (as the parties to the particular transaction) to demonstrate to ICASA how the licence-holder will meet the obligation to be 30% owned by persons from Historically Disadvantaged Groups (HDGs).

Class licences, on the other hand, are generally required in respect of services which ICASA finds do not have a significant impact on socio-economic development, necessitating less intensive regulation. A class licence is required to provide a community broadcasting service.[105]

HDGs refer to a specific class of persons in South Africa, namely Black people as defined in the Broad-Based Black Economic Empowerment Act 53 of 2003 (BBBEE Act),[106] women, youth, and persons with disabilities. This has been confirmed by ICASA in the Ownership and Control Regulations.[107]

Under the ECA, individual licensees are required to include as part of their application to ICASA the percentage of equity ownership to be held by persons from HDGs, which ownership percentage must not be less than 30%.[108] The new Ownership and Control Regulations impose new rules on individual and class licensees. In particular:

a. Individual licensees are required to (i) have a minimum of 30% of their ownership held by persons from HDGs (the HDG ownership requirement) which is to be calculated on a direct flow-through basis,[109] and (ii) have a minimum of 30% of its ownership held by Black people in addition to the HDG ownership requirement (the Black equity requirement) which is to be calculated on a direct flow-through basis,[110] and (iii) maintain a BBBEE contributor status of Level 4 in accordance with the ICT Sector Code[111] published under the BBBEE Act. Large individual licensees (i.e., individual licensees with an annual turnover of at least ZAR 50 million (approximately USD 3,3 million) have a period of 36 months (since the date on which the Ownership and Control Regulations were published on 31 March 2021) within which to comply with these requirements.[112]

b. Class licensees are required to maintain a BBBEE contributor status of level 4 in accordance with the ICT Sector Code published under the BBBEE Act,[113] which status is calculated in accordance with the various principles under the ICT Sector Code. Class licensees and individual licensees that are SMMEs have a period of 48 months from 31 March 2021 within which to comply with this obligation.[114] Class licensees are not subject to the equity ownership obligations to which individual licensees are subject.

The Draft White Paper proposes, amongst other things, that the current licensing regime applicable to broadcasters under the ECA should be extended to on-demand content service providers. In the event that the Draft White Paper is finalised on this basis, and the legislation is ultimately enacted or the ECA and the FPA amended to reflect this position, the implication is that the local equity ownership requirements as outlined above would apply to on-demand content service providers. It is not entirely clear how this will work given that most of these service providers are foreign-based.

103 Section 5 (3)(b) of the ECA.
104 Section 9 (2)(a) of the ECA.
105 Section 5 (5)(b) of the ECA.
106 See the definition of "black people" in section 1 of the BBBEE Act.
107 Published under General Notice 170 in Government Gazette 44382 of 31 March 2021.
108 Section 9 (2)(b) of the ECA.
109 Section 3 (4) of the Ownership and Control Regulations.
110 Section 4 (1) of the Ownership and Control Regulations.
111 Published under General Notice 1387 in Government Gazette 40407 of 7 November 2016.
112 Section 7 (3)(b) of the Ownership and Control Regulations.
113 Appendix 2 of the Ownership and Control Regulations.
114 Section 7 (3)(a) of the Ownership and Control Regulations.

3.3.5. Competition law

In South Africa, competition is regulated by the Competition Act 89 of 1998 (the Competition Act) and the regulations promulgated in terms of the Competition Act. The Act applies to all economic activity within or having an effect within South Africa.

In line with international best practice, South African competition law aims to promote and maintain competition in order to, *inter alia*, promote an efficient economy as well as provide consumers with competitive prices and product choices. In addition, the Competition Act recognises the injustices of the discriminatory laws of the past, which resulted in the exclusion of the majority of the population from participating in the economy. The Act includes mechanisms aimed to address this.

There is recognition in the preamble of the Competition Act that apartheid and other discriminatory laws and practices of the past resulted in excessive concentrations of ownership and control within the national economy, weak enforcement of anti-competitive trade practices and unjust restrictions on full and free participation in the economy by all South Africans. As such, the Competition Act was established to facilitate the opening of the economy to greater ownership by a greater number of South Africans. The guiding principles of the Competition Act include: (i) promoting employment and the advancement of the socio-economic welfare of all South Africans;[115] (ii) ensuring that small and medium size enterprises have equitable opportunities to participate in the economy;[116] and (iii) promoting a greater spread of ownership in the economy, especially among HDGs.[117]

For completeness, the South African competition authorities are:

a. The Competition Commission (Commission), which forms the investigative branch.[118] The Commission is tasked with the investigation of mergers and restrictive practices, considering applications for exemptions, and conducting market inquiries.[119] The Commission is the decision-maker in respect of certain categories of mergers ("small and intermediate"), but with "large mergers", the Commission conducts an investigation and makes a recommendation to the Competition Tribunal (Tribunal), which is then the decision-maker (the various categories of merger are determined with reference to financial metrics);

b. the Tribunal, which is the adjudicative branch (of first instance).[120] The Tribunal is responsible for deciding large mergers, as well as considering small and intermediate merger decisions, where taken on consideration (akin to an appeal, albeit that parties are not confined to the record of proceedings before the Commission). The Tribunal also adjudicates restrictive practices referred to it by the Commission or a third party and any other matter that may be considered by the Tribunal in terms of the Competition Act; and

c. the Competition Appeal Court (CAC), which is the appellate branch.[121] The CAC reviews and considers appeals arising from decisions of the Tribunal and is the court of final instance (other than in respect of constitutional matters, which can then be brought before the Constitutional Court).

3.3.4. Market power in the South African context

Section 1 of the Competition Act defines "market power" to mean "the power of a firm to control prices, to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers". Closely connected to the concept of market power is that of dominance. Section 7 of the Competition Act sets out the test for dominance. In terms of its prescripts, a firm is dominant in a market if it has (i) at least 45% market share in that market (here, the firm is, presumed to be dominant by operation of law); (ii) at least 35% market share, but less than 45% in that market, unless it can show that it does not have market power; or (iii) less than 35% market share in that market, but has market power.

115 Section 2 (c) of the Competition Act.
116 Section 2 (f) of the Competition Act.
117 Section 2 (f) of the Competition Act.
118 Established in terms of section 19 of the Competition Act.
119 Importantly, to date the Commission has not identified the media industry as a market that requires a public inquiry into anti-competitive practices. Examples of other market inquiries that the Commission has initiated include the Healthcare Market Inquiry, the Grocery Retail Market Inquiry and the Online Intermediation Platforms Market Inquiry.
120 Established in terms of section 26 of the Competition Act.
121 Established in terms of section 36 of the Competition Act.

Elmond Jiyane/GCIS/Handout

South African competition law does not outrightly prohibit firms from being dominant within any market or sector (including that of the media), nor from owning any specific percentage of a firm within a specific market or sector.

Instead, South African competition law concerns itself with the creation, increase and/or abuse of market power in manners that substantially prevent or lessen competition, or significantly harm public interest (particularly in a merger context).[122] To be clear, the Competition Act does not prohibit the mere possession of market power, but instead prohibits its use as a means of distorting effective competition within a particular market (the correct definition of which, by product and by geographical area, is critical to determining whether market power exists).

3.3.5. The assessment of mergers

Ownership regulation under South African competition law is regulated under the lens of merger control. South Africa has a mandatory and suspensory merger notification system in circumstances where the thresholds for an intermediate or large merger are met. Small mergers are only notifiable in limited instances.[123] The Commission announces its decisions concerning intermediate merger notifications in the form of a brief media release as detailed reasons for decisions are not generally published.[124] The Tribunal publishes its decisions and fairly detailed reasons (depending on the complexity of the matter) on its own website.[125] Its decisions are also published on various platforms that provide the public access to reportable judgments.[126]

Disclosure of media organisation ownership is entirely dependent on the public nature of the media organisation in question (for example, to the extent that the media organisation is an entity listed on a securities exchange like the Johannesburg Stock Exchange (JSE), its ownership information may already be publicly available due to the disclosure obligations dictated by the applicable listing requirements). The South African competition authorities are not required to maintain a public list or database of media owners for the purposes of competition law. Instead, parties to mergers are required to disclose this information to the competition authorities for the merger assessment to be properly completed. However, merger parties may claim certain ownership information as confidential (i.e., they may request that the competition authorities do not disclose this information to third parties) for justifiable, commercially sensitive reasons – provided that the merger parties can prove that public disclosure of such information could cause unwarranted or irreparable economic harm to one or more of the parties involved.

A transaction must be notified to the Commission if it (i) constitutes a merger (as defined in the Competition Act);[127] (ii) meets the relevant thresholds;[128] and (iii) constitutes economic activity within, or having an effect within, South Africa.[129] The Competition Act prevents any party from implementing a notifiable merger without the approval of the Commission, Tribunal and/or the CAC as the case may be.[130] For the purposes of the Competition Act, a merger occurs when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm, whether such control is achieved as a result of the purchase or lease of the shares, an interest or assets of the other firm, by amalgamation or any other means.[131] There is no closed list of how control may be achieved. Broadly, a person controls another firm if that person, *inter alia*:

a. beneficially owns more than one-half of the issued share capital of the firm;[132]

b. is entitled to cast a majority of the votes that may be cast at a general meeting of the firm, or has the ability to control the casting of a majority of those votes, either directly or through a controlled entity of that person;[133]

c. is able to appoint or to veto the appointment of a majority of the directors of the firm;[134]

d. is a holding company, and the firm is a subsidiary of that company;[135] or

e. has the ability to materially influence the policy of the firm in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to above.[136]

Whereas the first four definitions are referred to as "bright line" or "legal" control, the last definition provides a catch-all, to the effect that a person controls a firm if that person "*has the ability to materially influence the policy of the firm in a manner comparable to the person who, in ordinary commercial practice, can exercise an element of [legal] control*". This covers instances in which a firm may acquire *de facto* control (as opposed to legal or *de jure control*) by being able to materially influence the policy of another firm in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of legal control.

Specifically, section 12A of the Competition Act requires the Commission and the Tribunal to substantively assess the merger based on whether the merger:

a. is likely to substantially lessen or prevent competition in a market and if so, whether the anti-competitive effects can be outweighed by any efficiency, technological or other pro-competitive gain that may arise from the merger's implementation; [137] and

b. can or cannot be justified on the basis of substantial public interest grounds.[138]

When determining whether a merger can or cannot be justified on public interest grounds, the Commission or the Tribunal must consider the effect that the merger will have on:

a. a particular industrial sector or region;[139]

b. employment;[140]

c. the ability of small and medium businesses, or firms controlled or owned by historically disadvantaged persons, to effectively enter into, participate in or expand within the market;[141]

d. the ability of national industries to compete in international markets;[142] and

e. the promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market.[143]

When assessing whether a merger is likely to substantially prevent or lessen competition, the Commission and the Tribunal are obliged to consider the following factors:

a. the ease of entry into the market, including tariff and regulatory barriers;[144]

b. the level and trends of concentration, and history of collusion, in the market;[145]

c. the degree of countervailing power in the market;[146]

d. the dynamic characteristics of the market, including growth, innovation, and product differentiation;[147]

e. whether the merger will result in the removal of an effective competitor;[148]

122 L. Mncube and H. Ratshisusu "Competition Policy and Black Empowerment: South Africa's Path to Inclusion" in the Southern Centre for Inequality Studies' Black Empowerment Project – Working Paper *22*.

123 Section 13(3) of the Competition Act. The Commission has issued non-binding Guidelines for the notification of small mergers.

124 The Commission's media releases can be accessed here.

125 The Tribunal's decisions can be accessed here.

126 For example, the Southern African Legal Information Institute or SAFLII.

127 Section 12 of the Competition Act.

128 Section 11 of the Competition Act.

129 Section 3 of the Competition Act.

130 Section 13 A(3) of the Competition Act.

131 Section 12 (1) of the Competition Act.

132 Section 12 (2)(a) of the Competition Act.

133 Section 12 (2)(b) of the Competition Act.

134 Section 12 (2)(c) of the Competition Act.

135 Section 12 (2)(d) of the Competition Act.

136 Section12 (2)(g) of the Competition Act.

137 Section 12A (1) of the Competition Act.

138 Section 12A (A) of the Competition Act.

139 Section 12A(3)(a) of the Competition Act

140 Section 12A (3)(b) of the Competition Act

141 Section 12A (3)(c) of the Competition Act

142 Section 12A (3)(d) of the Competition Act

143 Section 12A (3)(e) of the Competition Act

144 Section 12A (2)(b) of the Competition Act.

145 Section 12A (2)(c) of the Competition Act.

146 Section 12A (2)(d) of the Competition Act.

147 Section 12A (2)(e) of the Competition Act.

148 Section 12A (2)(h) of the Competition Act.

f. the extent of ownership by a party to the merger in another firm or other firms in related markets;[149] and

g. the extent to which a party to the merger is related to another firm or other firms in related markets, including through common members or directors.[150]

Having regard to the above factors and having determined whether the merger (i) will substantially prevent or lessen competition; and (ii) can or cannot be justified on the basis of substantial public interest grounds, the Commission and/or the Tribunal will either approve the merger (with or without conditions) or prohibit the merger. Importantly, the Commission and the Tribunal are required to consider each of these legs of the test equally (i.e., whether the merger is likely to substantially prevent or lessen competition is not of greater importance to the competition authorities' assessment than whether the merger is likely to substantially harm public interest).[151]

In light of the above, the Commission or the Tribunal has the authority to prohibit a merger if it finds that the specific merger substantially prevents or lessens competition or has unjustifiable adverse public interest consequences, and thus prevent a company from owning a shareholding stake that triggers control in terms of the Competition Act. South African competition law does not outright prohibit firms from owning shareholding within any market or sector (including that of the media), nor from owning any specific percentage of a firm within a specific market or sector.

An amendment Act to the Competition Act was signed into law in February 2019 and certain parts dealing with merger control, abuse of dominance, administrative penalties, exemptions and market inquiries came into effect on 12 July 2019 (the 2019 Amendment Act). Further sections relating to confidentiality and disclosure of information submitted to the competition authorities, and abuse of dominance, in particular price discrimination and buyer power, came into effect on 13 February 2020. Notably, section 18A of the Competition Act provides that the President must constitute a committee (yet to be constituted) which must be responsible for considering whether implementation of a merger involving a foreign acquiring firm may have an adverse effect on the national security interests of the Republic. The committee must decide whether the transaction may have an adverse effect on national security interests and the competition authorities may not make any decision where the merger has been prohibited on national security grounds. Having regard to the broad scope of this provision, it is possible that, should it come into force, media plurality may be impacted. However, the extent to which this amendment will impact merger assessment in South Africa will only become clear if and when the relevant provision is brought into force (which is yet to be determined) and corresponding regulations (detailing its scope and application) are duly promulgated.

3.4. APPLICABILITY OF MEDIA OWNERSHIP REGULATION TO SOCIAL AND DIGITAL MEDIA

The ECA's provisions regarding media ownership currently cover only traditional broadcast media.[152] Print media is regulated in terms of the FPA which does not regulate social/digital media ownership.[153]

From a broadcasting perspective, if the Draft White Paper is finalised and if the ECA is ultimately amended in line with the proposals in the Draft White Paper discussed above, the licensing framework under the ECA will then be extended to non-linear on demand audio-visual services in addition to traditional linear broadcasting services.

3.5. ENFORCEMENT OF MEDIA OWNERSHIP REGULATION

In general, the laws regulating media ownership as outlined above are predictably and regularly enforced by ICASA, particularly those regarding participation of HDGs. ICASA is an active regulator even though it is capacity constrained. For example, in 2019, ICASA shut down approximately 30 community radio stations, owing to a failure by these stations to renew their broadcasting licences.[154]

149 Section 12A (2)(i) of the Competition Act.

150 Section 12A (2)(j) of the Competition Act.

151 Section 12A (1A) of the Competition Act.

152 Sections 9 (2)(b), 13 (3) and 13 (4) of the ECA.

153 See the definition of "publication" under section 1 of the FPA.

154 It appears that ICASA reported the number of radio stations targeted was 43, but that in actuality the number was more likely 29, as reported here.

In respect of the predictability and legal certainty around the enforcement of media ownership under the ECA, there is some debate as to how the equity ownership requirements (as required in terms of the ECA and the new Ownership and Control Regulations) should be interpreted and applied. In particular, there is industry-wide debate regarding the manner in which equity ownership by persons from HDGs and Black people should be calculated. As outlined further above, on a literal reading of the Ownership and Control Regulations, they provide that the HDG equity requirement and the Black equity requirement (both of which are defined further above) should be calculated on a direct flow-through basis. Nevertheless, there is a question as to whether (i) the Ownership and Control Regulations should be interpreted to mean that all the deeming principles, other than the "modified flow-through principle", in the ICT Sector Code can be used to calculate ownership. These deeming principles include for example the private equity fund principle, the exclusion principle and the mandated investments principle, amongst others, and allow measured companies to treat certain shareholding as being held by Black people or to gross up certain shareholding by Black people and, accordingly, to claim a higher percentage ownership by Black people than the actual percentage that Black people hold; or (ii) whether the Ownership and Control Regulations should be interpreted to mean that ownership by persons from HDGs should be calculated on a straight flow-through basis. Based on previous guidance issued by ICASA, it is likely that the latter approach applies i.e., that HDG ownership and Black ownership, for purposes of the Ownership and Control Regulations, should be calculated on a direct flow-through basis.

There is also some debate as to how the ownership requirements apply in relation to listed entities given that their shareholdings are broad-based.

Currently, the ECA prohibits a foreign firm from controlling a commercial broadcasting licensee by limiting financial interest, interest in voting share or paid-up capital to a maximum of 20%. Similarly, not more than 20% of the directors of a commercial broadcasting licensee may be foreign nationals.[155] This, however, may be set to change as the Draft White Paper proposes amending the limitations in respect of foreign ownership by increasing it to a maximum of 49%. According to the Draft White Paper, the purpose of this is to achieve an uptick in foreign investment.

Although ICASA can exempt persons from the statutory limitations in sections 65 and 66 of the ECA on good cause shown, there are no exemptions applicable to foreign ownership limitation in section 64. In the past, in the context of complaints around breaches of the foreign ownership rules, ICASA has not interrogated the ownership structures of listed companies in a huge amount of detail and has required complainants themselves to submit evidence of the residence/citizenship of shareholders rather than conducting its own investigations. As such, it seems likely that, in practice, listed companies have been able to have a higher percentage foreign ownership than is permitted under the ECA. However, there is no guarantee that ICASA or its complaints committee will adopt the same approach in other matters.

3.6. AVAILABILITY OF ACCURATE, COMPREHENSIVE, AND UP-TO-DATE INFORMATION ABOUT MEDIA OWNERSHIP STRUCTURES

Commercial broadcasting licensees (which will hold individual broadcasting service licences in terms of the ECA) are required to submit their ownership information to ICASA on an annual basis in terms of the Compliance Procedure Manual Regulations, published under the ICASA Act, whenever there is a shareholding change that does not amount to a change of control in terms of the Standard Terms and Conditions for Individual Licences under chapter 3 of the ECA. In the event of a change of control in the context of the regulatory approval process, this ownership information is not publicly available, except where the licensed broadcaster is a listed entity although these shareholdings and ownership structures are often too broad-based to be made comprehensively available to the public.

155 Section 64 (1) of the ECA.

REUTERS/Siphiwe Sibeko

4. DEFAMATION

4.1. LEGAL FRAMEWORK

Defamation (or libel law) exists at the intersection between the right to freedom of speech and the protection of human dignity, both of which are protected by the Bill of Rights. A defamation claim is a delictual (tort) claim brought by a plaintiff – who alleges an infringement of their right to dignity – against a defendant – who publishes the material that commits the alleged infringement. Defamation under South African law is regulated by the common law and not specifically by statute.

In order to succeed in a defamation claim, a plaintiff must prove – on a balance of probabilities – that:

a. there was a publication made by the defendant; and

b. that the publication was defamatory (in that the published material might reasonably be understood to convey a meaning that is defamatory to the plaintiff).

Once these two requirements are fulfilled, a presumption of wrongfulness and intention arises in respect of the defendant, which presumption the defendant has the onus of discharging. This can ordinarily be done through various means, including:

a. that the publication was subject to privilege;

b. that the defamatory material was true and in the public interest;

c. that the publication constituted fair comment; and

d. an absence of intention.

In addition to these, however, the South African courts have developed a distinct defence to defamation claims that is available to media defendants: the "reasonable publication" defence. This defence was first applied in a decision of the Supreme Court of Appeal in *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA).[156] This defence, which is based on the reasonableness of publications made by media defendants in matters of public interest,[157] allows a media defendant to avoid liability for the publication of false and defamatory matter in circumstances where the publisher has acted reasonably and without negligence.

The test under the defence of reasonable publication is whether the defamatory material published was, under all circumstances, reasonably published, on the facts of the case, in the manner of the publication, and at the time of publication. Importantly, the defence is available only in instances where the media defendant's publication was made in the public interest. In considering the reasonableness of the publication, regard is had to:

a. the nature, extent, and tone of the allegations;

b. whether the publication was made as part of a political discussion (where greater latitude is given to the media to make such publications);

c. the information on which the publication is based;

d. the reliability of the source from which the abovementioned information was received; and

e. the steps taken by the media defendant to verify or fact check the information.

The question of whether the media defendant had acted reasonably when making the publication is to be answered by the media defendant, who bears the onus of proving that such publication was reasonable, on a balance of probabilities.

Despite the existence of the reasonable publication defence, it has been made clear by the courts that there can be no justification for the publication of untruths, and members of the press should not be left with the impression that they have a licence to lower the standards of care associated with their practices.[158] In this regard, South African law does not recognise the doctrine of "press exceptionalism." To this end, the court in *Khumalo v Holomisa* 1996 (2) SA 588 (W) held that "it does not follow, however, from the special constitutional recognition of the importance of media freedom, or from the extraordinary responsibilities the media consequently carry, that

156 *National Media Ltd. and Others v Bogoshi* (579/96) [1998] ZASCA 94; 1998 (4) SA 1196 (SCA); [1998] 4 All SA 347 (A) (29 September 1998).

157 *Mthembi-Mahanyele v Mail and Guardian Ltd* 2004 (6) 329 (SCA).

158 *National Media Ltd and Others v Bogoshi* 1998 (4) SA 1196 (SCA); 1999 (1) BCLR 1 (SCA), cited with approval in *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC) at para 18.

journalists enjoy special constitutional immunity beyond that accorded to ordinary citizens."

South African law therefore, according to the Appellate Division in *Neethling v The Weekly Mail & Others* 1994 (1) SA 708 (A), rejects the doctrine of press exceptionalism, while at the same time emphasising that, because of the critical role played by the media in modern democratic societies, the law of defamation must leave the media free to speak on matters of public importance as fully and openly as justice can possibly allow.

The law of defamation also has a criminal aspect. In this regard, it is possible for the state to prosecute a defendant for "criminal defamation."[159] This, however, requires the state to prove its case beyond reasonable doubt, and convictions for the crime of defamation are extremely rare.[160]

4.2. ONLINE THREATS

There is only one statute that specifically regulates the conduct of online and social media journalists. Instead, the publication of defamatory material online is usually dealt with in terms of the law of defamation as it relates to publication of defamatory material online set out above. This is because the publication of defamatory material, whether it be online or in the print media, is still deemed to be publication for the purposes of the law of defamation.

The Cybercrimes Act[161] allows for the criminal prosecution of certain conduct in the online space. The Cybercrimes Act deals mainly with the unlawful interception of data, and malicious communications. These malicious communications include incitement to damage property, incitement of violence, and the disclosure of intimate images.[162] These issues are unlikely to impact the *bona fide* work of media personnel working in the online space.

5. ESSENTIAL MEDIA FREEDOM JURISPRUDENCE

Since 1995, the Global Freedom of Expression Institute (GFEI) online global database of freedom of expression case law has collected 60 decisions of various South African fora, from BCCSA to the Constitutional Court. Of these 60 cases, the Institute has identified 41 to "expand expression", whereas 14 resulted in a "mixed outcome" and where only five are identified to "contract expression". In the last 10 years, however, 26 cases have been identified to "expand expression", while only one has been identified to "contract expression" and eight have been classified as having a "mixed outcome". Notably, the one decision identified to "contract expression" was decided on by a single judge in the High Court and, accordingly, would only bind another single judge sitting within that jurisdiction.

Accordingly, one can identify a discernible trend towards the expansion of freedom of expression through case law, rather than its contraction, some examples of which are examined in detail below.

a. Limits on the right to freedom of expression

Media Monitoring Africa v eNCA Channel 403 (2020) BCCSA (case number 09/2020)

In June 2021, BCCSA found that a television show hosted on a news channel, eNCA Channel 403, had violated BCCSA's Code of Conduct by featuring an interview with a famous COVID-19 conspiracy theorist, who made several false allegations regarding the pandemic. Various members of civil society approached BCCSA, seeking sanctions against eNCA on the grounds that the broadcast had included false facts. BCCSA noted the "life-and-death" consequences of denying the existence of COVID-19 and stated that it had to balance the right to freedom of expression with the need to protect South Africans from harm caused by misinformation. In finding that the broadcast had breached the broadcaster's obligation that comment be based on facts that are truly stated, fairly indicated or referred to, BCCSA imposed a fine on the broadcaster and ordered it to broadcast an apology.

159 *Hoho v S* 2009 (1) SACR 276 (SCA).

160 N Padayachee, Law of South Africa – Media (Volume 28 (1) – 3eds).

161 19 of 2020.

162 At sections 14 to 16.

In making the decision, the Tribunal referred to various cases which recognise the importance of the right to freedom of expression in South Africa while also acknowledging that there are limits to this right and that the rights to freedom of expression and not to be offended by a broadcast have to be balanced. The Tribunal noted that South Africa allows for rights to be restricted in terms of the general limitations clause in section 36 of the Constitution (provided that the limitation is reasonable and justifiable in an open and democratic society). Thus, eNCA's right to freedom of expression could be limited by "other rights of the viewing public, like the right to dignity, the right to receive information or ideas, etcetera".[163]

b. Protection of journalists

South African National Editors Forum v Black First Land First [2017] ZAGPJHC 179 (7 July 2017)

Eleven journalists, represented by the South African National Editors Forum, filed an application before the High Court requesting urgent protection orders against a political organisation, Black First Land First (BLF). The High Court determined that the journalists had a right to the protection of their physical and human dignity, and to carry out their profession in line with the constitutional right of freedom of expression. The High Court therefore granted a number of orders forbidding BLF from engaging in acts of intimidation, harassment, and threats directed at certain journalists. The High Court also ordered that the organisation not use social media in an intimidating and threatening way.

c. Right to broadcast court proceedings

Van Breda v Media 24 Ltd 2017 (2) SACR 491 (SCA)

The Supreme Court of Appeal rejected a ban on the recording of criminal proceedings against a high-profile defendant and ruled that a court could determine the nature and scope of audio-visual broadcasting of court proceedings on a case-by-case basis. The court reasoned that audio-visual broadcasting was implicit and therefore entrenched in section 16 of the Constitution as part of the right to freedom of the press, which right not only protects the right of the press to disseminate information but more importantly the right of the public to receive information. This is the first time the Supreme Court of Appeal affirmed the importance of the right of the press to disseminate information and the ruling constitutes a step forward in the right of the press to broadcast court proceedings in South Africa.

163 Para 8.

d. Right to broadcast incidents of disorder or altercation during parliamentary proceedings

Primedia Broadcasting v Speaker of the National Assembly 2017 (1) SA 572 (SCA)

The Supreme Court of Appeal struck down two main provisions of parliament's rules and policies that prohibit live television broadcasting of incidents of disorder or altercation when parliament is in session. The appeal had been brought by Primedia Broadcasting, an independent South African media company. The court held that the restrictions in parliament's rules violated the right to an open parliament and were unconstitutional and unlawful. The court also found the government's use of a device temporarily to disrupt cellular phones during the session without the permission of parliament was unlawful.

e. Journalists' right and duty to publish information in the public interest

Mail & Guardian Ltd v Maharaj [2016] ZAGPPHC 613 (12 May 2016)

The High Court reaffirmed the public's right to know and journalists' right and duty to publish information in the public interest. The court ruled in favour of the Mail and Guardian Centre for Investigative Journalism and the Mail & Guardian newspaper (M&G) in their application against the National Director of Public Prosecutions (NDPP), who had refused M&G permission to publish information from a closed bribery inquiry involving the former South African Minister of Transport and presidential spokesperson, Mac Maharaj. M&G argued that the prohibition on publishing the record of evidence in section 41(6) of the National Prosecuting Authority Act was a limitation on the right to freedom of expression as set out in section 16 of the Constitution of South Africa. The court agreed.

South African Airways v BDFM Publishers 2016 (2) SA 561 (GJ)

Three South African news outlets – Business Day, Moneyweb, and Media 24 – sought to publish the contents of a confidential legal memorandum prepared by an in-house counsel of South African Airways (SAA). The memorandum concerned the legal implications of the airline's potential withdrawal from its ongoing agreement to purchase an aircraft due to its inability to pay and the absence of a government bailout. As SAA is a state-owned entity, the disclosure of the memo by unknown sources and the decision to publish it came out at the height of

public scrutiny over the company's financial viability and its mismanagement of public funds. After publishing the contents of the memo, a court of first instance granted a temporary restraining order against the news outlets on the grounds that SAA was entitled to invoke its attorney-client privilege of confidentiality. On appeal, the High Court in Johannesburg set aside the order. While finding that the disclosure of the information could not be imputed to SAA, its attorney-client privilege was not absolute and could not suppress the dissemination of information in which the public had an interest.

f. Freedom of expression

The Citizen 1978 (Pty) Ltd v McBride 2011 (8) BCLR 816 (CC)

The Constitutional Court held that criticism of an individual in the media is protected even if harsh, so long as it expresses an honestly held opinion, made without malice, on a matter of public interest on proven facts. The Citizen newspaper published several articles opposing the appointment of Robert McBride to a senior police post on the basis that he was a convicted murderer, despite the fact that he had been granted amnesty for that crime under the Promotion of National Unity and Reconciliation Act, 1995. The court held that the Reconciliation Act did not change the fact that McBride committed murder, nor did it prohibit frank public discussion of his act or prevent him being described as a "criminal", and therefore did not curtail the constitutional right to freedom of expression protected under the Bill of Rights.

Reference is frequently made by South African courts to the European Court of Human Rights' (ECHR) 1976 decision in *Handyside v United Kingdom*.[164] This was one of the first freedom of expression cases considered by the ECHR and set a strong standard for the examination of freedom of expression cases. In particular, it has been used as authority for the principle that one's freedom of expression attaches not only to information and ideas that are favourably received by the public, or regarded as inoffensive to it, but extends to the dissemination of information that may shock or disturb the state or a sector of its population.

g. Enforcement of licensing requirements

Radio Pretoria v Chairperson of the Independent Communications Authority of South Africa (296/06) [2007] ZASCA 90

The courts in South Africa have set aside unreasonable application of regulatory licensing requirements, as was the case here, where the court upheld an appeal against the dismissal by the High Court of an application for review of ICASA's decision not to grant Radio Pretoria a community broadcasting licence, on the grounds *inter alia* that some of ICASA's requirements were contradictory in the circumstances of the case.[165]

h. Classification of publications

The Spear (2012 painting)

In 2012, the Goodman Gallery took the FPB's classification decision regarding a painting, *The Spear* by artist Brett Murray, on appeal to the Appeals Tribunal. The painting, which depicted the then-President Jacob Zuma with exposed genitalia, was reproduced both in print and electronically on several websites, including in media publications such as the City Press newspaper. The FPB received two complaints in this regard. A majority of members of the Classification Committee (the Committee) established in terms of the FPA assigned a 16N classification (this means that children under the age of 16 may not have access to the artwork, because it displays nudity) to the artwork (for both print and digital use), while a minority believed that a 13N would be sufficient. The Appeals Tribunal, however, set aside the FBS's decision, finding no restriction to be appropriate.

Of Good Report (2013 film)

In 2013, the Committee refused classification (i.e., banned) of the film *Of Good Report*, directed by Jahmil X.T. Qubeka, under section 18(3)(a) of the FPA on the basis that the film contained a scene of child pornography, which is prohibited by the FPA. Qubeka and the film's production company, Spier Films SA, appealed the Committee's decision to the Film and Publication Appeal Tribunal. The Tribunal found in favour of Qubeka and set aside the Committee's decision. The film was assigned a classification of 16VNS (this means that children under the age of 16 may not have access to the artwork, because it displays violence, nudity and sexual activity). One of the reasons for the Tribunal's decision was that the Committee did not assess the film in its context, in that it did not have regard to whether the intent of the filmmakers was to stimulate erotic sentiments in the target audience and, as a result, its classification decision was not correct.

Inxeba **(2018 film)**

In 2018, the Appeals Tribunal came under scrutiny for its decision in relation to *Inxeba* ("*The Wound*") directed by John Trengove. *Inxeba* depicted a homosexual relationship in the context of a traditional Xhosa initiation ritual. The Committee had rated *Inxeba* 16LSN (Language, Sex and Nudity), but the initial release of the trailer resulted in a strong backlash, particularly among certain people within the Xhosa community in South Africa. Following an appeal by the Congress of Traditional Leaders of South Africa and others, the Appeal Tribunal classified *Inxeba* as X18 and removed the film from public circulation with immediate effect.

Commentary on the Tribunal's decision notes that previously, publications depicting similar level of language, violence, sexual activity and nudity in the context of heterosexual relationships, have never received a classification of X18. Commentators have argued that the FPB's decision reveals an unwarranted sensitivity on its part for publications that deal with homosexual relationships. The Tribunal's decision was taken on review by Indigenous Film Distribution (Pty) Ltd and others and set aside by the High Court, on the basis that the parties had not been given sufficient opportunity to participate in the Tribunal process.[166]

i. Ownership and transparency

While it is evident from the above analysis that South African competition law does not prohibit the concentration of ownership in any sector or industry (including that of the media), it is also clear that South African competition law obliges the competition authorities to closely monitor any transactions or practices occurring within any sector, which may have the effect of substantially preventing or lessening competition.

Having regard to previous cases decided by the competition authorities, it is clear that this approach has been consistently applied in matters involving the media.

Media 24 Limited v Uppercase Media (Pty) Ltd (Case No. 60/LM/May08)

The large merger between Media24 Limited (Media 24) and Uppercase Media Proprietary Limited in 2008 (Uppercase Merger),[167] the Commission considered *prima facie* indicators of likely unilateral effects that could occur in the market for "men's interest magazines" as a result of the merger (since both parties were active in that market), by relying on pre and post market share calculations.[168] Following its analysis, the Commission concluded that the merging parties' post-merger market share would be 54% in the market for general men's interest magazines with a market share accretion of 17%.[169] The Commission also expressed concerns regarding the high barriers to entry in the market.

While the Tribunal acknowledged the Commission's concerns in the Uppercase Merger, it ultimately determined that because of various licensing arrangements in place, the merging parties would be sufficiently constrained from abusing any market power that the merger created.[170] Further the Tribunal took the view that the Commission's concerns appeared to be driven less by the effects of this particular transaction, than by Media 24's pre-eminent position in the magazine market; the Tribunal remarked that while these concerns may be well-founded and may dictate that the Commission pays close attention to Media 24's conduct in this market, the Tribunal did not believe that the transaction materially enhanced that established position, and so a finding that it would substantially lessen competition was not warranted.[171]

164 (1976) 1 EHRR 737, 754.

165 Other examples of cases dealing with unsuccessful licence applications are provided by *Radio Kingfisher v Langa* NO [2000] JOL 7471 (SECLD); *Barkhuizen v ICASA* [2002] 1 All SA 469 (E); *Radio Pretoria v ICASA* 2003 (5) SA 431 (T); *Trinity Broadcasting (Ciskei) v ICASA* 2003 (5) SA 97 (W); *Trinity Broadcasting (Ciskei) v ICASA* 2004 (3) SA 346 (SCA); *Onshelf Trading Nine (Pty) Ltd v De Klerk* NO 1997 (3) SA 103 *W and Kingdom Radio (Pty) Ltd v The Chairperson, Independent Broadcasting Authority Witwatersrand Local Division*, 19 December 2000 (case 26474/1999); *Good News Community Radio v ICASA* (2006) JOL 17514 (N); *Radio Pretoria v Onafhanklike Kommunikasie-Owerheid van Suid-Afrika* (2006) 1 All SA 143 (T); *Kingdom Radio (Pty) Ltd v IBA* (2006) 1 All SA 521 (JHC); *Radio Pretoria v ICASA* 2008 (2) SA 164 (SCA).

166 *Indigenous Film Distribution (Pty) Ltd and Another v Film and Publication Appeal Tribunal and Others* (3589/2018) [2018] ZAGPPHC 438; [2018] 3 All SA 783 (GP) (27 June 2018).

167 *Media 24 Limited v Uppercase Media (Pty) Ltd* (Case No. 60/LM/May08).

168 Uppercase Merger at para 14.

169 Ibid.

170 Uppercase Merger at para 15.

171 Uppercase Merger at para 18.

Media 24 Ltd v Natal Witness Printing and Publishing Company (Pty) Ltd (Case No.15/LM/Jun11)

In another instance, in its decision on the large merger between Media 24, Paarl Coldset Proprietary Limited (Paarl Coldset) and the Natal Witness Printing and Publishing Company Proprietary Limited (Natal Witness) in 2012 (Natal Witness Merger), the Tribunal considered whether the merger would likely give rise to exclusionary conduct by the merged entity, which post-merger would be active both in the publishing of community newspapers and the printing of these newspapers.[172] Specifically, the Commission and the Tribunal grappled with whether or not the proposed merger would negatively affect the public interest since the small community newspaper publishing businesses in KwaZulu-Natal and the Northern Eastern Cape require Coldest printing services. In its analysis, the Tribunal took into consideration submissions made by regional competitors of the merging parties alleging that the proposed merger was likely to give rise to substantial anti-competitive effects and further contending that the Commission's recommended conditions were inadequate to address the concerns arising from the merger.[173] The Tribunal also invited further submissions from other competitors[174] and allowed all interested parties to call on both factual and expert witnesses to testify at the Tribunal hearing.[175]

The Tribunal concluded that there were two potential harms that would arise from the merger. The first harm identified was foreclosure in the broad sense of small independent community newspaper publishers on the printing side – this was determined to be a traditional harm in terms of the Competition Act. The second harm identified was one of public interest, in that the merger would likely hinder the ability of these small publishers owned largely by historically disadvantaged persons to compete on the publishing side.[176] The Tribunal approached its decision in a manner that the independence of the small community newspapers was preserved through a clear governance structure separating the two businesses, with annual reporting to the Commission to demonstrate compliance. The Tribunal also reserved a notification requirement of all future "small" mergers between Media 24 or any other entity controlled by it and a target firm which is a small independent publisher and/or a target firm that provides printing services to a small independent publisher.[177]

172 Natal Witness Merger at para 3.

173 Natal Witness Merger at paras 5 - 6.

174 Natal Witness Merger at paras 7 - 8.

175 Natal Witness Merger at para 12.

176 Natal Witness Merger at para 145.

177 Nata Witness Merger at para 215.

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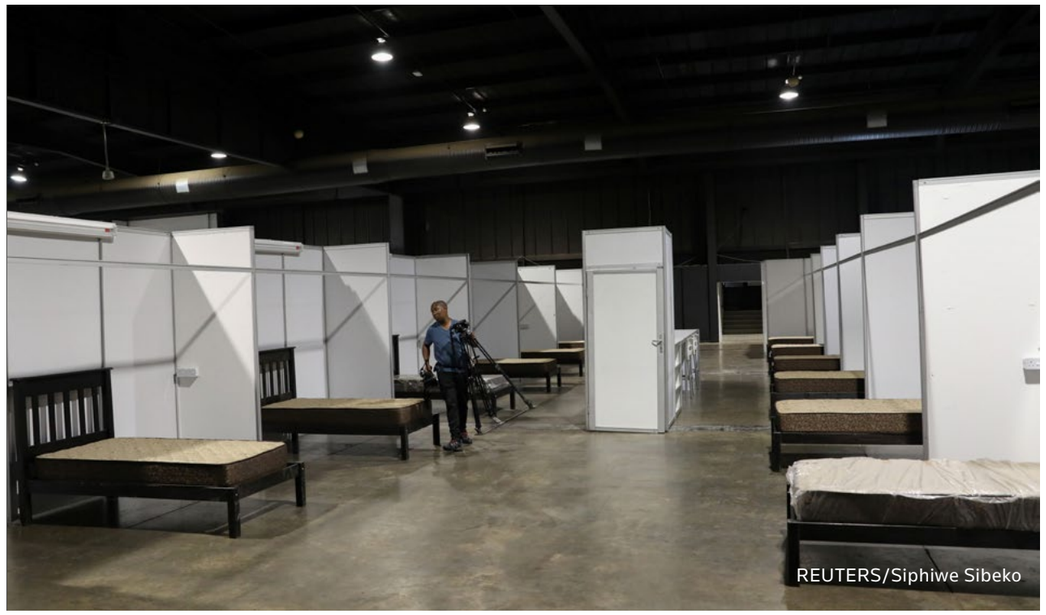
REUTERS/Siphiwe Sibeko

Caxton and CTP Publishers and Printers Limited v Multichoice Proprietary Limited (37/2010)[2010]

Failure to comply with the equity ownership requirement may result in ICASA not granting, revoking or suspending the licence or licences. This was demonstrated in this case where Caxton and CTP Publishers and Printers Limited had lodged a complaint with the Complaints and Compliance Committee (CCC) that Multichoice Proprietary Limited (MultiChoice) and Electronic Media Network Limited (MNet) had, through their holding company Naspers Limited, contravened sections 64, 65 and 66 of the ECA on foreign ownership limitation, limitation of control and limitation of cross media control respectively. Section 64 of the ECA regulates foreign media ownership and the applicable limitations in this regard i.e., that a foreigner may not exercise control over a commercial broadcasting licensee, have a financial interest, or have voting rights or capital in a commercial broadcasting licensee which exceeds 20%. This limitation was interpreted by the CCC in the Caxton case to mean "in aggregate". In other words, foreigners can only hold up to 20% in aggregate of the shares in a commercial broadcaster.

j. Defamation

The law of defamation has been applied in a number of cases in the last 10 years. Some of the more prominent defamation cases regarding media defendants are as follows:

Ramos v Independent Media (Pty) Ltd [2021] ZAGPJHC 60 (28 March 2021)

The High Court held that an article published by Independent Media (Pty) Ltd (Independent Media) accusing Maria Ramos, a prominent businesswoman of currency manipulation was defamatory. The court found that the article had accused Ramos of criminal conduct and was therefore *per se* defamatory. Independent Media was unable to proffer a defence and failed to establish the reasonable publication defence ordinarily used by media defendants. Independent Media was required to remove the article and publish an apology.

Mineral Sands Resources (Pty) Ltd and Others v Reddell and Others [2022] ZACC 37

In February 2021, the High Court held that a series of defamation suits brought against several attorneys and environmental activists constituted strategic lawsuits against public participation (SLAPP) and dismissed the suits. This is the first time a South African court has identified an application as a SLAPP *per se*. After the respondents received summonses from two related mining companies seeking damages for defamation, the respondents filed a special plea alleging that the suits were an abuse of legal process. The respondents argued that the only reason the companies were suing them was to silence their activism and submitted that the court should dismiss the suits.

In its judgment, the High Court recognised the importance of public debate on environmental issues and identified that the companies' defamation suits were not genuine but were an attempt to silence opposition to their operations. The court noted that although there was no anti-SLAPP legislation in South Africa, this case "matches the DNA of a SLAPP suit" and ruled in favour of the activists.[178]

On a direct appeal to the Constitutional Court, the environmental activists raised the SLAPP defence – also referred to by the court as a "corporate defamation defence special plea".[179] This case focused on the narrow issue of whether a trading corporation may claim general damages for defamation, and in doing so, what it is required to allege or prove. While the SLAPP defence did not ultimately succeed in full, the court recognised SLAPP suits as instances of abuse of process and cemented the position of the SLAPP defence in South African law. The appeal was upheld to the extent that trading corporations may claim general damages for defamation, save for where the speech concerned forms part of public discourse on issues of public interest, and subject to the court's discretion. The court held that an unqualified award of general damages in this context would limit the right to freedom of speech.

EFF and Others v Manuel (711/2019) [2020] ZASCA 172 (17 December 2020)

The Supreme Court of Appeal upheld a High Court decision that a political party had defamed a former politician, Trevor Manuel, by calling him "corrupt and nepotistic." Manuel had approached the High Court after the political party posted a statement on Twitter, which he claimed was false and damaging to his reputation. Although the High Court had held that the political party had no defence to the publication of the statement, it commented that the defence of reasonable publication – previously restricted for use by the media – was available to non-media defendants as well. The Supreme Court of Appeal noted that the political party had acted with malice and had relied on untruths when making its statement, and therefore had unlawfully and wrongfully defamed the politician. However, the Supreme Court of Appeal refused to accept the extension of the defence of reasonable publication, and also found that the High Court had incorrectly quantified the damages to be awarded and so referred the matter back to the High Court for determination of an appropriate remedy.

178 At paragraph 66.

179 Para 7.

6. CONCLUSION

South Africa has a robust legal framework for media freedom, particularly in the Constitution, which guarantees the rights to freedom of expression, which includes media freedom and access to information. Although these rights are not absolute, the scope of their enjoyment and their limitation is set out under the Constitution. There are several statutes which give effect and provide the frameworks for the enjoyment of the rights. There is also a discernible trend towards the expansion of freedom of expression through case law, rather than its contraction, from the cases collected by GFEI.

Through statute, foreign ownership of broadcast services is limited at 20%. However, the Draft White Paper, which is yet to be made law, proposes a 49% limitation on foreign ownership in order to attract investment. The foreign ownership limitation regulation is enforced by ICASA and through the competition law. While there are a few reported cases where the competition bodies have adjudicated disputes involving mergers of broadcast media outlets, there is limited information on ICASA's regulation of foreign ownership in practice.

Despite the robust legal framework for promotion of media, some criminal provisions have the potential to be abused to stifle free speech. However, courts have, in a number of cases discussed, demonstrated a progressive interpretation of the Constitution to promote freedom of expression and media freedom.

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CHAPTER 3: **ZAMBIA**

1. OPERATING ENVIRONMENT

The Constitution of the Republic of Zambia of 1991, as amended by the Constitution of Zambia (Amendment) Act No 2 of 2016, Chapter 1 of the Laws of Zambia (the Constitution) grants every person the right to freedom of expression.[180] This right extends to the right to hold opinions, receive ideas, and to communicate ideas and information without interference.[181] The Constitution prohibits any legislation from containing any provision that derogates from the freedom of the press.[182]

The right to freedom of expression is given effect to, and in some instances limited, by several laws in force in Zambia. The Supreme Court of Zambia has also held that the right is not limitless.[183] A derogation of the right to freedom of expression will be permitted where it is shown that the law in question is reasonably required in the public interest or in protecting another person's rights. Further, article 25 of the Constitution permits the derogation of fundamental rights during any period when the Republic is at war or when a public emergency has been declared. Zambia has a diverse media sector, comprising a variety of state-owned and independent print publications, television and radio broadcasters and a growing digital media. State-owned print publications, television and radio broadcasters historically dominated the media space. However, since 1991 when the economy was liberalised, the number of privately-owned newspapers, radio stations and bloggers and influencers has been increasing. According to the 2022 Reporters Without Borders World Press Freedom Index, Zambia ranks 109th out of 180 countries.

Digital terrestrial signals and digital satellite signals are predominantly used to broadcast radio and television. As a member of the International Telecommunications Union, Zambia in 2010 agreed to embrace new technology in broadcasting, and as such, to migrate television broadcasting from analogue to digital by June 2015 (the Digital Migration Program). To implement and finance the Digital Migration Program, the Zambian government acquired a loan facility through the Zambia National Broadcasting Corporation (ZNBC) amounting to USD 273 million from the Export-Import (Exim) Bank of China.[184]

A special purpose vehicle, TopStar Communication Company Limited (TopStar), was created by the ZNBC and Hantex International Corporation Limited. Topstar is controlled by Startimes International Holdings Limited (Star Times), to carry the loan for the Digital Migration Program. TopStar was incorporated in June 2016 in Zambia, as a limited liability company with 60% to 40% shareholdings between StarTimes and ZNBC respectively. Topstar was incorporated for the purpose of implementing the Digital Migration Program by providing new broadcasting technology and equipment as well as constructing and equipping six broadcasting studios.[185] Since 1 October 2017, there has been a complete switchover

180 The Constitution is accessible here and the Constitution (Amendment) Act is accessible here.

181 Article 11 (b) as read with article 20 of the Constitution.

182 Article 20 (2) of the Constitution.

183 See the case of *Fred Mmembe Masautso Phiri Goliath Mungonge v People* (S.C.Z. Judgment 4 of 1996).

184 "Zambia's digital migration given US$273m boost" IT Web (May 29, 2017) accessible here.

185 Competition issues relating to this Joint Venture are discussed under the Media Ownership below.

to digital broadcasting from analogue television services for cities and towns along the line of rail.

To allow non-discriminatory and open access to digital broadcasting platforms, the signal distribution for broadcasters is undertaken by a public and private signal distributor. The role of signal distributors is to provide nationwide coverage and services to content service providers (that is, holders of broadcasting licences) on a non-discriminatory basis in order to enable universal access network infrastructure.

The public signal distributor for digital terrestrial transmission is operated by TopStar while GOtv Zambia Limited is the designated private signal distributor for digital terrestrial transmission in Zambia.

2. SOURCES OF MEDIA LAW

2.1. THE CONSTITUTION

The Constitution contains the Bill of Rights under part 3 which includes the right to:

a. life, liberty, security of the person and the protection of the law;

b. freedom of conscience, expression, assembly, movement and association;

c. protection of young persons from exploitation; and

d. protection for the privacy of a person's home and other property and from deprivation of property without compensation.[186]

There is no standalone right on media freedom in the Constitution.

a. The right to freedom of expression

The scope of the right to freedom of expression in article 20 of the Constitution includes the freedom to hold opinions, receive, impart and communicate ideas and information to the public and individuals. The scope of the right to freedom of expression extends to the media.

b. The right of access to information

The Constitution does not prescribe or provide for the right of access to information. In addition, there is currently no legislation on access to information, although there was an unsuccessful attempt to introduce an access to information law in 2002. The opposition members sponsored a bill known as the Freedom of Information Bill whose objective was to provide for the right of access to information; to set out the scope of public information under the control of public authorities to be made available to the public in order to facilitate more effective participation in the good governance of Zambia; and to promote transparency and accountability of public officers. The Freedom of Information Bill was withdrawn by the government to allow for further consultations.

Although in 2019 the minister responsible for information and broadcasting disclosed that the Access to Information Bill had been approved by cabinet, no bill has been formally tabled before the Zambian National Assembly at the time of publishing this report.

c. Limiting rights in the Bill of Rights

Article 20 (3) of the Constitution provides the terms by which the right to freedom of expression may be limited:

Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that it is shown that the law in question makes provision—

a. that is reasonably required in the interests of defence, public safety, public order, public morality or public health; or

b. that is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, regulating educational institutions in the interests of persons receiving instruction therein, or the registration of, or regulating the technical administration or the technical operation of, newspapers and other publications, telephony, telegraphy, posts, wireless broadcasting or television; or

c. that imposes restrictions on public officers;

and except so far as that provision or, the thing done under the authority thereof as the case may be, is shown not to be reasonably justifiable in a democratic society.

2.2. LEGISLATIVE FRAMEWORK

As a general proposition, all legislation relating to the right to freedom of expression may not conflict with the right as provided in the Constitution.

a. Zambia National Broadcasting Corporation Act, as amended (ZNBC Act)

The ZNBC Act establishes and regulates the Zambia National Broadcasting Corporation (ZNBC) as a corporate body which provides public broadcasting services. ZNBC is the oldest, most wide-ranging and largest radio and television service provider in Zambia. According to section 4 of the Act, the board of directors control the operations of ZNBC.[187] The board comprises a chairperson and between six and nine directors appointed by the Minister for Information and Media.

The commercial services of ZNBC are subject to different policy and regulatory structures as private broadcasters as explained below.

b. Independent Broadcasting Authority Act No. 17 of 2002, as amended (IBA Act) 188

The IBA Act establishes the Independent Broadcasting Authority (IBA), as a regulator for private radio and television media organisations. The IBA became operational in July 2013. Section 19 requires media organisations to obtain a licence prior to providing any broadcasting services in Zambia.[189] The scope of the IBA Act is limited to broadcasting services and does not extend to print media and online or social media.

There are four categories of service providers:

a. Public commercial content service provider;

b. Public non-commercial content service provider;

c. Private commercial content service provider; and

d. Private non-commercial content service provider.

The following licences are issued in terms of the IBA, which are valid for a prescribed number of years, as below:

a. Public Television Broadcasting (Non-Commercial) – 10 years;

b. Public Television Broadcasting (Commercial) – 10 years;

c. Private Commercial Content Service Provider – Seven years;

d. Private Non-Commercial Content Service Provider – 10 years;

e. Terrestrial Subscription Broadcasting – Seven years;

f. Cable Subscription Television – Seven years;

g. Satellite Subscription Broadcasting – 10 years;

h. Digital Mobile Television – 10 years;

i. Subscription Management Service – Five years;

j. Public Radio Broadcasting (Non-Commercial) – Five years;

k. Public Radio Broadcasting (Commercial) – Five years;

l. Private Commercial Radio Broadcasting – Five years;

m. Private Non-Commercial Radio Broadcasting – Five years; and

n. Landing Rights Broadcasting Service – Five years.

Public Broadcasting

ZNBC is currently the only designated public broadcaster, which provides the predominant channel through which the government of Zambia communicates its development agenda, disseminates information and facilitates education. ZNBC is funded by government, donations and its own commercial activities. ZNBC may operate commercial TV/radio, but under the same terms as other commercial operators.

186 Article 11 of the Constitution.

187 Section 4 of the ZNBC Act.

188 The amendment to the IBA Act is accessible here.

189 Section 19 of the IBA Act.

Commercial Broadcasting Services
Commercial broadcasting services are undertaken by a person or entity whose services are usually funded by advertising revenue and operated for profit or as part of a profit-making enterprise.

Community Broadcasting Services
Community broadcasting services are undertaken by a person or entity whose services are not operated for profit or as part of a profit-making enterprise. The services are provided for community purposes or for purposes of encouraging members of the community served to participate in the operations of the service and the selection and provision of the programmes.

A community broadcasting services provider is funded from membership fees, grants, and donations. Furthermore, a community broadcasting service is prohibited from carrying advertising except for broadcast sponsorship announcements and limited adverts specifically relevant to the community.

Subscription Broadcasting Services
A subscription broadcasting service is undertaken by a person or entity whose programmes are made available to the general public on payment of subscription fees (whether periodical or otherwise). The services are received by specialised equipment such as decoders and are provided using any delivery system such as satellite, cable or other means.

A subscription broadcasting services provider is required to obtain a subscription management licence or to appoint a licensed subscription management service provider.

Subscription Management Services
A subscription management services provider provides an interface between a subscription service provider and the public. These services include customer care services, billing, subscription activation/deactivation services on behalf of content providers and the supply and maintenance of the subscription broadcasting receiving equipment such as decoders.

This service is operated for profit or as part of a profit-making enterprise and is usually funded by revenues from receiver sales and fees charged to subscription broadcast providers.

Landing Rights
The IBA, as a regulator, is also an issuer of landing rights for broadcasting services. Landing rights are an authorisation granted to a foreign satellite or cable operator whose signal is received in Zambia, but the operator is neither physically based in Zambia nor uplinking from Zambia.[190] A number of foreign broadcasters such as the BBC and CNN are authorised to broadcast their content in Zambia pursuant to a landing right issued by the IBA. In such cases, a holder of a landing right is required to appoint a subscription management service provider that is licensed in Zambia to manage its subscriptions, customer equipment distribution/sales maintenance and customer care.

Satellite Subscription
A satellite subscription broadcasting services provider provides uplink broadcasting signal from Zambian territory and provides services which are more or less the same as those under Subscription Broadcasting Services. The IBA maintains and publishes a register of all the licensed broadcasters in Zambia.

Broadcasting Standards
The conditions attached to a broadcasting licence may, among other things, specify the location, and the type and standard of broadcasting; require payment of annual fees, compliance with certain directions, provision of specific programming and submission of certain documentation to the IBA.[191]

There are additional content conditions for programming provided by a commercial broadcasting service. The programming should:[192]

a. reflect the culture, character, needs and aspirations of the people in the areas specified in the broadcasting licence;

b. provide an appropriate amount of local or national programming;

c. include news and information programmes on a regular basis including discussion on matters of national, regional, and where appropriate local significance;

d. include significant portions of Zambian drama, documentaries and children's programmes that reflect Zambian themes, literature and historical events; and

e. meet the highest standards of journalist professionalism.

190 Please see the Licensing Requirement accessible here.
191 Section 22(5) of the IBA Act.
192 Section 24(1) of the IBA Act.

REUTERS / Howard Burditt

The conditions attached to licences are not publicly available. However, the IBA has published the Standard Operating Procedure for Broadcasting in Zambia (SOP) to create guidelines for licensed broadcasters. The SOP sets out minimum standards of broadcasting that are applied in light of various sections of the IBA Act. Some of the principles in the SOP include:

a. Protection of children: Material that might seriously impair the physical, mental or moral development of children must not be broadcast.

b. Due impartiality and due accuracy and undue prominence of views and opinions: This principle demands that news, in whatever form, must be reported with due accuracy and presented with due partiality.

c. Fairness: Licensees are required to avoid unjust and unfair treatment of individuals or organisations in programmes.

Although the SOP does not set out penalties where a licensee fails to comply with its principles, each principle is tied to a provision of the IBA Act and thus a failure to comply would amount to a breach of the IBA Act itself.

A broadcasting licence may be cancelled or suspended by the IBA if the holder of the broadcasting licence is in breach of the conditions attached to the broadcasting licence. The IBA may cancel a broadcasting licence if:[193]

a. the holder of a broadcasting licence provides broadcasting services that the holder of a broadcasting licence is not licensed to provide;

b. the holder of a broadcasting licence fails, in spite of written notice, to comply with the conditions attached to the broadcasting licence; and

c. the cancellation of the licence is necessary in the interest of public safety, peace, welfare or good order.

The IBA has exercised its power to suspend or cancel a licence of a broadcaster on the basis that the cancellation is necessary in the interest of public safety, peace, welfare and good order as discussed further below.

c. Information and Communications Technologies Act, 2009 as amended (ICT Act)

The ICT Act provides for the regulation of information and communication technology and facilitates access to information and communication technologies. The Act establishes the Zambia Information and Communications Technologies Authority (ZICTA). ZICTA is mandated to regulate information technology, electronic communication services and products and monitor the performance of the sector including the levels of investment and the availability, quality, cost and standards of the electronic communication services.[194]

The Act defines an electronic communications service as a service provided by means of one or more electronic communications networks. This includes the distribution of signals for digital terrestrial transmission for broadcasting. As such, all signal distributors of digital terrestrial transmission are required to hold an electronic communications service licence.[195] At present, ZICTA has only issued two licences for signal distributors of digital terrestrial transmission. ZICTA determines the application process and issuance of the service licence for signal distributors of digital terrestrial transmission. Issuance depends on the availability of resources, among other considerations. The service licence for a private signal distributor of digital terrestrial transmission was awarded to GOtv Zambia Limited after a competitive tender process.[196]

d. Printed Publications Act Chapter 161 of the Laws of Zambia (Printed Act)

There is no formal legislation or regulator for the print media in Zambia. A proprietor of print media, is, however, required to register with the office of the Director of the National Archives of Zambia the full and correct title of the business, the full and correct names and places of abode of every person who is or is intended to be the proprietor, editor, printer or publisher of such newspaper, and the description of the premises where the same is to be published.[197]

193 Section 29 of the IBA Act.

194 Section 6 of the ICT Act.

195 Section 9 of the ICT Act.

196 See "GOtv Zambia Limited accepts award of Private Network Licence from ZICTA" Lusaka Times (March28, 2018) accessible here.

197 Section 4 of the Printed Act.

2.3. OTHER STATUTES

LEGISLATION	RELEVANT PROVISIONS
Copyright and Performance Rights Act, **as amended, Chapter 406 of the Laws of Zambia (Copyright Act)**	Section 8 prohibits the reproduction of a copyrighted work, including broadcasts.
Cyber Security and Cyber Crimes Act No. 2 of 2021	Criminalises interference with computer systems and data (section 49) and online communication which may be deemed to be hate speech or any form of communication which may be transmitted with the intent to coerce, intimidate, harass, or cause emotional distress (section 65). Section 28 authorises the lawful interception of communication, by a law enforcement officer.
Data Protection Act No. 3 of 2021 **(DPA)**	Prohibits processing of personal information, except where the processing of personal data is necessary for or relevant to a journalistic purpose.[198] This exception is only applicable where a data controller can demonstrate that the processing complies with the law regulating journalists in Zambia or any code or guidelines issued by the IBA.[199]
Electoral Act No. 35 of 2016	Section 7 requires print and electronic media to (a) provide fair and balanced reporting of campaigns, policies, meetings, rallies and press conferences of all registered political parties and candidates during a campaign period; (b) provide news of an electoral process up to the declaration of results; (c) abide by regional codes of conduct in the coverage of elections provided that such guidelines are not in conflict with the electoral code; (d) be bound by the provisions of the electoral code during elections; and (e) in liaison with the Electoral Commission of Zambia, recognise a representative media body authorised to receive complaints and provide advice regarding fair coverage of elections. Section 8 prohibits the broadcasting of any campaign interviews for political parties or independent candidates or prediction of election results on polling day.
Penal Code, as amended, Chapter 87 of the Laws of Zambia	• Section 53 empowers the President to declare any publication within and outside Zambia prohibited, if he/she deems it to threaten national security. • Establishes offences such as sedition (section 57), criminal defamation (section 191), and obscenity (section 177).

198 Section 43 (1) of the DPA.

199 Section 43 (2) of the DPA.

REUTERS/Siphiwe Sibeko

2.4. OTHER SOURCES OF LAW

Other sources of law in Zambia include case law, common law, customary and international law. Article 7 of the Constitution stipulates that customary law is only applicable to the extent it is not repugnant or contradicts the Constitution, natural justice or any written law. Zambia is party to both the ICCPR and the African Charter whose articles 19 and 9 respectively stipulate the right to freedom of expression and access to information.

2.5. RULES AND CODES

The Zambian media industry is largely self-regulating. There are a number of professional bodies representing journalists and media industries, several of which have issued various rules and codes which regulate content published by the media. Some of the industry institutions include:

a. The Press Association of Zambia, whose aim is to promote ethical standards among members of the press;

b. The Media Institute of Southern Africa, a non-governmental organisation that defends and promotes media freedom, freedom of expression and access to information in several Southern African countries including Zambia;

c. The Zambia Union of Journalists and Zambia Union of Broadcasters, who act as a voice for journalists and other media workers. These unions mainly advocate for better pay and working conditions for media workers and promote media freedom, professionalism and ethical standards;

d. The Zambia Media Council (ZAMEC), is a voluntary, self-regulatory body for journalists in Zambia.[200]

2.6. PROTECTION OF JOURNALISTS

Journalists enjoy the full benefit of protection under the Bill of Rights as well as the criminal justice systems. They may institute proceedings under the Constitution to challenge the threat or violation of their rights and seek redress. They may also make complaints to law enforcement bodies for investigation into criminal cases such as online harassment and bullying under the cybercrime law.

200 "IPI welcomes launch of Zambia Media Council" International Press Institute (6 July 2012) accessible here.

3. MEDIA OWNERSHIP

3.1. LEGAL FRAMEWORK FOR MEDIA OWNERSHIP

a. Media law

The IBA Act requires a holder of a broadcasting licence to notify the IBA of any change to that broadcasting licensee's particulars relating to the licence.[201] These changes appear to include changes in the ownership structure. Furthermore, while one of the functions of the IBA is to develop regulations relating to advertising, sponsorship, local content, and media diversity and ownership, such regulations are yet to be issued by the IBA.[202] In the absence of formal regulations, advertising, sponsorship, local content, and media diversity and ownership are regulated by the conditions attached to a licence or through directives issued by the IBA. Once regulations are issued, a failure to comply with the regulations is an offence.[203]

b. Competition law

The Competition and Consumer Protection Act No. 24 of 2010 (Competition Act) regulates competitive practices in Zambia and applies to all economic activity within or having an effect within Zambia.[204] The Competition Act is enforced by the Competition and Consumer Protection Commission (CCPC).[205] The CCPC has powers to initiate investigations on its own motion or to act on a complaint made by a member of the public.[206] The CCPC has exercised this power on a number of occasions as discussed below in this section.

Under the Competition Act, the CPCC may prohibit a company from owning a majority or a certain percentage of a market share of the media if such ownership has an effect of lessening competition in the media sector.[207] Consequently, the Competition Act regulates all mergers in Zambia.

A merger occurs where an enterprise directly or indirectly acquires or establishes direct or indirect control over the whole or part of the business of another enterprise, or when two or more enterprises mutually agree to adopt arrangements for common ownership or control over the whole or part of their respective businesses. A merger is notifiable only if it meets the merger notification threshold under the Competition and Consumer Protection (General) Regulations, 2011,[208] that is, the merging parties must have a combined turnover or assets amounting to ZMW 15,000,000 (approximately USD 882,352).

The Competition Act further prohibits any act or conduct by an enterprise that limits access to markets, unduly restrains competition, or is likely to have an adverse effect on trade or the economy in general.[209] This is particularly conduct through abuse or acquisition of a dominant position of market power.

The threshold for dominance relates to the supply of goods or services. This means that 30% or more of those goods or services are supplied or acquired by one enterprise or 60% or more of those goods or services are supplied or acquired by not more than three enterprises.[210]

3.2. COMPETITION CASES IN THE MEDIA SECTOR

a. ZNBC and Top Star Merger [211]

On 20 June 2018, ZNBC and Star Times applied to the CCPC for merger authorisation of the proposed Joint Venture with TopStar, in accordance with the Competition Act. The CCPC considered the application and granted conditional authorisation of the proposed merger.

In approving the merger, the CCPC made the following directives:

a. that the operational functions of Top Star must be split into two entities. Top Star must perform the functions of the public signal

201 Section 27 (1) of the IBA Act.
202 Section 5 (2)(j) of the IBA Act.
203 Section 45 (i) of the IBA Act.
204 Section 3 of the Competition Act.
205 Part II of the Competition Act.
206 Section 55 (1) of the Competition Act.
207 Section 34 of the Competition Act.
208 Section 26 of the Competition Act.
209 Section 16 (1) of the Competition Act.
210 Section 15 of the Competition Act.
211 "Decision to merge ZNBC with Star Times was made in public interest – CCPC" Diggers News (October 20, 2018), accessible here.

distributer while ZNBC should provide subscriber management services and content provision services;

b. that ZNBC and Top Star should relate on a commercial basis at arm's length;

c. that Top Star in its operations of signal distribution must ensure that it provides access to entities that require signal distribution services on the same terms as those that would apply to ZNBC and within a reasonable period of time as that accorded to ZNBC;

d. that Top Star should not abuse its dominance in the signal distribution market by ensuring that all pricing decisions and tariffs charged to its customers of signal distribution are approved by ZICTA in accordance with section 47(3) of the ICT Act.

b. Content carriage arrangement

In 2015, the CCPC investigated a content carriage agreement between Multichoice Africa Limited and ZNBC. This was after the CCPC received a complaint from the market indicating that ZNBC had denied a pay television broadcaster competing with Multichoice Africa Limited access to ZNBC's free-to-air channels (ZNBC TV1 and TV2) to enable it to fulfil the local content requirements as required under the IBA Act.

The CCPC found that ZNBC entered into an exclusive agreement with MultiChoice Africa Limited with regard to offering ZNBC free-to-air channels and therefore the agreement prevented any independent broadcaster from accessing ZNBC TV1 and TV2 except through Multichoice Africa Limited.

The CCPC ordered the termination of the content carriage agreement. The CCPC further warned Multichoice Africa Limited and ZNBC to desist from conduct likely to restrict, prevent or distort competition in Zambia in the free-to air and pay television markets.

The CCPC ordered that ZNBC undertake to conduct itself on an arm's length basis with Multichoice Africa and its subsidiaries and to refrain from any acts or conduct likely to foreclose or limit access to the market or whose aim is to restrict competition.[212]

3.3. COMMON LEGAL VEHICLES FOR MEDIA OWNERSHIP

The legal vehicle most relied on by local and foreign investors to run media operations in Zambia is a private company. The public broadcaster, ZNBC, is established by legislation. On-demand content service providers that are foreign-based are not currently required to establish any local presence in Zambia or hold any licences under the IBA.

In the case of a licensed entity, legal and regulatory advantages and/or disadvantages from a media perspective will depend on the nature of the licence and associated obligations applicable to the licensee rather than the choice of its ownership vehicle. As such, the usual legal and commercial advantages and disadvantages associated with the different legal entities would apply (for example, a private company has limited liability).

3.4. REGULATION OF FOREIGN MEDIA OWNERSHIP AND OPERATIONS IN ZAMBIA

A person who is not a citizen of Zambia does not qualify to provide a broadcasting service.[213] Citizens of Zambia in relation to a body corporate means a company in which no less than 75% of the company's shares are held by Zambians.[214] Notably, the Minister of Information and Media may, in consultation with the IBA, by statutory instrument, exempt any person, institution or organisation from any of the limitation.[215] The IBA has no express provision on control. The issuance of landing rights, however, is not restricted to Zambian citizens. Equally, the ICT Act does not restrict the issuance of a service licence for signal distributors of digital terrestrial transmission to Zambian citizens.

212 "TopStar refutes high charges to Zambian TV Stations" Lusaka Times (29 March 2018), accessible here.

213 Sections 19 (2) (b) of the IBA Act

214 Section 19 (3) of the IBA Act.

215 Section 19 (5) of the IBA Act.

3.6. APPLICABILITY OF MEDIA OWNERSHIP REGULATION TO SOCIAL AND DIGITAL MEDIA

The provisions in the IBA Act regarding media ownership currently cover only traditional broadcast media and do not regulate social/digital media ownership. The absence of legislation has resulted in an increased number of online bloggers and other online media providers who are not subject to any standards or guidelines.

3.7. ENFORCEMENT OF MEDIA OWNERSHIP REGULATION

The IBA, in its capacity as regulator of the commercial broadcasting services, regulates and enforces the provisions of the IBA Act and the terms and conditions attached to the broadcasting licence.

The IBA may cancel a broadcasting licence if, among other grounds:[216]

a. circumstances have arisen disqualifying the broadcasting licensee from holding the broadcasting licence;

b. the holder of the licence has failed, in spite of written notice, to comply with the conditions of the broadcasting licence;

c. the cancellation is necessary in the interest of public safety, security, welfare or good order; or

d. the IBA considers it appropriate in the circumstances of the case to do so.

The IBA Act empowers the IBA with broad discretionary power which can be easily abused or used to target media organisations by terminating a broadcaster's licence and alleging that it is in the public interest or that it is appropriate to do so. For instance, in April 2020, a broadcasting licence for a private broadcaster, Prime TV, was revoked on the basis that it was in the public interest to do so after the private broadcaster informed public officials that Prime TV was not prepared to air the government's coronavirus-awareness campaign for free, because the government owed Prime TV money for advertisements which had been previously aired.[217] The IBA does not define what amounts to "public interest", but section 62 of the Penal Code stipulates that it may include any act done in the interest of defence, public safety, public order, public morality or public health.

Furthermore, in August 2016, the IBA resolved to suspend the broadcasting licences of Muvi TV, Komboni Radio and Radio ltezhi Tezhi with immediate effect on the basis that they posed a risk to national peace and stability during the 2016 presidential and parliamentary elections. The IBA insisted that the private broadcasters conducted themselves in a manner that was contrary to section 29 of the IBA Act.[218] Section 29 allows the IBA to cancel a broadcasting licence if the cancellation of the licence is necessary in the interest of public safety, security, peace, welfare or good order.[219] The IBA, unfortunately, did not provide further details and further justification for suspending the licences of the private broadcasters.[220]

As discussed, foreign media organisations that wish to broadcast through traditional channels in Zambia may be established outside Zambia and provide content in Zambia pursuant to landing rights issued by the IBA.

Notably, social media is not regulated in Zambia. However, in 2021, ZAMEC presented a draft bill (ZAMEC Bill) to the Minister of Information. One of the objectives of the ZAMEC Bill is to bring about statutory self-regulation of the media sector in Zambia. In addition, it intends to include the regulation of online media. The Minister of Justice has proposed that the ZAMEC Bill should also regulate visiting international journalists.[221] The bill has not yet been passed into law.

216 Section 29 of the IBA Act.

217 Please see media reports relating to this issue:
"Zambia cancels broadcaster Prime TV's license, police shutter office" Committee to Protect Journalists (April 13, 2020) accessible here;
"Zambia cancels license of private TV channel over COVID-19 ad dispute" International Press Institute (April 14, 2020) accessible here; and
"Cancellation of Prime TV licence illegal – LAZ" Diggers News (April 11, 2020) accessible here.

218 "IBA Press Release – 22 August 2016 – IBA suspends MUVI TV Komboni and Itezhi Tezhi Radio" Independent Broadcasting Authority (August 16, 2016) accessible here.

219 "IBA Press Release – 22 August 2016 – IBA suspends MUVI TV Komboni and Itezhi Tezhi Radio" Independent Broadcasting Authority (August 22, 2016) accessible here.

220 "Zambia suspends licenses of Muvi TV, Komboni Radio and Radio Itezhi Tezhi" ifex (August 27, 2016)accessible here.

221 "Ministry of Justice wants Self-Regulation Bill to include the regulation of visiting international journalists" Lusaka Times (March 2, 2022) accessible here.

4. DEFAMATION

4.1. LEGAL FRAMEWORK

a. Defamation Act, Chapter 68 of the Laws of Zambia

The Defamation Act consolidates and amends the law relating to libel, other than criminal libel, and slander. The Defamation Act was enacted in 1954 and is therefore archaic, not up to date with modern social changes and not exhaustive in many respects. As such, principles of common law relating to defamation complement the Defamation Act in regulating the law of defamation. The Defamation Act does not provide for non-pecuniary remedies such as an injunction and specific performance.

The Defamation Act provides for the defence of justification, fair comment, qualified privilege of newspapers, and the plea of publication without malice and negligence, with apology. Section 8 of the Defamation Act provides that the defence of absolute privilege can only be invoked in relation to court proceedings by a judicial authority in Zambia.

b. Common law

Defamation (or libel law) exists at the intersection between the right to freedom of speech and the protection of human dignity, both of which are protected by the Bill of Rights. A defamation claim is a tortious claim brought by a plaintiff – who alleges an infringement of their right to dignity – against a defendant – who publishes the material that commits the alleged infringement. To succeed in a defamation claim, a plaintiff must prove – on a balance of probabilities – that:[222]

a. the statement refers to the claimant, identifying him/her;

b. the statement is published, that is, communicated to at least one person other than the claimant; and

c. that the publication was defamatory (in that the published material might reasonably be understood to convey a meaning that is defamatory to the plaintiff).

Once the above requirements are fulfilled, a presumption of wrongfulness and intention arises in respect of the defendant, which presumption the defendant has the onus of discharging. This can ordinarily be done through a number of means, including:

a. that the publication was subject to privilege;[223]

b. that the defamatory material was true and in the public interest;

c. that the publication constituted fair comment; and

d. an absence of intention.

An action for libel is actionable *per se*, and therefore there is no requirement for proof of actual damage by the plaintiff.

c. Defamation under the Penal Code

The state may prosecute an individual for criminal defamation and defamation of a foreign dignitary under the Penal Code. The only difference is the threshold of proof in criminal defamation is beyond reasonable doubt.[224]

The Penal Code criminalises defamation of another person, categorising it as a misdemeanour. The scope of criminal defamation extends to dead persons.[225] The general penalty for criminal defamation is imprisonment for up to two years or a fine or both.

On 23 December 2022, the President of the Republic of Zambia, Hakainde Hichilema, signed into law the Penal Code (Amendment) Act No. 23 of 2022), repealing the offense of criminal defamation of the President. The President communicated that the changes aligned with campaign promises to amend laws that inhibit the growth of democracy, good governance, and human rights.

4.2. ONLINE LEGAL THREATS

Defamation law in Zambia covers both online/digital and print publications. In addition, the Cyber Act criminalises malicious communication, including incitement to damage property, incitement of violence, and the disclosure of intimate images, hate speech or any form of communication which may be transmitted with the intent

222 See the case of *Muvi TV Limited v Charity Katanga* (Appeal 77 of 2018) [2019] ZMCA.

223 See the case of *Mathews Makayi & Another v Wa'chata & Another* (HP 1229 of 1985) [1992] ZMHC 100.

224 *The People v Josphat Kapaipi* [2014] ZMHC 56.

225 Sections 191 and 192 of the Penal Code.

to coerce, intimidate, harass, or cause emotional distress.[226] The Cyber Act also authorises the lawful interception of communication, by a law enforcement officer.[227]

The Cyber Act is, however, subject to abuse and likely to negatively impact the work of journalists. Local civil society groups have challenged several sections of the law arguing that they threaten the rights to privacy, freedom of expression, access to information, freedom of conscience, freedom of the media and a fair trial.[228] According to Chapter One Foundation, the petitioner in the case, the case was adjourned by the consent of both parties on the understanding that Chapter One will only withdraw its case from court once parliament has passed amendments to the Cyber Act that are in conformity with constitutionally protected human rights standards.[229]

226 Part IX of the Cyber Act.

227 Section 28 of the Cyber Act.

228 "New Cyber law goes to Court" Lusaka Times (April 2, 2021) accessible here.

229 Please see press statement by Chapter One Foundation on the proposed amendments to the Cyber Security and Cybercrimes Act, dated 2 February 2023, accessible here.

REUTERS/Salim Henry

5. ESSENTIAL MEDIA FREEDOM JURISPRUDENCE

The Global Freedom of Expression Index has collected five cases relating to Zambia. One of the cases is a case brought before the African Commission under the African Charter. In 1999, Zambia was found to have violated article 9 of the African Charter on freedom of expression for deporting two political opponents. The other four cases promote the right to freedom of expression.

As seen from the cases discussed below, media freedom in Zambia is gradually but steadily expanding.

a. Access to Information

Chapter One Foundation v. Zambian Information and Communications Technology Authority (HP 955 of 2021) [2022] ZMHC 3 (17 March 2022)

The High Court of Zambia, in 2022, issued a consent judgment, confirming that the Zambian Information and Communications Technology Authority (ZICTA) would not "do any act or make any omission outside of their legal regulatory powers and authority which may inhibit or interrupt the flow of and uninhibited access to information on all available telecommunication platforms under their control and/or regulation where the interest of consumers and their consumer and constitutional rights are threatened".[230] ZICTA also consented to informing the public within 36 hours of any disruptions in access to the internet of the reason for that interruption.[231]

b. Defamation

The law of defamation has been applied in a number of cases. There is little consolidated data on the nature and outcome of the cases on media freedom in Zambia. This is partially because most of the disputes are before the subordinate courts which do not publish public judgments. Most of the information is accessed from media reports. What is clear, however, is that in the last 10 years, the majority of cases are not against journalists, but against online bloggers, influencers and activists as demonstrated in some of the essential cases below.

230 Para 1 of the judgment.

231 Para 2 of the judgment.

Attorney General v Clarke Appeal No.96A/2004

In this case, the respondent, Roy Clarke, a British national and journalist who contributed to articles in the Post Newspapers Limited under a column called the Spectator, authored a satirical article entitled "*Mfuwe*", in which rude language was used and criticism expressed of the President and the government. The article also contained descriptions of the physical features of the characters the respondent was writing about and allegations of election rigging by the President and some ministers.

In view of the article, the Minister of Home Affairs, acting pursuant to the provisions of the Immigration and Deportation Act, signed an order for the respondent to be deported. The respondent applied for judicial review and sought an order to quash the decision of the minister arguing, among other things, that the decision to deport him was *ultra vires* article 20 of the Constitution (freedom of expression).

The High Court found that the respondent was deported as a result of a satirical article and that the respondent's rights to freedom of expression under articles 20 and 23 of the Constitution were contravened. The decision by the minister was nullified.

On appeal, the Supreme Court stated that the Constitution itself is clear that freedom of expression is not limitless, therefore for the minister to deport an alien on the belief that the alien has exceeded the limits of freedom of expression did not itself amount to constricting the freedom of expression and therefore, a violation of article 20 of the Constitution.

The Supreme Court further stated that, in interpreting legislation, the court should avoid romantic acceptance of all the theories on any issue, in this case, on the freedom of expression and freedom of the press, because doing so may lead to an interpretation that offends the Constitution itself.

Despite the above observation by the Supreme Court, the court stated that while some action could have been taken against the respondent for the descriptions and the crude language used in the article, the deportation of the respondent on the facts was disproportionate and too extreme an action.

Transparency International Zambia ("TIZ") v Chanda Chimba III and Zambia National Broadcasting Corporation 2010/HP/1176

In this case, the first respondent, Chanda Chimba III, produced a documentary titled "*Stand Up for Zambia*" which was broadcast by the second respondent; ZNBC. The documentary contained defamatory words and images referring to TIZ's president.

The plaintiff, TIZ, applied for an interim injunction against the respondents, contending that the words and images used were circulated to disparage TIZ, and to cause injury to TIZ's reputation. The respondents pleaded the defence of justification and fair comment on a matter of public defence. The respondents also contended that ZNBC being a public broadcaster, had a duty to inform the public and enjoyed the right to free speech.

The High Court granted TIZ an interim injunction on the basis that the comments made by the respondents had no factual basis and could therefore not be said to be justified or fair comment.

Michael Chilufya Sata v Chanda Chimba III and Zambia National Broadcasting Corporation (HP 1282 of 2010) [2011] ZMHC 71

In this case, the first respondent, Chanda Chimba III produced a documentary titled *"Stand Up for Zambia"* which was broadcast by the second respondent, ZNBC. The documentary contained defamatory words and images referring to the plaintiff, who was leader of the main opposition party at the time. The plaintiff applied to the High Court of Zambia seeking an interim injunction to restrain the respondents from publishing defamatory statements and programmes amounting to libel.

The High Court held that it has discretion to grant an interim injunction in order to restrain libel. However, the court cannot restrain the publication of libel, where the defences of justification, fair comment, or privilege have been properly raised.

Michael Chilufya Sata v Wallen Simwaka, Rebecca Chileshe and Zambia Daily Mail Limited (HP 577 of 2011) [2011] ZMHC 84

In this case, the defendants authored articles titled *"Sata's gay love historical"* and *"Sata condemned for gay love"*. The articles were published in the Zambia Daily Mail. The plaintiff applied for an interim injunction and claimed general damages against the defendants for libel. The High Court took judicial notice of the fact that the plaintiff was a leader of the major opposition party with a wide following and concluded that damages would not constitute an adequate recompense in the event of his success at trial. On this basis, the court granted the interim injunction restraining the defendants or their agents from publishing articles "suggesting that the plaintiff is or tending to portray of him that he is involved in or with persons whose sexual orientation is homosexual for such purposes."

Bevin Ndovi v Post Newspapers Limited Times and Printpak Zambia Limited (SCZ 8 of 2011)

In this case, Major Richard Kachingwe, in his capacity as Deputy National Secretary of the Movement for Multiparty Democracy, wrote a letter to Dalton Sokontwe, the then member of parliament for Chembe constituency and accused him of having clandestine meetings with the appellant, Bevin Ndovi. Sokontwe responded to the charges and denied the allegations and made his response available to the first and second respondents (i.e., Post Newspapers Limited and Times Printpak Zambia Limited respectively), with the view that they should publish the letter. The first respondent published the letter as "... Sokontwe is alleged to have been having clandestine meetings with ... Bevin Ndovi.". On the same date, the second respondent under an article headed: *"Charges Baseless"*, published the response as follows: "Mr. Sokontwe was alleged to have between January, and August 2004, attended clandestine meetings especially on April 15, 2003, in Kabulonga with .... Mr. B. Ndovi".

Despite the second respondent rendering an apology, the appellant still proceeded to institute proceedings against the first and second respondent. The issue which the Supreme Court addressed related to the availability of the defence of fair comment, the defence of denial that the words complained of in their natural and ordinary meaning are not defamatory of the plaintiff and the effect of tendering an apology in an action for defamation.

The Supreme Court held that it is a defence to an action for defamation that the statement is a fair comment on a matter of public interest. The rationale is that criticism ought to be, and is, recognised in any civilised system of law as indispensable to the efficient working of institutions, or offices and as salutary for private persons who make themselves or their work the object of public interest. The Supreme Court added that there are three requisites of

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fair comment. The first is that the comment must be an observation or inference from facts, not an assertion of fact. The second, is that the matter commented on must be of public interest. And the third, is that the comment must be fair or objective; it should not be actuated by malice.

The Supreme Court also observed that although criticism of persons, government and of public functionaries was not always so freely allowed, it is now fully recognised as one of the essential elements of freedom of speech which is not to be whittled down by legal refinement.

Muvi TV Limited v Charity Katanga (Appeal 77 of 2018) [2019] ZMCA

This case involved a claim for damages and an apology for libel by Charity Katanga, who was a senior policewoman at the time of the action. The details of the alleged libel related to a television news report that was aired by Muvi TV Limited on its prime-time news with the caption "Katanga involved in a punch up with subordinate Assistant Superintendent Lukonde".

The High Court found in favour of Katanga and awarded her ZMW 20,000 (approximately USD 1, 125) as damages for defamation. On appeal, the Court of Appeal confirmed that Katanga was defamed and clarified that libel is actionable in tort without proof that its publication has caused special damage to the person. Since libel is actionable *per se,* damage is presumed and there is no requirement for proof of actual damage.

The Court of Appeal further restated that an adequate apology, even if it is rendered late, has the effect of extenuating the seriousness of the defamation and therefore of the quantum of damages.[232]

Savenda Management Services Limited v Stanbic Bank Zambia Limited & Gregory Chifire (Alleged Contemnor) Selected Judgement No. 47 of 2018

Gregory Chifire, an anti-corruption activist and Director of Southern Africa Network Against Corruption at the time, was cited for contempt of court for his disparaging remarks about the Chief Justice and the judiciary after he wrote a letter to the Chief Justice in which he described the judgment in the case of *Stanbic Bank Zambia v Savenda Management Services Limited* as having "omitted very crucial evidence" that formed the basis for the awarding of damages to Savenda Management Services Limited, and asked for the judges to be investigated. The Supreme Court held that the alleged contemnor was guilty of contempt of court owing to actions attributed to him which the court found were intended to bring the reputation of the judiciary into disrepute and to ridicule the court that delivered the judgment. The Resident Magistrates Court further held that the actions of the alleged contemnor were calculated at obstructing the administration of justice and sentenced him to six years' imprisonment.

In addition to the above, other cases which have been reported in the media include:

- A criminal defamation charge was laid against a Lusaka-based photographer and social media personality, Cornelius Mulenga, known as Chellah Tukuta. The alleged facts were that Mulenga, in a Facebook live video, accused Dora Siliya, the then Chief Government Spokesperson and Minister of Information and Broadcasting, of being immoral and of facilitating the prostitution of young girls for high-profile people. The court found Mulenga guilty and sentenced him to two years' imprisonment with hard labour for defaming Siliya. The magistrate went on to describe Mulenga's utterances against Siliya as reckless and required a stiff punishment to deter would-be offenders who abuse social media to disparage other people.[233]
- Patrick Mubanga, a district culture officer in Kasama, Northern Province, was convicted on 15 May 2015 for defaming then President Michael Sata in comments he expressed in March 2015. The magistrate who convicted him sentenced him to three months' imprisonment with hard labour as a deterrent to others.[234]
- Fred M'membe, the then editor of the Post newspaper, and Wynter Kabimba, leader of the opposition Rainbow Party, were charged with defamation of former President Rupiah Banda in February 2015 for articles commenting on a corruption trial. Months later, the charges were dropped after Banda withdrew his complaint.[235]

232 The decision in *Kalonga and another v Chisamanga and another* (1988-1989) ZR 52 (SC) followed.

233 "Chellah Tukuta jailed 2 years" ZNBC (July 15, 2021) accessible here.

234 "Civil servant jailed for defaming President Sata" Lusaka Times (May 15, 2012) accessible here.

235 "Fred M'membe and Kabimba RB defamation case fails to take off" Lusaka Times (April 1, 2016) accessible here.

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Frank Bwalya, the then leader of the Alliance for a Better Zambia (ABZ) opposition party, was charged in 2014 with defaming President Sata by describing him as "chumbu mushololwa," a Bemba term for a sweet potato that breaks when bent, indicating a person who rejects advice, during a radio interview.[236]

Sanford Mwale, a businessman, received a suspended sentence of six months' imprisonment with hard labour on 16 September 2013 after a Lusaka magistrate convicted him of defaming President Sata.[237]

Peter Mwete, a resident of Kalomo District, Southern Province, was sentenced to six months' imprisonment on 6 August 2012 after a local magistrate convicted him of defaming President Sata.[238]

Darius Mukuka, a driver from Chifubu Township, Ndola, was sentenced to 18 months' imprisonment with hard labour after Ndola's Chief Magistrate convicted him of defaming President Rupiah Banda. Mukuka was said to have accused the President in 2009 of "lying to the people" and "failing to govern" while drinking in a bar; he was later released under a presidential pardon.[239]

Popular satirical singer Chama Fumba, (known by the stage name "Pilato") was prosecuted for a song he wrote which allegedly defamed the President at the time, Edgar Chagwa Lungu. Officials stated that the song defamed President Lungu by accusing him of drinking too much and being incompetent.[240]

236 "Zambian politician Frank Bwalya charged with defamation for calling President Sata a potato" The Independent (January 7, 2014) accessible here.

237 "Zambia: Lusaka Man Gets Suspended Sentence for Defaming President" All Africa (September 6, 2013) accessible here.

238 "Kalomo man sentenced to 6 months imprisonment with hard labour for defaming President Sata" Lusaka Times (August 6, 2012) accessible here.

239 "Jailing a man for insulting RB unfortunate" Lusaka Times (March 19, 2010) accessible here.

240 "Pilato's latest Koswe mu Mpoto causes anxiety among PF cadres" Newsday Zambia (December 12, 2017) accessible here.

6. CONCLUSION

Zambia's Constitution contains the right to freedom of expression, which is sacrosanct to a free and democratic society. Although the right is not absolute, the scope of its enjoyment and its limitation is set out under the Constitution. There are several statutes which give effect and provide the frameworks for the enjoyment of the right to freedom of expression and by extension, media freedom. The right of access to information has not been legislated despite cabinet approval of an Access to Information Bill in 2019. From case law, there has been a gradual but steady opening up of the media freedom space in Zambia.

Through statute, broadcast service licensees are required to have at least 75% local ownership. The foreign ownership limitation regulation is enforced by the IBA and through the competition law. While there are a few reported cases where the competition bodies have adjudicated disputes involving mergers of broadcast media outlets, there is limited information on the IBA's regulation of foreign ownership in practice.

There are various criminal provisions that are inimical to media freedom and continue to threaten free speech, particularly the cybercrime law as well as the Penal Code. The offence of criminal defamation of the President has been particularly challenging as a number of journalists have been arrested and others charged and convicted of the offence. However, in December 2022, the President repealed the offence. The courts have also carefully interpreted the right to freedom of expression in order to give effect to the right, particularly in relation to journalists.

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CHAPTER 4: **CONCLUSION**

In Kenya, South Africa and Zambia, each country's Constitution offers an overarching framework of rights and freedoms. Freedom of expression is explicitly enshrined in each country's Constitution, and the Kenyan and South African Constitutions make specific reference to media freedom and freedom of the press. National legislation gives effect to media freedom and other linked rights in all the three countries. In all three jurisdictions, rights and freedoms are circumscribed by limitations under the doctrine of constitutional supremacy and the balancing of different rights.

Outdated legislation remains a barrier to the full realisation of media freedom. Though multiple legislative mechanisms govern the sector, many are not updated to reflect its fast-paced and ever-changing character. While legislation relating to such issues as data protection may be transposed to the current context, gaps remain in cyber and social media regulation. Older legislation suffers from inadequacy when applied to social and digital media. In Zambia, the majority of defamation cases as canvassed in this report target online bloggers, influencers and online activists.

In Zambia, the Penal Code obstructs media freedom, and presents a challenge to the fulfilment of constitutional provisions pertaining to media freedom. Similarly, in Kenya, government interference hinders the exercise of freedom by media outlets. Kenya's Penal Code may also in some instances be seen to restrict the freedom of the press. Case law provides examples of intimidation suffered by journalists, and obstacles to media freedom, experienced to varying degrees in South Africa, Kenya and Zambia. This is often grounded in the field of defamation law.

The three jurisdictions have extensive competition legislation, generally aimed at prohibiting abuse of dominance and regulating local and foreign shareholding. Foreign broadcasters are subject to the same licensing requirements as local broadcasters and must comply with local laws governing content and other industry standards. In Zambia, ownership of broadcasting services is the sole domain of Zambian citizens, or companies in which at least 75% of shares are held by Zambians. In South Africa, a similar provision exists, with the requirement that foreigners may only hold up to 20% in aggregate of the shares in a commercial broadcaster. While Kenyan ICT policy requires 30% local shareholding for broadcasting companies, a transitional grace period is still in effect for ICT licensees. However, in Kenya, the President recently announced that the 30% local ownership requirement for ICT services licensees would be reviewed to attract investment. This is yet to be announced. In all three countries, media ownership regulation is governed by broadcast regulators as well as under the competition laws.

It is hoped that this report will provide a broad understanding of media law in the three countries and will equip actors in the media ecosystem to advance legal review and reform, where relevant.

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