



## **1 INTRODUCTION**

The Republic of Namibia is a large country with a small population of just over two million. The territory, previously known as South West Africa, was administered by South Africa from the end of World War I, but gained independence in 1990. Since independence, Namibia has been a constitutional democracy. The current media environment in Namibia, particularly in respect of broadcasting, is very different compared to the pre-independence regime. There are, for example, a number of new broadcasters, and the public has access to a wider range of news, information and viewpoints than was previously the case.

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

- Media and the constitution
- Media-related legislation
- Media-related regulations
- Media-related common law based on decided cases

The aim of this chapter is to equip the reader with an understanding of the main laws governing the media in Namibia. Key weaknesses and deficiencies in these laws will also be identified. The hope is to encourage media law reform in Namibia, to better

enable the media to fulfil its role of providing the public with relevant news and information, and to serve as a vehicle for government–citizen debate and discussion.

## 2 THE MEDIA AND THE CONSTITUTION

In this section you will learn:

- The definition of a constitution
- What is meant by constitutional supremacy
- How a limitations clause operates
- Which constitutional provisions protect the media
- Which constitutional provisions might require caution from the media or might conflict with media interests
- What key institutions relevant to the media are established under the Namibian Constitution
- How rights are enforced under the Constitution
- What is meant by the ‘three branches of government’ and ‘separation of powers’
- Whether there are any clear weaknesses in the Namibian Constitution that ought to be strengthened to protect the media

### 2.1 Definition of a constitution

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

The Namibian Constitution sets out the foundational rules of the Namibian state. These are the rules upon which the entire country operates. The Constitution contains the underlying principles, values and law of the Republic of Namibia. A key constitutional provision in this regard is article 1(1), which states: ‘The Republic of Namibia is hereby established as a sovereign, secular, democratic and unitary State founded upon the principles of democracy, the rule of law and justice for all.’

### 2.2 Definition of constitutional supremacy

Constitutional supremacy means that the constitution takes precedence over all other law in a particular country, for example, legislation or case law. It is important to ensure that a constitution has legal supremacy: if a government passed a law that

violated the constitution – was not in accordance with or conflicted with a constitutional provision – such law could be challenged in a court of law and could be overturned on the ground that it is ‘unconstitutional’. The Namibian Constitution makes provision for constitutional supremacy. Article 1(6) specifically states: ‘This Constitution shall be the Supreme Law of Namibia.’

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

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

The Namibian Constitution makes provision for two types of legal limitations on the exercise and protection of rights and freedoms contained in Chapter 3 of the Namibian Constitution, headed ‘Fundamental human rights and freedoms’.

### **2.3.1 Internal limitations**

Internal limitations clauses occur within an article of the constitution. They deal specifically and only with the limitation of the particular right or freedom that is dealt with in that article. As discussed more fully later in this chapter, both the right to privacy and the right to freedom of expression contain such internal limitations clauses. In other words, the article which contains the right also sets out the parameters or limitations allowable in respect of that right.

### **2.3.2 General limitations**

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

A general limitations clause applicable to rights can be found in article 22 of the Namibian Constitution, ‘Limitations upon fundamental rights and freedoms’. This allows the Namibian government to pass laws limiting fundamental rights and freedoms. Article 22 sets out the requirements for this to be done lawfully. These requirements are that such a law must:

- Be generally applicable – that is, the law may not single out particular individuals and deny them their rights
- Not negate the essential content of the right. This is a difficult legal concept. It means that the limitation cannot do away with the entire right; its essence must remain intact. For example, the death penalty negates the essential content of the right to life – there is nothing of the right left
- Specify the ascertainable extent of the limitation – that is, the law must clearly set out what the limitation is and how far it reaches

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

## **2.4 Constitutional provisions that protect the media**

The Namibian Constitution contains a number of important articles in Chapter 3, ‘Fundamental human rights and freedoms’. These articles directly protect the media, including publishers, broadcasters, journalists, editors and producers. There are a number of articles in other chapters of the Namibian Constitution which can be used by the media to ensure effective reporting on government activities.

### **2.4.1 Freedom of expression**

The most important provision that protects the media is article 21(1)(a), which is part of the article headed ‘Fundamental freedoms’. It states: ‘All persons shall have the right to freedom of speech and expression, which shall include freedom of the press and other media.’ This provision warrants some discussion.

- The freedom applies to ‘all persons’. This is important as certain rights apply only to particular groups of people, such as ‘citizens’ (in respect of voting rights, for example) or ‘children’ (in respect of children’s rights). Freedom of expression is therefore a fundamental right enjoyed by everyone in Namibia, including foreigners.
- The freedom is not limited to speech (oral or written) but extends to non-verbal or non-written ‘expression’. There are many examples of this, including physical expression, such as mime or dance, photography or art.
- The article specifies that the right to freedom of expression includes ‘freedom of the press and other media’. This is very important for two reasons:

- It makes it clear that this right can apply to corporate entities such as media houses, newspapers or broadcasters, as well as to individuals.
- It makes it clear that the right extends to both the ‘press’ and ‘other media’. The article distinguishes between the ‘press’ – with its connotations of the news media – and ‘other media’. Thus ‘other media’ could include, for example, fashion, sports, gardening or social media. Note that all technology platforms are also protected – print media, broadcasting and the internet.

### 2.4.2 Administrative justice

Another important provision that protects the media is article 18, ‘Administrative justice’, which states: ‘Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal’. This right also requires further explanation:

- An administrative body is not necessarily a state body; indeed, they are often private or quasi-private institutions, such as a press council operated by private newspapers or an independent broadcasting regulator. This constitutional requirement would therefore apply to these non-state bodies too.
- This provision is important for journalists and the media because it protects them (as it does all people) from administrative officials who act unfairly (for example, maliciously or in a biased manner) and unreasonably (which means there is no rational justification for the action) and who otherwise do not comply with legal requirements. The provision gives them the right to approach a court to review administrative decisions.

### 2.4.3 Privacy

A third protection is contained in article 13, ‘Privacy’. Article 13(1) specifies, among other things, that ‘no person shall be subject to interference with the privacy of their homes, correspondence or communications save as in accordance with the law and as is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the protection of health or morals, for the prevention of disorder or crime, or for the protection of the rights and freedoms of others’.

The provisions of article 13 are problematic and do not afford the media a great deal

of protection. This is because the supposed protections are actually rather weak. The article contains an internal limitation clause – namely, that the constitutional right to privacy can be limited by law in certain circumstances. Unfortunately, these are widely cast. In particular, it is a pity that terms such as ‘national security’, ‘public safety’, etc. are employed as they can be used to deny the media the right to report on sensitive issues. The effect of this is that the constitutional right to privacy is watered down. This article probably does not provide substantial privacy protection to the media and to journalists.

#### **2.4.4 Emergency provisions**

An important protection for the media is contained in the constitutional articles dealing with states of emergency and derogations of fundamental rights. Chapter 4 contains only one article, article 26, ‘Public emergency, state of national defence and martial law’.

Article 26 contains a number of provisions which allow the president to:

- Declare a state of emergency in all or part of Namibia, during times of national disaster, state of public defence or national emergency which threatens the life of the nation or the constitutional order
- Make regulations during a state of emergency, including the right to suspend the operation of any rule of the common law, statute or any fundamental right or freedom protected under the Constitution

However, article 26 is subject to article 24 of the Constitution, ‘Derogation’. Importantly, article 24(3) specifically prohibits the derogation of a number of rights, such as the right to freedom of speech and expression, which includes the freedom of the press and other media contained in article 21(1)(a).

The Constitution therefore specifically does not allow for the freedom of the press and the right to freedom of expression to be interfered with or limited by presidential powers during a declared state of emergency. This is a significant strength of the Namibian Constitution, but one that is rare on the continent.

#### **2.4.5 Public access to sittings of the National Assembly**

Article 61 of the Namibian Constitution requires that, as a general rule, all meetings of the National Assembly must be open to the public. The press and other media would therefore have open access to the proceedings of the National Assembly.

Disappointingly, there are exceptions – as provided in article 61(2); however, the public can only be excluded upon the adoption of a motion to this effect supported by at least 10% of the members of the National Assembly.

#### **2.4.6 State policy principles encourage public debate**

Another provision in the Namibian Constitution which may be used to support the media and the work of journalists is article 95(k). This article falls within Chapter 11 of the Constitution, ‘Principles of State Policy’, and provides that:

The state shall actively promote and maintain the welfare of the people by adopting, inter alia, policies aimed at ... encouragement of the mass of the population through education and other activities and through their organisations to influence Government Policy by debating its decisions.

The media undoubtedly plays a crucial role in educating the population to participate meaningfully in a democracy. This article could therefore be used to encourage the growth of a culture of openness and transparency on the part of government, and could be interpreted as requiring media-friendly policies on the part of the state in order to meet the informational needs of the population.

It is important to note, however, that in terms of article 101 of the Constitution, the principles of state policy, including the one set out above, are not legally enforceable by themselves. They are only there to guide government action and can be used by the courts when interpreting laws based on them. Thus, while one cannot directly sue the state for failure to comply with article 95(k), it is useful in interpreting other laws.

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

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

#### **2.5.1 Internal limitations on freedom of expression**

Perhaps the most important and troubling constitutional provision which could be used against the media is the internal limitation provision (see discussion on limitations clauses above) contained in article 21(2). This limitation unfortunately deprives the fundamental freedoms contained in article 21(1) (including freedom of

speech and expression, which extends to freedom of the press and other media) of much of their force.

Article 21(2) provides that the freedoms contained in article 21(1) must be exercised subject to the law of Namibia. This is a troubling provision because it essentially provides that an ordinary law, such as a statute, can limit the fundamental freedoms. This goes against the notion of constitutional supremacy (discussed above) and undermines the whole point of enshrining rights in a constitution.

Article 21(2) does, however, require that such a limiting law must impose ‘reasonable restrictions’, which are ‘necessary in a democratic society’ and which are ‘required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence’.

The reference to defamation is particularly noteworthy: the Namibian Constitution clearly envisages laws limiting freedom of expression to protect against defamation (see case law on defamation below).

## 2.5.2 Dignity

The requirement of respect for human dignity set out in articles 8 and 8(1) specifically provides that the ‘dignity of all persons shall be inviolable’. Dignity is a right that is often raised in defamation cases because defamation usually undermines the dignity of the person being defamed. This right is frequently set up against the right to freedom of the press, requiring a balancing of constitutional rights.

## 2.5.3 Privacy

Similarly, the right to privacy (discussed in some detail above) is often raised in litigation involving the media. People who find themselves the object of media attention sometimes assert their privacy rights when arguing that they should not be photographed, written about or followed in public.

The media does have to be careful in this regard and should be aware that there are boundaries that need to be respected. It is impossible to state with certainty what these boundaries are as they are context specific and depend on the circumstances of each case. However, a public figure clearly has less of a right to personal privacy in relation to matters relevant to his or her public life. For example, a church minister will have less of a right to privacy concerning his/her private life if it is led in a manner that is inconsistent with his/her church teachings.

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

Three important institutions in relation to the media are established under the Constitution of Namibia: the judiciary, the Ombudsman and the Judicial Services Commission (JSC).

### **2.6.1 The judiciary**

In terms of article 78(1), the judiciary is the Namibian courts – that is, the Supreme Court, High Court and lower courts of Namibia.

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

Article 78(2) specifically provides that the courts are independent and subject only to the Constitution and to the law. Judges are appointed and removed by the president, acting on the recommendation of the JSC.

### **2.6.2 The Ombudsman**

In terms of article 89 of the Namibian Constitution, the Ombudsman is a constitutional office with the same level of independence as the members of the judiciary. The Ombudsman's functions are set out in article 91, and include investigating complaints regarding violations of fundamental rights. The Ombudsman can therefore play an important role in, for example, protecting the media from unlawful action by the state.

The Ombudsman is appointed and removed by the president, acting on the recommendation of the JSC. Specific legislation has been passed governing the office and functions of the Ombudsman in the Ombudsman Act, Act 7 of 1009.

### **2.6.3 The Judicial Services Commission**

The JSC is a constitutional body established to participate in the appointment and removal of judges and of the Ombudsman. Many would query why the JSC is

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

In terms of article 85, the JSC is made up of the chief justice, a judge appointed by the president, the attorney-general and two members of the legal profession nominated by professional bodies. The provisions regarding the JSC are adequate as it is clear that legal practitioners as opposed to politicians serve on the JSC. This is important to protect the independence of the JSC, which in turn is necessary to protect the independence of the judiciary.

## **2.7 Enforcing rights under the Constitution**

A right is only as effective as its enforcement. All too often rights are enshrined in documents such as a constitution or a bill of rights, and yet remain empty of substance because they cannot be enforced properly. There are a number of ways in which the Namibian Constitution addresses the issue and tries to ensure that rights are effective.

Article 5, 'Protection of fundamental rights and freedoms' requires all of the fundamental rights and freedoms enshrined in Chapter 3 to be 'respected and upheld by the Executive, the Legislature and the Judiciary' as well as by 'all natural and legal persons in Namibia', where the rights are applicable to them and 'shall be enforceable by the Courts.' This means that:

- All three branches of government (see below) must uphold these fundamental rights and freedoms
- Individuals and companies also have a duty to uphold rights and freedoms where applicable
- A person whose rights or freedoms have been violated can approach the courts for relief

Clearly, however, the Constitution itself also envisages the right of people, including the media, to approach a body, such as the Ombudsman or the courts, to assist in the enforcement of rights.

Perhaps one of the most effective ways in which rights are protected under the Constitution is through the provisions of the Constitution that entrench the chapter on fundamental human rights and freedoms. If it were easy for the National Assembly

to do away with the constitutional protection of rights and freedoms then, in an overall sense, the enforcement of the rights would be weak. The rights and freedoms would be subject to the constant potential threat of the rights simply being done away with. Article 131 of the Constitution, ‘Entrenchment of fundamental rights and freedoms’, clearly addresses this concern.

This article flatly disallows the amendment or repeal of any of the provisions of Chapter 3 (which contains the fundamental human rights and freedoms) if the repeal of amendment ‘diminishes or detracts from the fundamental human rights and freedoms’ contained and defined in that chapter. Importantly, the article also provides that any purported amendment or repeal which violates this rule will be invalid and have no effect.

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

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

### **2.8.1 Branches of government**

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

#### **THE EXECUTIVE**

In Namibia, executive power vests in the president and the Cabinet, in terms of article 27(2). In terms of article 35, the Cabinet is made up of the president, the prime minister and the ministers appointed by the president.

Article 40 sets out a number of functions of the Cabinet, including the following:

- In terms of article 40(a): ‘to direct, co-ordinate and supervise the activities of Ministries and Government departments, including para-statal enterprises’.
- In terms of article 40(b): ‘to initiate Bills for submission to the National Assembly’.

Clearly, the executive is responsible for developing government policy, which is to inform the development of such bills. The role of the executive is to administer or enforce laws, make governmental policy and propose new laws.

## THE LEGISLATURE

The principal legislative authority in Namibia is the National Assembly, in terms of article 44. The vast majority of members of the National Assembly are elected by general, direct and secret ballot, in terms of article 46(1)(a). In terms of article 63(1), this legislative authority has the power to make and repeal laws. Note that in terms of article 75 of the Namibian Constitution, the National Council plays a role in reviewing legislation passed by the National Assembly.

The legislature also fulfils other important functions, including, in terms of article 63(2)(f), holding the executive accountable for its operations – that is, playing an oversight role in terms of the workings of the executive branch of government.

Under article 146(2), which deals with constitutional definitions, Parliament is defined as being the National Assembly acting subject to review by the National Council when this is required by the Constitution.

## THE JUDICIARY

Judicial power, as discussed above, vests in the courts. The main role of the judiciary is to interpret the law and to adjudicate legal disputes in accordance with the law. The judiciary has no powers of enforcement.

### 2.8.2 Separation of powers

It is important in a functioning democracy to divide governmental power between different organs of the state in order to guard against the centralisation of power, which may lead to abuses of power. This is known as the ‘separation of powers’ doctrine. The aim, as the Namibian Constitution has done, is to separate the functions of the three branches of government – the executive, the legislature and the judiciary – so that no single branch is able to operate alone, assume complete state control and amass centralised power. While each branch performs a number of different functions, each also plays a ‘watchdog’ role in respect of the other. This helps to ensure that public power is exercised in a manner that is accountable to the general public and in accordance with the constitution.

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

There are a number of weaknesses in the Namibian Constitution. If these provisions were strengthened, there would be specific benefits for the Namibian media.

### 2.9.1 Remove internal limitations on fundamental rights and freedoms

The internal limitations applicable to fundamental rights, such as the rights to freedom of expression and privacy, ought to be repealed because they weaken the rights. In any event, the general limitations clause renders the internal limitations unnecessary as government has all the power it needs to limit fundamental rights reasonably under the general limitations clause.

### 2.9.2 Recognise the right to information

It is disappointing that the Namibian Constitution does not explicitly recognise the right to receive information and ideas, and does not guarantee the public a right of access to information held by the state.

We live in an ‘information age’, and access to information is probably the single biggest factor in empowering people to make appropriate decisions about their lives, including political decisions. The media is the way that most people obtain access to news and information, and having a right of access to information would enable the media to play its public information role.

### 2.9.3 Provide for an independent broadcasting regulator and public broadcaster

It is disappointing that the Constitution does not provide specific protection for the independence of the broadcasting regulator or of the public broadcaster. These institutions are critical to the functioning of broadcasting as a whole in Namibia.

The Constitution should specifically protect their independence and ensure that they operate in the public interest in order to guarantee impartiality and to ensure that the Namibian public is exposed to a variety of views.

## 3 THE MEDIA AND LEGISLATION

In this section you will learn:

- What legislation is and how it comes into being
- The kinds of legislation that deal with the different roles government plays in relation to state media, including in respect of state newsgathering, state newspapers and state broadcasting
- What legislation governs the press more generally, both print and broadcast media (state or commercial), including legislation that threatens the protection of sources, licensing requirements and content regulation or prohibitions

## **3.1 Legislation: An introduction**

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

Legislation is a body of law consisting of acts properly passed by the legislative authority. Legislative authority in Namibia vests primarily in the National Assembly, with legislation also being referred to the National Council on certain occasions, in terms of the Constitution. Legislation or statutes are therefore acts of the National Assembly made into law.

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

A bill is a draft law that is debated and usually amended by Parliament during the law-making process. If a bill is passed by Parliament (that is, by the National Assembly and the National Council), it becomes an act once it is signed by the president (signifying his assent to the bill) and published in the Government Gazette, in terms of article 56 of the Namibia Constitution.

It is important to note that, in terms of article 56, the president may refer a bill back to Parliament for reconsideration only if the bill was not initially passed by a two-thirds majority of members of the National Assembly. Upon reconsideration, if the National Assembly passes the legislation by at least a two-thirds majority, then the president cannot withhold consent and the bill will become an act. However, if the majority is less than two-thirds, the president can refuse to sign a bill into law and it will simply lapse.

### **3.1.3 Why do some pieces of old South African legislation continue to be law in Namibia?**

Article 140(1) of the Constitution specifically provides that, subject to the Constitution, all laws which were in force in Namibia immediately before the date of independence shall remain in force until repealed or amended by an act of Parliament or until declared unconstitutional by a competent court. This provision maintains a peaceful transition to a constitutional legal regime by ensuring the existing laws continue to apply until properly dealt with in terms of the Constitution, whether by Parliament or by a court.

## **3.2 Statutes governing state media – Newsgathering**

### **3.2.1 Establishment of the Namibian Press Agency**

The Namibia Press Agency (NAMPA) is established in terms of section 2(1) of the Namibia Press Agency Act, Act 3 of 1992.

### **3.2.2 NAMPA's main mandate**

Following the passage of the Namibia Press Agency Amendment Act (2004), NAMPA's mandate is two-fold: to operate a news agency service; and to operate an information technology service for the production, collection and dissemination of media, information and information technology products and services. In order to achieve its mandate, NAMPA is given a wide range of powers, listed in section 5 of the act. These include establishing facilities for collecting and distributing news and information, publishing any literary matter, and entering into any agreement to supply news and information to NAMPA.

### **3.2.3 Appointment of the NAMPA Board**

NAMPA is controlled and governed by a board, comprising three to five members, all of whom are appointed by the minister of information and broadcasting. If the minister is responsible for appointing the board, the board cannot be said to be independent of the executive.

### **3.2.4 Funding for NAMPA**

NAMPA is funded through a range of sources, including donations and from contracts for services rendered by it. In terms of section 12 of the Namibia Press Agency Act, NAMPA is funded primarily through money appropriated by Parliament – that is, specifically allocated to it in the national budget.

Given that NAMPA is essentially government funded and controlled, it appears that NAMPA actually operates as a government communications and information service.

## **3.3 Statutes that govern state media – state newspaper**

### **3.3.1 Establishment of the state-sponsored newspaper**

The New Era Publication Corporation is established as a 'publication corporation' in terms of section 2 of the New Era Publication Corporation Act, Act 1 of 1992.

### **3.3.2 Main functions**

In terms of section 3 of the New Era Publication Corporation Act, New Era's main function is to provide an objective and factual information service by compiling, publishing and distributing the *New Era* newspaper in English as well as in different indigenous languages. Section 3(b) sets out reporting objectives of the newspaper.

These are community-related issues (particularly in rural areas), issues of national interest and government-related matters.

### **3.3.3 Board appointments**

The affairs of New Era are managed by a board of directors of between seven and 12 members, all of whom are appointed by the minister of information and broadcasting.

### **3.3.4 Funding**

While New Era is entitled to be funded from, among other sources, money received from the sales of *New Era* and from the sale of advertising in *New Era*, it is clear from section 11(1)(a) that the New Era Publication Corporation Act envisages that the major source of funding is from the national budget, paid over to it by Parliament. Importantly, the newspaper is exempt from paying income tax and transfer duty, in terms of section 15 of the act.

### **3.3.5 Is the newspaper independent?**

*New Era* was never intended to be an independent newspaper. It was established overtly as a government newspaper, with a mandate which includes reporting on government. Its board is entirely appointed by the minister, and while its main aim is to provide an objective and factual information service, there is no reference in the legislation to operating in the public interest.

### **3.3.6 Weaknesses in the statute that should be amended to strengthen the media generally**

There is undoubtedly a need to communicate with the public, and having an effective communications strategy is a key priority for all governments. But should a government be establishing and funding its own newspaper?

The problem with state-sponsored newspapers is that it is difficult to ensure genuinely objective news reporting on government if the medium is really an extension of government. Furthermore, given that it has special benefits, including government funding and tax exemptions, a government newspaper such as *New Era* does not compete on a level playing field with other print media. An imbalance or unfair advantage for government media is therefore created, to the detriment of other media.

If government wanted to ensure the development of community-focused media it

could encourage this through, for example, funding community media initiatives or establishing a genuine public broadcasting service.

### **3.4 Statutes governing state media: The Namibian Broadcasting Corporation**

#### **3.4.1 Establishment of the NBC**

The Namibian Broadcasting Corporation (NBC) is established as a corporation under section 2 of the Namibian Broadcasting Act, Act 9 of 1991.

#### **3.4.2 The NBC's mandate**

The NBC's mandate is set out in section 3 of the Namibian Broadcasting Act. Its mandate is to:

- Provide a broadcasting service to inform and entertain the public
- Contribute to the education and unity of the nation and to peace in Namibia
- Provide and disseminate information relevant to the socio-economic development of Namibia
- Promote the use and understanding of English

#### **3.4.3 Appointment of the NBC Board**

The NBC is controlled by a board comprising between six and eleven members, who are appointed by the minister responsible for broadcasting services, in terms of section 6(1) of the Namibian Broadcasting Act.

While it is often the case that there is a minister for communications, sometimes the interior, home affairs or information minister is tasked with regulating broadcasting.

The wording of the section makes it clear that whoever is responsible for regulating broadcasting appoints the NBC Board. Clearly, if the minister is responsible for appointing the board, the board cannot be said to be independent of the executive.

#### **3.4.4 Funding for the NBC**

The Namibian Broadcasting Act is vague about how the NBC is funded. There appear to be three different sources of funding:

- In terms of section 16(3), the NBC is entitled to collect and keep television licence fees, which are paid by the public. Note that it is the minister responsible for broadcasting services, not the NBC, who determines what the actual television licence fee is to be.
- Section 20(1)(a) refers to ‘monies appropriated by law for the benefit of the Corporation’. Therefore it seems that Parliament would set aside an amount of money for the NBC in the national budget.
- However, section 20(1)(a) also refers to ‘all other moneys received by the Corporation’, and this is a reference to advertising revenue.

The NBC therefore seems to have a mixed model of funding, including television licence fees, government funding and commercial revenue through advertising.

### **3.4.5 NBC: Public or state broadcaster?**

Unfortunately, it does appear that the NBC does not meet certain basic standards for public broadcasting. It is clear that the NBC is not sufficiently independent from government and in particular is not sufficiently independent from the minister responsible for broadcasting. This can be seen in a number of key areas:

- The minister appoints the entire board. While section 6(2) of the act specifies some objective (and good) criteria for the board as a whole – including knowledge or experience in the administration or management of public affairs and the political, socio-economic and communication field – the minister has sole discretion over board appointments.
- The minister also plays a role in a number of the NBC’s functions, as is clear from the provisions of section 4 of the act, some of which require the minister’s permission to be obtained before the NBC can engage in certain activities, including erecting foreign broadcasting installations and entering into programming supply agreements.
- Nowhere does the act specify that the NBC is editorially independent and free to express its views.
- Nowhere does the act specify to whom the board is accountable. Such accountability statements are common in a public broadcaster, and the governing legislation of many public broadcasters will state that the corporation is accountable to the public and acts in the public interest.

### **3.4.6 Weaknesses in the NBC statute that should be amended to strengthen the media generally**

Two important weaknesses ought to be addressed: the concept of broadcasting ‘in the public interest’ needs to be strengthened in the act; and the direct involvement of the executive in the NBC diminished. In line with international best practice standards:

- The public ought to be involved in making board nominations
- There ought to be a public interview process for short-listed candidates
- Parliament (which is a multi-party body) ought to make recommendations on board appointments to the president and not to a minister
- The NBC’s mandate ought to be expanded to develop measurable goals for broadcasting in the public interest

## **3.5 Statutes governing media more generally: Registration of newspapers**

### **3.5.1 Introduction**

In terms of section 2 of the Newspaper and Imprint Registration Act, Act 63 of 1971, no person is entitled to publish a newspaper intended for public dissemination unless the newspaper has been registered.

### **3.5.2 Requirements associated with registration**

The key provisions of the Newspaper and Imprint Registration Act, Act 63 of 1971, are as follows:

- In terms of section 4 of the Newspaper Act, registration certificates are issued by the minister of the interior: however, the application for registration must be made, in accordance with the prescribed form and upon payment of the prescribed fee, to the secretary for the interior, in terms of section 3. The only basis for refusing to register a newspaper is set out in section 4, and this is if the name of the newspaper too closely resembles the name of another registered newspaper so as to be deceiving.
- Section 5 of the Newspaper Act requires changes to the registration information to be notified to the secretary.
- Section 6 of the Newspaper Act provides that a copy of the first edition of the

newspaper must be forwarded to the secretary. Also, if the minister makes a written request for any issue, this must be sent to the minister.

- The name and address of where the newspaper is published and the name and addresses of the proprietor, printer and publisher must be published in every issue of a registered newspaper, in terms of section 7.
- The editor of a registered newspaper must be a resident, in terms of section 8.

### **3.5.3 Penalties for non-compliance with the registration and associated requirements**

Section 11 of the Newspaper Act makes it an offence not to comply with a provision of this act, and the penalty is a fine or imprisonment for up to six months, or both.

### **3.5.4 Amending the legislation to strengthen the media generally**

As this is such an old statute, many of its provisions are out of date. The registration provisions ought to be updated to refer to existing functionaries. While ordinarily registration requirements are not seen as being in accordance with the right to freedom of expression, these are not terribly problematic because there are very limited grounds for refusal to register a newspaper other than similarity of name/title.

## **3.6 Statutes governing media more generally: Broadcasting**

### **3.6.1 Statutes that regulate broadcasting**

Broadcasting in Namibia is regulated primarily in terms of the Namibian Communications Commission (NCC) Act, Act 4 of 1992. However, frequency-related issues are governed by the Radio Act, Act 3 of 1952.

### **3.6.2 Establishment of the NCC**

The NCC Act provides that the Namibian Communications Commission/Communications Regulatory Authority of Namibia is established in terms of section 2.

### **3.6.3 Main functions of the NCC**

- In terms of section 11 of the NCC Act, the NCC's main functions are to exercise control over broadcasting activities – both radio (also called sound) and television. This means being responsible for content regulation – in other words, regulating what is actually broadcast by licensees, imposing licence conditions, ensuring that

technical requirements are adhered to, among other things. The NCC is responsible for issuing broadcasting licences as well as licences for both postal and telecommunications services. Furthermore, the NCC is responsible for radio frequency spectrum planning and management.

- In terms of section 19 of the NCC Act, the NCC is also responsible for supervising compliance with licence conditions and with the duties of broadcasters laid down in section 18 of the act (dealt with below). Such supervision can include ordering programme changes, imposing a fine, or suspending, or even withdrawing, a broadcasting licence. As part of this function, section 22 grants the NCC certain inspection powers.
- It is important to note, however, that the provisions of the NCC Act do not apply to the NBC or to broadcasting activities carried out by the NBC, in terms of section 29 of the NCC Act. The broadcasting activities of the NBC therefore fall outside of the area of responsibility of the NCC, leaving it essentially unregulated by any outside body.

### **3.6.4 Appointment of NCC commissioners**

There are between six and nine members of the NCC, all of whom are appointed by the minister of information and broadcasting, in terms of section 3(1) of the NCC Act. Clearly, if the minister is responsible for appointing the members of the NCC, the NCC cannot be said to be independent of the executive.

### **3.6.5 Funding for the NCC**

The NCC Act is silent as to the funding of the NCC, but it is important to note that the NCC Act clearly seems to envisage that the members of the NCC are to operate on an intermittent/part-time basis as the NCC Act, at section 8(2), makes provision for a minimum of only four NCC meetings annually.

The minister is responsible for determining the remuneration, travelling expenses and subsistence allowances for NCC members, in terms of section 5(3)(a) of the NCC Act. NCC staff are appointed as part of the public service, in terms of section 8(1) of the NCC Act.

### **3.6.6 Making broadcasting regulations**

Broadcasting regulations (like all regulations made in terms of the NCC Act) are made by the minister acting on the recommendations of the NCC. This means that

while the minister cannot simply make regulations without the involvement of the NCC, the NCC is likewise not free to make its own regulations. Thus, broadcasting is effectively co-regulated by both the NCC and the minister, even in respect of straightforward regulatory matters such as applications for licences, application fees, process regulations for issuing, renewal or transfer of licences, and annual licence fees.

### **3.6.7 Licensing regime for broadcasters in Namibia**

The NCC can issue broadcasting licences, including for radio and television, in terms of section 11(b) of the NCC Act. Radio (sound) broadcasting licences are valid for not more than five years and television licences for not more than eight years, and both of these can be renewed for a five-year period, in terms of section 13 of the NCC Act.

It is important to note that the radio frequency spectrum is licensed by the NCC in terms of the Radio Act, Act 3 of 1958, which licences are required in addition to a broadcasting licence if spectrum is used to provide broadcasting services. Anyone using spectrum without the necessary licence is guilty of an offence, and the penalty is a fine or a period of imprisonment or both, in terms of section 19 of the Radio Act.

### **3.6.8 Responsibilities of broadcasters in Namibia**

#### **ADHERENCE TO LICENCE CONDITIONS**

Licence conditions are set in regulations, which are made by the minister on the recommendation of the NCC. Many of these licence condition regulations will doubtless relate to technical specifications, such as frequencies to be used. However, certain content requirements can be imposed in licence conditions, such as the broadcasting of news or other information required to be broadcast in the public interest (see generally section 12 of the NCC Act).

#### **GENERAL CONTENT REQUIREMENTS**

Besides its licence conditions, a licence holder has to comply with the duties set out in section 18 of the NCC Act. These include:

- Presenting news accurately and impartially
- Presenting current affairs in a fair, clear, factual, accurate and impartial manner
- Providing a range of Namibian content and using Namibian creative resources

- Limiting advertisements to a maximum of 20% of daily broadcasting time
- Complying with generally accepted standards of journalistic ethics
- Keeping copies of material broadcast

## POLITICAL BROADCASTING OBLIGATIONS

Interestingly, section 18 of the NCC Act also contains a number of duties relating to political broadcasting, including not broadcasting any programme aimed at furthering the advancement of any political party except during election time, not broadcasting party political advertising, and providing the NCC with the name of the relevant political party, and the date and time of the broadcast, if the broadcaster broadcasts a political speech of longer than three minutes.

## RIGHT OF REPLY

Section 20 of the NCC Act makes specific provision for a ‘right of reply’ – an obligation upon licensees to broadcast a counter version by any person or organisation affected by the broadcast of a ‘fact’, which turns out to have been false.

## SUBMISSION OF FINANCIAL STATEMENTS

All licensees have to submit audited financial statements to the NCC annually, in terms of section 21 of the NCC Act.

## OBLIGATION TO BROADCAST MATERIAL IN THE INTEREST OF NATIONAL SECURITY

There is an obligation upon licensees to comply with a ministerial order to broadcast material in the interest of national security or in the public interest, in terms of section 26 of the NCC Act.

### **3.6.9 Is the NCC an independent regulator?**

The NCC does not meet certain basic standards for an independent broadcasting regulator. The NCC is not sufficiently independent from government.

This can be seen in a number of key areas:

- The minister appoints the entire board. Worse, there are no criteria to act as a guide in making such appointments.

- The minister also plays a role in a number of the NCC’s functions; for example, the minister makes broadcasting regulations, albeit on the recommendation of the NCC.
- Nowhere does the NCC Act specify to whom the NCC is accountable. With respect to an independent broadcasting regulator, such accountability statements are common and the governing legislation of many regulators will state that the regulator is accountable to the public and acts in the public interest.
- Nowhere does the NCC Act specify that the NCC is independent from commercial and/or political interests.

### 3.6.10 Amending the legislation to strengthen the media generally

There are a number of weaknesses in the NCC Act which ought to be strengthened in the interests of a free and independent media, and of the public more generally.

- The concept of regulating ‘in the public interest’ needs to be strengthened in the act, and the direct involvement of the executive branch of government – namely, the minister – in the affairs of the NCC needs to be diminished. This is in line with international best practice standards for appointment procedures.
- The NCC ought to be free to regulate broadcasting on its own and to make broadcasting regulations, for example, without any role being played by the minister.
  - There ought to be objective appointment criteria for NCC members, emphasising the required skills and experience.
  - The public ought to be involved in making NCC member nominations.
  - There ought to be a public interview process for short-listed candidates.
  - Parliament (as a multi-party body) ought to make binding recommendations on NCC appointments to the minister.
- The NCC and not the minister ought to be empowered to instruct broadcasters to broadcast programming in the public interest (which could include during times of national emergency or where there is a threat to national security).
- The act should distinguish specifically between public, commercial and community broadcasting services.
- The activities of the NBC should fall under the jurisdiction of the NCC, to ensure that the NBC is regulated in the public interest.

### **3.7 Statutes that undermine a journalist's duty to protect his or her sources**

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

#### **3.7.1 Criminal Procedure Act, Act 51 of 1977**

The Criminal Procedure Act (CPA), Act 51 of 1977, which was an old South African statute, is still applicable in Namibia, although it has been revised and amended many times by the Namibian Parliament.

Section 205 of the CPA essentially empowers a presiding officer to call any person who is likely to give material or relevant information as to any alleged offence to come before him or her and to be examined by the public prosecutor, at the request of a public prosecutor. Thus, if a public prosecutor suspects that a journalist knows something about a crime, such journalist might be ordered, in terms of section 205 of the CPA, to reveal his/her sources of information relating to that crime.

#### **3.7.2 Security Commission Act, Act 18 of 2001**

The Security Commission Act, Act 18 of 2001, is an act to regulate the affairs of the National Security Commission, established in terms of article 114 of the Namibian Constitution. According to the Constitution, the role of the National Security Commission is, primarily, to advise the president on the appointment of the chief of the defence force, the inspector-general of police and the commissioner of prisons. However, the Security Commission Act, at section 5, sets out a number of other functions, including advising the president on states of emergency and defence and internal security issues, and advising the minister on whether or not a person constitutes a threat to Namibia and ought to be labelled a prohibited immigrant.

Section 5(6) of the Security Commission Act empowers the commission to conduct an enquiry into any matter relating to its functions, and at such enquiry the Commission is empowered, in terms of section 5(6)(a), to require any person who, in

its opinion, is able to provide information relevant to the enquiry to appear before the Commission and to give evidence.

Thus, if the Commission suspects that a journalist knows something of relevance to an enquiry being held by it, such journalist might be ordered in terms of section 5(6)(a) of the Security Commission Act to reveal his/her sources of information.

It is important to note, however, that whether requiring a journalist to reveal a source is in fact an unconstitutional violation of the right to freedom of expression will depend on the particular circumstances in each case. It is therefore extremely difficult to state that these provisions are, by themselves, a violation of the right to freedom of expression under the Constitution.

### **3.8 Statutes that prohibit the publication of certain kinds of information**

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

- Identities of litigants in court proceedings
- Advertising restrictions
- Bank information
- Obscenity laws
- National security laws

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

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

##### **GENERAL LAW AMENDMENT ORDINANCE, 22 OF 1958**

The General Law Amendment Ordinance is an old South West African ordinance enacted by the Legislative Assembly for the Territory of South West Africa (as it was then), which is still in force in Namibia.

Section 1(1) of the ordinance prohibits the publication of the name, address, school, place of employment or any other information likely to reveal the identity of any person who is under 18 years and who is a party to any civil proceedings or is a

witness in any legal proceedings, unless the judge or magistrate in question has agreed in writing after consultation with the person's parent or guardian. A violation of section 1(1) is an offence, and the penalty is a fine, imprisonment or both.

### CRIMINAL PROCEDURE ACT, ACT 51 OF 1977

The Criminal Procedure Act (CPA) is a piece of South African legislation that is still in force in Namibia, although it has been amended by the Namibian Parliament several times.

Section 154(3) of the CPA prohibits the publication of the identity of an accused person or of a witness in criminal proceedings if that accused person or witness is under 18 years, unless the court rules that such publication would be just and equitable. In terms of section 154(5), such publication is an offence with a penalty of a fine, imprisonment or both.

#### **3.8.2 Prohibition on the publication of certain information relating to criminal proceedings**

The Criminal Procedure Act, Act 51 of 1977, at section 154, read with section 153, sets out circumstances in which a court may direct that no information relating to certain criminal proceedings may be published. These circumstances include:

- In the interests of the security of the state or of good order, public morals or the administration of justice
- In extortion proceedings
- Where the identity of the complainant in a sexual offences case might be revealed, unless the judge authorises such publication as being just and equitable, or where the complainant is 18 or older and consents to the publication
- The publication of the identity of a complainant in relation to a charge involving extortion or sexual offences from the commission of the offence until such time as the accused has pleaded to the charge

In terms of section 154(5) of the CPA, any such publication is an offence with a penalty of a fine, imprisonment or both.

Importantly, section 154(6) of the CPA specifically states that to the extent that such prohibitions upon publication authorise interference with a person's freedom to publish, this is done in terms of article 21(2) of the Namibian Constitution. This

clause was dealt with in greater detail at the beginning of the chapter – it is the so-called internal limitation to, among others, the right to freedom of expression.

### **3.8.3 Prohibition on the publication of identities involved in protection order proceedings**

Section 30 of the Combating Domestic Violence Act, Act 4 of 2003, makes it an offence to publish any information concerning protection order proceedings that might reveal the identity of an applicant, complainant, or any child, or any other person involved in such protection order proceedings unless the court has authorised publication in the public interest. The penalty is a fine, imprisonment or both.

### **3.8.4 Prohibition on the publication of information relating to defence, security and prisons**

#### **DEFENCE ACT, ACT 1 OF 2002**

Section 54(1) of the Defence Act prohibits any person from publishing (including in a newspaper or on radio or television) any information likely to endanger national security or the safety of any member of the defence force, except where the minister responsible for national defence has authorised the publication thereof or furnished the information.

Furthermore, section 54(2) of the Defence Act makes the owner, printer, publisher or editor of the publication in which the prohibited information was published guilty of an offence too.

Section 55 of the Defence Act also makes it an offence to take photographs or make a sketch of any military camp, installation or other premises which are under military control, or to have any means for taking photographs while on military property.

Section 63 sets out the penalties in respect of all of the offences set out above. The penalties are a fine, imprisonment or both.

#### **PROTECTION OF INFORMATION ACT, ACT 84 OF 1982**

The Protection of Information Act is a piece of old South African legislation that has been amended by the Namibian Parliament. Section 4 of the act sets out a number of provisions relating to the disclosure of security-related information and essentially makes it an offence to publish a range of security-related information, such as official codes or passwords, or confidential information that has been entrusted to a person by the government. The penalty for such disclosure is a fine, imprisonment or both.

## PRISONS ACT, ACT 17 OF 1998

The Prisons Act is a Namibian statute regulating prison matters. Section 71 of the Prisons Act makes it an offence for anyone to, without the written permission of the Commission of Prisons:

- Take a photograph or make a film, video, sketch or drawing of a prison
- Publish a photograph, film, video, sketch or drawing of a prison
- Take a photograph or make a film, video, sketch or drawing of a prisoner or group of prisoners, whether inside or outside of a prison
- Publish a photograph, film, video, sketch or drawing of a prisoner or group of prisoners, whether inside or outside of a prison

It is also an offence to publish false information concerning a prisoner's behaviour or experience in prison, or prison administration, if reasonable steps were not taken to verify such information.

The penalty for conviction for any of the above offences is a fine, imprisonment or both.

### 3.8.5 Prohibition on the publication of obscene photographic matter

The Indecent or Obscene Photographic Matter Act, Act 37 of 1967, is an old South African statute that makes it an offence to possess indecent or obscene photographic matter. The penalty is a fine, imprisonment or both.

It is important to note that this act might not survive a constitutional challenge as many of its definitions are outdated and too broad. The act has been repealed in South Africa.

### 3.8.6 Prohibition on the publication of advertising on roadsides

The Advertising on Roads and Ribbon Development Ordinance, 30 of 1960, is an ordinance that was passed by the Legislative Assembly for the Territory of South West Africa and which remains in force. Its provisions are probably of more interest to media owners than to media practitioners, but it is important to note that this act allows for local government to regulate certain forms of advertising on roadsides, such as billboards.

### 3.8.7 Prohibition on the disclosure of Bank of Namibia information

The Financial Intelligence Act, Act 3 of 2007, is designed to prevent money laundering activities. Section 35 deals with the protection of confidential information and prohibits any person from disclosing ‘confidential information’ obtained from the Bank of Namibia, with very few exceptions.

Note that the term ‘confidential information’ is undefined, making it difficult to know what falls within the ambit of that term. The penalty for such disclosure is a fine, imprisonment or both.

### 3.8.8 Prohibition on the publication of racist publications

The Racial Discrimination Prohibition Act, Act 2 of 1991, as amended, is a post-independence piece of legislation clearly aimed at overcoming the legacy of apartheid in Namibia through outlawing a raft of racist practices. Certain of its provisions directly affect the media:

- In terms of section 10 of the act, no one can publish an advertisement that indicates an intention to discriminate in relation to: public amenities; provisioning of goods and services; selling or letting immovable property (houses, flats, etc.); educational institutions; medical institutions; employment; and the formation of associations and religious services.
- In terms of section 11 of the act, no one can publish an article which intends to:
  - Threaten or insult any person or group on racial grounds
  - Incite hatred between different racial groups
  - Disseminate ideas based on racial superiority

It is important to note that the original wording of section 11 was much broader, but this was held to be an unconstitutional violation of the freedom of expression provisions in the Namibian Constitution in *S v Smith NO and Others* 1996 NR 367 (HC). The section was consequently amended to its current wording. The penalty for violating sections 10 or 11 is a fine, imprisonment or both.

- Section 15, in the parts relevant to the media, provides that where the person convicted of an offence under the act also holds a licence, such as a broadcasting licence, the court may enforce additional penalties, including a declaration that imposes conditions upon, suspends or even cancels such a licence.
- In terms of section 16, in making a determination in respect of an offence, a court may make a compensatory damages award in favour of the person who originally

complained about the conduct. Thus, a media outlet might find itself liable for these damages.

## **4 REGULATIONS AFFECTING THE MEDIA**

In this section you will learn:

- What regulations or rules are
- The different types of broadcasting licences available and whether media diversity is provided for
- The restrictions on broadcasters in respect of news, political broadcasts, advertising and sponsored programmes

### **4.1 Definition of rules**

Regulations are subordinate legislation. They are legal rules that are made in terms of a statute, in this case, the Namibian Communications Commission (NCC) Act (discussed earlier in this chapter). Rules are a way for ministers or organisations, such as the NCC, to make regulations governing an industry or sector, without having to proceed to Parliament.

The empowering statute will entitle the minister or a body such as the NCC to make regulations on particular matters within the scope of the functions and powers of that minister or organisation.

### **4.2 The different types of broadcasting licences and media diversity**

The minister of information and broadcasting, acting on the recommendation of the NCC, has passed broadcasting regulations (Government Gazette 802 dated 25 February 1994), which have been subsequently amended.

The Broadcasting Regulations distinguish between:

- Urban community-based radio stations
- Rural community-based radio stations
- Community-based television stations
- Commercial radio stations
- Commercial television stations

This is important because it is clear that the legal environment does indeed allow for a variety of types of broadcasters, which is necessary to provide media diversity for the public.

## 4.3 Restrictions on broadcasters

The Broadcasting Regulations contain a number of content requirements or restrictions that apply to commercial and community broadcasting licensees. Some of these are outlined below.

### 4.3.1 News commentary

Section 6 of the Regulations provides that commentary on news events must be broadcast separately from the news and must be identified as commentary.

### 4.3.2 Party election broadcasting

Section 7 contains requirements on party election broadcasting during election periods, and essentially allows broadcasters to choose whether or not to grant broadcasting time for electioneering. If broadcasters choose to grant broadcasting time for electioneering then there are specific rules for how this is to be done. Broadcasters must:

- Grant each political party equal broadcasting time in respect of 40% of the total broadcasting time available for party election broadcasts
- Grant each political party broadcasting time equal to the percentage of votes that party obtained in the last election in respect of 60% of the total broadcasting time available for party election broadcasts
- In respect of presidential elections, grant presidential candidates equal time

This complicated process is best illustrated by examples:

- *In respect of 40% of the total broadcasting time available for general electioneering:*
  - Each party must get equal broadcasting time.
  - Example: If 100 minutes of broadcasting time are available for electioneering on a broadcasting service, then 40 minutes (40%) must be divided equally between the competing parties. If there are four parties competing in an election, then the time must be divided as follows:

Name of party	Minutes to be allocated to each party out of a total of 40 minutes
Party A – ruling party	10 minutes
Party B	10 minutes
Party C	10 minutes
Party D – new party	10 minutes

■ *In respect of 60% of the total broadcasting time available for general electioneering:*

- Each political party must be given the percentage of broadcast time equal to the percentage of votes that party obtained in the previous election.
- Example: If 100 minutes of broadcasting time are available for electioneering on a broadcasting service and there are four parties competing in the election, then 60 minutes must be divided as follows:

Name of party	Percentage of votes obtained in previous election	Minutes to be allocated to each party out of a total of 60 minutes
Party A – ruling party	80%	48 minutes
Party B	10%	6 minutes
Party C	10%	6 minutes
Party D – new party	0%	0 minutes

■ *In respect of presidential elections:*

- 100% of the total broadcasting time must be divided equally between the presidential candidates as follows:

Presidential candidate	Minutes to be allocated to the candidate out of a total of 100 minutes
Mr A – sitting president	25 minutes
Mr B – candidate	25 minutes
Mr C – candidate	25 minutes
Mr D – candidate	25 minutes

### 4.3.3 Advertising

Section 8 of the Broadcasting Regulations requires advertising material to be clearly identified as such. There is a prohibition on advertisements for alcohol or tobacco products in programming intended for persons under the age of 18.

### 4.3.4 Sponsored programming

Section 9 of the Broadcasting Regulations requires that sponsored programming must be clearly identified with the name and logo of the sponsor appearing at the beginning and end of sponsored programming. The broadcaster must be responsible to the NCC for content and scheduling of sponsored programming.

## 5 COMMON LAW AND THE MEDIA

In this section you will learn about:

- Common law
- Defamation, the defences to an action for defamation, and remedies for defamation
- Contempt of court

### 5.1 Definition of common law

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

In this section we focus on two areas of common law of particular relevance to the media, namely, defamation and contempt of court.

### 5.2 Defamation

#### 5.2.1 Definition of defamation

Defamation is part of the common law of Namibia and reliance is placed on a number of leading South African cases. Defamation is the unlawful publication of a statement about a person which lowers his or her standing in the mind of an ordinary,

reasonable and sensible person. It is important to note that the media can be liable for defamation even if it is merely reporting on a defamatory statement made by someone (see *Smit v Windhoek Observer (Pty) Ltd and Another* 1991 NR 327 (HC)).

The Namibian courts have held that the common law of defamation is not per se inconsistent with the Constitution. This is because of the importance of upholding the right to dignity, which includes the right of a person not to be unlawfully defamed (see *Afshani and Another v Vaatz* 2006 (1) NR 35 (HC)).

Once it is proved that a defamatory statement has been published, two legal presumptions arise:

- That the publication was unlawful: this is an objective test which determines the lawfulness of a harmful act based on considerations of fairness, morality, policy and by the court's perception of the legal convictions of the community.
- That the person publishing same had the intention to defame.

The person looking to defend against a claim of defamation must then raise a defence against the claim.

### 5.2.2 Defences to an action for defamation

There are several defences to a claim based on defamation. We shall focus on two of the most common of these: truth in the public interest; and that the defamation occurred at a privileged occasion. See, for example, *Marais v Hauliyondjaba* 1993 NR 171 (HC) and *Afshani and Another v Vaatz* 2006 (1) NR 35 (HC).

- *Truth in the public interest*: This is where an action for damages is defended by asserting that the defamatory statement was true and, further, that it is in the public interest to publicise the information. It is important to note that 'public interest' does not mean what is interesting to the public, but rather what contributes to the greater public good. It is therefore often the case that it will be in the public interest to publish true, albeit defamatory, material about public representatives. This is because of the importance of the public having accurate information to be able to engage in democratic practices such as voting.
- *Privileged occasions*: These are when the law recognises that certain situations require statements to be made freely, even if the statements are defamatory. For example:
  - In the discharge of a legal, social or moral duty to a person having a

reciprocal duty or interest to receive the statement. For example, when a teacher reports suspected child abuse to a social worker

- In the protection or furtherance of an interest to a person who has a common or corresponding duty or interest to receive such information, and the statement was relevant to the matter under discussion on that occasion. For example, a manager giving an assessment of the work performance of an employee to a management committee

### 5.2.3 Remedies for defamation

There are two main remedies in respect of defamation in the absence of a defence: an action for damages; or a prior restraint.

- *Action for damages:* This is where a person who has been defamed sues for monetary compensation. This takes place after the publication has occurred and damages (money) are paid to compensate for the reputational damage caused by the defamation in circumstances where there are no defences to defamation. The quantum of damages (in other words, the amount to be paid in compensation) will depend on a number of factors, including whether or not an apology or retraction was published, and also the standing or position of the person being defamed in society (see, *Smit v Windhoek Observer (Pty) Ltd and Another* 1991 NR 327 (HC)).

It is important to note that the Namibian courts have ordered that exemplary damages (this is where a high amount is ordered to be paid to make an example of the defamer) be awarded in circumstances where defamatory material was published and continued to be published about a person after the institution of legal proceedings and without an apology, and also without defending the defamation action (see, *Afrika v Metzler and Another* 1994 NR 323 (HC)).

- *Prior restraint:* This is where the alleged defamatory material is prevented from being published in the first place. Where a person is aware that defamatory material is going to be published, he or she may be able to go to court to, for example, obtain an interdict prohibiting the publication, thereby preventing the defamation from occurring. Prior restraints are dangerous because they deny the public (such as readers of a publication or audiences of a broadcaster) the right to receive the information that would have been publicised had it not been for the interdict. Prior restraints are a last resort mechanism, and the legal systems of countries which protect the right to freedom of expression usually prefer to allow publication and to deal with the matter through damages claims – in other words, using ‘after publication’ remedies. The Namibian High Court has refused to grant

an interdict preventing the broadcast of material in circumstances where the producer has taken reasonable steps to ascertain the truth of the allegations to be broadcast (see, *Muheto and Others v Namibian Broadcasting Corporation* 2000 NR 178 (HC)).

### 5.3 Contempt of court

In general terms, the common law crime of contempt of court is made up of two distinct types of contempt, namely: the *sub-judice* rule; and the rule against scandalising the court.

#### 5.3.1 The sub-judice rule

The *sub-judice* rule guards against people trying to influence the outcome of court proceedings while legal proceedings are under way. It is therefore illegal to report on judicial proceedings in such a way as to pre-empt the outcome of the proceedings.

#### 5.3.2 Scandalising the court

The rule against scandalising the court is there to protect the institution of the judiciary. It acts to prevent the public undermining of the dignity of the courts. This issue has been addressed by the Namibian courts and by the judiciary in *S v Heita and Another* 1992 NR 403 (HC). The court discussed contempt of court as follows: ‘Contempt of Court is a common law crime. This crime is necessary to protect the independence of the court and the independence, dignity and effectiveness of the courts and their judicial officers.’

The court also quoted extensively from a public statement by the minister of justice on contempt of court in which the minister contrasted criticism with contempt, quoting former Judge President Strydom: ‘An honest and temperate expression of a dissenting opinion regarding, for example, the perennial topic of inequality of sentences will not constitute contempt of Court ... However it is one thing to exercise one’s right to make fair comment, it is quite another to scandalise or intimidate a Judge by calling him or her names ... We ... say yes to fair comment but definitely no to undue political and other pressures on members of the judiciary.’

