

**ENHANCING THE MEDIA'S DEMOCRATIC ROLE: A COMPARATIVE
STUDY OF THE LEGAL ENVIRONMENT OF THE MEDIA IN BOTSWANA
AND SOUTH AFRICA**

By

Badala Tachilisa Balule

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DECLARATION

I hereby declare that this thesis has been composed by me and, apart from due acknowledgments, it is entirely my own work. The material in this thesis has not been submitted for any other degree or professional qualification at this or any other university.

ABSTRACT

Freedom of expression is regarded as indispensable in modern representative democratic societies. The will of the people is said to be the basis of the authority of government in such societies. Freedom of expression thus ensures that citizens are able to make responsible political decisions and participate effectively in public life. In order to do this, a free flow of information and ideas is essential to enable citizens to make informed decisions. The mass media play a crucial role as purveyors of information and ideas, and a platform for the exchange of ideas. Democratic societies therefore have a duty to guarantee and ensure the enjoyment of freedom of expression and media freedom. In addition, they have an obligation to ensure that the mass media disseminate a wide range of information and ideas to a diverse audience.

This thesis is a comparative study of the measures taken by the states of Botswana and South Africa to guarantee and ensure the enjoyment of media freedom. It further examines the steps taken by the two states to promote the dissemination of a wide range of views and information in the media. The measures taken by the two states are compared to international law requirements, which arguably, establish minimum standards below which no member of the international community should fall.

DEDICATION

For My Mother And In Memory of My Father

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LIST OF ABBREVIATIONS

AC	Appeal Cases (law reports, UK)
AD	Appellate Division (law reports, S. Africa)
AIA	Promotion of Access to Information Act 2000 (S. Africa)
ACHR	American Convention on Human Rights
ACHPR	African Convention on Human and Peoples' Rights
ALL ER	All England Law Reports
ALR	Australian Law Reports
Article 19	The Global Campaign for Free Expression
BCLR	Butterworths Constitutional Law Reports (S. Africa)
BLR	Botswana Law Reports
BTA	Botswana Telecommunications Authority
BTC	Botswana Telecommunications Corporation
Btv	Botswana Television
CMLR	Common Market Law Reports
CPD	Cape Provincial Division (law reports, S. Africa)
DIB	Department of Information and Broadcasting (Botswana)
DLR	Dominion Law Reports (Canada).
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EHRR	European Human Rights Reports
FC	Federal Court Reports (Canada)
FoI	Freedom of Information
GCIS	Government Communications Information System (S. Africa)
HRC	Human Rights Committee (United Nations)
IACmHR	Inter-American Commission on Human Rights
IBA	Independent Broadcasting Authority (S. Africa)
ICASA	Independent Communications Authority of South Africa
ICCPR	International Covenant on Civil and Political Rights
LRC (Const.)	Law Reports of the Commonwealth (Constitutional Law)
MDDA	Media Development and Diversity Agency (S. Africa)
MISA	Media Institute of Southern Africa
NBB	National Broadcasting Board (Botswana)

NSA	National Security Act 1986 (Botswana)
OP	Office of the President (Botswana)
OSA	Official Secrets Act (UK)
PSB	Public Service Broadcasting
RB	Radio Botswana
QB	Queens Bench Division (law reports, UK)
SA	South African Law Reports
SABC	South African Broadcasting Corporation
SADC	Southern African Development Community
TPD	Transvaal Provincial Division (law reports, S. Africa)
UDHR	Universal Declaration of Human Rights
US	United States Reports

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CHAPTER 1

INTRODUCTION

*“In a democratic society...the mass media play a role of undeniable importance. They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture. As primary agents of the dissemination of information and ideas, they are, inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility”.*¹

1.1 Topic and Motivation for the Study

The importance of media freedom in sustaining a democratic society has become something of an unchallengeable dogma. In 1991 UNESCO convened journalists from across Africa in Windhoek, Namibia, at a seminar whose theme was the establishment of a free, independent and pluralistic press in Africa. At the end of the seminar on 3rd May 1991, the participants adopted a document, the Windhoek Declaration on Promoting an Independent African Press.² The Windhoek Declaration affirms that the establishment, maintenance and fostering of an independent, pluralistic and free press is essential to the development and maintenance of democracy in a nation. The Declaration encourages African states to take positive measures to guarantee the enjoyment of media freedom. It further provides guidance for the development of independent and pluralistic media in Africa.

The UNESCO General Conference endorsed the Windhoek Declaration at its twenty-sixth session in 1991.³ The Declaration has also been adopted by the Information

¹ Per O'Reagan J in *Khumalo and others v Holomisa* 2002 5 SA 401 at 417 para. 24.

² See: [http://www.unesco.org/webworld/com_media/development_rel_policies.html].

³ Resolution 4.3, adopted on the report of Commission IV on 6th November 1991.

Ministers of the Southern African Development Community (SADC).⁴ SADC has further adopted a Protocol on Culture, Information and Sport, which among other things, gives recognition to the Windhoek Declaration, and calls upon states to ensure the development of media that are editorially independent and conscious of their obligations to the public and greater society.⁵ It has however been observed that despite the adoption and ratification of the above instruments, coupled in most cases with constitutional guarantees of media freedom, many governments in SADC pay only lip-service to their obligations to media freedom.⁶

Instances of violations of media freedom in the SADC region have been monitored and recorded since 1994 by the Media Institute of Southern Africa (MISA). MISA is a non-governmental organisation founded in 1992 by media advocates and defenders, with the objective of promoting free independent and pluralist media in the region, as envisaged in the Windhoek Declaration.⁷ The organisation publishes annual reports on the state of the media in the region. A perusal of these reports reveals that in all SADC member states covered by MISA, there have been, and continues to be, violations of media freedom. While the nature and extent of the violations differ from one country to another, the general pattern is one of non-fulfilment by states of their obligations to ensure the enjoyment of media freedom, which challenges the essence of the freedom.⁸

The current study seeks to critically examine the extent to which the state of Botswana respects, and has taken measures to ensure the enjoyment of media freedom. It may be recalled that as a member of SADC, Botswana has proclaimed its

⁴ See G. Lister, *So this is Democracy? Report on Media Freedom in Southern Africa 1994* (MISA, 1995) p. 2. (SADC is a regional organisation that comprises fourteen states in southern Africa. Its objectives are *inter alia* achieving development and economic growth; evolve common political values, systems and institutions; and promote and defend peace and security in the region. Members include: Angola; Botswana; Democratic Republic of Congo; Lesotho; Malawi; Mauritius; Mozambique; Namibia; Seychelles; South Africa; Swaziland; Tanzania; Zambia and Zimbabwe. See: [<http://www.sadc.int>]).

⁵ Article 20. The Protocol is available at:

[http://www.sadc.int/index.php?lang=english&path=legal/protocols/&page=p_culture_information_and_sport].

⁶ Lister, n 4 above p. 2.

⁷ See MISA website at: [<http://www.misa.org>].

⁸ Cf. P.N. Takirambudde, 'Media Freedom and the Transition to Democracy in Africa' (1995) 7 *African Journal of International and Comparative Law* 18 at 25.

commitment to media freedom through the adoption and ratification of the Windhoek Declaration and the SADC Protocol on Culture, Information and Sport, respectively.

In view of the fact that media freedom is valued for its importance in a democratic society, it is appropriate to begin by considering the concept of democracy. There is consensus among the institutions that enforce major international and regional human rights treaties that freedom of expression is one of the fundamental cornerstones of every democratic society.⁹ The question that immediately arises is: what is meant by a democratic society? There may be no one authoritative definition of democracy, but international law has made significant steps towards establishing minimum requirements for the concept to be realised. All major human rights treaties spell out in some detail the minimum content of democracy, which is understood to be the right of all citizens to participate in the political life of their societies.¹⁰ Article 25 of the UN's International Covenant on Civil and Political Rights (ICCPR) provides that every citizen has a right to take part in the conduct of public affairs directly or through freely chosen representatives. The Article grants citizens *inter alia* the right to vote and to be elected at genuine periodic elections conducted on the principle of universal and equal suffrage, and by secret ballot in circumstances that guarantee the free expression of the will of the electors. The major regional human rights treaties have similar provisions, which basically provide that the will of the people should be the basis of the authority of government.¹¹ For the purposes of this thesis, I adopt this definition of a democratic society.

Every person has basic rights in a democratic society envisaged under international law. These rights, which are commonly referred to as civil and political rights, are generally derived from the UN's Universal Declaration of Human Rights of 1948.¹² Nowak characterises civil and political rights as falling into three categories:

⁹ For example, see UN Human Rights Committee General Comment 25(25) of 12th July 1996; Article I of the Declaration of Principles on Freedom of Expression in Africa and *Lingens v Austria* (1986) 8 EHRR 407 at 418 para. 41.

¹⁰ J. Crawford, 'Democracy and International Law' (1993) 64 *The British Year Book of International Law* 113.

¹¹ See Articles: 13 - African Charter on Human and Peoples' Rights; 23 - American Convention on Human Rights; and, 3 - Protocol 1, European Convention on Human Rights.

¹² A. Eide, *et al* (eds.) *The Universal Declaration of Human Rights: A Commentary* (Scandinavian University Press, 1992) p. 6.

- i) Political rights, which include the right to vote, to equal access to public service and to take part in the government of one's country;
- ii) Civil rights, which range from the protection of the individual's physical, spiritual, legal and economic existence (such as rights to life, privacy, dignity, property, freedom of thought, opinion, religion, etc) to procedural safeguards relating to fair trial and the rule of law; and
- iii) Political freedoms, which include the freedoms of expression, media, information, assembly, and association.¹³

He further argues that civil and political rights are the legal expression of two different concepts of freedom: the ancient democratic concept of achieving collective freedom through active participation in the political decision-making process; and the modern liberal concept of achieving individual freedom by creating a private sphere for every human being which is protected against any undue interference by the state and other powerful actors. Political freedoms serve to advance both democratic and liberal freedom, and thereby constitute the link between civil and political rights.¹⁴

Political freedoms are therefore not only valued as an end in themselves in that they advance private interests by warding off state interference, but they also perform a wider social function by rendering meaningful public participation in the democratic process. In modern states, democracy usually operates through representative participation. Thus the political right to vote is very important as it enables the public at large to participate in the democratic process by indicating their will through the ballot box. In order for citizens to exercise their will effectively, free communication of information and ideas about public and political issues is essential, hence the importance that international law attaches to freedom of expression. As the South African Constitutional Court observed in the *Khumalo* case, quoted above, the mass media play a critical role in disseminating a range of information and ideas that influence how citizens exercise their political choices. The media therefore perform an important informative function in a democratic society. In addition, the media are expected to act as a watchdog in relation to the elected representatives, ensuring that

¹³ M. Nowak, 'Civil and Political Rights' in J. Symonides (ed) *Human Rights: Concept and Standards* (Dartmouth Publishing Co Ltd, 2000) pp. 69 – 70.

¹⁴ *Ibid.*

there is independent criticism and evaluation of the established power or other institutions that may usurp democratic power. These two functions performed by the media are referred to as the media's democratic role or democratic mandate in this thesis. The success of the media in fulfilling their democratic mandate depends to a large extent on their ability to access information, especially information held by the state. If the media are unable to access relevant information, they will be impotent.¹⁵

The political freedoms of expression, media and information are important for ensuring that governments are based on the will of the people, and are therefore guaranteed by the major international human rights treaties. The latter two freedoms are considered components of freedom of expression. States have a duty to respect all rights guaranteed by international human rights treaties. This obligation of respect entails the traditional duty of states to refrain from restricting the exercise of rights.¹⁶ This, however, does not mean that civil and political rights are absolute. International law allows the exercise of rights to be restricted in the interests of other important social interests such as national security and in order to protect the human rights of others. Clauses that limit the rights guaranteed by international human rights treaties nevertheless require that restrictions on those rights must be reasonably justifiable in a democratic society.

States also have duty to ensure the enjoyment of civil and political rights by their citizens. The HRC has held that this obligation in principle imposes a duty on states to take positive measures to guarantee these rights in their domestic laws.¹⁷ In addition to the guarantee of these rights, the obligation to ensure their enjoyment requires that states: (i) enact domestic laws and adopt the necessary administrative and judicial measures to give effect to each right; (ii) provide for effective judicial and other remedies against violations of rights; and (iii) safeguard certain rights institutionally by way of procedural guarantees or the establishment of relevant legal institutions.¹⁸

¹⁵ Cf. *Gauthier v Canada* (633/95) para. 13.4, decision of the HRC, reproduced in: S. Joseph *et al* (eds.) *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford University Press, 2000) p. 398.

¹⁶ Nowak, n 13 above at 73.

¹⁷ HRC General Comment 10(19) of 27th July 1983.

¹⁸ See Nowak, n 13 above at 73.

The legal system of Botswana recognises the right to a democratic representative government. Section 61 of the constitution deals with qualification requirements for election to the National Assembly, while section 67 deals with matters relating to the franchise. These provisions spell out the minimum content of democracy as the right of all citizens to be governed according to their will and to participate in the political life of their societies.¹⁹ Civil and political rights, including the political freedoms of expression and information are enshrined in a Bill of Rights in the constitution established at independence, which has enjoyed an uninterrupted existence as the supreme law of the land since 1966. Media freedom is implicitly guaranteed as a component of freedom of expression.²⁰ Further, the state of Botswana has ratified the ICCPR and the African Charter on Human and People's Rights. Treaties that have been ratified by the state do not, however, take effect automatically in municipal law unless incorporated by an act of the legislature, and neither of the two treaties has yet been incorporated into domestic law.

Since independence, Botswana has had an impressive record regarding observance of the rule of law, and its citizens have generally enjoyed most of the rights guaranteed under the constitution.²¹ Botswana has perhaps, not been so successful in ensuring that its citizens enjoy media freedom. Notwithstanding the protection that the freedom is accorded in the constitution, the media in the country face legal, institutional, economic and infrastructure barriers in performing their democratic mandate.²² These problems arise from both the failure by the state to observe its obligations to refrain from restricting the exercise of rights, and to take positive measures to ensure the enjoyment of rights. Direct restrictions by the state on the exercise of rights are rare, but the state does occasionally employ laws such as the *National Security Act 1986*, and its power over the placement of public advertising in the private media can be used to interfere with media content.

¹⁹ See generally, O. Tshosa, *National Law and International Human Rights Law: Cases of Botswana, Namibia and Zimbabwe* (Ashgate Dartmouth, 2001) p. 185.

²⁰ B. Otlhogile, 'The Constitutional Rights of the Mass Media in Botswana: An Academic's View' in M. Leepile (ed) *Botswana's Media and Democracy: Selected Papers from the Seminar on the Media in a Democracy* (Mmegi Publishing House, 1996) 53 at 55.

²¹ See United States Embassy Stockholm, Country Reports on Human Rights Practices for 2001, Botswana, available at: [<http://www.usemb.se/human/2001/africa/botswana.html>].

²² See T. Balule, 'Botswana' in R. Galant, J. Minnie and Z. Wales (eds.) *So this is Democracy? Report on State of the Media in Southern Africa 1999* (MISA, 2000) 45.

Botswana has generally failed to take positive measures to ensure the realisation of media freedom. There is no law giving effect to the right of access to information held by the state, a lacuna compounded by the government's failure to promote a culture of openness and transparency. This impacts negatively on the media's ability to perform their democratic role, as they find it difficult to access information. The government has also been reluctant to reform existing archaic laws that severely repress media freedom. The most notorious of these laws are, firstly, the *National Security Act 1986*, which is used by the government to deny the media access to a wide range of information under the pretext of the protection of national security, and, secondly, the civil law of defamation, which holds media defendants strictly liable for publication of defamatory statements. Furthermore, the government has failed, after over three decades of democratic rule, to guarantee the independence of the public service media.²³

In 1997 the government of Botswana approved a document, *Vision 2016*, which takes stock of the country's achievements after thirty years of independence, and in addition formulates aspirations for the future.²⁴ The document is regarded as a national manifesto for the people of Botswana and is intended to guide policymaking. One of the aspirations espoused in *Vision 2016* is the enhancement of democracy by encouraging open and transparent governance.²⁵ In order to achieve this, the document argues that the government will have to ensure that citizens understand the reasons for its decisions and policies. It also emphasises the need for free and informed political debate that subjects every decision and policy to careful consideration. The realisation of these aspirations will depend to a significant extent on the media performing their democratic mandate effectively. *Vision 2016* recognises that an independent, diverse and pluralist media, adhering to high ethical standards is crucial for the attainment of its goals.²⁶

The role that the media is expected to play in the attainment of the goals set out in *Vision 2016* has inevitably led to debate focusing on the question: how friendly is the

²³ C. M. Fombad, 'The Protection of Freedom of Expression in the Public Service Media in Southern Africa: A Botswana Perspective' (2002) 65 *Modern Law Review* 649.

²⁴ *Long Term Vision for Botswana: Towards Prosperity For All* (Government Printer, 1997).

²⁵ *Ibid.*, p. 57.

²⁶ *Ibid.*, p. 74.

prevailing legal environment for the exercise of media freedom and the media's democratic mandate? The current study is intended as a contribution to this on-going debate. It critically examines the laws regulating the media in Botswana with a view to determining the extent to which they are supportive of the exercise of media freedom and the effective performance by the media of their democratic role. In particular, the study assesses the extent to which the laws giving effect to media freedom ensure media pluralism and the provision of diverse information. It also considers whether restrictions on media freedom are applied in a manner consistent with the international law standard of necessity in a democratic society.

1.2 Methodology and Delimitation of the Study

The study considers the situation of the three traditional news media: the printed press, radio and television broadcasting. In addressing the question of the extent to which the legal environment in Botswana is conducive to the performance by the media of their democratic mandate, the study adopts a comparative approach. Firstly, international law standards are considered and the position in Botswana is assessed for conformity with them. The approach is premised on the assumption that international law provides minimum standards of human rights below which no member of the international community should fall. International law standards that guarantee media freedom and seek to enhance the performance by the media of their democratic role are therefore regarded as the minimum standards that each member of the international community must incorporate into its municipal law in order that media freedom be realised.

Secondly, the situation of the media in Botswana is compared to that of their counterparts in South Africa. The latter has also proclaimed her commitment to media freedom by the adoption and ratification of the Windhoek Declaration and the SADC Protocol on Culture, Information and Sport, respectively. A comparative law approach is of particular interest in this context due to growing internationalisation and concomitant export and import of social, cultural and economic manifestations

across national borders.²⁷ Botswana and South Africa may therefore learn valuable lessons from each other that may enhance democracy in both states. The choice of South Africa has been influenced by two factors. Firstly, both the common law of Botswana and that of South Africa are based on Roman-Dutch law. Thus, some of the laws that affect the media, such as the law of defamation should, in principle, be the same. South Africa has also ratified both the ICCPR and the African Charter, but as in Botswana, treaties must be incorporated before they can have direct application in the municipal law. Secondly, while Botswana is arguably the oldest democracy in the Southern African region, South Africa is regarded as the youngest.

South Africa became a democratic state in 1994 after many years of apartheid rule by the minority white South Africans. The evils of the apartheid policy are well documented.²⁸ Black South Africans were generally denied the enjoyment of civil and political rights. It is in the light of the injustices that occurred in the past that the new constitution of South Africa establishes a society based on democratic values, social justice and fundamental rights.²⁹ The constitution thus requires the government to respect the principle of democracy, defined in the preamble as a society in which government is based on the will of the people and where every citizen is equally protected by the law. Section 1 of the constitution further provides that the state is founded, *inter alia*, on the values of 'universal adult suffrage, a national common voter's roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness'. The political freedoms of expression, information and media are expressly guaranteed in the Bill of Rights, which also guarantees other civil and political rights.

The South African post-democratic courts have consistently acknowledged the importance of freedom of expression as a guarantor of democracy and the special role that the media play as purveyors of information and public watchdog. Consequently,

²⁷ D. Goldberg *et al* (eds.) *Regulating the Changing Media: A Comparative Study* (Clarendon Press, 1998) p. 9.

²⁸ For example, see Culhane, D.S.K. 'No Easy Talk: South Africa and the Suppression of Political Speech' (1994) 17 *Fordham International Law Journal* 896.

²⁹ Preamble to the Constitution of South Africa of 1996, Act 108 of 1996.

they have demonstrated their willingness to ensure the enjoyment of these freedoms.³⁰ The South African government has also taken elaborate positive measures to enhance the enjoyment of media freedom and the performance of the media's democratic mandate. For example, the government has enacted access to information legislation that gives the public a right of access to information held by the state, and it has also guaranteed the independence of the public service broadcaster.

This study is divided into five parts. Part I discusses the theoretical background to the concept of media freedom, particularly its relationship with freedom of expression, so that one can appreciate the nature of the freedom under discussion. This is necessitated by the fact that media freedom in international human rights treaties is guaranteed as a component of freedom of expression and there is a tendency to treat the two freedoms as synonymous.

Part II provides an overview of the news media currently available in Botswana and South Africa. It focuses on whether these sources provide a sufficiently diverse range of information and ideas, whether they are accessible to the general public and seeks to identify the major problems faced by the media in both countries. Part II then addresses the protection of media freedom in international human rights instruments and the relevance of these instruments in the municipal laws of Botswana and South Africa. Finally, it examines the protection of media freedom in the municipal laws of Botswana and South Africa and how the protection compares with international law standards.

Part III of the study examines the regulatory environment of the media in both countries. It scrutinises the regulatory objectives, methods and institutions, as provided in the laws and official policies of the two states, with a view to ascertaining the extent to which they provide for diversity and pluralism in the various media sectors. The assumption here is that a plural and diverse media sector will provide a diverse range of information and ideas, thereby enabling citizens to play an effective part in the democratic process. Further, since the ability of the media to perform their

³⁰ For example see: *South African National Defence Union v Minister of Defence and another* 1999 4 SA 469; *Government of the Republic of South Africa v Sunday Times Newspaper* 1995 2 SA 221 and *Khumalo and others v Holomisa*, n 1 above.

democratic mandate effectively depends to a large extent on whether they are able to access relevant information, part III also examines whether Botswana and South Africa have put in place adequate measures to ensure that the media have access to information.

In part IV I consider the impact of two restraints on media freedom, which, based on interviews with news media editors and MISA records, appear to pose the most serious threat to media freedom in Botswana. These are restrictions based on the protection of national security and the reputation of others. It may be recalled that under international law, restrictions on media freedom are justifiable only if they are shown to be necessary in a democratic society. Part IV therefore explores whether restrictions on media freedom in Botswana and South Africa in order to protect national security and the reputation of others comply with the international law standards.

There is a close relationship between issues of access to official information discussed in Part III and national security. Access to official information may be denied if the disclosure will compromise the security of the state. Thus, in order to avoid a repetition of issues addressed in the chapters on access to official information and national security, the former focuses on the general principles that would give a meaningful right to the public to access official documents, while the latter concentrates on the impact of national security on the enjoyment of media freedom.

The thesis ends with a general conclusion. This evaluates the legal environment in both countries with a view to determine whether it is conducive to the performance by the media of their democratic mandate. Where the legal environment is found wanting, the conclusion makes suggestions that, if implemented, would lead to the enhancement of media freedom and the performance of the media's democratic role.

PART I

A THEORETICAL BACKGROUND TO MEDIA FREEDOM

CHAPTER 2

MEDIA FREEDOM AND ITS RELATIONSHIP WITH FREEDOM OF SPEECH

2.1 Introduction

The aim of this chapter is to give an overview of the theoretical background to media freedom. It explores the nature of the freedom and its relationship with freedom of speech or expression.¹ Theoreticians and contemporary advocates of media freedom defend the freedom and freedom of speech in the same stroke, with the implication that the two freedoms are inseparable, probably equivalent, and equally fundamental.² Furthermore, an examination of the most famous arguments for media freedom reveals that they do not differ from those of freedom of speech generally.³ These observations clearly indicate that media freedom is intimately connected with freedom of speech.

In the light of the fact that the general arguments for freedom of speech are advanced to support media freedom, it will be convenient to start by looking at the main arguments for freedom of speech before examining the nature of media freedom. This chapter therefore begins by looking at the main arguments for freedom of speech and then goes on to examine the relevance of these arguments to media freedom, and the relationship between the two freedoms.

¹ The terms freedom of speech and freedom of expression are used synonymously for purposes of discussion in this chapter.

² J. Lichtenberg, 'Foundations and Limits to Freedom of the Press' in J. Lichtenberg (ed.) *Democracy and the Mass Media* (Cambridge University Press, 1990) p. 102.

³ For example, even though John Stuart Mill's discussion in *On Liberty* begins by asserting the need for 'liberty of the press' he however proceeds to enumerate arguments for freedom of expression in general in support of the latter. See J.S. Mill, *On Liberty* (John W. Parker & Son, 1992) chapter 2.

2.2 Main Arguments For Freedom of Speech

There is a vast body of literature on the theory of freedom of speech and this chapter is by no means an exhaustive discussion of a topic that has been the subject of many distinguished scholarly dissertations. Instead, this chapter attempts to summarise the main arguments for freedom of speech in order to highlight the importance of the right. Before embarking on a discussion of the main arguments for freedom of speech, some brief observations on the nature of the right are apposite.

Freedom of speech can be an individual or a social right, and also an intrinsic or an instrumental right.⁴ The right is individual if it is construed as being for the benefit of the right holder. It may be of benefit either because the individual has an interest in the freedom of speech for its own sake, in which case it is an intrinsic individual right, or because the right holder wants the right in order to protect or pursue further interests, in which case it is an instrumental individual right. Freedom of speech is a social right if one person's right is justified by the benefits that accrue to other people. A social right may be intrinsic, for example, where the beneficiaries of the right derive information for its own sake and it may also be an instrumental social right, where the recipients desire the communication for ulterior purposes, such as the protection of their political interests. The right can also be a public good where its benefits cannot be restricted to identifiable persons, but promotes a progressive economic culture or a tolerant political pluralism.⁵

There is also a debate over whether the right is a liberty-right or a positive claim-right.⁶ On the one hand, liberals consider the right to be a liberty-right, that is, they define it in terms of absence of legal prohibitions on speech. Liberty-rights of free speech are usually closely associated with a number of negative claim-rights in terms of which one person's freedom of speech correlates with other people's duties to refrain from interfering with that speech in specified ways. On this view, government intervention is regarded with suspicion and freedom of speech is depicted as an

⁴ See T. Campbell, 'Rationales for Freedom of Communication' in T. Campbell & W. Sadurski (eds.) *Freedom of Communication* (Dartmouth, 1994) pp. 19 – 20.

⁵ *Ibid.*, pp. 21 – 22.

⁶ See generally, D. Kelly and R. Donway, 'Liberalism and Free Speech' in Lichtenberg (ed.), n 2 above p. 66 and R. Suttner, 'Freedom of Speech' (1990) 6 *South African Journal of Human Rights* 372.

absolute right. On the other hand, some argue that the right is also affirmative or has positive claim-rights in that it involves correlative duty holders who are obliged to empower the right holders to participate in successful communicative activities. For example, a government may be required to intervene and curtail expression by the majority to enable the minority to be heard. Thus this approach, unlike the former, does not consider the right to be absolute.

There may be several distinct theories for freedom of speech, but there are three traditional theories. These are:

- (a) Freedom of speech is essential as a means of assuring individual self-fulfilment;
- (b) It is an essential process for advancing knowledge and discovering truth; and
- (c) Freedom of speech facilitates participation in decision making by all members of the society.

These theories constitute what is popularly referred to as the 'classical trio' of the arguments for freedom of speech, and below follows a brief discussion of each.

2.2.1 Argument For Self-Fulfilment

The argument here is that it is of overriding importance that a person be able to think for himself/herself, that whatever his/her 'outer' condition, he/she should not be intellectually or psychologically subjugated to another's will. The argument sees speech as an integral aspect of each individual's right to self-development and fulfilment or individual autonomy. Autonomy so understood requires freedom of speech because of the close connection between thought and language. One needs to speak and listen to others to develop one's thoughts. Restrictions on what a person is allowed to say and write, or to hear or read inhibit the growth of his/her personality.

Therefore the fundamental interest in freedom of speech is an interest not only in freedom to think for ourselves, but also in communicating our thoughts to others.⁷

The argument for self-fulfilment is a speaker-oriented approach to freedom of speech and has both intrinsic and instrumental individual aspects. It protects the right to self-determination in cases where individuals are expressing themselves for the sake of it, the intrinsic aspect, and cases where individuals are using the opportunity to express themselves in order to protect their interests or further their projects beyond mere self-expression, the instrumental aspect. Campbell refers to these as the 'self-expression' and 'self-projection' arguments, respectively.⁸ The argument seems to be based on the theory that protection of free speech is grounded on fundamental background rights to human dignity and to equality of concern and respect.⁹ Freedom of speech is justified by the intrinsic values of authentic self-expression and frank communication. And because of this, it has been argued that this rationale has the advantage of empirical impregnability (if we ignore its harmful side-effects), a position that cannot be extended to the other rationales that are based on alleged consequential benefits of freedom of speech. Freedom of speech as an individual's right to self-development would therefore appear to be an absolute right even though it may be inimical to the welfare and development of society.

Although it has been said that the self-expression argument is not defeasible, the same cannot be said of the self-projection argument. The latter is defeasible in the face of evidence that particular exercises of that freedom are not protective of that person's interests or interests of the community at large, and in the light of the quality of the objectives adopted by the communicating person. Thus the freedom of speech of a person who wishes to protect his/her activities as a fraudster may have some intrinsic significance, but it is vulnerable to curtailment in the light of the uses to which that freedom is put in a way that would not apply in the case of a person who chooses to pursue goals approved by society.¹⁰

⁷ Lichtenberg, n 2 above p. 108 and T.I. Emerson, 'Towards a General Theory of the First Amendment' (1963) 72 *Yale Law Journal* 877 at 879.

⁸ Campbell, n 4 above p. 34.

⁹ E. Barendt, *Freedom of Speech* (Oxford University Press, 1985) chapter 1.

¹⁰ Campbell, n 4 above pp. 35 – 36.

The self-projection utility of speech has greater importance in societies that minimise organised social concern and depend on individual responsibility. However, in this type of society, freedom of expression cannot be expected to realise its self-fulfilling function in an equitable way if there are major inequalities of capacity, education and access to communicative means. In individualistic societies, instrumental arguments for freedom of speech may ultimately defend the interests of the articulate and powerful sections of society. Given this scenario, one may think of remedial measures, at least to allow the minority access to communicative means and therefore, against this background, the right to freedom of speech cannot be regarded as a purely negative right.¹¹

Some critics resist this argument for self-expression because anything one might wish to do can be considered a mode of self-expression, thus rendering the argument one of liberty in general that fails to make speech special. Lichtenberg counters this criticism by arguing that freedom of speech protects expression that is essentially symbolic. And that symbolic expression is special because it is the primary means by which we communicate beliefs, ideas, feelings, etc and its success requires distinctively human responses, and not mere reaction.¹² The importance of freedom of speech has also been questioned because of a lack of clear evidence that it is conducive to personal happiness or that it satisfies more basic needs and wants: why is free speech more important to a person's fulfilment than the right to education? It is said that speech is afforded constitutional protection because it is primarily a liberty against the state, a 'negative freedom' and is therefore more capable of judicial interpretation and enforcement than positive rights.¹³

It has also been noted that the argument for self-fulfilment tends to be sidelined in political contexts.¹⁴ The argument is founded on intrinsic individual right, while free speech in the political domain is grounded in the idea of instrumental individual rights. However, as has been indicated above, there is an instrumental form of the argument for self-fulfilment, self-projection, which sees speech as a means to further the well being of the speaker.

¹¹ Ibid.

¹² Lichtenberg, n 2 above p. 110.

¹³ Barendt, n 9 above p. 15.

¹⁴ See Campbell, n 4 above p. 34.

2.2.2 *Argument For Truth*

The argument for truth is associated with John Stuart Mill who argues that a free press can guarantee an abundant supply of facts and arguments about facts, thus cultivating the habit of questioning and correcting opinions and ensuring the victory of truth over falsehood.¹⁵ Mill pursued a case for the education and improvement of individuals for the ‘necessity to the mental well-being of mankind’ (on which all their well-being depends). He offered three reasons for the guarantee of freedom of the press:

- (i) Any opinion that is silenced by government or civil society because it is allegedly false may prove to be true, in the sense that it may conform to the facts and survive vigorous counter-arguments about those facts. Those who seek to censor potentially true opinions naturally deny its truth;
- (ii) Though an opinion turns out to be false, it often contains an ounce or two of truth. The prevailing opinion on any matter is rarely the whole truth. This means that it is only by confronting it with other, contrary opinions that the full truth can be attained; and
- (iii) Even if an opinion is the whole truth, it will soon degenerate into prejudice – into a dead dogma, not a living truth if it goes unchallenged.

The point here is that unrestricted speech is the only basis for justified truth-claims. The argument epitomises the liberal conception of freedom of speech. A central element of the argument for truth is the depiction of freedom of speech as an absolute right without limits. The value of this approach is in conformity with the dictates of the capitalist market. The argument for truth has an individualistic dimension with both instrumentalist and intrinsic forms. It may be vindicated as enhancing the speaker’s grasp of the truth for its own sake, and as a means whereby the individual may acquire useful information that enables him/her to protect his/her own interests.

¹⁵ See generally, Mill, n 3 above chapter 2.

The argument may also be seen to put forward a social right which benefits the public good for it enhances the distribution of reasonable belief within a community.

The argument for truth relies on a number of assumptions. First, that truth is objective or discoverable, i.e., truth is able to outshine falsity in debate or discussion only if truth is there to be seen. Second, it assumes that people are basically rational, that they possess the capacity correctly to perceive truth or reality. For this assumption to hold: (i) a person's personal history or position in society must not control the manner in which he/she perceives or understands the world; (ii) people's rational faculties must enable them to sort through the form and frequency of message presentation to evaluate the core truth in the messages, otherwise the market place of ideas would only promote acceptance of those perspectives that were best packaged and promoted effectively; and (iii), that the discovery of truth must be desirable, for example, because truth provides the best basis for action and thereby uniformly promotes human interests.¹⁶

It has however been argued that this approach is weakened by the failure of the above assumptions.¹⁷ Truth is not objective; those values to which people personally give allegiance provide the necessary criteria for judging between competing theories. People individually or collectively choose, or create, rather than discover their perspectives, understandings and truths. And it is not clear that the market place of ideas is the only or best realm in which to create truth, as truth can be created by other activities. The theory further assumes that people's reason enables them to comprehend a set reality and test assertions or propositions against that reality. The argument is also affected by the rejection of truth as objective, for people cannot use reason to comprehend a set reality where no set reality exists for them to discover. People's perspectives and understanding are greatly influenced by their experiences and their interests both of which reflect their various locations in a historically specific socio-economic structure. Dialogue cannot completely eliminate conflicts and divergences between people's perspectives as long as the social structure causes people to have very different experiences and conflicting interests.

¹⁶ C.E. Baker, *Human Rights and Freedom of Expression* (Oxford University Press, 1989) p. 7.

¹⁷ *Ibid.*, pp. 13 – 15.

Moreover the theory also depends on rationality, that people will be able to use their rational capacities in order to eliminate distortion caused by the form and frequency of message presentation and find thereby the core, relevant information. This view cannot be accepted, as it is inconsistent with psychoanalytical and behavioural theories that people consistently respond to emotional or ‘irrational’ appeals.¹⁸ It has therefore been argued that freedom of expression is not a sufficient condition for the emergence of truth, and that the argument for truth supports the claim that diversity of expression and openness to deviant views are necessary conditions of intellectual progress or that it helps the advance of knowledge.¹⁹

The argument for truth has been subjected to a number of criticisms. Much actual speech has little if any potential truth-value in that it is either not directed at the expression or vindication of justified belief or is not the sort of speech that is capable of having a truth-value. If the freedom were to be restricted to ‘truth-oriented’ speech, a great deal will be excluded especially expressions of opinion about matters which are not capable of truth or falsity. It will therefore appear that the argument for free speech here applies strongly in favour of truth-oriented expressions where the truths at issue are of intellectual significance or have beneficial uses. On this basis it can be argued that this theory sees freedom of speech as far more than just a liberty right. In the interests of truth, special weight could be given to communications of those who are in a position to contribute significantly to the search for truth such as knowledgeable experts or skilled analysts and therefore modern governments must support those engaged in scientific and other research in the quest for truth.

The argument for truth seems to assume that in all circumstances the publication of a possibly true statement is the highest possible good and that speech does not cause harm.²⁰ The observation stems from the argument that, although harm may result from speech, the results are normally produced non-coercively in that their eventuality depends on others adopting certain attitudes. The speaker is therefore not responsible for the harm unless he/she has been coercive. However, it has been argued on the contrary that this distinction between words and actions is fallacious and that Mill

¹⁸ Ibid.

¹⁹ Campbell, n 4 above p. 26.

²⁰ Ibid. See also Barendt, n 9 above pp. 8 – 9.

himself does not see an act as logically detached from its circumstances, for he qualifies freedom of speech to exclude 'mischievous' acts. Mill cites an example that: 'An opinion that corn-dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn dealer, or when handed about among the same mob in the form of a placard. Acts of whatever kind, which without justifiable cause, do harm to others, may be, and in the most important cases absolutely require to be, controlled by the unfavourable sentiments, and when needful by the active interference of mankind.'²¹ It will therefore appear that speech that causes harm, on this view, is excluded from protection.

2.2.3 *Argument For Democracy*

The famous proponent of this theory is Alexander Meiklejohn.²² According to this argument, because democracy means popular sovereignty, the citizens in a democracy, as the ultimate decision-makers, need full (or at least extensive) information to make intelligent political choices. It stresses two functions of freedom of speech and press in a democracy:

- (i) Informative function; i.e., free speech permits the flow of information necessary for citizens to make informed decisions and for leaders (public servants) to stay abreast of the interests of their constituents; and,
- (ii) Watchdog function; the press in particular, serves as the people's watchdog by ensuring independent criticism and evaluation of the established power of government or other institutions that may usurp democratic power.

Democracy means not only that people are collectively self-governing, but also that they are equal in an important sense. Equality bears on free speech in two ways.

²¹ H.B. Acton (ed.) *Utilitarianism, Liberty, Representative Government: Selections from Auguste Comte and Positivism* (Dent, 1972) p. 114

²² See generally, A. Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (Harper and Brothers, 1960).

Firstly, democracy functions as it should only when each person's interests are represented in the political forum; freedom of speech and the media enhances opportunities for representation. The scale of modern society does not allow more than a relatively small number of people to be physically co-present, the mass media, especially television networks, newspapers, journals and magazines have become the chief institutions in the dissemination of information, ideas and opinions. Secondly, we show that sort of respect for persons associated with democracy both by acknowledging that anyone (regardless of race or colour) may have a view worth expressing, and by assuming that people can be open-minded or intelligent enough to judge alien views on their merits.²³ The democracy theory envisages that the nature of an acceptable democratic process will include:

- a) A majority election of rulers;
- b) The equal distribution of power among the citizens;
- c) Acceptance of the outcome of the democratic process;
- d) The recognition of diversity; and,
- e) A process of deliberation.

Calls for absolute freedom of speech under this theory are strong in the political sphere because it is here that the danger of abuse of any legitimate restrictions of the freedom is thought to be greatest. The argument from abuse has a more positive form – namely that freedom of speech about activities of government is a necessary means of control. It is said that taken in this context, the argument is an application of an instrumentalist version of the argument for truth, that public knowledge of what politicians are up to keeps them on the straight and narrow.²⁴

It is further argued that extensive discussion is required to make the elected leaders more accountable and this has implications for access to information. From this perspective, freedom of speech as an instrumental social right converges with the arguments for access to information as well as the opportunity to disseminate it.²⁵ There is yet another form of the argument for democracy which focuses on the idea of

²³ Lichtenberg, n 2 above p. 111.

²⁴ Campbell, n 4 above p. 38.

²⁵ See 2.3 below.

discussion with a view to reaching agreement as basic to the democratic process. On this view, discussion is inherently democratic since the opinion of each person is given equal weight, thus maximising autonomy in the political arena.

A problematic issue with the argument is whether freedom of speech should on this basis be seen as absolute. One view is that sometimes the values of a democracy, including its long term commitment to free speech, can best be preserved by the temporary suppression of some speech, where the exercise of such may be contrary to the public welfare. A contrary view is that the maintenance of a confident democracy is best guaranteed by the protection of freedom of speech in all (or almost all) circumstances, for temporary regulations may induce political unrest or undermine the acceptability of other laws.²⁶ However, in light of the socio-economic and political inequalities in the modern state, there may be a need to restrict the freedom of some citizens in order to enable others to participate in the democratic process.²⁷ Furthermore, the government may be required to take affirmative steps to enable the latter to utilise such an opportunity. In this context, the notion of an absolute right is incompatible with the democracy argument and it also shows that there may be positive claim-rights involved in this argument.

The democracy theory rests, to a considerable extent, on the values and commitments embodied in a particular constitutional structure rather than on the more abstract philosophical theorising that characterises the arguments from truth and self-fulfilment. For example, a democratic theory that sees electoral procedures as a way for individuals to protect their self-interests by giving them leverage over the actions of the elected politicians will require the maximal flow of information about the details of governmental activity and its effects. Whereas a theory that sees politicians as being elected for their personal capacities and representative qualities, as persons to be entrusted with complexities of government, will be more focused on the passage of information about candidates than conduct of government business.²⁸

²⁶ Barendt, n 9 above p. 21.

²⁷ For example, the broadcast media's freedom of speech is normally subjected to some measure of control to ensure that news broadcasts are presented in a balanced manner.

²⁸ Cf. Campbell, n 4 above p. 38.

The democracy theory appears to be based on democracy as it was seen in ancient times where all citizens (albeit a limited class) were able to participate in the legislative process, which passed only general laws that had an equal impact on all because everyone was in roughly the same economic and social position. In the modern state there is no equality among the citizenry, with wide disparities of wealth and influence. The rich and powerful, because of their position, are able to access important information and will therefore play a leading role in the decision making-process, while the influence of the poor will be minimal or non-existent. Because of a lack of equality, critics point out that for this theory to work, inequalities and oppression in the democratic process must be removed. This should include, among other things; (i) promotion of equal access rights to the media; (ii) education for self-expression; (iii) and ensuring dominance of civic over commercial values in advertising.²⁹

2.2.4 Connections Between Arguments For Freedom of Speech

A closer examination of the classical trio of arguments for freedom of speech reveals some interconnections between them. There is a connection between the arguments for democracy and truth. Under the democracy argument, it is suggested that, ideally, any person may have a view worth expressing, and that assumes that others should be open-minded and judge such views on their merits, this connects with the argument that freedom of speech is an indispensable means to the attainment of truth. The belief that anyone might make a valuable contribution to the search for truth or for better ways to do things does not mean that we think anyone is likely to. It means: (i) there is no way of telling in advance where a good idea will come from; (ii) valuable contributions to arriving at truth come in many different forms, speaking the truth being one of them; and, (iii) much of the value of a person's contribution to the market place of ideas is its role in stimulating others to defend or reformulate or refute their ideas, and that value may be quite independent of the merits of the original view.³⁰ Thus equality of the citizens, which is a key concept in a democracy, and fallibilism, a central assumption in the argument for truth, are mutually supportive. Under the former, we are required to pay attention to the views of all in the society

²⁹ Ibid., p. 41.

³⁰ Lichtenberg, n 2 above p. 111.

and the latter bids us question the views of experts and elites in order to arrive at the truth.

There is a further connection between these arguments. The argument for truth supports the claim that diversity of expression and openness to deviant views are necessary conditions of intellectual progress or that it advances knowledge in the society. On the other hand the argument for democracy emphasises citizen participation in the decision making process. The two theories overlap in that an informed citizenry will make informed choices leading to an enhanced decision making process.

The argument for democracy is also connected to the argument from self-fulfilment in its instrumental form in that political expression can be used to make others aware of one's views or demands. Democracy can therefore be defended as a way of valuing aggregate individual choices as ends in themselves independent of the worth of the choices made.³¹

The argument for truth also overlaps with the argument for self-fulfilment. For a large area of human interests, these arguments are so closely related as to be practically inseparable because where morals, religion, politics, social relations, and business life are concerned, truth must be something inseparable from the process of arriving at it, and has therefore a great deal to do with virtues of intellect and character central to self-development. Mill argues that truth, in the great practical concerns of life, is so much a question of the reconciling and combining of opposites that there are very few minds sufficiently capacious and impartial to make the adjustment with an approach to correctness, so that it has to be made by the rough process of a struggle between combatants fighting under hostile banners. Therefore, the nature of truth in these matters determines the nature of wisdom, which is an element of enlightenment and self-development.³²

The interconnections between the arguments for freedom of speech are an indication that the arguments are not mutually exclusive. Rather, the arguments should be seen

³¹ Campbell, n 4 above p. 39.

³² Lichtenberg, n 2 above p. 113.

as supportive of each other, and taken in this context they support a strong free speech principle. We want free speech for many reasons. Some involve essentially individualistic interests, others the public interest or the common good. Others have to do with intellectual values while others deal with the promotion of certain values such as tolerance, etc. It is therefore not surprising that each of the theories may be seen as strongly advocating certain values rather than others. For example, the argument for truth is said to be strong in regard to truth-oriented speech, while the democracy argument is said to be important in the political sphere. The three theories should be treated as cumulative, thus complementing each other. A monistic theory of speech, emphasising only one of the values, would fail to do justice to the variety of our interests in free speech.³³

An examination of these rationales reveals that they do not justify an absolute right to freedom of speech. Although the argument for self-expression as an intrinsic individual right is said not to be internally limited by its own premises, it appears that the freedom may be curtailed in the face of evidence which shows that its side-effects are not acceptable in terms of other values. However, in all the theories, it seems one may make a strong case for an absolute legal right to participate in certain types of speech subject to the qualification that such does not cause harm, or at least causes little harm to the public good.

All the theories portray the right of freedom of speech as more than just a mere liberty-right against the government. The socio-economic and political imbalances in the modern state arguably place obligations on governments to take affirmative steps to promote and ensure the means for the development of knowledge, access to technology for effective communication and the disclosure of politically relevant information.

³³ There are some conflicts between the theories of free speech, however such an exercise is considered beyond the concerns of this study, and also given the limited space available, a discussion of the conflicts between the theories may render this chapter unnecessarily long.

2.3 Freedom of Speech and Freedom of Information

In the discussion of the democracy argument above, it has been indicated that freedom of speech plays a watchdog function by ensuring independent criticism and evaluation of the established power. For this function to be effectively performed, the public must be fully informed of the activities of government, hence the conclusion that freedom of speech as an instrumental social right, converges with the argument for access to information. Here we look at the nature of the access to information right.

Freedom of information as a fundamental human right began to take shape in the international environment as early as the first session of the UN General Assembly. Resolution 59(1) of 14 December 1946 asserted its importance in terms that: 'Freedom of information is a fundamental right and is the touchstone of all the freedoms which the United Nations is consecrated'.³⁴ The right has been informed by liberal theory. At the forefront of the liberal justification, is the democratic rationale that freedom of information will enable the public to find out what its government has done, and to participate in what it proposes to do.³⁵

There is a debate on the nature of this right, the question being whether the right is or is not an element of the constitutional right to free speech. Barendt argues that, in principle, it is difficult to subsume a broad 'right to know' under the free speech clause because it will be invoked most often where there is no willing speaker. He regards the right to information as resulting from a mere liberty to receive information imparted willingly by a speaker.³⁶ He evaluates the claim that freedom of information is a component of free speech by assuming that consideration of the speaker's interest should govern the weight of the claim. Such interests seem paramount, although he acknowledges that recipients' (or the public's) interests are relevant in the case of information in contradistinction to opinion and ideas. He further argues that restrictions on the free flow of political information are suspect because they invade the audiences' interests in having enough material before it to make informed choices

³⁴ For an account of the development of the right, see C.G. Weeramantry, 'Access to Information: A New Human Right. The Right to Know' (1995) 4 *Asian Yearbook of International Law* 99.

³⁵ P. Bayne, 'Freedom of Information and Political Free Speech' in Campbell & Sadurski (eds.) *Freedom of Communication*, n 4 above p. 199.

³⁶ Barendt, n 9 above pp. 107 – 112.

and to participate fully in the democratic process. However, he denies that there is a free speech right to compel the government or anyone to disclose information which it or he/she wishes to keep secret, arguing that it would be a distortion of a free speech principle to invoke it where there is no willing speaker at all.³⁷

Bayne, on the other hand, argues that freedom of information is an element of the constitutional right to free speech.³⁸ In response to Barendt's argument, he argues that, first, if we accept that the claim for freedom of information should be evaluated in terms of the speaker's interest, it is necessary to ask who, in this context, is the speaker whose interests are paramount. The person seeking information from the unwilling party may also be seen as a speaker too, for the seeking of information precedes the formation of an opinion by the person who seeks the information, and consequently also of its expression.³⁹ The question then becomes whether the interest of the speaker who desires to speak prevails over that of the speaker who created the information. He acknowledges that Barendt's argument has weight where some person other than the government is the speaker who created the information. Where government holds the information, he argues that it will be a distortion to consider it as belonging to the government for information is held, received and imparted by governments, their departments and agencies to further the public interest.

Bayne further argues that the claim that freedom of information is an element of freedom of speech need not rely only on the interests of the speaker. One or other variant of the citizen participation theory of free speech also supports the claim. He argues that the right to read, to listen, to see, and to otherwise receive communications, and the right to obtain information as a basis for transmitting ideas or facts to others, together constitute the reverse side of the coin from the right to communicate, and that the coin is one piece, namely the system of communication.⁴⁰ Freedom of information is therefore regarded as an element of the greater right to freedom of speech. There is evidence of support for this view from commentators on the First Amendment. Cox argues that the recognition of the right to information in the possession of government may well be essential if the First Amendment is to

³⁷ Ibid., p. 26.

³⁸ Bayne, n 35 above p. 205.

³⁹ Ibid., p. 206.

⁴⁰ Ibid.

continue to serve the basic function of keeping the people informed about their government.⁴¹

The UN has argued that freedom of information is not merely a corollary of freedom of opinion and expression, but a right in and of itself.⁴² Some countries now give constitutional recognition to freedom of information as an independent right from freedom of expression. South Africa is one such country, and the provision in its constitution that guarantees the right has been said to be a novelty and perhaps gives rise to a fourth generation right.⁴³

Access to information is important in modern democracies as it provides individuals with the greatest opportunity for self-development and self-fulfilment.⁴⁴ Information is necessary to make sensible or wise judgements. Democracy is said to rest upon the consent of the governed, and consent is never real unless it is informed consent. Citizens have a right to participate in the government of their country, and as a result thereof, they have the right to the information that is necessary to enable them to make up their mind on matters pertinent to government. Information therefore enhances the public's ability to participate in the decision making process. The media normally play an important role in imparting information and thereby informing the general public of all the events to their interest.

Information is also a safeguard against governmental power. In the words of Bentham, 'without publicity, no good is permanent, under the auspices of publicity no evil can continue.'⁴⁵ Information on the elected governors puts them under public scrutiny and will keep them straight, thus making them more accountable to the governed.

⁴¹ A. Cox, 'Foreword: Freedom of Expression in the Burger Court' (1980) 94 *Harvard Law Review* 23.

⁴² See Report of the UN's Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression 1999, Doc.E/CN.4/2000/63 (18th January 2000) para. 42.

⁴³ Davies *et al* (eds.), *Fundamental Rights in the Constitution* (Juta & Co Ltd, 1997) p. 147.

⁴⁴ Cf. A.C. Mason, 'The Relationship Between Freedom of Expression and Freedom of Information' in J. Beatson and Y. Cripps (eds.) *Freedom of Expression and Freedom of Information: Essays in Honour of Sir David Williams* (Oxford University Press, 2000) 225 at 230.

⁴⁵ J. Bentham, 'On Publicity', *Works of J. Bentham* (1843, ed. J. Bowring) reproduced in P. Birkinshaw, *Freedom of Information, The Law, The Practice and The Ideal*, (Butterworths, 1996) p. 19.

Information to which we apply our faculties of judgement and decision-making is far from immutable. It is subject to change, historical development or distortion. These factors make it necessary to lay certain ground rules in the use of information and its employment in human communication. According to Habermas,⁴⁶ the process of communication between human beings, of which information is an essential, if not exclusive component, is only possible on the basis that certain ground rules representing an underlying consensus are accepted. These cover such features as: assertions are made on the basis that they are believed to be true, or that the facts that we allude to in our speech are correct. Rational discourse is premised upon norms such as these. Through discourse, the only form of pressure that is allowed to operate is the force of the better argument. What discourse presupposes is an ideal speech situation where all participants must be given the same opportunity to debate and justify according to reasoned argument without external pressure or domination. He further argues that all assertions and norms and claims are subjected to examination and appraisal in discussion.

However, the ideal speech situation in the modern state is frustrated by a number of factors such as the systematic distortion of communication in order to manipulate public opinion, misinformation, lack of full information on which to exercise a proper freedom of choice, economic and political domination, etc. The consumer of information has a right to a free flow of information, rather than information that is tainted at its source and selectively channelled to suit the interests of the information supplier. The media is a powerful influence for good and evil, it can turn a liberty that was originally meant to save the public from despotism into a form of despotism over the public.

There are several principles that need to be promoted to ensure an ideal speech situation in order to keep the media in check thereby ensuring dissemination of reliable information. These include:⁴⁷

⁴⁶ J. Habermas, *Towards a Rational Society* (1971), reproduced in Birkinshaw, n 45 above pp. 15 – 16.

⁴⁷ See Report of the UN Special Rapporteur on Promotion and Protection of the Right to Freedom of Opinion and Expression 1998, Doc.E/CN.4/1999/64 (January 1999) para. 16.

- (a) A monopoly or excessive concentration of ownership of the media in the hands of a few is to be avoided in the interest of developing a plurality of viewpoints and voices;
- (b) State-owned media must have a responsibility to report on all aspects of national life and to provide access to diversity of viewpoints;
- (c) State-owned media must not be used as a communication or propaganda organ for one political party or as an advocate for the government to the exclusion of all other parties and groups;
- (d) Laws governing the registration of media and allocation of broadcasting frequencies must be clear and require a balance between competing interests; and
- (e) Any regulatory mechanism, whether for electronic or print media, should be independent of all political parties and function at an arms-length relationship to government.

Like freedom of speech, freedom of information is not absolute. The right must be reconciled with other social interests. There are spheres of our personal and public lives that are a legitimate object of secrecy. There appears to be consensus in international legal instruments, at least, that freedom of information may be restricted to protect national security, law enforcement, individual privacy, commercial secrecy, public safety and the integrity of government decision-making processes.⁴⁸

2.4 Freedom of Speech and Media Freedom

In the introduction to this chapter, an observation was made that the general arguments for freedom of speech discussed above, are also raised in support of media freedom, which has resulted in the implication that the two freedoms are identical. This part of the chapter addresses the question whether the tendency of treating the two freedoms as the same is correct. In tackling the issue, an attempt is made to ascertain the nature of media freedom and assessment is made of the extent to which the general arguments for freedom of speech are relevant to media freedom.

⁴⁸ See, Article 19(3) - ICCPR; Article 13(2) - ACHR; and Article 10(2) – ECHR.

In the USA, where the First Amendment to its constitution guarantees freedom of speech and freedom of the press in the same provision, the two concepts are accorded distinct meanings. It has been argued that if the free press guarantee meant no more than freedom of expression, it would be a constitutional redundancy.⁴⁹ Further support for the view that the two freedoms are not the same is also seen in the arguments that see the media as a fourth estate, i.e., the constitutional guarantee of a free press was to create a fourth institution outside government as an additional check on the three official branches of government.⁵⁰

In Britain courts tend to treat freedom of speech and freedom of the press indiscriminately or as interchangeable terms.⁵¹ Dicey, whose works are very influential in the UK, regarded the identical treatment of freedoms of speech and the press as a matter of constitutional principle.⁵² English law did not recognise any special body of press law and therefore press freedom was ‘no more than the right to publish in a newspaper what one could scribble on a gate’.⁵³ Press freedom was simply the right of proprietors and editors to speak freely in their newspapers – a particular exercise of a generally held right.⁵⁴

The traditional view, which treats freedom of speech and media freedom as identical, is based on an assumption concerning the character and scope of freedom of speech. The assumption is that freedom of speech is entirely concerned with individual rights of expression and that these must be protected against government intervention. Media freedom is seen simply as the right of proprietors and editors to speak freely in their newspaper or the right of broadcasters to air their views. The traditional view is however flawed. Firstly, the traditional approach fail to appreciate that the modern press consists largely of vast and complex institutions that differ in essential respects both from individuals and from the early press, around which the concept of freedom

⁴⁹ P. Stewart, ‘Or of the Press’ (1975) 26 *Hastings Law Journal* 631 at 633-4.

⁵⁰ *Ibid.*

⁵¹ See for example, *Attorney General v Guardian Newspapers (No.2)* [1990] AC 109.

⁵² A.V. Dicey, *An Introduction to the Study of the Law of the Constitution* (Macmillan, 1961) at 246 – 247. See also E. Barendt, ‘Press and Broadcasting Freedom: Does Anyone Have Any Rights to Free Speech?’ [1991] 42 *Current Legal Problems* 63.

⁵³ *Ibid.*, at 65.

⁵⁴ Cf. *Channing Arnold v Emperor* [1914] AC 116 at 117.

of the press grew.⁵⁵ Secondly, considerations internal to the theory of free speech itself may provide reasons for treating media freedom differently from freedom of speech. The contemporary mass media may suppress information and stifle ideas rather than promote them. As has been observed by one commentator, the media in their modern incarnation, mass media in mass society, works not only to enhance the flow of ideas and information but also to inhibit it. Nothing guarantees that all valuable information, ideas, theories, explanations and points of view will find expression in the public fora. Which views get covered, and in what way depends on the economic and political structure and context of press institutions, and on the characteristics of the media themselves.⁵⁶

Some of the factors that characterise the modern media and impact on news and information dissemination are:

- (i) Increasingly, contemporary news organisations belong to large corporations whose interests influence what gets covered and how;
- (ii) News organisations are driven economically to capture the largest possible audience, and thus not to alienate their readers, viewers or listeners, coverage that is too controversial, demanding or too disturbing will be avoided;
- (iii) The media are easily manipulated by government officials and others for whom the press can become a simple mouthpiece by reporting unfiltered press releases and official statements; and,
- (iv) Characteristics of the media themselves constrain or influence coverage, for example, television is said to lend itself to action-oriented, unanalytical treatment of events that can distort their meaning or importance.⁵⁷

If the media tends to suppress diversity and impoverish public debate, the arguments meant to support media freedom turn against it. Lichtenberg therefore argues that,

⁵⁵ G. Marshall, 'Press Freedom and Free Speech Theory' (1992) *Public Law* 40 at 49.

⁵⁶ Lichtenberg, n 2 above p. 103 and E. Barendt, 'The First Amendment and the Media' in I. Loveland (ed) *Importing the First Amendment: Freedom of Expression in American, English and European Law* (Hart Publishing, 1998) 29 at 50.

⁵⁷ Lichtenberg, n 2 above p. 103

unlike freedom of speech, to certain aspects of which our commitment must be virtually unconditional, freedom of the press should be contingent on the degree to which it promotes certain values at the core of our interest in freedom of expression generally.⁵⁸ The argument sees media freedom as an instrumental good. Barendt supports this view, arguing that media freedom is valued because it fosters free speech by providing fora for vigorous and uninhibited public debate.⁵⁹ Media freedom is therefore seen as a derivative or instrumental freedom, subordinate to the more fundamental right to freedom of speech.

I now turn to the issue of the relevance of theories of freedom of speech to media freedom in the light of the observation that the same arguments are usually raised in support of both freedoms. It is submitted that while arguments for media freedom are arguments for a more general freedom of speech, it does not follow that whatever supports the latter also supports the former freedom. The arguments that support freedom of speech for individuals or for small publications do not necessarily support similar freedoms for the mass media. For example, theories of self-fulfilment and personal development which focus on the interests of the speaker are irrelevant to national newspapers and journals, though they may play some role in supporting the rights of smaller publications. It has been observed that nowadays many media outlets largely distribute the speech of others, rather than communicate their own ideas or information.⁶⁰ Mill's argument for truth is also not particularly pertinent to newspapers. The manner in which the modern press covers news is more likely to be influenced by certain considerations such as, pursuing particular political agendas and manipulating material for commercial reasons. The problem is further compounded by the emergence of monopolies and oligopolies in media ownership with the result that a few players dominate the media. Monopolies and oligopolies threaten diversity in the expression of views and opinions.

The democracy argument may suggest that the press should be given special status and rights in view of its responsibility to keep the public informed. Thus freedom of the press may mean not only the freedom of newspapers to publish information and

⁵⁸ Ibid., p. 104.

⁵⁹ Barendt, 'Press and Broadcasting Freedom', n 52 above at 67.

⁶⁰ Barendt, 'The First Amendment and the Media', n 56 at 44.

opinions, but may also entail certain duties of investigation, and rights of access to public institutions.⁶¹ In some cases it may be legitimate for practical reasons to extend certain privileges to the media that would not be extended to individuals. For example, access to some government institutions like prisons and courts of law. In some instances it may be impossible to allow access by individuals to these institutions, but the media may be allowed access on behalf of the public because they are in a better position to communicate the information to the public.

Another objection to the traditional view of media freedom as simply the application to the media of individual free speech rights relates to the question of whose rights of speech are protected? Is it the individual journalist's, the editor's or the proprietor's? There is here a likelihood of right claims to free speech conflicting, for example, does a newspaper editor enjoy immunity from dismissal for writing articles that the proprietor does not like? To avoid such potential conflicts, it is argued that media freedom should be seen as an institutional right, rather than a set of individual free speech rights. What is crucial is that newspapers are free to foster the values of free speech not who exercises rights in this context.⁶²

From the discussion of the nature of media freedom and its relationship with freedom of speech, we can draw the following conclusions:

- a) Media freedom is not identical with freedom of speech. Although the arguments for media freedom also support a more general freedom of expression, it does not follow that whatever supports freedom of speech also supports media freedom. In some cases it will be in the interest of the greater freedom of speech to curtail media freedom. And the character of the modern press is different from the early press around which the concept of media freedom grew;
- b) Not all theories of free speech, especially those focusing on the interests of the speaker are that relevant to the media or sections of the media; and,

⁶¹ Barendt, n 9 above pp. 68 - 69.

⁶² Barendt, 'Press and Broadcasting Freedom', n 52 above at 68 - 9.

- c) Media freedom is an instrumental good and its exercise must promote the goals of free speech, i.e., having an informed democracy and unhindered discussion of a variety of views. The protection of media freedom therefore should be contingent on the degree to which it promotes values at the core of our interest in freedom of speech.

In terms of the relationship between media freedom and freedom of speech discussed above, the ideal media in a democratic society will be those that serve the democratic expectations on which freedom of speech is premised. Communications media can facilitate the objectives identified in the arguments from truth, self-fulfilment and democracy. The media exercise great power in our lives for we rely to a large extent on both the broadcast and print media as communicators of politics, culture and information. The argument from truth rest on a faith in the efficacy of a competitive market in speech or ideas, while the argument from self-fulfilment requires that people must be free to formulate beliefs and political attitudes through discussion and criticism. And the argument from democracy rest on the belief that people must be able to understand political issues so that they can participate effectively as citizens within the process of democracy. All three theories share an underlying belief in the value of allowing individuals and groups to have access to a wide range of information, a role that the media in modern democratic societies is expected to fulfil. The media also plays a vital part in support of democracy by acting as a counterbalance or watchdog to the state, facilitating the calling to account of government.

2.4.1 Justifying Regulation of the Media

We have seen that media freedom is expected to foster the values of freedom of expression by disseminating a diverse range of views and opinions. Diversity of media product is viewed as a function of a well-informed public equipped to participate effectively in society, or as a function of a citizenry endowed with a

maximum of choice as an end in itself.⁶³ It has, however, been observed above that features that characterise the modern mass media tend to suppress diversity and thereby impoverish public debate. The constraints within the media market that tend to compromise diversity are therefore used as justification for the regulation of the media in order to ensure that the media fulfil their democratic mandate. There are arguably four distinct rationales for the regulation of the media.⁶⁴

The first rationale relates to social regulation of content, i.e., certain categories of speech are prohibited for fear of individual or social damage. Programmes which are considered obscene, racist, an affront to religious sensitivities or likely to damage children are generally prohibited. The type of regulation involved here also extends to restrictions on television advertising.⁶⁵

Secondly, regulation for competition. There are two aspects to this form of regulation, structural and behavioural. Structural regulation focuses on the corporate structure, seeking to avoid the anti-competitive consequences of media markets being dominated by one or a few major players. Behavioural regulation on the other hand, aims at limiting how property can be used in relation to its impact on actual or potential competitors, i.e., it seeks to prohibit market distorting practices or abuse of a dominant position.⁶⁶

Thirdly, regulation is also necessary to ensure plurality and diversity in the media on democratic grounds. The argument has particular importance in the context of news and current affairs, attempting to secure that different political and social viewpoints are fully represented. It is also applied across programming as a whole in order to ensure that such programming covers a range of interests rather than offering only content which is cheap to produce or designed to appeal only to audiences most likely to attract advertising. This is referred to as 'internal pluralism', and is normally regulated for by imposition of programme requirements into broadcasting licences such as political impartiality and balance. Closely related to internal pluralism, is

⁶³ M. Feintuck, *Media Regulation, Public Interest and the Law* (Edinburgh University Press, 1999) p. 64.

⁶⁴ See D. Goldberg *et al.* (eds.) *Regulating the Changing Media: A Comparative Study* (Clarendon Press, 1998) chapter 1.

⁶⁵ R. Craufurd Smith, *Broadcasting Law and Fundamental Rights* (Clarendon Press, 1997) p. 220.

⁶⁶ Feintuck, n 63 above p. 51.

‘external pluralism’, which is concerned not with the content of a particular service, but with the maintenance of a range of different services.⁶⁷ External pluralism is related to the competition goals of regulation in that it is used to justify controls on concentration of ownership.

And fourthly, in modern democratic societies, the enjoyment of the right to freedom of expression and information depends heavily upon access to the mass media. Attempts should therefore be made to provide media services to all members of the society to avoid a society divided between ‘information haves’ and ‘information have nots’ resulting in social division. Thus regulation may be required to ensure universal access to media services by the citizens. Regulation here may aim at ensuring an extensive geographical coverage by the media and may also include ‘must carry’ rules under which new forms of delivery, such as cable or digital broadcasting, must provide viewers with access to public service channels as part of the service. It also relates to the question of allocation and management of spectrum resources, especially in broadcasting, to ensure order in the industry and representation of a wide range of interests and groups in the society.

Of the above four rationales for regulating the media, the last three are pertinent to the media’s role in a democratic society. A regulatory regime pursuing these rationales should be able to prevent monopolies in media ownership, thus ensuring a plurality of voices and at the same time giving access to media services to a majority of the citizens. Regulating for internal pluralism should arguably provide choice in terms of product, political viewpoint and cultural diversity.

Regulation of the media is, however, criticised by libertarians who believe in the efficacy of the market forces to respond to the wishes of individuals and provide a range of products that they wish for. Market liberals argue that a genuine communications market requires, at a minimum, that consuming individuals be able to effectively and directly register their preferences, and that producers willing and able to finance their costs of production should have effective freedom of entry into

⁶⁷ Goldberg *et al*, n 64 above p. 19.

the market-place.⁶⁸ This, they argue, will result in diversity of views, ideas and information. However, contrary to the liberal market theory, it has been observed that media markets appear to show a peculiar predisposition towards monopoly or oligopoly, increasing in size and global reach.⁶⁹ If commercial imperatives drive the media to a monopoly or near monopoly of control, this may result in a restricted range of information or views being made available. Further, it has also been observed that unrestricted competition does not necessarily ensure freedom of entry of producers into the market place. Markets are often non-contestable because the levels of investment required to enter the market are too high or risky due to an existing stranglehold by companies that have already ‘creamed off’ the market potential.⁷⁰

Opponents of the market liberals further point to the failure by the latter to appreciate the constraints within the media market itself that tend to compromise diversity even if there may be diversity in the ownership of media outlets. The argument follows from the observation that globalisation of the media has also resulted in commercialism, and with it, the resulting centrality of advertising. Media markets have shifted the definition of information from that of a public good to that of a privately appropriable commodity.⁷¹

The market failure argument is taken further by Fiss, who starts by observing that public debate is dominated by television networks and a number of large newspapers and magazines, and that the competition among these institutions is far from perfect. He argues that a market, even one working perfectly, is itself a structure of constraint. A fully competitive market might produce a diversity of programmes, but it will be the diversity of ‘a pack going essentially in one direction’.⁷² In his opinion, the market constrains the publication of public interest content in two ways.

Firstly, the market privileges select groups by making programmes, journals and newspapers especially responsive to their needs and desires. One such group consists of those who have the capital to acquire or own a television station, newspaper or

⁶⁸ J. Keane, *The Media and Democracy* (Polity Press, 1991) p. 68.

⁶⁹ *Ibid.*, pp. 72 – 73.

⁷⁰ *Ibid.*, p. 69.

⁷¹ *Ibid.*, p. 89.

⁷² O. M. Fiss, ‘Why the State?’ in Lichtenberg (ed.), n 2 above p. 143.

journal, another consists of those who control the advertising budgets of various businesses, and a third group consists of those who are most able and most likely to respond enthusiastically to advertising. Although market liberals claim that the market maximises individual freedom of choice, this is doubtful. In an unrestricted market competition in fact tends to work strongly against the choices of certain citizens, especially the poor and minorities. It produces a growing division between the relatively information rich and information poor. Citizens with stable employment and high disposable income can better afford and better access space and time in the media. They can also better access new communications gadgets, products and services. Furthermore, media owners know that when they compete for audiences, the best way to maximise their audience share is to jostle for the heartland of viewers by offering mass appeal programmes. This leads to insufficient diversity in programming which fails to cater for the needs of some sections of the society, especially minorities.

Secondly, the market brings to bear on editorial and programming decision factors that might have a good deal to do with profitability or allocative efficiency, but little to do with the democratic needs of the electorate. The costs of production and the revenue likely to be generated are highly pertinent factors in determining what shows to run and when. There is no necessary relationship between making a profit or allocating resources efficiently and supplying the electorate with information they need in order to make free and intelligent choices about government policy.

Fiss concludes by arguing that the market may be splendid for some purposes but not for others, especially the media. He therefore sees state intervention in the form of regulation as inevitable, as a measure to counteract the skew of public debate attributable to the market, and thus to preserve the essential conditions of democracy.⁷³

Bollinger introduces yet another dimension to the argument. He argues that libertarians proceed from an erroneous premise that the only rationale for public regulation involves a kind of market failure, that people have no legitimate interest in

⁷³ Ibid., p. 145.

having public regulation of the media as long as the total number of actual or potential outlets in the media rises above a certain threshold. In his view, regulation of the media is justified by the risks associated with power over access to the market place. Power here being the ability to command an audience more or less exclusively. To this, he adds the point that we should also be concerned with the nature, or character of our own behaviour in the discussion of public questions, a concern with the nature of our demands in the market. He identifies in humankind troublesome tendencies to jump to conclusions from partial evidence without waiting to hear or read the other side, to want to hear only what we are predisposed to believe, and to shelter from our attention ideas and opinions that differ from and challenge our own political values. Such tendencies, he concludes, have bad effects for society, not just in yielding misinformed and closed-minded citizens, but also creating subgroups within society that feel alienated and excluded.⁷⁴

In the light of what he identifies as the troublesome tendencies in human beings alluded to above, Bollinger argues that the public may be concerned about how they are behaving and about what choices they are making in the society. The public may therefore accordingly decide together, through public regulation, what they would like and to alter or modify the demands that they find themselves making in the market. We have seen that the argument for democracy requires well informed citizens to make intelligent choices, so even if citizens may have the opportunity to acquire all relevant points of view, in the absence of agreed-upon structures or methods for deciding questions, they may very well end up with poorer decisions than they would otherwise have.⁷⁵

Regulation of the media is thus justified by the threats to the values of freedom of speech. The libertarians' case against regulation is weakened, as we have seen, by evidence that shows that modern media markets restrict freedom of speech by generating barriers to entry, monopolies and restrictions upon choice.⁷⁶ The media are regulated in almost all countries in the world to ensure that they perform their democratic mandate effectively. Regulation usually involves the state and it varies

⁷⁴ L. C. Bollinger, 'The Rationale of Public Regulation of the Media' in Lichtenberg (ed.) n 2 above p. 363.

⁷⁵ *Ibid.*, p. 364.

⁷⁶ See generally, D. Goldberg *et al*, n 64 above chapter 1.

from direct government control to powerful state authorised agencies. Market liberals however oppose state intervention in the form of regulation of the media, except that relating to competition, arguing that such intervention stifles rather than promote the ideals of freedom of speech. They believe in the efficacy of market forces or self-regulation within the industry by the market players themselves. As regards the first option, it is not viable due to the market failures discussed above. The second option has also been criticised as a breeding ground for unaccountable exercise of power.⁷⁷

It has been observed that during the twentieth century, networks of private sector organisations performing functions for government through negotiations, grants and contracts have become commonplace. A substantial number of decisions of public consequence are taken, not by executives, or through legislation or markets, but by bargains struck between these civil society groups and the state itself. The intertwining of state and civil society has allowed the growth of ‘corporatism’, or ‘government by moonlight’, in which government and powerful private entities reach accommodations and symbiotic relationships in a secret world, hidden from public scrutiny and outside the scope of traditional mechanisms of accountability. The withdrawal of the state from regulatory roles in favour of these groups of civil society is therefore seen as a replacement of public, overt regulatory activity by hidden, unaccountable corporatist influence, and the secret furthering of symbiotic interests by government and media establishment.⁷⁸

State regulation of the media is therefore justified on the ground that government employees are subject to a different set of constraints from those who run the media. Public officials are supposed to be accountable.⁷⁹ Critics of state regulation insist that the state will also become a victim of the same forces that dominate media markets. It is however arguable to the contrary, that elements of independence possessed by the state are real and substantial.⁸⁰ Although the state may not be wholly independent of the forces that dominate media markets, some agencies of the state are more independent of these market forces than others and can be allocated more power to monitor the regulatory process. The courts, for example, although not wholly

⁷⁷ Keane, n 68 above p. 107.

⁷⁸ Feintuck, n 63 above p. 49.

⁷⁹ See Fiss, n 72 above p. 145.

⁸⁰ *Ibid.*, pp. 147-8.

independent from the same forces that shape and dominate our social life, are likely to achieve a greater measure of independence from particularised political pressure or social demands than the legislature or administrative agencies. Judges are subject to well-established professional norms and are required to justify their decisions publicly on the basis of principle.

2.4.2 *The Double Standard in the Regulation of the Media*

The arguments advanced to justify regulation of the media apply to the media in general. However, in practice, radio and television are subjected to a significantly greater degree of regulation than that applied to newspapers. Broadcasters are normally required to be impartial and cover news and some serious programmes, whereas the print media is free to publish what it wants, subject only to the constraints of the criminal and civil law.⁸¹ The basis for this double standard in the regulation of the media has been a subject of vigorous debate in academic literature.

Four arguments are generally advanced for the strict regulation of the broadcast media. Firstly, it is said that airwaves are a public resource and that governments are entitled to license their use on terms they see fit. Secondly, regulation is also justified by the scarcity of broadcast frequencies. Since it is not possible for everyone to acquire licences to broadcast, governments may reasonably require licensees to share their privilege with other representative members of the public. Licensees may be compelled to present a balanced range of programmes in the interests of listeners and viewers. Thirdly, regulation of broadcasting is also justified on the basis of its character. Television and radio are said to be more influential on public opinion, as they intrude into the home, are more pervasive, and are more difficult to control than the print media. And fourthly, the double standard in regulation of the media has further been justified on the ground that society is entitled to remedy the deficiencies of an unregulated press with a regulated broadcast system. It is further argued that since regulation poses danger of government control, the risk is reduced if one branch of the media is left free.⁸²

⁸¹ See E. Barendt, *Broadcasting Law* (Clarendon Press, 1993) p. 4.

⁸² Bollinger, n 74 above p. 365.

The arguments for the strict regulation of the broadcast media have been criticised.⁸³ In relation to the first argument, it is said not to be convincing for it infers that it is right for a government to regulate broadcasting from the fact it has the opportunity to do so. It would also presumably be possible for a government on this basis to allocate frequencies without programme conditions by means of a competitive tender and allow their resale by the purchaser. The scarcity argument is also rejected on the basis that it has been overtaken by events, the advent of cable and satellite and digital broadcasting has significantly increased the number or potentially available channels. Regarding the third argument, it has been noted that broadcasting does not intrude in the home unless listeners and viewers want it to. And further that, from the point of view of constitutional principle, it is not easy to justify the imposition of greater limits on the audiovisual medium on the ground that it is more influential than the written word. And finally, the fourth argument, like the other three, is dismissed as lacking coherence as it attempts to justify the unequal treatment of the liberties of broadcasters and print editors, when in all material respects, their position is identical. It will therefore appear that there is no convincing explanation for the regulation of the broadcast media in contrast to the liberal regime enjoyed by the print media.

It seems that regulation of broadcasting is largely contingent upon historical circumstances rather than resting upon clearly defined principles. Craufurd Smith observes that in Britain and continental Europe, regulatory choices had little to do with elevated issues of human rights or fundamental freedoms, but were motivated more by a desire to further the national electronics industry, or by concerns over radio's social and political influence.⁸⁴ She further notes that by the inception of regular radio broadcasting in the early 1920's, the other form of mass communication, the newspaper, was emerging in many countries after the battles of the nineteenth century, free from the worst excesses of enforced government censorship. By the time radio broadcasting became a reality, the 'free press' model was being dismissed in established circles as pandering to vulgar tastes and sensationalist comment. Politicians were therefore increasingly anxious to exert at the very least a degree of control over the new mass media.⁸⁵ The new media had played an important role as a

⁸³ Barendt, *Broadcasting Law*, n 81 above pp. 4 - 9.

⁸⁴ Craufurd Smith, n 65 above, chapter 1.

⁸⁵ *Ibid.*, p. 15.

propaganda tool during World War II, and governments realised just how influential the new media were and thus were reluctant to leave them in the hands of free enterprise.

The dichotomy in the regulation of the media does not rest upon any constitutionally recognised principle. Media freedom is an instrumental good and its exercise must promote the ideals of the greater freedom of speech. Regulation is justified only to the extent that it enables the media to play their role effectively. Threats to the media's role affect all sections of the media, so that if regulation is thought necessary at all, then it must apply to all media indiscriminately. The maintenance of the double standard in the regulation of the media is also weakened by the results of the technological revolution that is going on, resulting in the convergence of telecommunications, media and information technology. Convergence calls into question the traditional approach to broadcasting regulation because convergence opens up scope for regulatory by-pass; for example, one can download a television programme or look at a newspaper via the Internet.

PART II

**OVERVIEW OF THE MEDIA AND PROTECTION OF
MEDIA FREEDOM**

CHAPTER 3

OVERVIEW OF THE NEWS MEDIA IN BOTSWANA AND SOUTH AFRICA

3.1 Introduction

In this chapter, I provide a brief introduction to the media in Botswana and South Africa, setting out the available media sources and the interests or sectors that such sources cater for. This is done by way of giving a profile of the mainstream media in the two states. The chapter also addresses the question of accessibility of the available services to the general public. Finally, I look at some political and economic factors that impact on the enjoyment of media freedom in the two countries. The chapter consequently sets the scene for the more detailed examination of key regulatory issues that follows.

3.2 Profile of the Mainstream Media in Botswana

3.2.1 Print Media

One of the most striking features about the press in Botswana is its brief history and small size. At the beginning of the year 2003, there were about nine newspaper titles in circulation.¹ The main reason for the small scale of the press in the country is demographic. Botswana has a population of approximately 1.6 million and one of the lowest population densities in the world, ranging between 1.6 and 3.1 persons per kilometre.² Given the population of the country, the nation has difficulty in sustaining a national media network of scale. The easy access to both print and broadcast media from neighbouring South Africa and Zimbabwe has also acted as an impediment to the development of Botswana media. Media audiences in Botswana seem to like these

¹ See Table 1 for full details of the mainstream newspapers.

² *National Development Plan 8 1997/98 – 2002/2003* (Ministry of Finance and Development Planning, 1997) pp. 10 – 11.

foreign media, for they consider these to be more sophisticated in terms of content and presentation than the local media.³

The state owned *Daily News* is the oldest publication in circulation in the country. It was founded in 1965 by the British Protectorate administration as the *Bechuanaland Daily News*. It changed its name to the *Daily News* at independence in 1966. The paper is published by the Department of Information and Broadcasting (DIB), which is controlled by the ministry of Communications, Science and Technology. Prior to the establishment of this ministry in 2002, DIB was controlled by the ministry of Presidential Affairs and Public Administration in the Office of the President. The main objective of the *Daily News* is to inform and educate Batswana on government policies and development programmes. It supplies government with feedback from the communities and districts on how policies and development programmes are being received.⁴ The paper reports mostly on development issues such as agriculture, economics, education, environment, health and national and rural developments. The *Daily News* is published in English and Setswana, and targets both rural and urban audiences.⁵

Although the government of independent Botswana did not hinder the development of a private press, it was not until the 1980's that one emerged. First on the scene was the *Guardian* in 1982, followed by *Mmegi/The Reporter* and *Gazette* in 1984 and 1985, respectively. The owners of the *Guardian* launched another publication, the *Midweek Sun* in 1990 and the owners of *Mmegi* followed suit with *Mmegi Monitor* in 2000. Three more titles were launched in the 1990's, *The Voice* (1993), *Mirror* (1997) and *Sunday Tribune* (2001).

All the independent titles appear in a tabloid form. In terms of content, their coverage concentrates on politics, business, economics, sports and entertainment. The papers also provide coverage of cultural and educational events.⁶ The *Midweek Sun* is an exception, its target audience is the youth and it focuses largely on entertainment. The

³ A.P.N. Thapisa & E. Megwa, *Situation Analysis and Profile of Mass Communications in Botswana*. (A Consultancy Report prepared for the Ministry of Finance and Development Planning, 1998) p. 8.

⁴ *Ibid.*, pp. 13 – 14.

⁵ Interview with the editor, L. Leshaga (Gaborone, 12th October 2001).

⁶ Thapisa & Megwa, n 3 above pp. 11 – 12.

other publications are directed at the educated adult urban audience. Save for *Mmegi*, all the papers publish in English. *Mmegi* carries an insert in Setswana and Ikalanga, the two most widely spoken indigenous languages. In 2002 a bi-weekly Setswana newspaper called *Mokgosi* was launched. The content of this paper is similar to that provided by the other newspapers.

Since its emergence, the private press has provided a necessary alternative voice in a set-up generally dominated by the government. Before that, public opinion was inevitably largely shaped by official information disseminated by the state owned media.⁷

It is estimated that local press circulation in the country amounts to around 192 830 copies, which translates to about 10% of the total population.⁸ The *Daily News* accounts for one third of this figure. The *Daily News* is the only daily in the country with a circulation figure of about 65 000 copies a day. The largest circulating weekly is *Mmegi*, with a circulation figure of 27 000 copies. The *Guardian* and *Gazette*, closely followed by the *Midweek Sun*, have circulation figures of 21 000, 20 000 and 19 000 copies respectively. The size of Botswana, its small and sparsely distributed population makes the distribution of newspapers throughout the country uneconomic. More than 60% of the population live in urban, semi-urban and large villages. Most newspapers therefore target these areas and English-reading audiences.⁹ These are located mainly in the eastern part of the country. The circulation of the *Daily News*, *Gazette* and *Mmegi* has been increased through the use of the Internet.

3.2.2 *Broadcast Media*

The history of the broadcast media in Botswana is dominated by state owned broadcasters. In radio, the state owned *Radio Botswana* enjoyed an absolute monopoly from independence till 1998 when two commercial radio broadcasters were

⁷ S.T. Sechele, 'The Role of the Press in Independent Botswana' in W.A. Edge & M.H. Lekorwe (eds.) *Botswana: Politics and Society* (J.L. Van Schaik Publishers, 1998) 412 at 415.

⁸ Thapisa & Megwa, n 3 above p. 11.

⁹ S.T. Sechele, 'Deepening Democracy or Creeping Authoritarian Rule? Media-Government Relations in Botswana in Historical Perspectives' (Unpublished Master of Public Administration dissertation, University of Botswana, June 2000) p. 97.

granted licences. The only national television station in the country, *Botswana Television (Btv)*, is also owned by the state.

Radio Botswana started as a pilot project in 1965 known as *Radio Bechuanaland*. It was used by the British Protectorate administration to prepare Botswana for self-government just before independence.¹⁰ After independence, *Radio Bechuanaland* became *Radio Botswana (RB)*. *RB*, together with the *Daily News* and *Btv*, are controlled by the DIB. The bulk of *RB*'s post-independence programming is geared towards educating people and informing them of government policies and activities. Programme content is largely made up of contributions from various government ministries and parastatals.¹¹

RB has two channels, *RB1*, a public service channel and *RB2*, a semi-commercial channel. *RB1* offers educational and informational programming targeted at educational institutions, particularly primary and secondary schools and development programmes for the rural audience. A large part of this programming is geared towards agriculture, health and environmental protection.¹² *RB1* broadcasts in English and Setswana. About 36.9% of its programme content per week is devoted to news and current affairs, 30.1% on educational issues, 25.2% to light entertainment broadcasts and the remaining 4.9% to cultural issues.¹³ *RB2* is fundamentally an entertainment channel. It was introduced in 1992 following pressure from the business sector, which wanted to advertise on radio.¹⁴ *RB2* was also intended to cater for the demands of an expanding youthful audience as *RB1* was concentrating on development programmes, which left out the youth.¹⁵ *RB2* broadcasts in English and Setswana.

Broadcast signals for *RB* are accessible to 80% of the population terrestrially through FM and SW frequency bands. Only the south-western parts of the country still have

¹⁰ *Draft Performance Management System (PMS) Strategic Plan 2001 – 2010* (Department of Information and Broadcasting, May 2001) p. 9.

¹¹ Interview with B. Segwe and M. Gabakgore, Chief Broadcasting Officers (Gaborone, 10th October 2001).

¹² Thapisa & Megwa, n 3 above p. 27.

¹³ *Ibid.*

¹⁴ See 'RB2 Celebrates 10 Years in Style' *Daily News*, 5th April 2002.

¹⁵ *Ibid.*

no access to these services.¹⁶ *RB* is also accessible to the whole country via satellite. However, it is estimated that only 66.6% of the total population has access to a radio.¹⁷

The monopoly that *RB* had been enjoying since independence came to an end in 1998 when the first commercial radio station was granted a licence. *Ya Rona FM*, owned by Copacabana Investments (Pty) Ltd, started operations on 22nd August 1999. The station hosts mainly talk shows and devotes 36 minutes per day of its broadcasting time to news and current affairs.¹⁸ The station's targeted audience is the youth and it broadcasts in English and Setswana. It broadcasts from the capital city, Gaborone, and covers a radius of 50 kilometres. It is estimated that the station has an audience of between 150 000 – 250 000 per day.¹⁹

Gabz FM, owned by Your Friend (Pty) Ltd, was the second commercial radio station to be granted a licence and it began its operations in November 1999. The station's targeted audience is the urban upmarket adult.²⁰ Its broadcasts are predominantly in English. Like *Ya Rona FM*, it also broadcasts from the capital city and covers an 80 kilometres radius from the city.

The only national television station in the country is the state-owned *Btv*, which was launched in July 2000. The television service is intended to compliment the mandate of both the *Daily News* and *RB*. At the time of writing, the organisational structure of the service was still being worked out. However, the station provides news and current affairs and entertainment programmes for the nation. It also provides advertising facilities for the business sector.²¹ The current geographic coverage of the service is 40% terrestrial (the urbanised eastern part of the country) and 100% via satellite.²² By the end of the year 2000, a mere 21.1% of the population had access to a television set.²³

¹⁶ Interview with Chief Broadcasting Officers, n 11 above.

¹⁷ *Botswana Multiple Indicator Survey 2000* (Ministry of Finance and Development Planning, 2001).

¹⁸ Interview with the Station Manager, Percy Raditladi (Gaborone, 7th October 2001).

¹⁹ *Ibid.*

²⁰ Interview with radio station's news editor, G. Segwati (Gaborone, 13th October 2001).

²¹ *Draft PMS Strategic Plan 2001 – 2010*, n 10 above p. 11.

²² *Ibid.*, p. 33.

²³ *Botswana Multiple Indicator Survey 2000*, n 17 above.

3.2.3 *Political and Economic Factors that Impact on Media Freedom*

In 1988 it was observed that Botswana provided a fairly secure environment for media freedom 'that can only exist in an open democratic society, which does not believe in imposing controls on the media or in abridging the right of freedom of information'.²⁴ Despite some occasional harsh criticisms of the media by leading politicians, a form of co-existence between the government and media seems to have been achieved. The main constraint on media freedom, especially the private media, was not political but financial.²⁵ A few years later Zaffiro warned that while necessary conditions for media freedom existed in the country, it was too early to celebrate its institutionalisation. Until important social, economic and political traditions were present in sufficient force, including a national, economically viable private press, he suggested that media freedom would remain a precarious thing.²⁶ Ten years later, it appears that economic factors are still the greatest threat to media freedom, even though of late there has been a growing tension in the relations of the government and the media.

Since their establishment, the private media have adopted the role widely expected of them, serving as a power bloc operating against other blocs, by influencing the formulation of public policy and by acting as a mirror of Botswana society independently from government.²⁷ It is probably in its watchdog role that the media in the country has distinguished itself. The role of the private media in this regard is well articulated by the editor of the *Guardian*:

"The media in Botswana is the last line of defence against excesses committed by government, non-governmental organisations and the business community. Botswana, while not a one party state, is a one party dominant state. The political opposition is fragmented and weak. The Parliamentary watchdog role has been eroded by the overwhelming majority of the ruling Botswana Democratic Party members of Parliament in the House, the civil society is small and still developing and places more of the watchdog role on the media,

²⁴ S. Grant & B. Egner, 'The Private Press and Democracy' in J. Holm & P. Molutsi (eds.) *Democracy in Botswana: Proceedings of a Symposium held in Gaborone* (Macmillan Botswana Publishing Co, 1989) 247 at 260.

²⁵ *Ibid.*

²⁶ J. Zaffiro, *From Police Network to Station of the Nation: A Political History of Broadcasting in Botswana 1927 – 1991* (Botswana Society, 1991) p. 96.

²⁷ Sechele, 'The Role of the Press in Independent Botswana', n 7 above at 415.

than would generally be the case with societies with more developed institutions".²⁸

The private media resorts to investigative journalism in the performance of its watchdog role. It has over the years exposed corruption in government, mismanagement, human rights abuses and other miscarriages of justice. A classic example was the revelation by the *Gazette* in 1994 that the then president and almost half his cabinet, were owing millions of Pula in loan arrears to the National Development Bank (NDB) which was on the verge of bankruptcy.²⁹ Barely a week after the revelations, the president paid up his arrears.³⁰ Some of the reports carried by the media have resulted in the appointment of presidential commissions of enquiry, which were eventually helpful in bringing culprits to book for their misdeeds and in, some cases cabinet ministers were even forced to resign.³¹

The state owned media, in particular *RB* and the *Daily News*, have also enjoyed some freedom to criticise government policies, furnishing airtime and coverage to members of functioning opposition parties. In addition, they have served the needs of rural audiences with programmes and information in tune with their real life problems.³²

Rifts between the media and government began to surface in the late 1980's. Politicians in the ruling party started making calls for legislation to control the media.³³ In the wake of the NDB scandal, one minister, in reference to the private press, warned: "We are breeding and nurturing a monster that threatens to gobble us as a nation..."³⁴ This was understood by the press to mean that the government had to take steps to limit media freedom.³⁵ At about the same time, government began to publicly admonish state owned media for engaging in investigative journalism and for criticising government policies. Government journalists were warned that *RB* and the

²⁸ Outsa Mokone, *Guardian*, 7th January 2000, p. 4.

²⁹ 'Big Guns Owe NDB Millions', *Gazette*, 9th February 1994, p. 1.

³⁰ 'President Owns Up to Owing the NDB', *Gazette*, 16th February 1994.

³¹ Sechele, n 8 above at 416 and *Mmegi* Vol. 16 No. 15, 16th-22nd April 1999, 'The Rise and Fall of Jacob Nkate', p. 1.

³² Zaffiro, n 26 above p. 33.

³³ Grant & Egner, n 24 above at 249.

³⁴ Dr G. Chiepe, then Minister of Foreign Affairs, quoted in M. Leepile, 'The Contribution of the Regional Media to the Democratic Process' in M. Leepile (ed.) *Botswana's Media and Democracy: Selected Papers from the Seminar on the Media in a Democracy, Gaborone, February – March, 1994* (Mmegi Publishing House, 1996) 101.

³⁵ *Ibid.*

Daily News could not be allowed to operate like the private media since they were vehicles through which the government of the day communicates with the people that brought it to power.³⁶ The government's position is that official media purveys official information. Civil servants who work for the state owned media are controlled by civil service conventions, which restrict their freedom to report news because they are expected to toe the official line in their reportage.³⁷

Despite calls for regulation, the government did not take any formal steps to regulate the media. However, it became extremely difficult for the media to access information from government departments and ministries. The fall-out between the government and media coincided with a deteriorating security situation in the region. The government of the then apartheid South Africa was sending its army commandos to raid neighbouring states which were suspected of harbouring anti-apartheid activists. One such raid was carried out on Gaborone on 14th June 1985. The editor of the *Guardian*, who was a South African refugee, was deported shortly thereafter under the *Immigration Act*.³⁸ At the time of his deportation, he had asked the commander of the national army to explain why the country's defence force personnel had stood off during the raid, and on the entry and departure points used by the South African commandos.³⁹

The period between 1986 – 1990 saw a further four South African refugee journalists deported from Botswana under the same legislation. It is widely believed that the real reasons behind the deportations were that the government felt that the journalists were too critical of its foreign policy regarding apartheid South Africa, and also that they were too inquisitive into what government perceived to be national security matters.⁴⁰ The government and its officials have shown themselves to be highly sensitive to critical reportage and vibrant inquiry into public policy by the media. And this has led to a culture where government officials arrogantly refuse to answer legitimate

³⁶ Zaffiro, n 26 above p. 88.

³⁷ See C. M. Fombad, 'The Protection of Freedom of Expression in the Public Service Media in Southern Africa: A Botswana Perspective' (2002) 65 *Modern Law Review* 649.

³⁸ [Cap 25:04], section 11(1).

³⁹ Sechele, *Deepening Democracy or Creeping Authoritarian Rule?* n 10 above p. 128.

⁴⁰ B. Otlhogile, 'The Constitutional Rights of the Mass Media in Botswana: An Academic's View' in Leepile (ed.), n 34 above 53 at 63.

questions from the press or ask for questionnaires, which are normally not responded to until the paper has gone to press.⁴¹

The long anticipated move to control the media finally arrived in 1997 when the government published a *Mass Communications Media Bill*. The Bill sought *inter alia* to establish a broadcasting board, newspaper registration, accreditation of journalists and a press council. Each of these bodies was to be appointed and managed by the government through the minister responsible for broadcasting and information.⁴² The government was however forced to withdraw the controversial Bill after national and international protests. An agreement was reached with media stakeholders whereby government proceeded to enact legislation relating to broadcasting, while the provisions relating to the press were shelved.⁴³ On 30th November 2001, the government published a 'new' *Mass Communications Media Bill*. The Bill, save for the broadcasting section, is exactly the same as the one that was rejected by the media a few years ago.⁴⁴ At the time of writing, the Bill was still to come before Parliament amidst protests from the media and civil society organisations.

If the *Mass Communications Bill* is eventually passed into law, it will add to the number of statutory enactments that limit media freedom already on the statute books. Most of the current statutory limits to media freedom relate to national security and sedition. In addition to these statutory enactments, there are also common law rules, which limit media freedom, such as contempt of court and defamation.⁴⁵ While statutory limits to media freedom pose harsher punishment, these are hardly used. The law of defamation poses the biggest threat to media freedom.⁴⁶ Editors of the private media are constantly harassed by threats to sue, especially from public figures. In November 2001, *Mmegi* was ordered to pay a High Court judge P250 000 in damages for defamation.⁴⁷ And more recently, in May 2003, *Mmegi* also had to pay P225 000 in an out of court settlement to the deputy Attorney General of Botswana after

⁴¹ Sechele, *Deepening Democracy or Creeping Authoritarian Rule?* n 9 above p. 120.

⁴² J. Minnie & B. Mwape, *So this is Democracy: State of the Media in Southern Africa 1997* (MISA, 1997) p. 23.

⁴³ *Ibid.*, p. 25.

⁴⁴ MISA Botswana Alert Update, at: [<http://www.misanet.org/alerts/20011204.Botswana.0.html>].

⁴⁵ For a list and commentary on the laws that limit media freedom in the country, see T. Balule & B. Maripe, *Laws and Regulations that Inhibit Media Freedom in Botswana* (MISA-Botswana, 2000).

⁴⁶ This view is based on the writer's interviews with the editors of the private press.

⁴⁷ *Dibotelo v Sechele and others* Civil Case 1511/2000, High of Botswana (Unreported).

publication of defamatory stories about the latter.⁴⁸ The paper is also said to be facing approximately ten more defamation suits.⁴⁹ The *Guardian* is also facing a lawsuit from the vice president over an article in which it alleged that he was abusing his office.⁵⁰ The paper is also facing another defamation suit which has been pending before the High Court since 1999 by two Members of Parliament. One is a former minister of finance and the other is the treasurer of the ruling party. The paper had published a story questioning a P51 million-government grant to an Indonesian investor who had bought the latter MP's textile factory.⁵¹

The private media in Botswana is financially weak. It is not eligible for government financial assistance programmes and has difficulty in raising loans from the conservative, foreign dominated financial sector. Government policy planners do not view an independent media as a viable industry, capable of producing employment and generating exports.⁵² If advertising were to be eliminated from the private media, it will be forced out of business. The private media in the country depend to a large extent on advertising revenue from the government and public sector. This renders the industry vulnerable in the sense that if these revenues are withdrawn, the industry cannot rely on the private sector for advertising since this sector is relatively small compared to the public sector.

Reliance on advertising revenue seriously compromises the editorial independence of the media. If the media publish stories critical of major advertisers, they are often threatened with withdrawal of adverts. In 1999, after the *Guardian* had published the story concerning the two MPs, the paper received threats to starve it of advertising. The ruling party went on to instruct its secretariat not to place any party adverts in the paper.⁵³ Recently, the government instructed all government departments and parastatal organisations to withdraw advertising from the *Guardian* and *Midweek Sun* newspapers.⁵⁴ The instruction came after the two papers had published a series of

⁴⁸ See 'Mmegi to Pay Tafa', *Daily News*, 22nd May 2003.

⁴⁹ Interview with *Mmegi* Managing Editor, Titus Mbuya (Gaborone, 17th October 2001).

⁵⁰ Interview with the editor, Outsia Mokone (Gaborone, 1st November 2001).

⁵¹ R. Galant, J. Minnie & Z. Wales (eds.) *So this is Democracy? State of the Media in Southern Africa 1999* (MISA, 2000) p. 49.

⁵² *Media Concentration and its Impact in South Africa, Botswana, Lesotho and Swaziland*, (Report produced by Freedom of Expression Institute for IFEX meeting in New York, 20 May 200) p. 21.

⁵³ Galant, Minnie & Wales, n 51 above p. 49.

⁵⁴ MISA Botswana Alert Update, at: [<http://www.misanet.org/alerts/200110604.botswana.0.html>].

articles critical of both the President and the Vice President. The decision was taken in order to put pressure on the two papers to conform to a reportage that falls within what government considers to be the parameters of editorial freedom. Advertising from government and parastatal organisations allegedly account for up to 40% of the two papers' advertising revenue. The papers launched an urgent application with the High Court to challenge the decision to starve them of government adverts. The court held that it was unlawful for the government to withdraw advertising from the papers as a punitive measure.⁵⁵

What is however disturbing about the decision of the court is the conclusion that:

"...I must reiterate that government like anybody else cannot be forced to advertise or buy advertising space in any paper or media. Even where it has been advertising or has bought advertising space in any paper or media for any given period of time, it is, as a general rule entitled to withdraw such patronage at will".⁵⁶

The implication of the decision is that the media must subordinate their democratic mandate to commercial interests. Given that the private media relies heavily on advertising revenue for survival, if for example a newspaper steps on the toes of big advertisers, it may find itself short of advertisers, which may have dire consequences for its continued existence. Economic factors therefore have a serious impact on the enjoyment of media freedom in the country. Its impact is probably greater than the self-censorship imposed on the media by harsh laws such as those on national security.

It has been observed that the commercial media today are characterized by an increasing concentration of media ownership and growing cross-media ownership nationally and globally.⁵⁷ Botswana is no exception, although the media industry is relatively young and small, there are already developments towards concentration and cross-ownership. Dikgang Publishing Co, the owners of *Mmegi* and *Mmegi Monitor*

⁵⁵ *Media Publishing (Pty) Ltd v AG of Botswana & others*, MISCA 229/2001, High Court (Unreported).

⁵⁶ *Ibid.*, at 31.

⁵⁷ J. Duncan & M. Seleokane, *Media and Democracy in South Africa* (Human Sciences Research Council and Freedom of Expression Institute, 1998) p.18.

own 51% of CBET (Pty) Ltd, the owners of the *Guardian* and *Midweek Sun*.⁵⁸ Dikgang Publishing Co also holds a 10% take in *Gabz FM*. On the other hand, News Company (Pty) Ltd, the owners of the *Gazette* also hold a 6% stake in *Yarona FM*.

3.3 *Profile of the Mainstream Media in South Africa*

3.3.1 *Print Media*

Until the early 1990's, the South African newspaper industry was dominated by two main groups: the Afrikaans language press, owned by Nasionale Pers (Naspers) and Perkskor, which supported the apartheid government, and the English language press owned by the mining and industrial conglomerate, Anglo-American Corporation (AAC), and supportive of liberal white opposition parties. The AAC controlled two companies that dominated the English market for many years, namely the Argus Group and the SA Associated Newspapers (Saan), later Times Media Limited (TML). The duopoly was vertically integrated at the level of print, distribution and product, with restrictive practices existing to ensure that distribution and, to a lesser extent, printing, was contained within the duopoly.⁵⁹ A few newspapers independent of the duopoly existed,⁶⁰ but for news outside their areas, they relied heavily on the news service provided by the South African Press Association (Sapa), which was owned by the duopoly.⁶¹

Important changes in the press took place during the transition to democracy.⁶² In 1987 a black-empowerment group, Mandla-Matla, bought the bi-weekly Zulu language *Ilanga* from the Argus group. The group also sold a controlling stake in the country's biggest daily circulation, the *Sowetan*, to a black-empowerment group, New

⁵⁸ The *Guardian* and *Midweek Sun* were initially owned by Media Publishing (Pty) Ltd, a company that was owned by a British national, William Jones. At the end of 2001, Jones relocated to Australia and sold off the two papers to CBET (Pty) Ltd on 1st November 2001.

⁵⁹ C. Emdon, 'Ownership and Control of Media in South Africa' in Duncan & Seleokane (eds.), n 58 above at 137.

⁶⁰ The most famous were the *Daily Dispatch* in East London and the *Natal Witness* in Pietermaritzburg.

⁶¹ *The Media Development and Diversity Agency (MDDA) Position Paper 2001* (Government Communications and Information System) p. 13. Available at: [<http://www.gov.za>].

⁶² *Ibid.*, p. 17. See also, Emdon, n 59 above at 141–145.

Africa Investment Limited (Nail). Nail joined the National Empowerment Consortium (NEC) in 1996, which then bought Johnnic (owners of TML) from ACC. TML owns the biggest circulation Sunday paper, the *Sunday Times*. On the eve of the first democratic elections, the Argus group sold its remaining titles to the Irish-based Independent Newspapers Group (ING).

Kagiso Trust Investment (KTI), another black-empowerment group, took over Perskor, the publishers of the English daily, the *Citizen*. However, they soon relinquished this and Perskor merged with Caxton. Similarly, in 1997, Naspers sold its English Sunday paper, *City Press*, to a black-owned group, Dynamo Investments. However, two years later, Naspers resumed ownership. Naspers has acquired full ownership of the Afrikaans language newspaper, the *Rapport*, leaving it as the sole owner of mainstream Afrikaans newspapers.

There are approximately thirty-one newspapers in circulation in South Africa today. Over half of these are daily papers and the rest, save for *Ilanga*, which is a bi-weekly, are weekly newspapers.⁶³ The majority of these papers are published in English. Four are published in Afrikaans language while *Ilanga* is the only paper published in an African language.⁶⁴ Most publications appeal to the tastes of middle to upper income readers of all races. The *Sowetan* and *City Press*' readership is predominantly black of all incomes.⁶⁵ The Afrikaans language newspapers target the Afrikaans speakers and seek to preserve their culture and language.⁶⁶ The content of the papers vary, but most focus on politics, public affairs, education, culture, business, sports and entertainment.⁶⁷

The role of the media in a democratic South Africa was defined by its High Court in the following terms:

'The press is in the frontline of the battle to maintain democracy. It is the function of the press to ferret out corruption, dishonesty and graft wherever it

⁶³ MDDA Position Paper, n 61 above p. 59. See also Table 2.

⁶⁴ The Afrikaans language publications are, *Die Volksblad*, *Die Burger*, *Rapport* and *Beeld*.

⁶⁵ Refer to Table 2 for a profile of the mainstream newspapers in the country.

⁶⁶ See *Faultlines: Inquiry into Racism in the Media* (South African Human Rights Commission, August 2000) p. 22, available at: [<http://www.sahrc.org.za>].

⁶⁷ Thapisa & Megwa, n 3 above p. 40.

*may occur and to expose the perpetrators. The press must reveal dishonest, mal- and inept administration...It must advance communication between the governed and those who govern. The press must act as the watchdog of the governed.*⁶⁸

The courts recognise that in a system of democracy dedicated to openness and accountability, there is need for robust criticism of the exercise of power, and that for the criticisms to be effectively voiced, there must be a strong and independent media.⁶⁹ The press in the country have been said to be relatively successful in the performance of their democratic mandate.⁷⁰ In this regard, the *Mail & Guardian* and the *Sunday Times* are leading the pack.⁷¹ Because of their tough stance against the government, these papers have often been accused of racism. The inquiry into racism in the media conducted by the Human Rights Commission in 1998 was triggered by complaints against the two papers. The *Mail & Guardian* is seen as the voice of independent journalism in the country because of its investigative, fearless in-depth reporting of government activities, corruption in government and in the private sector.⁷² The *Sunday Times* on the other hand, aims at exposing corruption and criminality in all sectors of the society, assisting with the growth of a culture of tolerance and debate and ensuring respect for the constitution.⁷³

With just over thirty newspaper titles and a population of approximately 43 million, South Africa is said to have the second lowest number of titles in the world in relation to population size, and the circulation of newspapers in relation to population is the fifth lowest in the world.⁷⁴ It is estimated that there are about 3,5 million illiterate adults in the country with the majority based in rural areas. Distribution of the press is biased towards urban areas. All national newspapers (*City Press, Sowetan, Star, Business Day & Sunday Times*) have almost 50% of their circulation in one province alone, Gauteng. South Africa is divided into nine provinces for administrative purposes. Gauteng, though the smallest in size, is the powerhouse of South Africa and

⁶⁸ *Government of the Republic of South Africa v Sunday Times Newspaper* 1995 2 SA 221 at 227.

⁶⁹ *Holomisa v Argus Newspapers* 1996 2 SA 588 at 609.

⁷⁰ Y. Burns, *Communications Law* (Butterworths, 2001) p. 301.

⁷¹ See *Faultlines: Inquiry into Racism in the Media*, n 66 above p. 7.

⁷² *Thapisa & Megwa*, n 3 above p. 41.

⁷³ *Faultlines: Inquiry into Racism in the Media* n 66 above p. 25.

⁷⁴ J. Duncan, *Broadcasting and the National Question: South African Broadcast Media in an Age of Neo-Liberalism* (Freedom of Expression Institute and Netherlands Institute for Southern Africa, 2001) p. 1.

the heart of commercial business and industrial sector.⁷⁵ In the other provinces, newspapers tend to be found mainly in the urban centres.⁷⁶ Newspapers therefore do not service adequately the estimated 46.3% of the country's rural population.

3.3.2 *Broadcast Media*

During the apartheid era, broadcasting was effectively a state monopoly. The state owned South African Broadcasting Corporation (SABC), which was established in 1936 was the main broadcaster in both radio and television. The SABC was used as a propaganda tool by the apartheid government and its services therefore reflected the government's policy of separate and unequal development.⁷⁷ The only private broadcasting services were provided by *M-Net*, a pay television service established in 1986, but was not allowed to broadcast news. And there were two radio stations licensed by the then 'homeland governments' of Bophuthatswana and Transkei.⁷⁸

Major changes in the broadcasting sector took place in the run-up to the first democratic elections with the enactment of the *Independent Broadcasting Authority Act 1993*.⁷⁹ The Act established an Independent Broadcasting Authority (IBA) to regulate the broadcast media. The role of the IBA was to open up the broadcast media and to give voice to as large a variety of South Africans as possible.⁸⁰ This was to be achieved through encouraging the historically disadvantaged ownership of the media, diversifying ownership and programming and encouraging South African programming.⁸¹ In order to achieve these objectives, the Act provides for the development of three kinds of broadcasting licences: community broadcasting, private or commercial broadcasting and public service broadcasting.

The obligation of providing public service broadcasting is tasked to the revamped SABC. In terms of the *Broadcasting Act 1999*,⁸² the SABC is mandated to provide in

⁷⁵ *MDDA Position Paper*, n 61 above p. 23.

⁷⁶ For example, in the Western Cape province the *Cape Times*, *Cape Argus* and *Saturday Argus* have more than 90% of their respective sales in the Cape Town metropolitan area.

⁷⁷ *MDDA Position Paper*, n 61 above p. 13.

⁷⁸ *Radio 702* and *Capital 604*, respectively.

⁷⁹ Act 153 of 1993, available at: [<http://www.iba.org.za.actaaa.htm>].

⁸⁰ Section 2, *IBA Act*.

⁸¹ *Ibid*.

⁸² Act No. 4 of 1999: [<http://www.parliament.gov.za/acts/1999/act4-99.htm>].

its radio and television services, programmes that inform, educate and entertain.⁸³ Such programming must make services available in all official languages and reflect the diverse cultural and multilingual nature of the country and of all its cultures and regions to audiences.⁸⁴ The SABC is also required to provide commercial broadcasting services to subsidise the public services, however, this service must comply with the values of public service broadcasting.⁸⁵

In a bid to fulfil its mandate, the SABC runs nineteen radio stations. Eleven of these provide full-spectrum public service programming in eleven different languages targeted at specific audiences.⁸⁶ The provision of services in eleven languages is in compliance with the constitution, which recognises eleven official languages.⁸⁷ The remaining stations provide commercial services. The programme content of the full-spectrum radio stations is 50% music, 20% talk shows and documentaries, 12% news and related programmes and the remaining 18% is shared between religious, formal education, sport and environmental and conservation programmes.⁸⁸ The commercial radio stations' schedule is 90% music with the remaining 10% devoted to talk shows, news and current affairs.⁸⁹

In addition to its radio services, the SABC also owns three television stations to further its public service and commercial mandates. *SABC1* is a full-spectrum channel aimed at younger views and broadcasts in five languages.⁹⁰ *SABC2* is also a full-spectrum channel aimed at the whole family and broadcasts in the remaining six official languages including English. *SABC3* is an entertainment and information channel aimed at cosmopolitan viewers and broadcasts in English.⁹¹

⁸³ Section 8 (d).

⁸⁴ Section 10(a) & (b).

⁸⁵ Section 11.

⁸⁶ See Table 4(a) for profile of SABC broadcasters.

⁸⁷ Constitution of the Republic of South Africa Act 108 of 1996, section 6(1). The official languages are: Sepedi; Sesotho; Setswana; siSiswati; Tshivenda; Xitsonga; Afrikaans; English; isiNdebele; isiXhosa and isiZulu.

⁸⁸ *This is the SABC* (SABC Corporate Communications Department, 2000) p. 13.

⁸⁹ *Ibid.*

⁹⁰ It broadcasts in English, isiZulu, isiXhosa, isiNdebele and siSwati.

⁹¹ *This is the SABC*, n 88 above p. 14.

The IBA licensed about fourteen private commercial radio stations.⁹² These are regional stations and their format is mainly talk shows and music. They broadcast in English and Afrikaans. These stations serve the interests of a varying audience ranging from black middle income to predominantly white audiences.⁹³ In addition, over eighty community radio stations have been granted licences. In general, the IBA accepted four distinct groups of community radio stations: ethnic, religious, student and development oriented stations.⁹⁴ Most of the community radio stations serving ethnic interests are based in the rural disadvantaged areas, with the others located mainly in the well-resourced urban areas and broadcast predominantly in English.⁹⁵

In commercial television, the only free-to-air television station was granted a licence in 1998. The station, *e-tv*, broadcasts nationally and depends on advertising for its survival. It is required to provide a range of programming addressing a wide section of the South African public. While *e-tv* is mainly an English language channel, it is required to include other official languages in its broadcasts.⁹⁶ There is also *M-Net*, a private subscription television service launched in 1986.⁹⁷ The launch of television in South Africa in 1975 gave rise to fears that newspapers would lose advertising revenue. The government sought to offset this by allowing newspapers ownership of a pay television service on the condition that the service did not carry news. Consequently, the dominant newspaper groups, Argus, Naspers, Perskor and TML launched *M-Net*. Its services are aimed at up-market viewers and focuses on movies, sport, entertainment and magazine programmes. In 1995, *M-Net*, through its sister company *Multi-Choice*, launched its digital satellite television.

Radio enjoys a penetration rate of 93% of the country's population, with television reaching approximately 69.6%.⁹⁸ SABC radio and television services reach specific targets via terrestrial transmitter network and are available nationally via satellite receiving system. These command over three times more listeners and viewers than

⁹² See Table 4(b) for profile of private broadcasters.

⁹³ *MDDA Position Paper* n 61 above p. 60.

⁹⁴ Emdon, n 59 above at 147.

⁹⁵ *MDDA Position Paper*, n 61 above p. 16.

⁹⁶ Section 30(a) & (b), *Broadcasting Act 1999*.

⁹⁷ *MDDA Position Paper*, n 61 above p. 13.

⁹⁸ Duncan, n 74 above p. 1.

all the other broadcasters combined.⁹⁹ Private broadcaster services are available terrestrially in their regions of operation. The private television service, *e-tv*, reaches 75% of the population terrestrially, but commands a viewership of only 10%.¹⁰⁰ By the end of the year 2000, there were approximately 18.6% South Africans who could not receive television and radio signals. In addition, even in areas where signals do exist, many more do not have the means to access them.¹⁰¹

3.3.3 *Political and Economic Factors that Impact on Media Freedom*

Although there has been some irritation and sensitivity by government in response to criticism in the media, it appears the government remains true to its commitment to freedom of expression, information and a free media.¹⁰² The democratic government brought to office in 1994, and which retained power in the following elections in 1999, committed itself to a programme of social reforms.¹⁰³ The programme would arguably have brought the country into line with the old welfare states in terms of delivery of social services. Once in power, the government had to reconcile its reform policy with the realities of globalisation. The government brought in the Growth, Employment and Redistribution Plan (GEAR), a macroeconomic framework that seeks to achieve its social reforms by adjusting the economy to the needs and priorities of global markets. The plan shifts the bulk of service delivery onto the private sector through privatisation and other business friendly policies.¹⁰⁴

After almost a decade of democratic rule, debates around government's delivery on its promises on social reforms are gaining prominence, with the media leading the debate. This has inevitably caused an uneasy relationship between the media and government. The latter often complains that its messages, its perspectives and its concrete decisions do not receive adequate media coverage.¹⁰⁵ In 1997, the then

⁹⁹ *MDDA Position Paper*, n 61 above p. 15.

¹⁰⁰ US Embassy Stockholm, Country Reports on Human Rights Practices for 2001, South Africa: [www.usemb.se/human/2001/africa/south_africa.html].

¹⁰¹ *MDDA Position Paper*, n 61 above p. 21.

¹⁰² *Communications 2000: A Vision for Government Communications in South Africa* (Report of the Task Group on Government Communications, 1996) p. 3.

¹⁰³ The programme is called the Reconstruction and Development Programme (RDP) and was developed by the ruling African National Congress (ANC).

¹⁰⁴ Duncan, n 74 above, p. 10.

¹⁰⁵ *Communications 2000*, n 102 above p. 8.

president, Nelson Mandela, accused the country's press of being embittered, conservative people who are out of touch with black society.¹⁰⁶ He further accused black journalists of writing to appease their white masters by undermining his government. Further attacks on the media were made by the current president who accused them of dwelling on negative things and distorting developments in the country.¹⁰⁷ A more threatening act designed to undermine media freedom by a senior government official was a visit by the minister of defence to the offices of *Die Volksblad* in the company of uniformed senior army officials where the minister confronted the editor, accusing him of distorted reporting. The minister later made a scathing attack on the media in Parliament accusing them of abusing their freedom.¹⁰⁸

Media freedom is further threatened by the fact that many apartheid censorship laws still remain on the statute books.¹⁰⁹ Despite a recommendation by the Task Group on Communications that these laws should be repealed, nothing has yet been done.¹¹⁰ There have already been indications that certain elements in government are not averse to using some of this legislation. For example, in February 1996, the ministry of health asked all employees to sign declarations of secrecy to prevent them from leaking information in the wake of a scandal involving a R14 million tender for an AIDS awareness play. The move was justified in terms of the *Protection of Information Act of 1984*.¹¹¹

Even though there have been some sporadic attacks on the media by some leading politicians, the government acknowledges and appreciates the importance of media freedom. Mandela's criticism of the media prompted a meeting with black journalists, and he later appeared on national television assuring the public that the differences had been resolved, and that media freedom was not under threat. The reassurance was later repeated in his final days in office when he warned that any democratic government that interfered with the freedom of the press would destroy itself.¹¹²

¹⁰⁶ Minnie & Mwape, n 42 above pp. 75 – 76.

¹⁰⁷ B. Mwape & J. Minnie, *So this is Democracy? State of the Media in Southern Africa 1998* (MISA, 1999) pp. 87 – 88.

¹⁰⁸ Galant, Minnie & Wales, n 51 above p. 126.

¹⁰⁹ See Burns, n 74 above, chapter 3.

¹¹⁰ *Communications 2000*, n 102 above p. 22.

¹¹¹ D. Sibongo & D. Lush, *So this is Democracy? Report of State of the Media in Southern Africa 1996* (MISA, 1997) p. 33.

¹¹² Galant, Minnie & Wales, n 51 above p. 115.

The government has, consistent with the former president's warning, taken important measures towards ensuring the enjoyment of media freedom and freedom of information. In 1998 it set up a Government Communications and Information System (GCIS). The mandate for the establishment of the GCIS is drawn from the freedom of expression clause in the constitution. The aim of the GCIS is to enable citizens not only to receive information about their government, but also to allow them to communicate their views to the government.¹¹³ Parliament has also passed an access to information law giving effect to the constitutional right of access to information.¹¹⁴ The Act applies to the exclusion of any other law that prohibits or restricts disclosure of information or that is materially inconsistent with the objects of the Act.¹¹⁵ The Act is very crucial given that the government has hitherto failed to amend or repeal censorship laws passed by the former apartheid government.

The SABC seems to be enjoying editorial freedom from government. A task team appointed by the SABC to examine its editorial independence found that there was no evidence to support allegations of infringement of editorial independence or bias towards any political organisation.¹¹⁶ A report by the IBA in 1999 also concluded that in terms of editorial coverage, reporting by the SABC was free and fair, and that even though the government and the ruling party received most coverage, such reports were not necessarily positive.¹¹⁷

The biggest threat to media freedom and access to information in South Africa is posed by economic factors. Newspaper ownership is highly concentrated, most titles are owned by three groups,¹¹⁸ and only *Ilanga* and the *Mail & Guardian* fall outside their ambit. There is both vertical and horizontal integration among the major media groups. Increasingly, media groups are operating on a multi-media basis by assembling a mix of mass and targeted media. The mix allows them to spread their bets by affording them the opportunity to attract a spread of revenue streams, including above the line and below the line advertising. The ideal multi-media group

¹¹³ See GCIS website at: [<http://www.gov.za>].

¹¹⁴ *Promotion of Access to Information Act, No. 2 of 2000*.

¹¹⁵ *Ibid.*, section 5.

¹¹⁶ Galant, Minnie & Wales, n 51 above p. 130.

¹¹⁷ *Ibid.*, p. 123.

¹¹⁸ Times Media Ltd, Naspers and Independent Newspaper Group.

is seen as having a mix of content-creation and distribution platforms, so that costs of content can be amortised across a spread of media.¹¹⁹ These groups are exploring synergies between different components of their operations, and are also forging co-operation agreements with one another in order to bring costs down.¹²⁰ In the process they create structural barriers to entry to the media industry, for the more they integrate with one another, the more they raise barriers to entry.

Leading media groups have centralised editorial content across titles. Stories are produced centrally, like a news agency and distributed across the titles. A common pool of reporters has been established to cover different subjects, which then supply all titles with copy.¹²¹ The SABC has also, in a move aimed at cutting costs, gone the bi-media route, merging the radio and television news and current affairs operations into a freestanding news division.¹²²

The ownership of broadcasting licences is regulated by law.¹²³ The law allows for any one entity to control a maximum of two FM and two AM radio licences, and not more than one television licence. However, the same entity can have non-controlling financial interests in an unlimited number of licences. Cross-media control between the broadcast and print media is also limited. For example, a person who is in control of a newspaper cannot have control over a radio or television licence in an area where the newspaper has an average circulation of 20% of the total readership in the area if the licence area of the broadcast licensee substantially overlaps with the circulation area of the newspaper.¹²⁴ At the time that the cross-media rules were introduced in 1999, some media houses had already acquired a dominant position in both sectors. For example, Nail, the parent company of the publishers of the *Sowetan* and *Sunday Times*, which have over 50% of their circulation in the Gauteng Province, also, through another subsidiary, have a controlling stake in *Jacaranda FM* radio station, which also broadcasts in Gauteng.

¹¹⁹ Duncan, n 74 above p. 7.

¹²⁰ Ibid.

¹²¹ *Media Concentration and its Impact in South Africa, Botswana, Lesotho and Swaziland*, n 52 above p. 16.

¹²² Ibid., p. 13.

¹²³ Section 49, *IBA Act 1993*.

¹²⁴ Section 50.

Advertising is regarded as the lifeblood of the commercial media. It therefore has a real impact on the form and content of the service offered in that it ensures that service is geared to delivering audiences to advertisers. Unemployment is rising in South Africa and domestic markets for goods and services are shrinking, which in turn is impacting negatively on advertising levels. As a result, competition for an ever-decreasing pool of high-income earners is increasing, which has profound implications on content of media reliant on advertising. Currently ad spend in the country is heavily skewed against media that primarily serve black consumers, despite their readership and listenership figures. The largest daily paper in the country, the *Sowetan*, is finding it difficult to attract advertisers compared to smaller traditionally white publications such as the *Business Day* and the *Star*.¹²⁵ In the broadcast sector, a survey conducted in November 1999 showed that *Highveld Stereo*, a private radio station with a then listenership of 797 000 received R13.7 million in advertising income, while *Ukhozi fm*, which had the biggest listenership in the country of 5 990 000, received R10.26 million. *High Stereo* has a predominantly white audience while *Ukhozi fm* is one of the SABC's public service stations targeting isiZulu speakers.¹²⁶

The SABC relies heavily on advertising, which accounts for approximately 80 % of its income with the licence fee accounting for a mere 13 %.¹²⁷ When the SABC was re-launched in the democratic South Africa, the overall audience figures remained unchanged, but the proportion of white viewers fell while the proportion of black viewers rose. As a result thereof, the SABC began to lose advertising revenue as white and Afrikaans viewers proved to be more attractive than black viewers.¹²⁸

3.4 Conclusion

The profiles of the press in the two countries demonstrate that the number of titles in both countries is small compared to their population sizes. Even though the newspapers in circulation in both countries disseminate a broad range of news and opinions, their distribution is skewed in favour of the urban affluent audiences. The

¹²⁵ *MDDA Position Paper*, n 61 p. 15.

¹²⁶ *Ibid.*, p. 24.

¹²⁷ Duncan, n 74 above p. 114.

¹²⁸ *MDDA Position Paper*, n 61 above p. 15

rural population is not adequately serviced by the newspaper industry. There is also a shortage of titles published in indigenous African languages, as most titles prefer publishing in English, which creates a language barrier. High levels of illiteracy further hamper the accessibility of newspapers to the citizens of both Botswana and South Africa. The newspaper industry in South Africa is highly monopolised with a growing tendency to centralise editorial content across titles thus posing a serious threat to editorial pluralism. In Botswana, although the industry is still relatively new, there are already developments towards concentration of newspaper ownership.

Concentration of ownership in the newspaper industry has led to the demise of a number of titles independent of the big media groups in South Africa. The situation has led to a monopoly or oligopoly of information dissemination by big media houses. In addition to concentration, there is also a growing incidence of cross-ownership in the newspaper and broadcast media. In South Africa, cross-ownership even extends to content production.

Radio and television are the most accessible media in terms of both geographic coverage and language in both countries. In South Africa, the SABC, private and community broadcasters offer a wide range of programming in various languages to the public. In Botswana the broadcast media are still dominated by state owned broadcasters and are prone to government interference.

The media in both countries play a crucial watchdog role in relation to their governments and other powerful institutions in society. The media's style of investigative journalism has created an uneasy relationship between the media and their respective governments. In South Africa the poor relationship between the government and the media does not seem to have jeopardised the enjoyment of media freedom and access to information. By contrast, in Botswana the picture is gloomy. The government is very secretive and often refuses to deal with the media and is also not willing to grant state owned media editorial independence.

The law of defamation further poses a serious threat to media freedom in Botswana. The law is mostly resorted to by political and public officials to thwart criticism by the media. Economic factors pose another serious threat to media freedom in both

countries. The media in both countries depend on advertising revenue for their survival. Economic considerations therefore play an important role in determining content, format and audience of media services. It is hardly surprising that most media services target middle to upper income urban audiences, because this is the bracket that can give advertisers significant revenue returns. The struggle for audiences tend to result in the homogenisation of content and format of media services thus threatening diversity.

Table 1: Profile of the mainstream newspapers in Botswana.

Title	Ownership	Frequency	Circulation*	Language	Audience
<i>Daily News</i>	Government	Daily (Mon-Fri)	65 000	English and Setswana	Adults
<i>Guardian</i>	CBET (Pty) Ltd	Weekly (Friday)	21 000	English	Urban educated adults
<i>Midweek Sun</i>	CBET (Pty) Ltd	Weekly (Wednesday)	19 000	English	Youth
<i>Mmegi/The Reporter</i>	Dikgang Publishing Co	Weekly (Friday)	27 000	English, Setswana and Ikalanga	Urban educated adult
<i>Mmegi Monitor</i>	Dikgang Publishing Co	Weekly (Tuesday)	18 830	English	Urban Educated Adult
<i>Gazette</i>	News Company (Pty) Ltd	Weekly (Wednesday)	20 000	English	Business and urban educated adults
<i>The Voice</i>	The Voice Publishing Trust	Fortnightly (Friday)	18 000	English	Adults
<i>Mirror</i>	Individual (Moeti Mohwasa)	Fortnightly (Friday)	8 000	English	Adults

Source: Adapted from, Thapisa & Megwa, *Situation Analysis of Mass Communications in Botswana*.

*Circulation figures are based on the writer's interviews with editors of the various newspapers. (October, 2001).

Table 2: Profile of the mainstream newspapers in South Africa.

Title	Ownership	Frequency	Circulation	Language	Audience
<i>Sowetan</i>	New Africa Publications	Daily	2 145 000	English	Black all income
<i>Post</i>	Independent Newspaper Group (ING)	Weekly	314 000	English	Indians all incomes
<i>Independent on Saturday</i>	ING	Weekly	338 000	English	Broad market non-racial
<i>Cape Argus</i>	ING	Daily	351 000	English	Middle income readers in Cape Town
<i>Sunday Independent</i>	ING	Weekly	184 000	English	Decision makers
<i>Saturday Argus Weekend</i>	ING	Weekly	397 000	English	Broad market
<i>Sunday Argus Weekend</i>	ING	Weekly	304 000	English	Broad market
<i>Cape Times</i>	ING	Daily	255 000	English	Middle income readers in Cape Town
<i>Sunday Tribune</i>	ING	Weekly	687 000	English	Middle income non-racial

<i>Saturday Star</i>	ING	Weekly	503 000	English	Non-racial
<i>The Mercury</i>	ING	Daily	249 000	English	Middle income non-racial
<i>Daily News</i>	ING	Daily	367 000	English	Mass, middle market of Greater Durban; non-racial; all income groups
<i>Pretoria News</i>	ING	Daily	202 000	English	Broad market
<i>Pretoria News Weekend</i>	ING	Daily	73 000	English	Broad market
<i>The Star</i>	ING	Daily	855 000	English	Non-racial; all incomes
<i>Ilanga</i>	Mandla-Matla	Bi-Weekly (Tue & Thur)	1 440 000 & 1 313 000	Zulu	Zulu speaking
<i>Citizen</i>	Caxton	Daily	897 000	English	Broad market
<i>Daily Dispatch</i>	Dispatch Media	Daily	218 000	English	Non-racial; all incomes
<i>Business Day</i>	Times Media/Pearson Group	Daily	146 000	English	Non-racial decision makers
<i>Sunday Times</i>	Times Media	Weekly	2 300 000	English	Non-racial middle to upper income
<i>Mail and Guardian</i>	Mail & Guardian	Weekly	192 000	English	Non-racial middle income
<i>Die Volksblad</i>	Naspers	Daily	127 000	Afrikaans	Afrikaans speakers
<i>Die Burger</i>	Naspers	Daily	600 000	Afrikaans	Afrikaans speakers
<i>Rapport</i>	Naspers	Weekly	1 762 000	Afrikaans	Afrikaans speakers
<i>Beeld</i>	Naspers	Daily	459 000	Afrikaans	Afrikaans speakers
<i>City Press</i>	Naspers	Weekly	2 381 000	English	97% Black readership

Source: Adapted from the *MDDA Position Paper 2001*.

Table 3 (a): Profile of state owned broadcasters in Botswana.

Station	Language	Audience
<i>RBI</i>	English and Setswana	N/A
<i>RB2</i>	English and Setswana	N/A
<i>Btv</i>	English and Setswana	N/A

N.B. At the time of writing, the Department of Information and Broadcasting was in the process of commissioning a survey to determine the audience of the state owned broadcasters.

Table 3(b): Profile of private broadcasters in Botswana.

Station	Proprietor	Language	Format	Audience
<i>Ya Rona FM</i>	Mopani Media Ltd (49%) and remaining 51% by a consortium of Botswana individuals and companies including News Company Botswana (6%)	English and Setswana	Music and Talk	150 000 – 250 000
Gabz FM	Makana Media (49%) and remaining 51% by a consortium of Botswana individuals and companies including Dikgang Publishing Co (6%)	English and Setswana	Music and Talk	N/A

N.B. Mopani Media Ltd and Makana Media are South African companies.

Table 4(a): Profile of South African Broadcasting Corporation broadcasters.

Station	Language	Audience
<i>Ukhozi fm</i>	Zulu	4 534 000
<i>Umhlobo Wenene FM</i>	Xhosa	3 066 005
<i>Metro FM</i>	English	2 865 000
<i>Lesedi FM</i>	Sotho	2 284 000
<i>Motsweding FM</i>	Tswana	1 689 000
<i>Thobela FM</i>	Sepedi	1 522 000
<i>Radiosondergrense</i>	Afrikaans	1 069 000
<i>Mungana Lonene</i>	Tsonga	826 000
<i>Ikwewezi FM</i>	Ndebele	665 000
<i>5FM</i>	English	1 011 000
<i>Ligwalagwala FM</i>	Swazi	670 000
<i>Phalaphala FM</i>	Venda	455 000
<i>Good Hope FM</i>	English	652 000
<i>Radio Bop</i>	English	286 000
<i>CKI Stereo</i>	English	342 000
<i>Safm</i>	English	369 000
<i>Lotus FM</i>	English, Tamil & Hindi	352 000
<i>Radio 2000</i>	Simulcast	141 000
<i>SABC1</i>	English, Zulu, Xhosa, Ndebele & Swati	13 166 000
<i>SABC2</i>	English, Afrikaans, Sotho, Tswana, Sepedi, Tsonga & Venda	9 175 000
<i>SABC3</i>	English	5 430 000
<i>Bop-TV</i>	English	316 000

Source: Adapted from the *MDDA Position Paper 2001*.

Table 4(b): Profile of the mainstream private broadcasters in South Africa.

Station	Proprietor	Language	Format	Audience
<i>Classic FM</i>	Classic FM (UK), Liberty Life & Ingoma Trust	English	Music	122 000
<i>Highveld</i>	Primedia	English	Music	778 000
<i>Cape Talk</i>	Premedia	English	Talk	73 000
<i>Radio 702</i>	Premedia	English	Talk	257 000
<i>East Coast Radio</i>	Kagiso Media	English	Music	782 000
<i>Jacaranda FM</i>	Kagiso Media & New Africa Media (NAM)	English	Music	835 000
<i>O fm</i>	African Media Entertainment (AME)	English	Music	295 000
<i>Radio Algoa</i>	AME	English	Music	235 000
<i>Punt Geselstadio</i>	AME	Afrikaans	Talk	58 000
<i>P4 (Durban)</i>	Makana	English	Music	100 000
<i>P4 (CapeTown)</i>	Makana	English	Music	150 000
<i>Kaya FM</i>	Makana & NAM	English	Music	398 000
<i>Y FM</i>	HCI	English	Talk	772 000
<i>Kfm</i>	NAM	English & Afrikaans	Music	530 000
<i>e-TV</i>	Sabido	Multilingual	Television	5 112 000
<i>M-Net</i>	Naspers	English & Afrikaans	Subscription TV	2 871 000

Source: Adapted from the *MDDA Position Paper 2001*.

CHAPTER 4

PROTECTION OF MEDIA FREEDOM: INTERNATIONAL LAW AND CONSTITUTIONAL PROVISIONS

4.1 Introduction

Freedom of expression is a universally recognised human right, and as such it is protected in a number of United Nations human rights instruments such as the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR), and in regional human rights treaties such as the African Charter on Human and Peoples' Rights (ACHPR), the American Convention on Human Rights (ACHR) and the European Convention on Human Rights (ECHR). This chapter introduces the treaties and other international instruments that provide protection for the rights of freedom of expression and information. It proceeds to discuss the relevance and/or application of these international instruments to the municipal laws of Botswana and South Africa. Finally, the chapter explores the constitutional protection that media freedom and freedom of information are accorded in the two states, and whether such protection is consistent with the international standards set out in the international human rights instruments.

4.2 Protection of Media Freedom in International Human Rights Instruments:

4.2.1 Universal Declaration of Human Rights (UDHR)

Even though freedom of information and of the media are not specifically mentioned in the Charter of the UN, the importance of these freedoms was recognised by the UN from its very beginning through Resolution 59(1) of the General Assembly at its first session in 1946. The resolution states, *inter alia*, that freedom of information:

a) Is a fundamental human right, and the touchstone of all the freedoms to which the UN is consecrated; and,

b) Implies the right to gather, transmit and publish news anywhere and everywhere.¹

After the adoption of the UN Charter, the international community started a process towards specifying human rights and fundamental freedoms. Further to Resolution 59(1), the General Assembly recommended that the Economic and Social Council (ECOSOC) establish a Commission on Human Rights and include in the work of this Commission all problems concerning freedom of information. At its first session, the Commission, realising that information questions were complex and needed deeper analysis, decided to establish a Sub-Commission on Freedom of Information and the Press. The work of the Commission and the Sub-Commission culminated in the UN Conference on Freedom of Information, which met in Geneva from 23rd March to 21st April 1948. The conference adopted and forwarded to ECOSOC three draft Conventions and also adopted forty-three resolutions and some draft articles for the proposed International Bill of Rights concerning information.²

The proposed International Bill of Rights was adopted by the General Assembly on 10th December 1948 as the UDHR. The Declaration was seen as a simple statement defining human rights and fundamental freedoms and its force was to be of a moral rather than a legal nature. It was taken to indicate goals rather than impose precise obligations upon states.³ Article 19 of the UDHR provides:

“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

Article 19 is very broad and protects both the right to freedom of opinion and expression. The Article refers to ‘freedom of expression’, and it is generally accepted that the term ‘expression’ includes both speaking orally or writing whether ordinarily

¹ *Yearbook of the UN 1946–1947* (United Nations, 1948) p. 176.

² See generally, A. Eide *et al* (eds.), *The Universal Declaration of Human Rights: A Commentary* (Scandinavian University Press, 1992).

³ See W. Kleinwachter, ‘The Birth of Article 19 – A Twin Concept of the United Nations’ (1989) 10(3) *Media Law and Practice* 93 at 99.

(i.e., in a private context) or in the print or electronic media.⁴ Media freedom is therefore protected and the last part of the article, ‘...impart information and ideas through any media and regardless of frontiers’, is pertinent to the media. The media in a democracy are expected to ensure a well-informed citizenry through discussion of a variety of views, and this therefore calls for the protection of media freedom to ensure that the media are not hindered in the dissemination of information and ideas to the public.⁵

Freedom of information is also protected under Article 19, which provides that freedom of expression includes the right to ‘seek, receive and impart information’. The right as protected here is not only passive, but active too. This may require states, which consider the Declaration to be binding on them to take active measures to ensure access to information, especially that held by government or its agencies.⁶ In a leading commentary, Article 19 is said to aim at establishing a world where receiving and imparting information is seen as an individual right, the main objective behind the article being to promote an unobstructed flow of information in all directions and regardless of frontiers.⁷

At face value, this Article appears to grant an absolute right to the freedoms of expression and information. The formulation of the provision has been criticised for its failure to balance the twin concepts of freedom and responsibility as laid down in Resolution 59(1). Under Resolution 59(1), the exercise of freedom of expression and information is subject to the following responsibilities:

- a) Willingness and capacity to exercise the freedoms without abuse; and,
- b) The moral obligation to seek facts without prejudice and to spread knowledge without malicious intent.⁸

⁴ P. Nnaemeka-Agu, ‘Freedom of Expression and of the Press and the African Charter’ (1993) 19 (4) *Commonwealth Legal Bulletin* 1761.

⁵ See chapter 2 at 2.4.

⁶ E. Evatt, ‘The International Covenant on Civil and Political Rights: Freedom of Expression and State Security’, in S. Coliver *et al* (eds.), *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information* (Kluwer Law International, 1999); this is a comment on a similar provision in the ICCPR, however, this has not yet been tested in communications.

⁷ Eide, n 3 above p. 278.

⁸ *Yearbook of the UN 1946–1947*, n 1 above p. 176.

Article 19 must however be read in conjunction with Article 29, which provides for the unity of freedom and responsibility. Article 29 permits restrictions on the freedoms of expression and information solely for the purpose of securing respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. Furthermore, the rights set forth in the Declaration may not be exercised contrary to the purposes and principles of the UN.⁹

Although the UDHR is not binding on states, it has had a tremendous impact on the development of both international and national human rights law. It is used as a yardstick by which to measure the content and standard of observance of human rights, and almost all human rights treaties adopted by UN bodies since 1948 elaborate principles set forth in the Declaration.¹⁰

4.2.2 International Covenant on Civil and Political Rights (ICCPR)

The ICCPR is an elaboration of the civil and political rights set forth in the UDHR and aims at transforming the rights spelt out in the latter into legally binding obligations. The ICCPR was adopted by the UN and opened for signature, ratification and accession on 16th December 1966,¹¹ and entered into force on 23rd March 1976. Freedom of expression and information are protected under Article 19(2):

“Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”

The text of this Article is based on Article 19 of the UDHR, and as such, it also uses the term freedom of expression to denote the freedom to seek, receive and impart information and ideas. The forms of communication protected under this Article are broad and varied, it mentions not only oral, written and printed communication, but

⁹ Article 29 (b) & (c) of the UDHR.

¹⁰ S. Coliver, *The Article 19 Freedom of Expression Manual: International and Comparative Law, Standards and Procedures* (Article 19, 1993) p. 9.

¹¹ General Assembly Resolution 2200A(XXI).

also ‘other media’, and this is important for both radio and television.¹² Media freedom is therefore expressly protected under this Article.

Freedom of information is also covered by this Article, which not only protects the right to receive and impart information, but also an active right to seek information. A question that arises here is whether the right to seek information obligates state parties to guarantee with positive measures access to state or private information. A subjective right to be informed is still largely unrecognised in the case law on the Covenant, but it has been observed that the rapid development of the modern information and communication society is leading in many states to progressive statutory duties to provide information, particularly on the part of the public administration.¹³

The exercise of freedom of expression and information carries with it duties and responsibilities. Under Article 19(3), these freedoms may be restricted to ensure respect for the rights or reputations of others and for the protection of national security or of public order or of public health or morals. Where a state party imposes certain restrictions on the exercise of the freedom of expression and information, these must not put in jeopardy the right itself. Such restrictions must satisfy the conditions laid in Article 19(3), that is, (i) the restriction must be provided by law; (ii) must be imposed for one of the purposes set out in sub-paragraphs (a) and (b); and, must be justified as necessary for that state party for one of those purposes.¹⁴

4.2.3 African Charter on Human and Peoples’ Rights (ACHPR)

The Organization of African Unity (OAU) adopted the ACHPR on 27th June 1981 and it entered into force in October 1983. The Charter’s protection of freedom of expression is set forth in Article 9(2) which provides:

¹² See M. Nowak, *UN Convention on Civil and Political Rights: A Commentary* (N.P. Engel, 1993) p. 342. See also Evatt, n 6 above.

¹³ *Ibid.*, p. 344.

¹⁴ Report of the Human Rights Commission to the General Assembly, 38th Session, Supp. No. 40, 1983 (A/38/40) Annexe VI, General Comment 10.

“Every individual shall have the right to express and disseminate his opinions within the law.”

A notable anomaly with the text of this Article is that it does not expressly cover expression and dissemination of information, which is probably the main concern of the media. Some commentators on the Charter have however argued that expression and dissemination of information is implied.¹⁵ Assuming that argument to be correct, media freedom can therefore be said to be guaranteed under this implication.

Freedom of information is protected under Article 9(1) albeit in a more restricted form. The provision reads, ‘every individual shall have the right to receive information’. What is protected is the right to receive information, and unlike the ICCPR, it does not mention the right to seek nor duties to impart information. Another peculiar feature of the Charter is that Article 9 does not include any express restrictions on freedom of expression and information. Article 9 must however be read subject to the restrictions set forth in Articles 27–29, the most pertinent of which requires the individual to exercise protected freedoms ‘with due regard to the rights of others, collective security, morality and common interest’.¹⁶

4.2.4 American Convention on Human Rights (ACHR)

The Convention was adopted by the Organisation of American States on 22nd November 1969 and entered into force on 18th July 1978. Article 13(1) sets forth the positive protection of the right to freedom of expression in the following terms:

“Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one’s choice”.

The Article is identical to Article 19 of the ICCPR, save that it also protects freedom of thought. The arguments on the extent to which both media freedom and freedom of information are protected under the ICCPR, are equally applicable here.

¹⁵ Nnaemeka-Agu, n 4 above at 1763.

¹⁶ Article 27(2) of the ACHR.

The ACHR goes further by expressly prohibiting any form of prior censorship of the media. It further prohibits indirect methods of restricting expression, such as unfair allocation of newsprint or broadcasting frequencies, and prohibits such methods by private persons as well as by government.¹⁷ Restrictions on freedom of expression are only permitted by way of subsequent imposition of liability. Such restrictions must be expressly established by law to the extent necessary to ensure: (i) the respect for the rights or reputations of others; or, (ii) the protection of national security, public order, or public health or morals.¹⁸ Article 13(4) however permits prior censorship of ‘public entertainments’ for the sole purpose of protecting the morals of children and youths, provided such is prescribed by law. States parties are also required to prohibit war propaganda and advocacy of national, racial or religious hatred.¹⁹

Another novel provision in the ACHR is Article 14, which protects the ‘right to reply’. Anyone injured by inaccurate or offensive statements and published by the mass media has a right to reply or make correction using the same media organ.

4.2.5 European Convention on Human Rights (ECHR)

The Convention for the Protection of Human Rights and Fundamental Freedoms (otherwise known as the European Convention on Human Rights) was signed by the contracting parties of the Council of Europe on 4th November 1950 and entered into force on 3rd September 1953. It is the oldest of the human rights treaties discussed here and its implementation procedures are the most developed. Article 10(1) guarantees freedom of expression in the following terms:

“Everyone has the right to freedom of expression. This right shall include the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.”

The phrase ‘freedom of expression’ as used in the Article extends to all types of expression, which impart or convey opinions, ideas or information, irrespective of

¹⁷ Article 13(2) & (3).

¹⁸ Article 13(2) of the ACHR.

¹⁹ Article 13(4) of the ACHR.

content or the mode of communication.²⁰ This therefore means that media freedom, even though not expressly mentioned, is covered. Further, the European Court of Human Rights (ECtHR) has held in several landmark judgments that the principles of freedom of expression are of particular importance as far as the press and other media are concerned. The Court has stressed the importance of media freedom in a democratic society to ensure proper discussion of matters of public interest.²¹

The Convention applies a double standard in its treatment of the print and the broadcast media. The position is justified by reference to the third sentence in Article 10(1). This therefore means that, while on the one hand any form of censorship of the press is likely to amount to a breach of Article 10, on the other hand, broadcasting may be subjected to some form of censorship or controls without breaching Article 10.²² In confirming this double standard, the Court in *Informationsverein Lentia and others v Austria* stated:

“...Technical aspects are undeniably important, but the grant or refusal of a licence may also be made conditional on other considerations, including such matters as the nature and objectives of a proposed station, its potential audience and the obligations deriving from international legal instruments.”²³

States do not have an unlimited margin of appreciation concerning the licensing of the broadcast media. The Convention requires states' licensing systems to respect the requirements of pluralism, tolerance and broadmindedness, which are essential in a democratic society. Any licensing system that is manifestly arbitrary or discriminatory will be contrary to the principles of the Convention and thus in breach of Article 10.²⁴ In regulating broadcasting, a state is also not allowed to infringe the right of a person to receive information.²⁵

²⁰ Lord Lester, 'Freedom of Expression' in (1995) 6 *Developing Human Rights Jurisprudence: The Domestic Application of International Human Rights Norms* (Commonwealth Secretariat) 122 at 124.

²¹ *Sunday Times (No. 1) v U. K.* (1979) 2 EHRR 245.

²² F. Jacobs & R. White, *The European Convention on Human Rights* (Clarendon Press, 1996) chapter 12.

²³ (1993) 17 EHRR 93.

²⁴ See decision of the European Commission on Human Rights: No. 10746/84, *Verein Alternatives Lokalradio Bern and Verein Radio Dreyeckland Basel v Switzerland*, Decision of 16th October 1986, D.R. 49, p. 126.

²⁵ *Autronic AG v Switzerland* (1990) 12 EHRR 485.

The right to receive information and ideas is also protected under Article 10. The right is not protected simply as the converse of the right to impart information, but in its own right and the Court has emphasised that the broad public interest in receiving information and in the quality of political and social debates lies at the heart of freedom of expression.²⁶ This right however appears to be dependent upon there being a willing speaker. In *Leander v Sweden*,²⁷ the Court recognised the right of access to information and that it basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him. However, the right does not impose positive obligations on the state to gather and disseminate information.

Freedom of expression under Article 10, as in other human rights treaties, is not absolute. The exercise of the right carries with it duties and responsibilities. Article 10(2) allows restrictions on the exercise of the freedoms of expression and information, and these restrictions can broadly be classified into:

- (i) Those designed to protect the public interest (national security, territorial integrity, public safety, prevention of disorder or crime, protection of health or morals);
- ii) Those designed to protect other individual rights (protection of the reputation or rights of others, prevention of disclosure of information received in confidence); and,
- iii) Those that are necessary for maintaining the authority and impartiality of the judiciary.

Not only must a restriction be justified on the basis of any of the above categories, it must also be prescribed by law and be necessary in a democratic society. In order to meet the requirement that the limitation is prescribed by law, the Court has held that the law need not be written, but must be expressed with sufficient clarity to enable the

²⁶ A. Lester, 'Freedom of Expression: Relevant International Principles' in (1988) 1 *Developing Human Rights Jurisprudence: The Domestic Application of International Human Rights Norms* (Commonwealth Secretariat) 23 at 33.

²⁷ (1987) 9 EHRR 433.

citizen to know with reasonable certainty the consequences a given action would entail.²⁸

On what is 'necessary in a democratic society', the Court has stated that Article 10 protects material that is likely to offend, shock or disturb a sector of the population within the bounds of pluralism, tolerance, and broadmindedness, which are features of a democratic society.²⁹ Consideration of this issue involves a margin of appreciation for the contracting state, and this is important especially in matters involving morals where there is a likelihood of wide differing views among contracting states. The margin of appreciation goes hand in hand with the Court's supervision, which ensures that the national margin of appreciation is circumscribed by the interest of democratic society in ensuring and maintaining a free media.³⁰

4.3 Comparison of the Protections Afforded by the Human Rights Treaties and Instruments to Media Freedom

All the human rights instruments discussed above, with the exception of the ACHPR, employ the term 'freedom of expression' to denote the freedom to 'seek, receive and impart information'.³¹ The UDHR, ICCPR and ACHR go further to indicate that the freedom extends to oral, written and printed communication and also to other media. The ECHR and ACHPR do not go to the extent of specifying what types of communication are protected, but it is generally accepted that the protection of freedom of expression under the two treaties extends to all types of expression, which impart or convey opinion, ideas or information irrespective of the mode of communication.

The protection granted to communication in all the instruments, save for the ACHPR, is guaranteed 'regardless of frontiers'. This shows the international character of freedom of expression and information and it is particularly significant with regard to satellite communication. Regarding the substance of the communication, the UDHR,

²⁸ *Sunday Times (No. 1) v United Kingdom* (supra) n 21 above.

²⁹ *Handyside v United Kingdom* (1979-80) 1 EHRR 737.

³⁰ *Worm v Austria* (1997) 25 EHRR 454 at para.47.

³¹ The ECHR however omits the word 'seek'.

ICCPR and ACHR protect 'information and ideas of all kinds'. Some commentators have concluded that these three instruments protect every communicable type of subjective idea or opinion, of news and information, of commercial advertising, art works, political commentary regardless how critical, pornography, etc, subject only to the provisos in the Articles guaranteeing the freedom.³² The ACHPR provides that the expression and dissemination of opinions must be within the law, while the ECHR does not have an equivalent qualification. However it has been argued that the two treaties could be interpreted so as to withhold protection from undesirable content such as pornography or blasphemy by restrictively defining the scope of protection afforded by the provisions on freedom of expression.³³ The ACHPR's protection of freedom of expression and information has been criticised for ambiguity, as the phrase within the law is a clawback clause restricting the right from the start and further opens wide doors for governments to enact draconian laws specifically designed at silencing media critical of governments.³⁴

Freedom of expression and information under the UDHR, ICCPR and ACHR is protected not only against interference by the public authorities, but also against that by private parties. These instruments recognise that private financial interests and media monopolies are just as harmful to the free flow of information as censorship measures by governments. State parties are therefore subjected to a duty to prevent excessive media concentration with positive measures such as anti-monopoly laws or state subsidies to the media.³⁵

The EHCR generally protects freedom of expression against interference by public authorities. However, the ECtHR has held that due to the importance of freedom of expression as one of the preconditions for a functioning democracy, genuine effectiveness of this freedom does not depend merely on a state's duty not to interfere, but may require positive protection, even in the sphere of relations between individuals.³⁶ In determining whether or not a positive obligation exists, regard is had

³² Nowak, n 12 above p. 341.

³³ Ibid.

³⁴ See C.E. Welch, 'The African Charter and Freedom of Expression in Africa' (1998) 4 *Buffalo Human Rights Law Review* 103.

³⁵ See General Comment on Article 19 of the ICCPR by the Human Rights Committee; Adopted by the Human Rights Commission at its 461st Meeting on 27th July 1983, UN DOC. A/38/40.109.

³⁶ *Ozgur Gundem v Turkey* (2001) 31 EHRR 1082 at paras. 42 – 43.

to the fair balance that has to be struck between the general interest of the community and the interests of the individual. The protection against interference with freedom of expression under the ECHR does not prevent states from requiring the licensing of the broadcast media. In practice, states are not only allowed to interfere in the form of imposing licensing requirements, but may also regulate matters such as the nature and objectives of a proposed station, as we saw in the case of *Informationsverein Lentia and others v Austria* (supra).

The UDHR, ICCPR and ACHR protect the right to ‘seek, receive and impart information and ideas’. These instruments protect the right to actively seek information, which goes beyond mere passive reception. State parties have an obligation to take positive measures to ensure the enjoyment of this right. The ECHR does not protect an active right to seek information and therefore state parties to the Convention do not have an obligation to gather and disseminate information, but they have an obligation to protect the dissemination of information where there is a willing information provider. It has been observed that since the UDHR, ICCPR, ACHR and ECHR give rise to a right of the public to receive information from a diversity of sources, a corresponding obligation is imposed on the contracting states to ensure media pluralism.³⁷ The same can also be said of the ACHPR, the Charter recognises that every person has a right to receive information even though, like Article 10 of the ECHR, it does not protect the right actively to seek information. As long as there are willing parties who want to provide information, it must be the duty of a government in a democratic society to ensure that everyone has a chance to impart information in an orderly way which respects the values of democracy such as pluralism, tolerance and broadmindedness.

In dealing with permissible grounds for restricting freedom of expression and information, all the instruments set forth essentially the same three-part test for determining the legitimacy of restrictions: First, any restriction must be prescribed by

³⁷ Coliver, n 10 above p. 77. The author reaches this conclusion despite that the ECHR, unlike the other three instruments, does not protect an active right to information.

law; secondly, it must serve one of the legitimate purposes expressly enumerated in their text; and finally, it must be necessary.³⁸

There is some variation among the UDHR, ICCPR, ACHR and ECHR concerning the legitimate purposes for which the freedom of expression may be restricted. Article 29 of the UDHR permits restrictions to freedom of expression and information only to secure 'due recognition and respect for the rights and freedoms of others...the just requirements of morality, public order and the general welfare'. The ICCPR is more detailed, adding such matters as national security, and public health. The ACHR follows the language of the ICCPR. The ECHR, on the other hand, provides a longer list of permissible restrictions, which includes protection of territorial integrity, confidentiality of information received in confidence and the authority or impartiality of the judiciary.

Save for the ACHPR, the above international human rights instruments provide solid protection to freedom of expression and information. The ECHR's protection is a bit weaker in that it does not protect an active right to seek information and allows censorship of the broadcast media, which poses dangers of abuse by governments. However, the dangers are alleviated by an efficient monitoring system in the form of the ECtHR, which tries to interpret the Convention generously in line with the provisions of the UDHR and ICCPR. The ACHPR gives the weakest formulation and protection of freedom of expression and information. The weakly worded treaty is also hampered by a lack of political will to interpret the wording of the Charter broadly.³⁹ The African Commission on Human and Peoples Rights has acknowledged and expressed concern at the weak protection of the right to freedom of expression under Article 9, and has now developed principles to inform the application and guide the development of Article 9.⁴⁰ The principles are drawn from a comprehensive range of international standards and jurisprudence, to elaborate and expand the nature, content and extent of the right to freedom of expression under the Charter.

³⁸ The grounds for permissible restrictions under the ACHPR are formulated differently, but interpretation of Articles 27–29 should impose similar requirements in practice.

³⁹ Welch, n 34 above.

⁴⁰ *Declaration of Principles on Freedom of Expression in Africa* (Adopted by the Commission at its 32nd Ordinary Session, 17th–23rd October 2002).

4.4 Relevance of International and Comparative Law in the National Courts of Botswana and South Africa

International human rights law exists mainly as conventional law, i.e., in the form of international legal instruments (treaties, conventions, declarations, etc). These provide the main source of international human rights law. Some aspects of international human rights law find their origin in customary international law.

The relationship between international law and municipal law is usually reflected in the opposing theories known as monism and dualism. In terms of the monist theory, the international legal order and the national or municipal legal orders of various states belong to a single universal system in which the municipal legal orders occupy a subordinate position. The theory is said to be connected with natural law theories with the view that individual human beings, rather than the states, are the real subjects of international law. Municipal courts are therefore obliged to apply rules of international law directly, even in matters concerning individual citizens, without any act of adoption by the municipal courts or transformation by the legislature. On the other end of the spectrum is the dualist doctrine, which maintains that international law and municipal law are entirely separate systems of law, originating from different sources and dealing with different subject matters. The doctrine is said to be connected with positivist theories of law and it views states, rather than individuals, as the primary subjects of international law. Rules of international law according to this theory only become part of the municipal law if they have been adopted by the national courts or transformed into local law by an act of the municipal legislation.⁴¹

It has however been observed that in practice, states do not always accord with the above doctrinal division. This is because, first, the effect of international law generally, particularly treaties, will always depend on a rule of municipal law. The fundamental principle in most legal systems is that domestic constitutional law governs the internal application of treaties. Second, between the extreme versions of monism and dualism, there lies a whole range of intermediate relationships, which do

⁴¹ See J.G. Starke, 'Monism and Dualism in the Theory of International Law' (1936) 17 *British Year Book of International Law* 66 and T. Maluwa, 'International Human Rights Norms and the South African Interim Constitution 1993' (1993/4) 19 *South African Yearbook of International Law* 14.

not lend themselves to easy classification. Finally, a strict distinction between monism and dualism may conceal the fact that the practice of the courts even in monist systems may fail to give effect to treaties that are binding under international law, and conversely, in dualist systems the courts may sometimes give limited effect even to unincorporated treaties, by subjecting their domestic legislation to the principle that such legislation should, wherever possible, be so construed as not to conflict with the international obligations of the state.⁴²

This part of the chapter briefly examines the status of international law in the municipal legal systems of Botswana and South Africa, especially the status of the international human rights instruments discussed above, which protect the right to freedom of expression and information.

4.4.1 Botswana

The constitution of Botswana does not assign international law any special status in the municipal law. The domestic status of international law therefore continues to be governed by the common law, which Botswana inherited from the United Kingdom.⁴³

a. Treaties

International human rights instruments, in principle, have no automatic operation in Botswana's domestic law unless incorporated by an act of the legislature. The dualistic position has been confirmed by the Court of Appeal in the case of *Dow v Attorney General of Botswana*, where it held that treaties and conventions do not confer enforceable rights on individuals within the state until Parliament has legislated their provisions into law.⁴⁴

Of the international human rights treaties protecting freedom of expression discussed above, Botswana has ratified the ICCPR and ACHPR,⁴⁵ but neither has yet been

⁴² Maluwa, n 41 above at 29.

⁴³ See O. Tshosa, 'Giving Effect to Treaties in the Domestic Law of Botswana: Modern Judicial Practice' (1997) 10 *Lesotho Law Journal* 205.

⁴⁴ [1992] LRC (Const.) 623 at 654.

⁴⁵ Botswana ratified the ACHPR on 17th July 1986 and the ICCPR on 8th September 2000.

incorporated into the domestic law and in consequence they are not directly enforceable in the country. Judicial activism, has however, gone some way towards altering the strict dualist position in the country. Over the years, courts have in some cases used, as an aid to the interpretation of constitutionally entrenched rights, emerging international human rights norms located in conventions to which their state is or even not a party. In Botswana, the legal basis for invoking unratified and unincorporated human rights treaties to interpret, not only domestic legislation, but even constitutional provisions is section 24 of the *Interpretation Act 1984*, which states that, as an aid to the construction of the enactment a court may have regard to any relevant international treaty, agreement or convention.⁴⁶ In addition to this canon of interpretation, the Court of Appeal has also emphasised that courts must interpret domestic laws in a way as compatible with the state's responsibility not to be in breach of international law as laid down by law creating treaties, conventions, agreements and protocols within the UN and OAU.⁴⁷

Even though the ICCPR and ACHPR have not been incorporated into the domestic law and therefore are not directly enforceable, there is evidence that the jurisprudence on the two treaties serve as a useful guide to the interpretation of similar provisions in the laws of Botswana as evidenced from the case of *Dow v A.G* (supra). There is also evidence that courts at times seek guidance from the jurisprudence developed under both the ACHR and ECHR, even though not binding on Botswana, the two instruments guide and inspire national courts.⁴⁸

b. Customary International Law

The rules and principles, which govern the status of customary international law, just as for treaties, are the same as those that govern the relationship between customary

⁴⁶ In *Dow v Attorney General* (supra) n 44 above, the Court of Appeal sought guidance from the provisions of the ACHPR which although ratified, is not incorporated into the domestic law and the UN Convention on the Elimination of All Forms of Discrimination Against Women to which Botswana was not then a party in order to interpret some provisions of the Constitution and the *Citizenship Act of 1984*. The court ultimately declared the provisions in question *ultra vires* the Constitution as they allowed sex based discrimination, which the Court said, was prohibited by the Constitution.

⁴⁷ Per Aguda JA in *Dow v AG* (supra) n 44 above at 674.

⁴⁸ For example, in *Petros and another v State* [1985] LRC (Const.) 699, in determining the constitutionality of a sentence to four strokes to the Appellants, which was to be administered in instalments, the court declared such punishment as inhuman and degrading. The court made references to Article 5(2) of the ACHR, Article 3 of the ECHR and also to some decisions of the ECtHR.

international law and the municipal law in the United Kingdom. A monist approach is adopted with regard to customary international law.⁴⁹ Customary international law consequently forms part of the law of Botswana, subject to certain qualifications. First, in the event of conflict between customary international law and legislation, the latter prevails. However, this is subject to a presumption of statutory interpretation that the legislature does not intend to violate customary international law. Second, due to the common law doctrine of *stare decisis*, courts will follow their own precedents even if such precedents do not reflect the true state of customary international law. Third, in accordance with the ‘act of state’ doctrine, courts will give effect to acts of state and acts of recognised foreign entities even if such acts are in conflict with customary international law.⁵⁰

There is a view that the provisions of the UDHR have crystallised into customary international law.⁵¹ Subject to the qualifications discussed above, a court in Botswana should be able to directly apply the provisions of the UDHR, which are accepted to have crystallised into customary international law in determining freedom of expression issues.

4.4.2 *South Africa*

The relationship between municipal law and international law is governed by the constitution.⁵²

a. Treaties

The position of treaties is governed by section 231(4) which provides:

“Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an

⁴⁹ See J.G. Collier, ‘Is International Law Really Part of England?’ (1989) 38 *ICLQ* 924. And for a more detailed treatment of the position in Botswana, see O. Tshosa, *National Law and International Human Rights Law: Cases of Botswana, Namibia and Zimbabwe* (Ashgate Dartmouth, 2001) p. 157.

⁵⁰ Maluwa, n 41 above at 32.

⁵¹ *Ibid.*, at 24 and A. Cunningham, ‘The European Convention of Human Rights, Customary International Law and the Constitution’ (1994) 43 *ICLQ* 537 at 542.

⁵² Act 108 of 1996.

agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament”.

The provision embodies a dualistic approach to the incorporation of treaties into the municipal law of South Africa. Only those treaties incorporated by an Act of Parliament form part of South African law. The constitution, however, makes an important proviso, that a ‘self-executing’ provision of a treaty ratified by the Republic becomes law unless it is inconsistent with the constitution or an Act of Parliament. The concept of self-executing provisions of treaties is far from settled, but it appears that to be self-executing, a treaty must: (a) reflect either in language or its drafting history that its clauses are intended to be directly applicable in domestic courts, and (b) impose obligations which are specific, mandatory and capable of implementation without further acts of the legislature. There is a view that the civil and political rights clauses of the main human rights treaties are self-executing.⁵³ South African courts, however, are still to produce their own jurisprudence on this subject.

South Africa, like Botswana, has ratified both the ICCPR and ACHPR.⁵⁴ These two treaties have not yet been incorporated into the domestic law, so that in accordance with the strict dualistic approach, they are not directly enforceable in the municipal courts. It must be noted, however, that the civil and political rights clauses of these treaties, as observed above, may be directly enforceable if the South African courts consider them to be self-executing.

Even if the provisions of these treaties are not recognised as self-executing, the treaties still play an important role as an aid to the interpretation of South African law, more especially, the Bill of Rights. The constitution shows a desire to achieve harmony between South African law and international human rights jurisprudence. Section 39(1) requires courts, tribunals, or other forums, when interpreting the Bill of Rights, to *inter alia*, consider international law. The provision is mandatory, and it further urges courts to consider foreign law in permissive terms. Furthermore, section 233 requires a court when interpreting legislation, to prefer any reasonable interpretation that is consistent with international law over any alternative

⁵³ Coliver, n 10 above at 25.

⁵⁴ South Africa ratified the ACHPR in June 1996 and ICCPR on 10th December 1998.

interpretation that is inconsistent with international law. The combined effect of these sections ensures that the municipal courts are guided by international human rights norms and the interpretation placed upon those norms by international courts and other institutions, in interpreting the Bill of Rights. The Constitutional Court has held that in applying section 39(1), a court should examine both non-binding as well as binding law as tools of interpretation, but that it is not bound to follow them.⁵⁵

The jurisprudence developed under the ECHR and ACHR, even though not binding, also play an important role as an aid to the interpretation of similar South African provisions. The South African Courts have had occasion to rely upon norms set by other international tribunals, especially the ECtHR, in a number of cases.⁵⁶

b. Customary International Law

In terms of section 232, customary international law is part of the municipal law of South Africa unless it is inconsistent with the constitution or an Act of Parliament. The constitution adopts a monist approach with regard to international customary law. What is more important regarding this constitutional provision is that it elevates the status of customary international such that it is no longer subject to subordinate legislation, as was the case under the common law.⁵⁷ The status of customary international law is further enhanced by section 233 of the constitution, which urges courts to prefer interpretations that are consistent with international law. The provisions of the UDHR, to the extent that they have crystallised into rules of customary international law, should be directly enforceable in South African municipal law.

The discussion of the status of international law in the municipal legal systems of Botswana and South Africa reveals three ways in which international law may be applied by municipal courts. First, a municipal court may be required to apply the provisions of a treaty where such has been ratified and incorporated into the domestic

⁵⁵ *S v Makwanyane* 1995 3 SA 391 at 413 – 14.

⁵⁶ See generally, R.C. Blake, 'The World's Law in One Country: The South African Constitutional Court's Use of Public International Law' (1998) 115 *South African Law Journal* 668.

⁵⁷ Maluwa, n 41 above and D.J. Devine, 'The Relationship Between International Law and Municipal Law in the Light of the Interim Constitution 1993' (1995) 44 *ICLQ* 1.

law. At the moment, neither of the two states has incorporated either the ICCPR or ACHPR into their domestic laws so that these treaties are not directly enforceable in the municipal legal systems. However, in South Africa, courts will directly enforce some provisions of these treaties, which are recognised as self-executing.

Second, a court may be asked to apply customary international law as this automatically forms part of both states' municipal legal systems. There are strong views that certain provisions of the UDHR have crystallised into rules of customary international law, so that courts in Botswana and South Africa may therefore be urged to apply Article 19 of the UDHR, as customary international law, in determining freedom of expression issues.

Third, a municipal court's attention may be drawn to pertinent international and comparative law and urged to consider these in construing provisions of national law. This appears to be the most common way in which international and comparative law is used in the municipal courts of the two states. Perhaps this is because the two states have not yet incorporated treaties dealing with freedom of expression into their domestic laws, and are therefore not directly enforceable. Further, reliance on customary international law may prove problematic, as a party will first be required to prove that a custom that he/she is relying upon has indeed crystallised into customary international law.

It may also be observed here that, while the courts in South Africa have demonstrated a willingness to use international and comparative law to build up their jurisprudence, especially in the interpretation of the Bill of Rights, their counterparts in Botswana do not seem to share the same enthusiasm. This could probably be due to the fact that the status of international and comparative law in Botswana is not as clear as is the case in South Africa, since the former's constitution is silent on the status of international law in the domestic legal system. Lawyers and judges in Botswana may therefore be conveniently sidestepping arguments involving international law, unless it becomes absolutely necessary to address them, due to this uncertainty. The problem is further compounded by what has been called a 'doctrine of avoidance' by the courts, i.e., the

tendency of the courts to avoid dealing with constitutional issues before them if the dispute could be resolved without reference to the constitution.⁵⁸

4.5 Constitutional Protection of Media Freedom in Botswana and South Africa

African states came to independence at diverse periods with varied constitutions. Those that attained independence in the late sixties and early seventies inherited constitutions, which did not specifically guarantee media freedoms. These were subsumed under the freedom of expression clause. It was only in the eighties that constitutions recognised media freedom as separate and distinct from freedom of expression.⁵⁹ This pattern remains true to date and is reflected in Botswana's independence constitution of 1966 and South Africa's democratic constitution of 1996, respectively.

4.5.1 Protection of Media Freedom under the Constitution of Botswana

Section 12(1) of the constitution provides:

'Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence'.

The constitution does not expressly guarantee media freedom, rather, it refers to freedom to communicate ideas and information without interference. In a recent case, the High Court in obiter dictum held that media freedom is an aspect of freedom of expression.⁶⁰ However, no authorities were cited to support this conclusion. It is submitted that given the importance of comparative international law in the interpretation of the law in the country, the court's conclusion is correct. In a leading authority on constitutional interpretation in the Commonwealth, the Privy Council

⁵⁸ B. Otlhogile, *A History of the Higher Courts of Botswana* (Mmegi Publishing House, 1993).

⁵⁹ See B. Otlhogile, 'Media Law Reform – Towards Proactive Strategies' a paper presented at the Southern African Media Lawyers' Conference, Windhoek, Namibia, 27th August 1999.

⁶⁰ *Media Publishing (Pty) Ltd v Attorney General and others MICSA 229/2001 (Unreported)* at 21.

declared that a constitution is *sui generis*, calling for principles of interpretation of its own, suitable to its character.⁶¹ The court further held that, in interpreting the provisions of a constitution, ‘respect must be paid to the language which has been used and to the traditions and the usages which have given meaning to that language’.⁶²

The case was cited with approval by the Court of Appeal of Botswana in *Dow v A.G.* (supra), where the court held that in determining the intentions of the framers of the constitution, a court must determine the ‘ethos, the environment, which the framers thought Botswana was entering into by its acquisition of statehood, and what, if anything, can be found to have contributed to the formulation of their intentions in the constitution that they made’.⁶³ The court further held that the Bill of Rights in the constitution of Botswana was greatly influenced by the ECHR, which the U.K. had ratified and applied to its dependent territories, and that the ECHR itself, was in turn influenced by the UDHR. These antecedents, the court concluded, called for a generous interpretation of the provisions of the constitution suitable to give to individuals the full measure of the fundamental rights and freedoms guaranteed by the constitution.

Following the jurisprudence developed under the ECHR, the High Court was correct to conclude that even though section 12(1) does not expressly guarantee media freedom, the freedom is implicitly guaranteed.⁶⁴ Media freedom under the constitution is protected against any interference, and it is submitted that in distinction to the position under the ECHR, this refers to interference from both public authorities and private parties. It is important to contrast the language used in section 12(1) and that employed in Article 10 of the ECHR, the former does not include the qualification, ‘by public authorities’, hence the conclusion that section 12(1) should be interpreted along similar lines to the UDHR, ICCPR and ACHR on this point. As a result thereof, the state is placed under an obligation to take measures to prevent media monopolies

⁶¹ *Minister of Home Affairs & another v Fisher & another* [1980] AC 319 at 329.

⁶² Per Lord Wilberforce, *Ibid.*

⁶³ Per Amissah JP in *Dow v A.G.* (supra) n 44 above at 654 – 5.

⁶⁴ See *Sunday Times (No.1) v U.K.* (supra) n 21 above, where the ECtHR held that the principles of freedom of expression are of particular importance as far as the press and other media are concerned.

or oligopolies by private parties, which are a threat to media freedom in that they compromise diversity in the provision of information.

Section 12, as Article 10 of the ECHR, applies a double standard in its treatment of the print and broadcast media. In terms of section 12(2)(b), the legislature is empowered to enact legislation regulating the technical administration or the technical operation of broadcasting or television. Although the language of this proviso appears to be forbidding any form of censorship of the broadcast media, except that which relates to technical aspects, the courts are more likely to adopt the approach taken by the ECtHR.⁶⁵ The courts in Botswana will probably recognise that a broadcasting licence could also be made conditional upon considerations such as the nature and objectives of the proposed station or its targeted audience to enable the state to fulfil its obligations deriving from the constitution and the international legal instruments discussed above. These obligations include, *inter alia*, ensuring diversity in information sources and maintaining a plurality of voices.

Freedom of information is expressly guaranteed under section 12(1), which provides that freedom of expression includes 'freedom to receive information' and 'freedom to communicate information without interference'. The provision employs the term 'communicate' rather than 'impart', which is used in the international human rights instruments. The two terms however have the same meaning. The constitution only protects a passive right to receive information along similar lines to the ECHR. The courts in the country have not yet had opportunity to proclaim the extent of this right. In spite of this, the courts are more likely to be influenced by the decisions of the ECtHR, given the similarity in the language used in the constitution and the ECHR. The right under the constitution depends on there being a willing speaker and the state has no obligation to gather and disseminate information. The Court of Appeal has however held that the primary duty of judges is to make the constitution grow and develop in order to meet the just demands and aspirations of an ever-developing society.⁶⁶ Given the importance of freedom of information, especially in enabling the citizenry to make informed choices in the democratic process, one can only hope that the courts, consistent with the Court of Appeal's opinion, will recognise an active

⁶⁵ See *Informationsverein Lentia & others v Austria* (supra), n 23 above.

⁶⁶ Per Aguda JA in *Dow v A.G.* (supra) n 44 above at 668.

right to government held information, subject to the well recognised exceptions, such as, national security, public order, protection of reputations of others, etc.

The guarantee of media freedom and freedom of information under the constitution is not absolute, their exercise is subject to section 12(2) which is in the following terms:

'Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent 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 regulating the technical administration or the technical operation of telephony, telegraphy, posts, wireless, broadcasting or television; or

(c) that imposes restrictions upon public officers, employees of local government bodies, or teachers,

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

The proviso incorporates the three-part test found in the international legal instruments on human rights in the determination of the legitimacy of restrictions to media freedom and freedom of information. First, the restriction must be done under the authority of any law. The Supreme Court of Zimbabwe has held that the phrase under the authority of any law, although worded differently from such equivalent phrases as provided by law, prescribed by law or in terms of the law, used in other constitutional and human rights instruments, carries substantially the same meaning.⁶⁷ The court went on to apply the decision of the ECtHR in *Sunday Times (No.1) v U.K.* (supra), and concluded that, to satisfy the test, done under the authority of any law, the law must be adequately accessible and formulated with sufficient precision to

⁶⁷ *Chavunduka & another v Minister of Home Affairs* 2000 4 SA 1.

enable a person to regulate his/her conduct. The courts in Botswana are still to decide on the meaning of this phrase, but it is submitted that given the similarity in the wording of the two countries' constitutional provisions on freedom of expression, and their close relationship with the ECHR, they should reach the same conclusion.

Second, a restriction must serve one or more of the purposes enumerated in subparagraphs (a), (b) and (c) above. It is pursuant to this provision that the legislature has enacted laws relating to the prohibition of publication of defamatory matter, treason, sedition, national security, etc.⁶⁸ What is striking about the history of Botswana is that, after over thirty years of independence, no court has ever decided on the constitutionality of any law relating to media freedom or freedom of information. Although the constitutionality of some of the laws is in doubt, the courts have denied themselves the chance to consider such laws by avoiding engaging in the interpretation of constitutional provisions (doctrine of avoidance alluded to above) while in other cases, the state withdrew charges in cases involving these laws.⁶⁹

Third, any restriction must also be shown to be reasonably justifiable in a democratic society. Once again, in the absence of guidance from local case law on the subject, guidance must be sought from comparative law. The determination of a restriction, whether it is reasonably justifiable in a democratic society, involves a balancing exercise, whether the benefits to a democratic society resulting from the specific restriction demonstrably outweigh the detriment caused to a democratic society by the specific restriction. The ECtHR has held that the demands of pluralism, tolerance and broadmindedness, without which there is no democratic society, require the protection not only of information and ideas that are favourably received or regarded as inoffensive, but also to those which offend or disturb the state or sector of the population.⁷⁰ The influence that the ECHR had on the drafting of the constitution of Botswana, and also in the interpretation of its other fundamental provisions, should

⁶⁸ See generally, T. Balule and B. Maripe, *A Quick Guide to Laws and Practices that Inhibit Freedom of Expression in Botswana* (MISA-Botswana, 2000).

⁶⁹ For example, on 28th February 1995, the High Court dismissed charges against two journalists working for *Mmegi* newspaper who were charged under the National Security Act for unlawfully receiving an official document marked 'secret' and publishing classified information. And on 25th May 1998, the Attorney General withdrew charges against a journalist charged under section 59 of the Penal Code for publishing false statements.

⁷⁰ *Handyside v U.K.* (supra), n 29 above at para. 49.

persuade the courts to adopt a similar approach to the ECtHR on the determination of what is 'reasonable and justifiable in a democratic society'.

4.5.2 *Protection of Media Freedom under the Constitution of South Africa*

Media freedom is expressly guaranteed by the South African constitution under the freedom of expression clause. The relevant part provides that:

'Everyone has the right to freedom of expression, which includes –

*(a) freedom of the press and other media;*⁷¹

The Constitutional Court has pronounced on the importance of the rights guaranteed by section 16(1) holding that 'the constitution recognises that individuals in the society need to be able to hear, form and express opinions and views freely on a wide range of matters',⁷² hence the need to protect freedom of expression. The constitution does not limit its guarantee to the freedom of the press, but specifically extends the freedom to other media of communication. The guarantee extends to, *inter alia*, radio and television.⁷³

With regard to the broadcast media, the guarantee of media freedom must be read together with section 192, which provides for the establishment of an independent authority to regulate broadcasting in the public interest, to ensure fairness and diversity of views broadly representing South African society. The section imports the double standard in the treatment of the press and broadcast media found in ECHR and the constitution of Botswana into South Africa. While a reading of section 16(1) seems to prohibit any form of censorship of the media, section 192 permits some form of censorship of the broadcast media in order to enable the state to fulfil duties imposed on it under the latter section.

Media freedom is protected not only against interference by the state, but also against interference by private parties. Section 8(2) of the constitution provides that the Bill

⁷¹ Section 16(1) of the Constitution.

⁷² *South African National Defence Union v Minister of Defence & another* 1999 4 SA 469 at 477.

⁷³ *Dotcom Trading 121 (Pty) Ltd t/a Live Africa Network News v King & others* 2000 4 SA 973.

of Rights binds natural and juristic persons if, and to the extent that a provision is applicable, taking into account the nature of the right and the nature of any duty imposed by the right. Since media freedom imposes upon the state a duty to ensure diversity and a plurality of voices, it must take steps to ward off any threats to the freedom by private parties.

Freedom of information is also expressly guaranteed in two provisions. Section 16(1) protects the 'freedom to receive, impart information and ideas', and further, section 32(1) proclaims:

'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'.

The Constitutional Court has proclaimed the importance of freedom of information to the general freedom of expression in the following terms:

'Firstly, my right to express myself is severely impaired if others' rights to hear my speech are not protected. And secondly, my own right to freedom of expression includes as a necessary corollary the right to be exposed to inputs from others that will inform, condition and ultimately shape my own expression'.⁷⁴

The dictum shows that freedom of expression, which includes media freedom and freedom of information, is impoverished if it does not embrace the right to receive, hold and consume expressions transmitted by others. Section 16(1)(b) provides for a passive right to information, while section 32(1) provides for an active right to information held by the government and a qualified right to information held by private parties. The latter section also makes provision for the enactment of legislation to give effect to the public's right to information.⁷⁵ Pursuant to this provision, the legislature has enacted the *Promotion of Access to Information Act 2000*, which gives effect to the constitutional right of access to information.

⁷⁴ *Case v Minister of Safety and Security; Curtis v Minister of Safety and Security* 1996 BCLR 609 at 622.

⁷⁵ Section 32(2) of the Constitution.

Consistent with international human rights instruments, the constitution recognises that media freedom and freedom of information are not absolute. The exercise of these freedoms does not extend to propaganda for war, incitement of imminent violence or advocacy of hatred that is based on race, ethnicity, gender or religion.⁷⁶ In addition, the provisions guaranteeing the two freedoms must be read together with section 36(1) of the constitution, which is a general limitation clause on the exercise of rights guaranteed under the Bill of Rights. The limitation clause reads:

'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 the 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 relationship between the limitation and its purpose; and*
- (e) less restrictive means to achieve the purpose.'*

The application of the limitation clause involves a process of weighing up of competing values and ultimately an assessment based on proportionality, which calls for the balancing of different interests.⁷⁷ Each particular infringement of a right has different implications in an open and democratic society based on dignity, equality and freedom. The proportionality of a limitation therefore, is assessed in the context of its legislative and social setting, and as a result, courts have said there can be no absolute standard for determining the reasonableness of limitations to rights, but that the reasonableness of a given limitation can only be done on a case-by-case basis with reference to the facts and circumstances of the particular case.⁷⁸ It has also been said that the five factors expressly itemised in section 36(1) are not presented as an exhaustive list, but that they are included in the section as key factors, to be used in

⁷⁶ Section 16(2) of the Constitution.

⁷⁷ *Dotcom Trading 121 (Pty) Ltd t/a Live Africa Network News v King & others* (supra) n 73 above at 989.

⁷⁸ *S v Monamela* 2000 3 SA 1 at 20.

conjunction with any other relevant factors, in the overall determination whether or not the limitation of a right is justifiable.⁷⁹

The constitution does not follow the traditional three-part test in the determination of the legitimacy of restrictions to media freedom and freedom of information, instead, it sets a two-part test. First, the limitation must be in terms of law of general application. The determination of this issue should be the same with the approach taken in the interpretation of similar phrases.⁸⁰ Secondly, a limitation must be shown to be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. This is based on an assessment of proportionality, which calls for the balancing of different competing interests, and is done on a case-by-case basis.

4.6 Conclusion

International treaties are said to enshrine minimum standards of human rights below which no member of the community of nations should fall.⁸¹ Fundamental human rights guarantees under national law should therefore be no less extensive than those provided for in international human rights instruments. The constitutional provisions of Botswana and South Africa guaranteeing media freedom and freedom of information appear to provide reasonably satisfactory protection to the two freedoms consistent with standards set in the international human rights instruments. The protection guaranteed by the constitution of Botswana is similar to that offered by the ECHR. A notable difference though, is that the protection of the freedoms under the former extends beyond interference by public authorities to interference by private parties.

Under the South African constitution, the freedoms are protected in a similar manner to the protection found in the UDHR, ICCPR and ACHR. The freedoms are more explicit than in the constitution of Botswana. An important distinction between the South African constitution and the international human rights instruments is found in

⁷⁹ Ibid.

⁸⁰ See *Chayunduka & another v Minister of Home Affairs* (supra) n 67 above.

⁸¹ J. Stevens, *The Interpretation of Fundamental Rights Provisions: International & Regional Standards in African and other Commonwealth Jurisdictions* (Article 19, 1998) p. 15.

the manner of determining the legitimacy of restrictions to media freedoms. The former employs a two-part test instead of the traditional three-part test in that it does not expressly enumerate the grounds on which freedom of expression may be justifiably interfered with. The two-part test is attractive in that it puts emphasis on the right and that any limitation thereto is only an exception, which must be justified in the light of existing facts. It can however be argued that the test does not provide for certainty in the law that the three-part test may be said to offer since restrictions are determined on a case by case basis, and as a result thereof, one cannot reasonably foresee whether in a given case the courts will or will not sanction a restriction on the freedom of expression.

The entrenchment of media freedom in a state's constitution alone is not enough. It also requires backing by an efficient enforcement mechanism, which will ensure that the freedom is observed and exercised without interference. The enforcement mechanism, in the context of the two states, is provided by the courts of law, which are charged with the responsibility of upholding the constitution by ensuring that the executive and legislature comply with the constitution. The courts must therefore be independent of both the executive and legislature and must demonstrate their eagerness to uphold the constitution by expounding its provisions so that citizens should know what the guaranteed freedoms entail. While the South African courts have demonstrated an eagerness to expound the provisions of the constitution, it is sad to note that courts in Botswana are disappointing in this respect.

There is however a problem that seriously compromises the effectiveness of the enforcement mechanism. In the tradition of the common law, courts do not give advisory opinions, they give opinions on real lawsuits. A person may not approach the courts to seek a ruling as to whether or not a proposed law is constitutional or how it will work in practice. This therefore means that constitutional provisions are interpreted in a way that is only relevant and limited to the controversy in question. Consequently, constitutional provisions guaranteeing media freedom have not been expounded in a methodological way to show with clarity the extent of the freedom.

PART III

**REGULATORY ENVIRONMENT OF THE MEDIA: ENHANCING
DIVERSITY AND ACCESS TO INFORMATION**

CHAPTER 5

MEDIA REGULATION IN BOTSWANA AND SOUTH AFRICA

5.1 Introduction

In chapter two I argue that media freedom is an instrumental good and that its exercise must promote the goals of free speech. Pluralism and diversity in the media are considered indispensable to democratic communication. Regulation of the media is therefore justified in so far as it aims at ensuring diversity in media output, which is viewed as necessary to enable a well-informed public to participate in the decision-making process. Media regulation in western democracies has to a large extent been shaped by the social and political value accorded to a free media in particular, and freedom of speech in general.¹

Pluralism in the media has two facets: internal pluralism, concerned with ensuring that media content responds to a range of interests and meets diverse tastes rather than offering content which is offered simply because it is cheap or appealing to advertisers; and external pluralism, concerned with the maintenance of a plurality of autonomous and independent media services.²

A central public interest principle in broadcasting is that of universal access, i.e., ensuring the availability of broadcasting services to all citizens. In developing countries, such as Botswana and South Africa, where the majority of the population cannot afford television sets, and with the emergence of new and expensive technologies such as cable and satellite, the question of access must also focus on the affordability of these. Genuine access to alternative channels depends not only on their existence, but also on their effective distribution, availability and affordability. In addition to geographic coverage, it is also important in the context of the two

¹ D. Goldberg *et al* (eds.) *Regulating the Changing Media: A Comparative Study* (Clarendon Press, 1998) p. 15.

² *Ibid.*, p. 305.

countries, given their low literacy rates, to provide broadcasting services in languages familiar to their citizens.

In this chapter, I discuss the regulation of both the print and broadcast media in Botswana and South Africa with the above considerations in mind. Focus is on the legislative measures in place in the two states and the extent to which these are designed to ensure both external and internal pluralism in the media sector, and access to media services, especially, broadcasting. An attempt is also made to evaluate the success and/or failure of the regulatory regimes in the two countries in the light of the present state of the media as depicted in chapter 3. I conclude by comparing the regulatory regimes in the two countries and how they compare with other regimes, especially, those in the developed western democracies, and what lessons, if any, the former can learn from the latter's experiences.

5.2 Regulation of the Print Media

5.2.1 Botswana

a. Regulating for External Pluralism

In terms of the *Printed Publications Act* 1968,³ no newspaper shall be printed or published in Botswana unless it has been registered at the General Post Office with the Registrar of Newspapers.⁴ To secure registration, the proprietor of a newspaper is required to launch with the Registrar a return, containing: the title of the newspaper, name and place of residence of the editor and name and place of business of both the publisher and printer.⁵ There is no discretion to refuse registration. Registration is intended to provide a source of information on a newspaper's owners, and not as a means of censorship. The registration of newspapers in Botswana is said to have emanated from English law, where registration was not a licence to publish, but

³ [Cap. 20:01]

⁴ Section 5(1).

⁵ Section 5(2).

rather, an application for concessionary mailing rates with the Post Office.⁶ The proposed *Mass Communications Bill 2001* however seeks to impose conditions for registration of newspapers. If the bill is enacted into law, newspaper proprietors will be required to provide a statement of account setting out the financial resources available to them to engage in the printing and publishing of the newspaper and payment of a registration fee.⁷

The *Printed Publications Act 1968* does not restrict the number of titles that any one entity can own, nor does it impose limitations on foreign ownership of the print media. The *Mass Communications Bill 2001* also does not propose to limit ownership of titles, however, it proposes to limit foreign ownership of the press to 20% of the equity shares of a company that owns a newspaper.⁸

Botswana does not have competition legislation to address problems of concentration of ownership in the media industry or in any other sector. The government is currently working on a policy that will culminate in the enactment of such legislation.⁹ Once enacted, problems of concentration in the media sector will be addressed under the general framework of competition law. There appears to be no intention on the part of government to include any specific provisions for the press.¹⁰

b. Regulating for Internal Pluralism

The private press is not subject to any legal content obligations to ensure internal diversity. The content of a newspaper is greatly dependent on the tastes of its readership with most papers tailoring their editorial content to meet or coincide with the views of its readers. A newspaper that ignores this reality does so at its own peril because loss of readers will result in loss of advertising revenue to which the private press relies for its continued existence. There is currently no press code in force in the

⁶ B. Otlhogile, 'The Constitutional Rights of the Mass Media in Botswana: An Academic's View' in Leepile, M. (ed) *Botswana's Media and Democracy: Selected Papers from the Seminar on the Media in a Democracy, Gaborone February – March, 1994* (Mmegi Publishing House, 1996) 53 at 56.

⁷ Section 6 (f) & (g). The impact that the registration fee may have on the issue of external pluralism is discussed under the section on the evaluation of the regulatory structures: 3.2.1 (b).

⁸ Section 7(2).

⁹ The Ministry of Commerce and Industry released a Draft Competition Policy in February 2000.

¹⁰ Interview with Ms Tebelelo Seretse, then Minister of Commerce and Industry. (Gaborone, 22nd October 2001).

country that may impose some content obligations on the press. A voluntary press council was registered in October 2002, but it has not yet adopted a code of practice. It must however be noted that one of the objects of the *Mass Communications Bill 2001* is to establish a press council. The governing body of the envisaged council will be appointed by the minister of Communications, and will be charged with the responsibility of promulgating a code of practice and its enforcement.¹¹ Since the industry has now established a voluntary press council, the question is whether the government will still go ahead with its plans to legislate for a press council or will give recognition to the newly established one, and abandon its plans.

The state owned *Daily News* is however subject to some content obligations. These obligations derive from the mandate of its publishers, the Department of Information and Broadcasting (DIB). The DIB was formed to *inter alia*: explain policies and actions of government to the people, and advise government on public opinion.¹² The department therefore use the *Daily News* and other state owned media to communicate government policies to the people and to give feed back from the people to the government.¹³ The *Daily News* is supposed to give coverage to developmental news; however, it has been observed that, at the moment, its emphasis tends to be coverage of official speeches (with no critical commentaries), and the comings and goings of top national political leaders, particularly the president.¹⁴

c. *Evaluation of the Regulatory Structures*

Even though the regulatory regime provided by the *Printed Publications Act 1968* is quite liberal (at least in so far as allowing new players into the market is concerned), there are only nine mainstream publications in circulation in the country. The reason for the small number of publications is not due to censorship, but to the country's peculiar economic and social circumstances.¹⁵ The situation may become worse under

¹¹ See sections 19 and 22(2)(e).

¹² *Draft Performance Management Strategic Plan 2001 – 2010* (Department of Information and Broadcasting, 2001) p. 10.

¹³ L.M. Mpotokwane, 'Government Media as Promoters of Democracy: An Examination of Three Cases' in J. Holm & P. Molutsi (eds.) *Democracy in Botswana: The Proceedings of a Symposium held in Gaborone 1st – 5th August 1998* (Macmillan Botswana Publishing Co, 1989) 245.

¹⁴ J. Zaffiro, *From Police Network to Station of the Nation: A Political History of Broadcasting in Botswana 1927 – 1991* (Botswana Society, 1991) p. 84.

¹⁵ See chapter 3 at 3.3.1.

the proposed new law. If the financial requirements and the registration fee are set high, this may disqualify many potential new players from breaking into the market. The possibility of such a development is not without precedent. In 1998 when the government liberalised the airwaves, the licensing authority invited tenders for eight FM radio licences. At the end, only two applicants were awarded licences. The other applicants who submitted tenders were unable to meet the excessively high financial requirements set by the licensing authority.¹⁶

Lack of controls on ownership of newspaper titles is slowly leading towards ownership concentrations in the sector. The acquisition by Dikgang Publishing Co of a controlling stake in the *Guardian* and *Midweek Sun* in November 2001 dealt a heavy blow to external pluralism in the sector. The acquisition gives the company control of about 45% of the general newspaper circulation in the country and 67% of the private press. It is therefore not surprising that the move has resulted in calls for government to promulgate rules to limit ownership in the print media.¹⁷

Diversity in the press has several components. These include, among others, intellectual and ideological diversity, regional diversity, cultural diversity and diversity of format.¹⁸ Applying these standards to the press in Botswana, they reveal a serious lack of diversity. All the publications in the country are tabloids. There are no quality papers (broadsheets). It has been observed that the press in Botswana lacks diversity in both editorial style and content. To demonstrate this shortcoming, it is said that, if one has read the *Guardian*, there is no need to buy *Mmegi*, as the issues covered will generally be identical.¹⁹ Save for the *Daily News*, the content and distribution of the other publications are biased in favour of affluent urban audiences. Rural audiences are generally neglected and there is also a shortage of publications in indigenous languages.²⁰

¹⁶ See T. Balule, 'When Money Becomes a Freedom of Expression Issue' (1999) 2 (1) *Southern Africa Media Development Fund News* 3, available at: [<http://www.misa.org>].

¹⁷ See, 'Government Must Introduce Media Ownership Rules' *Mmegi* 1st – 10th January 2002, p. 18.

¹⁸ P.J. Humpreys, *Mass Media and Media Policy in Western Europe* (Manchester University Press, 1996) p. 72.

¹⁹ A.P.N. Thapisa & E. Megwa, *Situation Analysis and Profile of the Mass Communications in Botswana* (Report prepared for the Ministry of Finance and Development Planning, 1998) p. 66.

²⁰ See chapter 3 at 3.2.1.

Given the problems of diversity of content, distribution and the fact that there is no private daily newspaper in the country, the government justifies the continued existence of the *Daily News* on the basis that it fills the vacuum left by the private press. It therefore means that, so long as the private newspapers are limited in their frequency and geographical coverage, there remains a role for the *Daily News* to play, especially, in servicing the rural communities.²¹

5.2.2 South Africa

a. *Regulating for External Pluralism*

During the apartheid era, newspapers printed and published in South Africa had to be registered under the *Newspaper Imprint and Registration Act 1971*.²² Before a newspaper could be registered under the Act, it had to be cleared under the *Internal Security Act 1982*.²³ The latter was used by the apartheid government to curb newspapers that were critical of its policies.²⁴ However, under the new democratic dispensation, the *Newspaper Imprint and Registration Act 1971* has been repealed and replaced by the *Imprint Amendment Act of 1994*.²⁵ Under the new Act, the press is no longer subject to licensing. The new law regulates matters such as the protection of names of existing newspapers, the identity of printers and addresses at which newspapers are printed.²⁶

There are no limits imposed on ownership of titles or on foreign ownership of the print media. Monopolist trends that tend to prevent diversity and pluralism in the media have always been regulated by the state. First, these were regulated under the *Maintenance and Promotion of Competition Act 1979*.²⁷ The objective of the Act was to maintain and promote competition by, among others, the prevention of monopolies. The Act did not have any special provisions applying to the print media. However,

²¹ *National Development Plan 8 1997/98 – 2002/03* (Ministry of Finance and Development Planning, 1997) p. 448.

²² Act 63 of 1971.

²³ Act 74 of 1982.

²⁴ Y. Burns, *Communications Law* (Butterworths, 2001) p. 299.

²⁵ Act no. 18 of 1994, available at: [<http://www.parliament.gov.za/acts/1994/act94.018>].

²⁶ Section 1.

²⁷ Act 96 of 1979.

there is evidence that in the seventies and eighties, the competition board created under the Act, was able to intervene in certain cases to prevent monopolies in the print media industry.²⁸

The *Maintenance and Promotion of Competition Act 1979* has now been repealed and replaced by the *Competition Act 1998*.²⁹ The new Act provides for the establishment of a Competition Commission,³⁰ which is an independent body³¹ responsible for investigating, controlling and evaluating restrictive practices,³² abuse of dominant position,³³ and mergers and acquisitions.³⁴ The Act applies to all economic activity within, or having effect within the country.³⁵ This therefore means that the Act applies to the press industry. Like its predecessor, the Act leaves the question of monopolies within the print media industry to be referred to the Competitions Commission, to be dealt with under the broad framework of competitions policy. The Act stipulates specific thresholds beyond which mergers must be notified to the Commission. These are classified as: 'a small' merger, an 'intermediate' merger and a 'large' merger.³⁶ Thresholds are worked out on the basis of the value of the combined annual turnover or assets involved in any merger.³⁷

Companies considering a merger that falls into the intermediate or large categories must notify the Commission before it is implemented.³⁸ Small mergers do not need to be notified to the Commission and may be completed without approval, unless it

²⁸ Y. Burns, 'Freedom of Expression under the New Constitution' (1997) 30 *Comparative International Law of Southern Africa* 264 at 273.

²⁹ Act 89 of 1998.

³⁰ Section 19. The Commission consists of a Commissioner and one or two deputy Commissioners, appointed by the Minister of Trade and Industry.

³¹ Section 20.

³² Section 4 deals with restrictive horizontal practices and section 5, with vertical restrictive practices.

³³ Section 8.

³⁴ Sections 11 – 18.

³⁵ Section 3(1).

³⁶ Section 11(5).

³⁷ A small merger refers to a merger or proposed merger where the combined annual turnover or assets of the buying firm and the target firm are valued below R200 million or where the annual turnover or asset value is under R30 million. An intermediate merger is where the combined annual turnover or assets of the buying firm and the target firm are valued at or above R200 million but below R3.5 billion or if the annual turnover or asset value of the target firm equals or exceeds R30 million but less than R100 million. And a large merger is one where the combined annual turnover or assets of the buying firm and the target firm equals or exceeds R3.5 billion or if the annual turnover or asset value of the target exceeds R100 million. See Notice by the Minister of Trade and Industry published in Government Notice R1943, Government Gazette 20388 of 20th August 2000.

[<http://www.compcom.co.za/TheLaw/MergerThreshold.asp>].

³⁸ Section 13A(1)

appears within six months that the merger may substantially prevent or lessen competition, or cannot be justified on public interest grounds.³⁹ Whenever required to consider a merger, the Commission must decide whether or not the merger is likely to prevent or reduce competition in the particular market. This is achieved by assessing the strength of competition in the relevant market and the likelihood that the companies in that market will behave competitively after that merger.⁴⁰ The Act stipulates several factors that have to be taken into consideration in determining this issue.⁴¹ After considering and assessing the above factors, the Commission must further consider two matters: (a) whether anti-competitive effects are outweighed by technological, efficiency or pro-competitive gains which would occur as a result of the merger and which will be greater than the prevention or lessening of competition; and (b) whether the merger can or cannot be justified on substantial public interest grounds by assessing such factors and the effect it will have on, a particular industrial sector or region, employment, the ability of small or black/emerging business to become competitive and the ability of national industries to compete in international markets.⁴² The latter consideration is important in the media sector, as pluralism and diversity are important public interests issues that the Commission will have to try to protect when considering mergers or proposed mergers. The Commission is yet to consider a merger in the print media industry under the new law.

b. Regulating for Internal Pluralism

The press in South Africa is not subject to any legal content obligations. Newspapers are free to publish anything subject only to the general law. In practice, however, their readers and advertisers determine the content of the papers. It has been observed that advertisers in the country choose newspapers that reflect their political, socio-

³⁹ Section 13.

⁴⁰ Section 12A(1) & (2).

⁴¹ These include, the actual and potential level of import competition in the market; the ease of entry into the market, including tariff and regulatory barriers; the level and trends of concentration, and history of collusion, in the market; the degree of countervailing power in the market; the dynamic characteristics of the market, including growth, innovation, and product differentiation; the nature and extent of vertical integration in the market; whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail; and whether the merger will result in the removal of an effective competitor. (Section 12A(2).)

⁴² Section 12A(3).

economic and cultural viewpoints, and that editors and journalists generally adhere to these viewpoints to ensure continued financial support.⁴³

South Africa has a press code that all newspapers in circulation have voluntarily elected to abide by. The code arguably imposes some content obligations on the press. It requires newspapers to, among others, report news truthfully, accurately and fairly; present news in context and in a balanced manner; seek the views of the subject of serious critical reportage in advance of publication and make amends for publishing or comment that is found to be harmfully inaccurate by printing a retraction, correction or explanation.⁴⁴ These obligations, to a certain extent, do determine the content of newspapers. A Press Ombudsman and an Appeal Panel enforces the code. In making their decisions, they must provide full reasons for their findings and the decisions are public records and are kept at the institution's headquarters.⁴⁵

c. Evaluation of the Regulatory Structures

The scrapping of newspaper registration requirements has, unfortunately, not resulted in the entry into the market of many new players. In fact, as noted in chapter 3, South Africa has the second lowest number of newspaper titles in the world compared to its population size. Even though the newspaper industry has always been subject to competition law, this seems to have failed to prevent concentration of ownership in the sector. The newspaper industry is dominated by three media groups, who, between them, own over 90% of the mainstream newspaper titles in circulation in the country.⁴⁶ The monopoly created by the three groups has raised entry costs into the newspaper industry, making it difficult for new comers to break into the market.⁴⁷ Such a high level of ownership concentration can arguably lead to homogenisation of information, resulting in the denial of citizens to diversity in information sources.

⁴³ Burns, 'Freedom of Expression under the New Constitution', n 28 above at 275.

⁴⁴ Para. 1 of the Press Code, available at: [<http://www.u-paris2.fr/ifp/deontologie/afriqueSud.html>].

⁴⁵ See paras. 5, 6 & 11 of the Constitution of the Press Ombudsman and Appeal Panel, available at: [<http://www.suntimes.co.za/sitemap/ombudsman.asp>]. Due to difficulties in accessing the records, I was not able to establish what leading decisions have been made by the institution to date.

⁴⁶ See chapter 3 at 3.3.3 for a detailed discussion of this point.

⁴⁷ *Media Concentration and its Impact in South Africa, Botswana, Lesotho and Swaziland* (Report produced by Freedom of Expression Institute for IFEX meeting in New York, 20th May 2000) p. 15.

Sadly, the post-democratic period has also witnessed the demise of the 'alternative press'.⁴⁸ Donors, who withdrew their support after the first democratic elections, leading to their closure, financed these newspapers.⁴⁹ The demise of the alternative press was a great loss to diversity.

Despite concentrations in ownership of the print media, the mainstream newspapers in South Africa offer a reasonable measure of diversity of format and content. The content of the papers focus mainly on: politics, public affairs, culture, business, entertainment and sports. The presentation of these matters differs across titles, each adopting a style suited to its targeted audience. The *Mail & Guardian* and the *Sunday Times* are quality papers, and these are complimented by the other titles, mostly tabloids. The content of the majority of these papers however caters for the interests of middle to upper income earners. Distribution of newspapers is skewed in favour of urban areas, which means that the rural population is not adequately serviced by the newspaper industry. The interests of the poor black South Africans, who are in the majority, are not fully represented in the mainstream newspaper titles.⁵⁰

In a country that has eleven official languages (nine of these African), lack of newspaper titles in indigenous African languages is quite conspicuous. Currently there is only one title published in an African language. Most titles are published in English and a few in Afrikaans. There is also lack of regional diversity in that the mainstream newspaper titles are all based in the rich industrialised provinces.

The government of South Africa has realised that market forces, the liberalisation of entry requirements into media markets and the changes in ownership involving black empowerment groups, on their own, cannot fully achieve transformation within the media sector to secure pluralism and diversity. The government has adopted a policy on media development and diversity to remedy the deficiencies in the media sector in order to bring about diversity and pluralism within the sector.⁵¹ The policy forms the basis for the *Media and Diversity Agency Act 2002*, aimed at promoting pluralism and

⁴⁸ These are newspapers that emerged during the 1980's, outside the then duopoly of the English and Afrikaans press, which gave platform to the voices of the resistance movement.

⁴⁹ *The Media Development and Diversity Agency (MDDA) Position Paper 2001* (Government Communications and Information System) p. 14.

⁵⁰ See chapter 3 at 3.3.3 on factors that generally determine content of newspapers.

⁵¹ *The MDDA Position Paper*, n 49 above.

diversity in the media sector.⁵² The primary purpose of the policy is to help create an enabling environment for media to develop and meet the diverse needs of all South Africans. In particular, the policy targets those marginalized because of factors such as gender, race, disability, geographic location, class or income, as well as marginalized schools of thought.⁵³

An independent statutory body, the Media Development and Diversity Agency (MDDA), which acts through a board, implements both the policy and the Act. The board consists of nine members, six are appointed by the president on the recommendation of the National Assembly and three directly by the president. In the case of the latter members, one must be from the commercial print media and another from the commercial broadcast media. Members of the board must be people committed to fairness, freedom of expression, openness and accountability. When viewed collectively, membership of the board must be representative of a broad cross section of the population of the country and must possess suitable qualifications, expertise and experience in the fields such as community media, social, labour and development issues, media economics, financial management and funding, advertising and marketing, journalism and broadcast programming, media research, media training, literacy and education, media law, information and communication technology policy.⁵⁴ The MDDA is required to operate at arms-length from the government, the private sector and any donors.⁵⁵ In terms of sections 6 and 8 of the Act, members of the board are appointed for a renewable term of between three and five years and can only be removed from office by the National Assembly. The MDDA is accountable to parliament through annual reports submitted to the minister responsible for government communications, who in turn, must table such reports before parliament.

The mandate of the MDDA is to promote diversity and development of freedom of the press and other media through, *inter alia*, encouraging ownership and control of, and access to, media by historically disadvantaged communities as well as by

⁵² Act No. 14 of 2002, available at: [<http://www.gov.za/documents/02Sublist.htm#M>].

⁵³ *The MDDA Position Paper*, n 49 above p. 4.

⁵⁴ Section 4, *MDDA Act*.

⁵⁵ Section 2.

historically diminished indigenous language and cultural groups.⁵⁶ The main beneficiaries of the policy are community media, as well as small commercial media, including radio, television, print and new media. The nature of support offered to these media will include: direct subsidies that are cash grants, emergency funding aimed at strengthening and ensuring the survival of media projects, capacity development, training and conducting media research.⁵⁷ The guiding principle in making recommendations for support is the contribution that projects would make to media development and diversity.⁵⁸ The MDDA is prohibited from interfering in the editorial content of the media.⁵⁹

Funding for the implementation of the policy is provided by government through appropriation in parliament and from donors.⁶⁰ The estimated cost of implementing the policy is in the region of R500 million over a five-year period. It is envisaged that expenditure will progressively decline after five years due to a significant decline in the need for support to community radio.⁶¹ Government has pledged to raise about two-thirds of the funding needs of the MDDA in the short term, with the hope that once the agency is firmly established, it will be possible to mobilise donor funding that will reduce the demand on government.⁶²

The policy seeks to address a serious defect in the South African media market. If the policy can be implemented properly, it should go a long way in catering for the interests of the millions of South Africans currently marginalized by the mainstream newspaper titles. A proper implementation of the policy has the potential of ensuring entry into the media market of new community voices; especially publications in indigenous African languages and regional titles from the poorer regions, thus enhancing plurality and diversity in the press sector.

⁵⁶ Section 3.

⁵⁷ Section 17.

⁵⁸ *MDDA Position Paper*, n 49 above pp. 8–9.

⁵⁹ Section 2(5).

⁶⁰ Section 15.

⁶¹ *MDDA Position Paper*, n 49 above p. 48. The assumption here seems to be that, after five years, community radio stations will have established themselves and will be able to survive without need for support. During the first five years, the policy aims at assisting, among others, 28 existing newspapers for 2 years; 25 new newspapers for 5 years; 57 existing community radio stations for 4 years and 67 new community radio stations for 5 years.

⁶² *Ibid.*

5.3 Regulation of the Broadcast Media

In chapter 2 I observed that the broadcast media, worldwide, has been, and continues to be, subjected to a significantly greater degree of regulation than the print media. Various reasons have been advanced for this double standard.⁶³ Whatever the validity of these reasons, the double standard is also applied in Botswana and South Africa. Regulation of broadcasting in the two countries is underpinned by the belief that airwaves are a scarce resource that belongs to the people and must be used for their benefit.⁶⁴ The use of the spectrum is considered a privilege, and therefore the public interest requires frequencies to be allotted in such a way that broadcasting is available universally and caters for the diverse needs of the total population.⁶⁵ The argument that frequencies are a public resource and should be used for serving the needs and interests of the public underlies the idea of public service broadcasting (PSB).

The concept of PSB is arguably associated with ‘Keynesianism’,⁶⁶ where state intervention in the market was deemed necessary to ensure the fulfilment of public interest obligations.⁶⁷ Duncan argues that John Reith, who identified information, education and entertainment as ‘non-negotiables’, inspired the core mandate of PSB in ‘welfare states’.⁶⁸ Feintuck on the other hand argues that different models of PSB have existed across Europe, thus indicating that the Reithian model is not the only manifestation of public service ethos. He, however, observes that the lowest common denominator across the various models of PSB appear to be commitment to delivering a wide-ranging, quality service to the whole population.⁶⁹

⁶³ See chapter 2 at 2.4.2.

⁶⁴ South African *White Paper on Broadcasting Policy* (Department of Communications, 1998) para.1.3.3: [<http://docweb.pwv.gov.za/docs/policy/broadcastingwp.html>] and Botswana’s *Draft National Broadcasting Policy of 2003*, para. 1.2.4, p. 24.

⁶⁵ *South African White Paper on Broadcasting Policy*, n 64 above, para. 1.3.3.

⁶⁶ The theory is named after the economist, John Maynard Keynes, and is associated with state support for a range of goods and services, including the media. See generally, J. Duncan, *Broadcasting and the National Question: South African Broadcast Media in an Age of Neo-Liberalism* (Freedom of Expression Institute and Netherlands Institute for Southern Africa, 2001) p. 14.

⁶⁷ *Ibid.*, p. 55.

⁶⁸ *Ibid.*

⁶⁹ M. Feintuck, *Media Regulation, Public Interest and the Law* (Edinburgh University Press, 1999) p. 47.

There is no one clear definition of PSB, however, writings of various scholars reveal an overlapping consensus on a set of core criteria.⁷⁰ These have been refined and summarised by Born and Prosser⁷¹ as follows:

- i. Universal access or availability, ensuring that all services and programme types can be received by all;
- ii. Universality of genres: that is, mixed programming, a broad and varied range of programmes within the same schedule that cater for a variety of tastes and interests;
- iii. Provision of high quality programmes in all genres, and thus a benchmark for quality in all genres, by being well resourced, requiring high ethical, technical and production standards, and showing the capacity for innovation, creative risk-taking, pluralism, originality, distinctiveness, and for challenging viewers;
- iv. A mission to inform, educate and entertain and thus enrich the lives of the audience;
- v. Provision of programming that supports social integration and national identity;
- vi. Provision of diverse programming to minorities and special interest groups to foster belonging and counteract segregation and discrimination;
- vii. Provision of programming that reflects regional interests and identities;
- viii. Provision of independent and impartial news and fora for public debate and plurality of opinions;
- ix. Commitment to national and regional production and to local talent;
- x. A mission to complement other broadcasters to enrich the broadcasting ecology;
- xi. Affordability: services either free at the point of delivery or at a cost which makes it affordable to the vast majority of people; and

⁷⁰ For various definitions of PSB see, among other works, E. Barendt, *Broadcasting Law: A Comparative Study* (Clarendon Press, 1993) p. 52; M. Raboy, 'Introduction: Public Service Broadcasting in the Context of Globalisation' in M. Raboy (ed.) *Public Service Broadcasting for the 21st Century* (Luton University Press, 1996) p. 6, and M. Tracy, *The Decline and Fall of Public Service Broadcasting* (Oxford University Press, 1998) pp. 26 – 32.

⁷¹ G. Born & T. Prosser, 'Culture and Consumerism: Citizenship, Public Service Broadcasting and the BBC's Fair Trading Obligations' (2001) 64 *Modern Law Review* 657 at 671.

xii. Limited, if any, advertising carried on services.

The above summary of the core criteria of PSB, although by no means authoritative, serves as a very useful guide to its mandate. Public service broadcasters require three elements to effectively execute their mandate: they must be free and independent, have sufficient resources to provide quality programming, and be accountable to the public for the way in which they fulfil their mandate and utilise public resources.⁷² Public service broadcasters can only properly serve the public interest if they have full creative and editorial freedom to present news and other programming to the public without interference by the government, political institutions or by powerful private interests. While PSBs should be independent of government interference, they must be accountable to the public, and mechanisms must be put in place to ensure that they remain true to their mandate. Funding arrangements for PSB should not render the broadcaster susceptible to interference with its editorial freedom or institutional autonomy.

Given that airwaves are regarded as a natural resource and their use must benefit society as a whole, regulation of the broadcast sector must aim at ensuring that every citizen has access to broadcasting services, either free at the point of delivery or at an affordable price. The provision of infrastructure whereby citizens who wish to, can receive broadcast signals, regardless of their geographical or social location is necessary for ensuring universal access to broadcasting services. The question of access to broadcasting services is important in the background of the rapid technological changes brought about by digitalisation, and the potential of powerful private interests to create barriers to access.⁷³ It is also important that viewers and listeners receive programmes in languages that they comprehend. There are various ways in which universal access to broadcast services can be achieved. Some of the most common are:⁷⁴

⁷² T. Mendel, *Public Service Broadcasting: A Comparative Legal Survey* (UNESCO, 2000) p.50.

⁷³ Digitalisation means that those receiving broadcasts must do so via decoding equipment, with the possibility of incorporating facilities for charging either a subscription fee or on the basis of pay-per-view. In addition, if technological gateways are not kept open, undue power to control who can transmit will be handed to those corporate interests controlling the gateways. (See Feintuck, n 69 above p. 200.)

⁷⁴ *Ibid.*, p. 201 and, Department of Trade and Industry, *A New Future for Communications, Cm 5010* (2000) pp. 27 -28 para. 3.4.

- Provision of publicly funded services, free at the point of delivery, made available to all citizens regardless of geographical location, provided they have receiving equipment;
- Specifying minimum areas of coverage when granting licences with the aim of ensuring that all parts of the country receive broadcast signals;
- Imposition of carriage obligations of public service television channels on all delivery platforms;
- Granting priority access to networks of limited capacity to services that are free at the point of delivery; and
- Imposition of language obligations on service providers.

The guarantee of the existence of a wide range of independent and autonomous players, providing a diverse and high-quality range of programming to all, lies at the heart of regulation of the broadcast media. It is therefore imperative to have a mechanism in place to ensure that the ideal is achieved in practice. The ideal is achieved through the licensing process and imposition of positive obligations regarding programming. A regulator of the industry, to license and enforce licence obligations, becomes an absolute necessity. For such regulator to properly carry out its functions, it must be independent of the government, other organs of state and powerful private concerns. The regulator should also be accountable to the public to ensure that it remains true to the public interest. A number of mechanisms are commonly employed to ensure the independence and accountability of regulators.⁷⁵

These include:

- Explicit guarantee of the independence of the regulator and prohibition of interference with activities of its members in the legislation that establishes the regulator or in the state's constitution;
- Setting out the policy objectives underpinning broadcast regulation in legislation establishing the regulator;

⁷⁵ See *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation* (Article 19, 2002) Article 4: [<http://www.article19.org/docimages/1293.htm>], and Council of Europe, *Recommendation Rec (2000) 23: On Functions of Regulatory Authorities for the Broadcasting Sector*.

- Ensuring that the process of appointing members of the regulatory body is open and democratic to minimise the risk of political or commercial interference;
- Providing security of tenure of office for members of the body;
- Accountability of the regulator to a multi-party body such as the legislature or a committee thereof; and
- Provision of the regulator with adequate funding to enable it to carry out its mandate and at the same time ensuring that the funding process does not influence decision-making by the body.

5.3.1 Botswana

The *Broadcasting Act 1998*⁷⁶ provides the legal framework for the regulation of broadcasting in Botswana. The Act is a mere skeleton that provides for the establishment of a National Broadcasting Board (NBB), which is responsible for awarding broadcasting licences as well as the control and supervision of broadcasting activities.⁷⁷ A brief history of regulation of broadcasting in the country may help the reader to appreciate the current issues concerning regulation of the sector. Since independence in 1966 until 1998, when two private radio broadcasters were granted licences, broadcasting was monopolised by the state owned *RB*, which has been operating without a licence. Licences for the private broadcasters were issued under the *Botswana Telecommunications Authority Act 1996*.⁷⁸ Prior to the enactment of this Act, the power to issue broadcasting licences was vested in the Botswana Telecommunications Corporation (BTC).⁷⁹ However, due to uncertainties in the procedures, BTC never issued a licence. BTC used to forward all licence applications to the Office of the President (OP) for clearance, which the latter never did. The reluctance of the OP to give clearances to applications, according to Zaffiro, was due

⁷⁶ Act no. 6 of 1999, available at: [<http://www.bta.org.bw/publications.html>].

⁷⁷ Section 10(1). The Act came into force on 29th June 2001 and the first Board was created on 1st August 2001.

⁷⁸ Act no. 15 of 1996, available at: [<http://www.bta.org.bw/publications.html>]. The Act establishes a telecommunications authority to regulate the industry and to issue licences to providers of telecommunications services.

⁷⁹ BTC is a state owned enterprise incorporated under the *Botswana Telecommunications Act 1980* to provide public telecommunications services.

to reasons of national sovereignty. It was believed that given the weak business infrastructure and advertising base in the country, serious interest from commercial sponsors would come mainly from people intending to aim their messages at the then apartheid South African audience.⁸⁰

In 1996, the High Court ruled that BTC alone, had power to issue broadcasting licences and that its practice of referring applications to the OP was improper.⁸¹ The decision coincided with the preparation of new legislation on the telecommunications sector, the *Botswana Telecommunications Authority Act 1996*. This Act divested BTC of its licensing powers in the telecommunications sector in favour of a new telecommunications regulator, the Botswana Telecommunications Authority (BTA). The power to issue broadcasting licences was also transferred to BTA, even though the telecommunications policy,⁸² which formed the basis of the legislation, did not mention broadcasting at all. It seems by granting BTA powers to issue broadcasting licences the government was merely giving in to public pressure to liberalise the airwaves, which was fuelled by the decision in *Gunda and Radio Gaga* (supra). BTA subsequently licensed the first private broadcasters in 1998. The authority never developed a policy to give guidance for regulation of broadcasting in the country.⁸³

In 1998 the government hurriedly passed the *Broadcasting Act 1998*, which stripped BTA of its powers to issue broadcasting licences. The move was allegedly in response to complaints from media organisations that BTA had no expertise in broadcasting.⁸⁴ The *Botswana Telecommunications Authority Act* was thus amended to exclude broadcasting from the jurisdiction of BTA.⁸⁵ The *Broadcasting Act* was enacted in a vacuum, as there was no policy setting out the objectives of regulation of the sector. One of the tasks assigned to the newly established NBB was therefore to come up with a draft national policy on broadcasting, which will form the framework for regulation of the sector.

⁸⁰ Zaffiro, n 14 above pp. 48 – 49.

⁸¹ *Gunda and Radio Gaga v Botswana Telecommunications Corporation & another* MISC A No. 376/96 (Unreported).

⁸² *Telecommunications Policy for Botswana* (Ministry of Works, Transport and Communications, 1995) available at: [<http://www.bta.org.bw/publications.html>].

⁸³ BTA initiated a draft policy in 1999, but that was never finalised.

⁸⁴ See *Effective Regulation Case Study: Botswana* (International Telecommunications Union, 2001) p. 4, available at: [<http://www.itu.int/ITU-D/treg/>].

⁸⁵ Section 25, *Broadcasting Act 1998*.

After a long consultation process, the NBB finally released a draft policy for public consultation in May 2003.⁸⁶ The draft policy will be submitted to the government for approval after public consultation, and if approved, it will lead to major amendments to the *Broadcasting Act 1998*. The broad objectives of the draft policy are to establish a new broadcasting system for Botswana that will seek to ensure: universal access to broadcasting services; diversity of choice for audiences; equality for new entrants into the broadcasting market; balance of opinion and fairness; citizen empowerment; and promotion of economic growth.⁸⁷

The discussion of the regulation of the broadcast media that follows examines the status quo under the *Broadcasting Act 1998*, and proceeds to look at the changes that the draft policy would bring, if it were to be approved in its present form, and given effect to by law.

a. Regulating for External Pluralism

In relation to the question of external pluralism, the *Broadcasting Act* requires the NBB to allocate the available spectrum in such manner as to ensure the widest possible diversity of programming.⁸⁸ In order to achieve this, the Act provides for a three-tier system of broadcasting licences, differentiated on the basis of ownership. These are: public, community and private broadcasting services. The draft policy recommends the maintenance of this three-tier system for broadcasting.⁸⁹

Public broadcasting service is defined in the Act as ‘a broadcasting service provided by any statutory body which is funded either wholly or partly through state revenues’.⁹⁰ The Act does not spell out the mandate of PSB. The draft national broadcasting policy addresses this lacuna. It provides that PSB must inform, entertain

⁸⁶ The draft policy is available at: [<http://www.bta.org.bw.news.html>].

⁸⁷ Para. 1.2.4, p. 25.

⁸⁸ Section 10(1)(c).

⁸⁹ Para. 2.3 Rec. 1, p. 32.

⁹⁰ Section 2.

and educate the public, and identifies the following obligations for ensuring that PSBs perform their mandate effectively:⁹¹

- i. Provision of a diversity of programmes for all, in which everyone will find material to inform, entertain and enrich;
- ii. Provision of a forum for democratic debate by offering news and current affairs reporting that is impartial, independent, explanatory and pluralist, which stimulates debate and clarifies issues;
- iii. Provide a showcase for culture by promoting the various cultures, as well as the intellectual and artistic life in the country in general;
- iv. Provide a vehicle for development by running extensive promotional campaigns for development in areas such as health, agriculture, civic education, environmental protection, etc;
- v. Provide unrestricted public access to events of significance by offering extensive live coverage of important events in politics, culture, sports etc;
- vi. Provide a reference point for quality programming to commercial and community broadcasters;
- vii. Stimulate and support local production; and
- viii. Provide a continuous service to the public.

One of the core mandates of PSB, relevant to external pluralism, is the provision of independent and impartial news. This mandate, as we have seen, can only be fulfilled if the organisation providing PSB is independent from both political and economic influences, has sufficient resources to provide quality programming, and is accountable to the public it serves. The *Broadcasting Act* does not address any of these issues. In terms of the definition of PSB in the Act, the three state owned broadcasters, *RBI*, *RB2* and *Btv*, are generally regarded as public service broadcasters.⁹² However, a government department controls these broadcasters, and they are not guaranteed editorial independence. The government has made it clear that it expects state owned media to act as its mouthpieces by purveying official

⁹¹ Para. 3.4, pp. 36 – 38.

⁹² *National Development Plan 8 1997/98 – 2002/03*, n 21 above p. 448.

information rather than as independent sources of information for the public.⁹³ In their current form, the state owned broadcasters in Botswana are therefore not PSBs, judged in terms of the generally recognised criteria for such broadcasters.

The draft national broadcasting policy recommends that the state owned broadcasters should be transformed into PSBs that will be controlled, and be accountable to the public they serve.⁹⁴ In order to achieve this, the government will have to transform the DIB, which is currently running these services, into an independent entity that will be run by a pluralistic and independent governing board. Such an entity will have to be directly accountable, through its governing board, to the public for the manner in which PSBs discharge their public mandate and use of public resources. The draft policy argues that PSBs should be adequately financed. It does not make any specific recommendation regarding the funding of PSBs, but urges the consideration of a combination of a number of tried and tested funding mechanisms. These include: licence fees; state grants; levies on commercial broadcasters and services such as electricity and telephone; sponsorship; and donations. Whichever mode or combination is adopted, the draft policy emphasises that it is crucial to ensure that PSBs are protected against undue interferences.⁹⁵

The second type of licence provided for under the *Broadcasting Act*, community broadcasting, is defined as a service that is fully controlled by a non-profit entity and carried on for non-profitable purposes. Such a service must serve a particular community. A community is defined as including a geographically founded community or any group of persons or sector of the public having a specific, ascertainable common interest.⁹⁶ Community broadcasters are to be funded from donations, grants, sponsorship or advertising and membership fees.⁹⁷ The idea behind community media is the empowerment of local communities in the process of sustainable development. By representing a diversity of opinion and experience,

⁹³ See chapter 3 at 3.2.3.

⁹⁴ Para. 3.8 Rec 3.2, p. 50.

⁹⁵ Para. 3.5.1, pp. 38 - 39.

⁹⁶ Section 2, *Broadcasting Act 1998*.

⁹⁷ *Ibid.*

community media has the potential to build a participatory democracy through empowerment of communities at a local level.⁹⁸

There is currently no community broadcaster in the country. In 1998, BTA turned down an application by World View Botswana, an NGO, which had applied for a licence for a community based radio station for the empowerment of Basarwa (Bushmen) local communities in the western part of Botswana. BTA felt that programmes provided by *RB*, even though the station does not air any single programme in the languages of the people concerned, met the needs of community broadcasting.⁹⁹

The draft broadcasting policy recognises that there is a special need for community radio broadcasters to be set up in the rural and remote areas of Botswana due to lack of communication facilities in those areas. The majority of these areas have no access to telephones, and the reception of other broadcasting services is generally poor. The draft policy takes notice of communication barriers, as most people in the remote areas speak the local languages only, it recommends that community-broadcasting services should reflect the language needs of their audiences.¹⁰⁰

Finally, the third category, private broadcasting, is defined as a service operated for profit and controlled by a person who is not a public or community broadcaster.¹⁰¹ The two radio stations licensed by BTA in 1998, fall under this category. As in the case of PSB and community broadcasting, the Act does not specify the mandate of private broadcasters. The draft broadcasting policy fills this vacuum by providing that private broadcasters in the new broadcasting system will be expected to promote and facilitate a diverse broadcasting landscape by offering a variety of different formats of broadcasting services.¹⁰²

⁹⁸ K. Thorne, 'Community Media – A Price We Can Afford?' in J. Duncan & M. Seleane (eds.) *Media and Democracy in South Africa* (Human Sciences Research Council and Freedom of Expression Institute, 1998) 211 at 213.

⁹⁹ B. Mwape & J. Minnie (eds.) *So this is Democracy? Report on State of the Media in Southern Africa 1998* (MISA, 1999) p. 24.

¹⁰⁰ Para. 5.1, p. 61.

¹⁰¹ Section 2, *Broadcasting Act 1998*.

¹⁰² Para. 4.3, p. 53.

The *Broadcasting Act* does not impose any explicit limitations on ownership of broadcasting licences. It is however arguable that such limitations can be implied from section 10(1)(c), which requires the allocation of the available spectrum to ensure the widest possible diversity of programming. Consequently, the NBB may refuse to grant a licence to an applicant who already holds another licence on the ground that the issuing of a further licence will not be compatible with the provision of a diversity of programming. Any proposed changes to the proprietorship of a broadcasting licence must be brought to the attention of the chairperson of the NBB. Where the chairperson is of the view that the proposed changes will be detrimental to the development of the broadcasting sector, he/she shall refer the matter to the NBB for its decision.¹⁰³ The provision enables the NBB to block any development in the broadcast sector that is likely to lead to undesirable concentration of ownership.¹⁰⁴ There are no limitations on foreign ownership of the broadcast media. In awarding licences, however, the NBB is required to give preference to enterprises that are owned by citizens or in which citizens have a significant shareholding.¹⁰⁵

Cross-media ownership between the broadcast and print media is not addressed in the *Broadcasting Act*. This is a serious loophole and may undermine pluralism and diversity in the provision of information by allowing a single player to dominate both sectors. Dikgang Publishing Co, the owners of both *Mmegi* and *Mmegi Monitor*, which is also the majority shareholder in C-BET (Pty) Ltd, owners of the *Guardian* and *Midweek Sun*, harbours ambitions of expanding into the broadcast sector. In 1998, its tender for a broadcast licence was disqualified by BTA for late submission.

The loopholes left by the *Broadcasting Act* in regard to issues of ownership and control of the media are addressed in the draft broadcasting policy. The draft policy acknowledges that media concentration may impinge on the media's democratic role, and that a diverse and pluralistic media cannot be achieved by leaving the development of the media industry to market forces alone. It thus recommends that regulations should be introduced that will limit ownership in broadcasting services in a way that will ensure that no one entity would be in a position to exercise control

¹⁰³ Section 15(1), (3) & (4).

¹⁰⁴ This provision is likely to create a concurrence of jurisdiction between the NBB and the envisaged competition authority, on mergers of companies involved in broadcasting activities.

¹⁰⁵ Section 10(2).

over more than one broadcasting service.¹⁰⁶ Further, the print media would not be allowed to have a controlling shareholding in broadcasting services, and, presumably, *vice versa*. The draft does not, however, expressly provide that entities that own broadcasting services will not be allowed to have a controlling shareholding in the print media.¹⁰⁷ Exemptions to the above restrictions would be allowed where there was evidence that it would lead to the creation of a pluralistic and diverse broadcasting landscape.

The draft broadcasting policy endorses the position espoused in the *Broadcasting Act* that preference in the awarding of licences should be given to enterprises owned by citizens or those in which citizens have significant shareholding. The draft policy recommends that the expression ‘significant shareholding’ should be interpreted to mean a shareholding of at least 55%. The regulator will be allowed to licence enterprises in which foreign shareholding is higher where it is established that it will be in the interest of the development of the broadcasting industry. However, wholly owned foreign entities will not be licensed for as long as the national industry is not fully developed.¹⁰⁸

b. Regulating for Internal Pluralism

The *Broadcasting Act* empowers the NBB to impose such conditions and restrictions on a licence, as it may consider necessary.¹⁰⁹ The provision enables the NBB, *inter alia*, to impose conditions on licensees to ensure that programming in the sector represents and reflects the interests of society as a whole. However, due to the failure of the Act to spell out the various mandates of the different categories of broadcasters, there are currently no specific obligations imposed on the existing broadcasters to ensure internal pluralism in their programming. The state owned broadcasters, as has been noted, are still operating without licences. They are therefore not yet subject to the provisions of the Act. The programme content of these broadcasters is currently, like the *Daily News*, derived from the mandate of the DIB.¹¹⁰

¹⁰⁶ Para. 8.4 Rec 8.1, p. 83.

¹⁰⁷ Cf. *Ibid.*, Rec 8.2.

¹⁰⁸ *Ibid.*, Rec 8.4.

¹⁰⁹ Section 13(2).

¹¹⁰ See discussion on mandate of the DIB at 5.2.1 (b) above.

The commercial radio broadcasters, unlike the state owned broadcasters, are already subject to the provisions of the Act.¹¹¹ In licensing the two radio stations, BTA was of the view that the promotion of a vibrant broadcasting market requires a regulator that does not demand commercial broadcasters to make high and costly public service contributions.¹¹² In the light of the country's low advertising base, it decided to apply a light touch regulation, which it felt was suited to a broadcasting environment that is required to grow and prosper. The two commercial radio stations are required to allocate thirty-six minutes of their programming time per day, to the provision of news. They are expected to cover news and information 'accurately, fairly and impartially'.¹¹³ In addition, they are expected to provide public services such as public announcements and emergency and disaster announcements.

One of the objectives of the draft national broadcasting policy is the development of a diverse broadcasting system that will reflect the public's diverse opinions, beliefs, views, interests and tastes, regardless of their holder's social or geographic status.¹¹⁴ The attainment of this objective entails the provision of diverse and quality programming by all broadcasters. The draft policy thus recommends the imposition of specific obligations on the three categories of broadcasters in order to ensure internal pluralism and quality in their programming.

PSBs will be expected to provide programming in which everyone will find material to inform, entertain and enrich.¹¹⁵ They will also be expected to play a crucial role during election campaigns by way of providing news, current affairs and special election programmes. In particular, they will have to provide general voter education, a platform for political parties, candidates and campaign issues.¹¹⁶ There are currently no rules in place regulating the behaviour of the state owned broadcasters during election periods. The broadcasters have been using their discretion in granting political parties and candidates access to their facilities. Given the fact that the

¹¹¹ Section 24 (1) of the *Broadcasting Act* provides that the Act does not affect the validity of any broadcasting licence issued by BTA, immediately before its commencement.

¹¹² BTA's *Draft National Broadcasting Policy of 1999* at p. 17.

¹¹³ Interview with Percy Raditladi, *Ya Rona FM* station manager. (Gaborone, 7th October 2001).

¹¹⁴ Para. 1.2.4.2, p. 26.

¹¹⁵ Para. 3.4.1, p. 44.

¹¹⁶ Para. 3.6.3, p. 45.

broadcasters are not guaranteed editorial independence, it is thus not surprising that their behaviour during election periods have been a subject of controversy over the past years, with opposition parties accusing them of pro-government bias.¹¹⁷ A report of the Electoral Commissions Forum of SADC Countries on the last general elections in 1999, observes that, while news of both the ruling party and opposition parties' election campaigns were systematically included in the news bulletins of the state owned broadcasters, the former enjoyed more coverage.¹¹⁸ The introduction of regulations that will ensure fair treatment of all political parties during election periods is therefore welcome. Today, a free and fair election is no longer considered only in terms of the manner in which votes are cast, but also, whether there is adequate and reliable information about political parties to enable voters to make informed choices. PSBs should play a leading role in this respect, as the draft policy correctly argues.

The draft policy also recognises that internal pluralism in the programmes provided by PSBs could be achieved by the use of local content. It recommends that PSBs, especially television services, should provide more local programme content and out-source a substantial part of their local productions to independent producers.¹¹⁹ Outsourcing of programmes would arguably help in the promotion of an independent production industry, thereby enhancing opportunities for the provision of diverse programming in the broadcast sector.

Private broadcasters will be obliged to offer news and current affairs programmes, which must be comprehensive, unbiased and independent.¹²⁰ Like PSBs, they will also be expected to play an important role during an election period by ensuring that all political parties are treated equitably. The draft policy assigns the NBB the task of developing regulations that will provide for equal opportunities for political parties and candidates in the use of broadcasting facilities.¹²¹ Internal pluralism in the programmes provided by private broadcasters will also be promoted by encouraging

¹¹⁷ See generally, C.M. Fombad, 'The Protection of Freedom of Expression in the Public Service Media in Southern Africa: A Botswana Perspective' (2002) 65 *Modern Law Review* 649 at 665 – 666.

¹¹⁸ Electoral Commissions Forum of SADC, *Botswana Elections Observer Mission Report* (Electoral Institute of Southern Africa, 1999) pp. 16 – 17.

¹¹⁹ Para. 3.7.1, p. 46.

¹²⁰ Para. 4.7 Rec, p. 59.

¹²¹ Para. 4.5.3, p. 57.

local content and out-sourcing programmes from the independent production sector.¹²²

Community broadcasters will be required to offer distinct services, dealing specifically with community issues that are not normally dealt with by other broadcasting services covering the same area. They will be expected to reflect the needs of the people in the communities they serve, and focus on the provision of programmes that highlight grassroots community issues, such as development, health, environmental affairs, general education etc.¹²³ In addition, community broadcasters will be obligated to promote local content more than PSBs and private broadcasters.¹²⁴

All the three categories of broadcasters will be expected to meet high professional quality standards in their programming. PSBs and community broadcasters in particular, will be required to reflect, without bias, and as comprehensively as possible, the range of opinions and of political, philosophical, religious, scientific and artistic trends in the country and the communities they serve, respectively.¹²⁵ Private broadcasters on the other hand will be required to ensure fairness in their programmes.¹²⁶ In order to maintain high professional standards in the broadcasting industry, the draft broadcasting policy recommends self-regulation within the industry through the adoption of a code of ethics that will regulate matters such as taste and decency, the reporting of news and the protection of privacy. It further encourages the establishment of a public complaints procedure that will be easily understood by the public.¹²⁷

c. Regulating for Access

The *Broadcasting Act* does not have elaborate provisions dealing with the question of access to broadcast services. Access obligations can however be inferred from the provision that empowers the NBB to issue licences ‘subject to such conditions and

¹²² Para. 4.6, p. 58.

¹²³ Para. 5.4, p. 64.

¹²⁴ Para. 5.7.1, p. 66.

¹²⁵ See paras. 3.6 and 5.8 Rec, pp. 40 and 67, respectively.

¹²⁶ Cf. para. 4.5.3, pp. 56 – 57.

¹²⁷ Para. 3.8 Rec 3.9 & Rec 10, pp. 51 – 52.

restrictions, including geographical restrictions, as the board may consider necessary'.¹²⁸ Most of the obligations outlined above in the introduction to regulation of broadcasting, which may be employed to ensure universal access to broadcast services, may be imposed on broadcasters by way of inserting conditions on their licences.

The need to ensure universal access to broadcast services, even though not clearly articulated in the Act, is clearly addressed in the draft broadcasting policy. The draft policy notes that universal access to as many information services as possible is now recognised as a basic human right in many countries around the world. It therefore aims, among other things, to ensure universal access to broadcasting services for all citizens.¹²⁹ The draft policy addresses two aspects of universal access. Firstly, it addresses the technical aspects. It argues that a signal distribution system should be put in place, which will cover the entire country so that all citizens, including those in the remote and rural areas could have access to broadcasting services. It further argues that such a signal distribution system should be efficient, cost effective and give universal access to all broadcasting operators.¹³⁰ The draft policy therefore recommends that the signal distribution section of the DIB should be privatised or transformed into a parastatal organisation that will provide services to all categories of broadcasters at a reasonable cost. And for economic reasons, the draft policy also argues for priority to be given to terrestrial signal distribution systems rather than coverage by satellite.¹³¹

Secondly, in view of the fact that about one third of the population is illiterate, and therefore rely exclusively on broadcasting services for their information needs, the draft policy argues that programmes offered by broadcasters should be accessible in terms of language.¹³² Consequently, PSBs would be expected to recognise the multi-lingual nature of Botswana by offering programmes in languages other than English and Setswana, which are the only two languages currently used on the state owned broadcasters. Community broadcasters will be required to reflect the language needs

¹²⁸ Section 13(2).

¹²⁹ Para. 1.2.4.1, p. 25.

¹³⁰ Para. 6.4, p. 71.

¹³¹ Para. 6.1, p. 69.

¹³² Para. 1.2.4.1, p. 23.

of their audiences. And private broadcasters, even though expected to reflect the language needs of their target audiences, will in addition be encouraged to use other languages.

d. Organisational Structure of the Broadcasting Regulator

As has been noted, the NBB is responsible for regulation of the broadcast media in Botswana.¹³³ The board is composed of eleven members. The minister of communications directly appoints four members, being officers representing: the office of the president;¹³⁴ department of copyright in the ministry of commerce and industry; the department of cultural and social welfare in the ministry of labour and home affairs; and BTA. The remaining seven members are appointed by the minister from a list of ten candidates presented to him/her by a nominating committee.¹³⁵ The committee nominates ten candidates for the NBB and submits the list to the minister for appointments. The committee is required to invite candidates through adverts in local newspapers and to interview applicants for nomination. The process must be conducted in accordance with the principles of transparency and openness. Members of the board are appointed for a renewable five-year term.¹³⁶

The Act does not guarantee the independence of the NBB. The board is funded from the ministry of communications, and is not allowed to retain any licence fees. All licence revenue is to be deposited in government's central account.¹³⁷ And the NBB is accountable to the minister of communications. The draft national broadcasting policy recommends that the *Broadcasting Act* should be amended in order to guarantee the NBB both legal and financial autonomy.¹³⁸ It further emphasises that the NBB should act independently, objectively and professionally, free from any undue influence from any interested sectors. To ensure this, the draft policy recommends the adoption of rules that will ensure: (i) that the NBB will be free from political influences on its

¹³³ Section 10(1)(b), *Broadcasting Act*.

¹³⁴ With the transfer of the DIB from the office of the president to the new ministry of communications, this officer will now be representing the latter ministry.

¹³⁵ The nominating committee is comprised of a member of the Law Society of Botswana, the Vice Chancellor of the University of Botswana or his/her nominee and a representative of the Office of the President. (Section 5.)

¹³⁶ Sections 8 and 6(2), respectively.

¹³⁷ *Effective Regulation Case Study: Botswana I*, n 84 above p. 5.

¹³⁸ Para. 2.3 Rec 3, p. 33.

decisions; (ii) that its members do not exercise functions or hold interests in enterprises or other organisations in the media or related sectors, which might lead to a conflict of interest; (iii) that members are appointed in a democratic and transparent manner; and (iv) that the NBB does not receive any mandate from or take any instructions from any person or body.¹³⁹

e. Evaluation of the Regulatory Structures

The regulation of the broadcast media in Botswana has hitherto failed to deliver both external and internal pluralism in the sector, and to ensure access to broadcasting services to all citizens. The sector is dominated by the state through its ownership of the national radio and television stations. National broadcasters funded out of the public purse have historically formed a vital component of the broadcast sector in many countries around the world, and form the basis of the concept of PSB. It is only when the independence of these broadcasters is guaranteed in law and practice that they can operate as true servants of the public interest by providing diverse and quality programming to the public. However, we saw that the publicly funded broadcasters in Botswana do not enjoy editorial independence, as they are expected to act as mouthpieces of the government by disseminating official information, and must therefore toe the official line in their reporting. Consequently, these broadcasters have not been able to perform their democratic mandate effectively.

The *National Development Plan 8* recommends the transformation of the DIB into a parastatal, independent from the government, in order to enhance the performance of the state owned broadcasters' democratic mandate. The basis of the recommendation was that the corporation status of public broadcasting would 'ensure diversity in coverage and would avoid one way communication, which tends to be the norm with wholly government controlled media'.¹⁴⁰ The government has so far failed to implement this recommendation. According to the minister of presidential affairs and public administration, under whom the broadcasting portfolio fell before the creation of the ministry of communications, the recommendation has not been implemented

¹³⁹ Para. 2.2, p 33.

¹⁴⁰ *National Development Plan 8*, n 21 above p. 448.

because the government needs a medium that it can control and direct.¹⁴¹ This is contrary to the widely acclaimed concept that publicly funded media should operate as servants of the public interest.

The delivery by the publicly funded media in Botswana of their democratic role has also been negatively affected by their narrow mandate. The broadcasters derive their mandate from the DIB, which, as we saw, is generally to explain government policies and actions to the people. The tendency therefore has been to concentrate on coverage of official speeches, the comings and goings of top government officials, with no critical commentaries.

Despite its dominance in the broadcast media, the government has failed to ensure universal access to citizens to broadcasting services. A large number of people still do not have access to both radio and television services. An estimated 20% of the population does not have access to radio signals, while the television signal is accessible to less than 20% of the population. Furthermore, about 33% of those who have access to radio signals, cannot afford the cost of buying and maintaining receiving equipment, and only 21.1% of those who have access to television signals own television sets.¹⁴² Broadcasting services by the state owned broadcasters are in English and Setswana. While most of Botswana's citizens are members of Setswana-speaking ethnic groups, there are minority groups such as Bakalanga, Basarwa and Baherero.¹⁴³ There are currently no programmes aired in these minority languages or even those that might be seen as fostering belonging and counteracting segregation and discrimination of these minority groups.

The liberalisation of the broadcast sector in 1998, resulting in the entry into the market of the two private radio stations was a positive step towards ensuring diversity and pluralism in the sector. These radio stations provide an alternative voice to the state owned broadcasters. However, their impact is minimal due to their limited geographic coverage and liberal conditions on programme content. Music dominates the programmes of these radio stations. And apart from the obligation to devote thirty-

¹⁴¹ See 'RB Will Remain Under Government Control, Says Kwelagobe' *Daily News*, 28th June 2002.

¹⁴² *Botswana Multiple Indicator Survey 2000* (Ministry of Finance and Development Planning, 2001).

¹⁴³ *National Development Plan 8*, n 21 above, p. 10.

six minutes per day of their programming time to the provision of news, the stations have very few programmes that are educational and informative.

The regulation of the broadcast media in Botswana to ensure the fulfilment of their democratic mandate has so far been a complete failure. This has been mainly due to the absence of clearly set objectives for the sector, which made the task of the regulator very difficult. The *Broadcasting Act* does not provide the mandates of the different categories of broadcasters recognised under the Act. In the absence of clear objectives, the regulator has generally been ineffective. It could not regulate the existing broadcasters or license new ones to ensure a diverse and pluralistic broadcasting landscape. Thus, since its establishment in August 2001, the NBB has not been able to impose any specific obligations on the existing broadcasters or license new players, in order to ensure the performance by the sector of their democratic role.

In addition, the ability of the NBB (to effectively) regulate the sector has been questioned in the light of the failure to guarantee the board both administrative and financial independence. It is not yet clear whether the board enjoys administrative independence. At the time of writing, the board had not started exercising its vital functions. However, what has already emerged is that a guarantee of financial independence will be necessary to enable the NBB to carry out its mandate effectively. In its first year, the board received a government appropriation of BWP250 000 through the OP to start its operations. The funding later proved to be insufficient to meet the board's requirements, especially, the cost of the consultative process in the drafting of a national broadcasting policy. Attempts to get additional funding from the government were futile, until a donor came into the picture to rescue the process. This should be a lesson that, unless transparent measures for the funding of the board are put in place, its work will be seriously undermined.

The release of the draft national broadcasting policy should therefore be regarded as a milestone in the history of the broadcast media in Botswana, as it fills the void that has hitherto prevented the effective regulation of the sector. The document addresses crucial issues that can enhance the broadcast media's performance of their democratic role. In order to achieve this, we saw that the draft policy addresses a number of

issues. It identifies, among other things, the objectives for the regulation of the broadcast sector, and sets out the mandates of the various categories of broadcasters. This should now make the task of the NBB in regulating the sector clear and easier. The document recognises the importance of external pluralism in ensuring diversity and pluralism in the sector. It thus calls for the licensing of community broadcasters and more private broadcasters. And, perhaps more importantly, it highlights the crucial role that an independent publicly funded broadcaster plays in a democratic society. Hopefully, this will finally convince the government of Botswana to transform the DIB into an independent entity. The need to ensure internal pluralism in the programmes offered by all broadcasters is also clearly articulated in the draft policy. This should enable the NBB to impose obligations on broadcasters so that they provide internal pluralism in their programming. The draft policy further underscores the importance of ensuring universal access to citizens to broadcasting services and recommends the imposition of obligations on all broadcasters to ensure access by citizens to their services. The other crucial issue addressed by the draft policy is the need to have an adequately funded, independent and accountable sector regulator.

The draft national broadcasting policy, however, does not adequately address, or does not address at all, certain issues that are crucial for ensuring a diverse broadcasting landscape. The policy recommends that the available frequencies for private broadcasting services should be tendered publicly, and that the criteria in awarding a licence should be based, *inter alia*, on the applicant's capability, expertise and experience in broadcasting and business matters, and the availability of sufficient means.¹⁴⁴ In view of the fact that one of the objectives of private broadcasting identified in the draft policy is the provision of sustainable investment, there is a danger that financial requirements for allocation of a licence may be pitched high, thereby marginalizing many potential citizen investors. This actually happened in 1998 when BTA issued tenders for the first private radio licences. Out of the eight licences tendered, only two were awarded because many applicants failed to satisfy the financial requirements set by BTA.¹⁴⁵ Diversity in the ownership and control structures of a broadcasting entity may promote internal pluralism in its programming. Thus, where financial requirements for the award of a broadcasting licence are high,

¹⁴⁴ Para. 4.7 Rec 4.2, p. 58.

¹⁴⁵ See Balule, n 16 above.

only the more affluent members of the society will be able to invest in the sector, resulting in broadcasters without broad-based ownership and control structures. In the interest of pluralism and diversity, it is submitted that one of the criteria for awarding a licence should be evidence that the ownership and control structures of an entity are composed of people from a diverse range of backgrounds.

The poorer sections of the society's chances of investing in private broadcasting will further be compounded by the absence of government financial assistance programmes for those who wish to invest in the sector. The same argument goes for community broadcasting. While the draft policy argues for priority in the awarding of licences to be given to community radio stations in order to provide for a plurality of players in the market, this may be frustrated by the inability of communities to raise enough funds to start operations. A corollary to ensuring a diversity of players in the market would therefore entail the provision of assistance to enter the market. The draft policy should have recommended to the government the setting up of a special fund to assist those who wish to invest in the sector in order to promote a diverse broadcasting landscape.

The draft policy also fails to address the issue of qualifications and composition of the NBB. The composition of the current board has been criticised for its failure to be representative of all interests of the Botswana society, and for the members' lack of expertise in broadcasting and related fields. The policy should have recommended that the composition of the NBB should represent a cross-section of the population, and that members should possess certain qualifications that can enable them to perform their duties competently and effectively. Further, the draft policy does not address how the NBB will be accountable to the public for the performance of its public mandate. The question is whether the board will account to the minister of communications or to parliament. It is submitted that, consistent with the principle of guaranteeing the independence of the board, it is preferable to have the board accounting to parliament.

Despite some omissions, the draft national broadcasting policy is a progressive document. Its adoption and implementation would be a watershed in the transformation of the broadcast media in Botswana. Proper implementation of the

policy should ensure pluralism and diversity in the broadcast sector, thereby enhancing its democratic role.

5.3.2 South Africa

The legal framework for regulation of broadcasting is provided in three statutes: *Independent Broadcasting Act 1993*¹⁴⁶ (*IBA Act 1993*), *Independent Communications Authority of South Africa Act 2000*¹⁴⁷ (*ICASA Act 2000*) and *Broadcasting Act 1999*.¹⁴⁸ The *IBA Act 1993* was enacted during the transition to democracy and its primary object is to provide for regulation of broadcasting in the public interest.¹⁴⁹ The Act established an independent broadcasting authority (the IBA) to regulate the sector.¹⁵⁰ In 2000 the government decided to merge the broadcasting and telecommunications regulators into one regulator called the Independent Communications Authority of South Africa (ICASA). The *ICASA Act 2000* dissolved the IBA, established a new regulator, ICASA, and transferred the functions of the IBA to the new regulator.¹⁵¹ The *Broadcasting Act 1999* repealed the *Broadcasting Act 1976*¹⁵² in order to establish a new broadcasting policy for South Africa. Under the latter, broadcasting was monopolised by the then apartheid state. The new Act ushered in a new broadcasting environment underpinned by the constitutional principles of freedom of expression, equality, equality of all languages, multiculturalism, choice and diversity within a framework of national unity.¹⁵³

¹⁴⁶ Act no. 153 of 1993, available at: [<http://www.iba.org.za.actaa.htm>].

¹⁴⁷ Act no. 13 of 2000, available at: [<http://www.gov.za/acts/00index.html>].

¹⁴⁸ Act no. 4 of 1999, available at: [<http://www.parliament.gov/acts/1999/act4-99.html>]. The *Broadcasting Act 1999* has been amended by the *Broadcasting Amendment Act No. 64 of 2002*, available at: [<http://www.gov.za/acts/02index.html>]. References to the former Act in this chapter therefore refers to the amended Act.

¹⁴⁹ Section 2, *IBA Act 1993*.

¹⁵⁰ *Ibid.*, section 3.

¹⁵¹ Section 4(1)(a), *ICASA Act 2000*.

¹⁵² Act no. 73 of 1976.

¹⁵³ *White Paper on Broadcasting Policy*, n 64 above p. 1.

a. *Regulating for External Pluralism*

In order to ensure a plurality of players in the broadcast sector, the regulator is required to promote the provision of a diverse range of sound and television services on a national, regional and local level.¹⁵⁴ No person is allowed to provide broadcasting services unless the regulator, in accordance with the *IBA Act 1993*, has licensed such.¹⁵⁵ When awarding licences, the regulator is required to: ensure that licences, viewed collectively, are controlled by persons or groups from a diverse range of communities, impose limitations on cross-media control of private broadcasting services and protect the integrity and viability of public broadcasting services.¹⁵⁶

The *Broadcasting Act 1999* provides for a three-tier system of broadcasting licences, namely: public, commercial and community broadcasting services.¹⁵⁷ PSB is defined as any service provided by the South African Broadcasting Corporation Limited (SABC) or any other statutory body or by a person who receives his/her revenue either wholly or partly from licence fees or from the state.¹⁵⁸ At the moment, the SABC is the only provider of PSB.¹⁵⁹

The SABC is a public company with a share capital, and is subject to the Companies Act. The state is its sole shareholder.¹⁶⁰ The governing structure of the corporation consists of a Board and an Executive Committee. The Board is composed of twelve non-executive members, and three executive members - the corporation's Group Chief Executive Officer, Chief Operations Officer and Chief Financial Officer.¹⁶¹ The non-executive members are appointed by the President on the advice of the National Assembly in a manner that ensures transparency, openness and public participation in the nominations process, after publication of a shortlist of candidates.¹⁶² Viewed collectively, members of the Board must have suitable qualifications, expertise and

¹⁵⁴ Section 2(a), *IBA Act 1993*.

¹⁵⁵ Section 39.

¹⁵⁶ Section 2(d), (i) & (j).

¹⁵⁷ Section 5(1).

¹⁵⁸ Section 2, *Broadcasting Act 1999*.

¹⁵⁹ For services provided by the SABC, see chapter 3 at 3.3.2.

¹⁶⁰ Section 8A(1) & (2), *Broadcasting Act 1999*.

¹⁶¹ Section 12.

¹⁶² Section 13(1) & (2).

experience in various broadcasting areas, be committed to fairness, openness and accountability, freedom of expression, the objects of the SABC, and must represent a broad cross-section of the population.¹⁶³ The Executive Committee consists of the Board's three executive members and not more than eleven other members appointed by the Board.¹⁶⁴

The SABC Board is the accounting authority of the corporation. Consequently, it is granted the power to control the affairs of the corporation and to protect the corporation's freedom of expression and journalistic, creative and programming independence as enshrined in the constitution.¹⁶⁵ The Executive Committee on the other hand performs such functions as may be determined by the Board and is accountable to the Board through the Group Chief Executive Officer.¹⁶⁶ The Board is entrusted with the general supervision of the corporation to ensure that it adheres to its mandate, leaving the day-to-day operations of the corporation to the Executive Committee. The Board is accountable to the minister of communications through annual reports, which must be tabled before the National Assembly.¹⁶⁷

The objects of the SABC are provided for in a charter that is drawn up by parliament as part of the broad national policy framework.¹⁶⁸ The objectives of the SABC in general are to provide services that cater for the needs and aspirations of all sections of the society, particularly the underprivileged and historically disadvantaged. Such services should be available and accessible and meet the education, information and entertainment needs of all South Africans.¹⁶⁹ To attain these objectives, the corporation is divided into two operational entities, a public and a commercial service, which are administered separately.¹⁷⁰ The latter is to be treated like any other commercial broadcasting operation, but must comply with the values of PSB in the provision of programmes and services, while the former is subject to special statutory obligations.¹⁷¹

¹⁶³ Section 13(4).

¹⁶⁴ Section 14(1).

¹⁶⁵ Section 13(11) & (12).

¹⁶⁶ Section 14(2), (3) & (4).

¹⁶⁷ Section 28.

¹⁶⁸ Chapter III Part II of the *Broadcasting Act 1999* constitutes the charter of the SABC.

¹⁶⁹ Section 8.

¹⁷⁰ Section 9.

¹⁷¹ Section 11. (See chapter 3 at 3.3.2 for details of services provided by the SABC.)

The mandate for PSB in South Africa was identified by the IBA after a public inquiry under the provisions of the *IBA Act 1993*.¹⁷² It identified the following obligations:¹⁷³

- i. Universality: the public broadcaster should strive to provide a truly national coverage, reaching all South Africans, even in the more remote areas of the country;
- ii. Accessibility: provision of programming that people find interesting, relevant and enjoyable, in the languages they choose;
- iii. National and provincial identity: PSB has a particular responsibility to promote national culture and create a sense of identity that reflects common experience;
- iv. Diversity and choice: PSB should provide a wide range of programming which meets the education, informational, spiritual and entertainment needs of the public as a whole;
- v. Quality: PSB should promote quality in all its services by providing new and innovative programming which encourages new talent and ideas;
- vi. Independence: the public broadcaster should assert its autonomy from control by vested interests, whether political or financial;
- vii. Accountability and efficiency: financial costs should be linked to public interest value and traceable to enhanced delivery of services.

These obligations are consonant with the general core criteria of PSB highlighted above in the introduction to regulation of the broadcast media. Various obligations, to be discussed later, are imposed on the SABC to ensure that it carries out its PSB mandate. The corporation is further guaranteed programming independence in the pursuit of its mandate.¹⁷⁴ The regulatory authority monitors and enforces compliance with the charter and PSB obligations by the corporation.¹⁷⁵ The corporation is funded

¹⁷² Section 28 of the *IBA Act 1993* allows the regulator to conduct an inquiry into any matter relevant to the achievement of the objects of the Act.

¹⁷³ *Report on the Protection and Viability of Broadcasting Services, Cross-Media Control of Broadcasting Services and Local Content and South African Music* (IBA, 1995) pp. 34 – 35. (The *Triple Inquiry Report 1995*), available at: [<http://www.icasa.org.za>].

¹⁷⁴ Section 6(3), *Broadcasting Act 1999*.

¹⁷⁵ Section 6(2).

from a combination of advertising revenue, sponsorship, grants, donations, licence fees levied in respect of television sets and grants from the state. The SABC however relies heavily on advertising revenue for its funding, which is estimated to account for up to 80% of its income. Licence fees account for a mere 13%.¹⁷⁶

Commercial broadcasting is simply defined as a service operating for profit or part of a profit entity but excludes any service provided by a public broadcasting licensee.¹⁷⁷

In licensing commercial broadcasters, the regulator is under an obligation to ensure that licensees provide a diverse range of programming addressing a wide section of the public.¹⁷⁸ In order to achieve this goal, the regulator tries to ensure that persons from a diverse range of communities control licences. In evaluating applications for licences, the regulator therefore takes into account, among other factors, the extent to which the financial interests in the application reflects inclusion of the historically disadvantaged and the nature and extent of decision-making by the historically disadvantaged in the business venture.¹⁷⁹

The regulator has also consistently refused to approve applications by licensees for amendments of shareholding structures diminishing shareholding or decision-making powers by people from historically disadvantaged backgrounds.¹⁸⁰ In rejecting one such application, the IBA held:

“... in the decision making process which resulted in the licence being awarded to the licensee, the Authority gave preference to applicants who demonstrated that their ownership and control structures included a diverse range of people, especially persons from historically disadvantaged communities. One of the advantages which the licensee had over the other applicants in the competitive application process, was its broad-based ownership structure. If the Authority were to approve the proposed

¹⁷⁶ Duncan, n 67 above p. 114.

¹⁷⁷ Section 2, *Broadcasting Act 1999*.

¹⁷⁸ Section 30(1)(a).

¹⁷⁹ *Position Paper for the Introduction of the First Free-to-Air Private Television Station Service in South Africa* (IBA, 1997) para. 8, available at: [<http://www.iba.org.za/qtvl.htm>] and *Position Paper on Private Sound Broadcasting Services* (IBA, 1996) para. 7, available at: [<http://www.iba.org.za/pvs1.htm>].

¹⁸⁰ Under section 52(1)(c) of the *IBA Act 1993*, the regulator may amend a broadcasting licence upon application by a licensee, which will be granted provided it does not negate the objects of the Act.

amendments to the licensee's shareholding structure, this characteristic of the licensee would be negated to a certain extent."¹⁸¹

A community broadcasting service is one that is fully controlled by a non-profit entity and carried on for non-profit purposes, serving a particular community and encouraging members of the community it serves to participate in the selection and provision of programmes.¹⁸² Community is defined to include a geographically founded community or any group of persons or sector of the public having a specific, ascertainable common interest.¹⁸³ The latter includes services catering for institutional communities such as communities made up of persons associated with an institution of learning, labour or any institutional formation, services catering for religious communities and services catering for cultural communities.¹⁸⁴ Donations, grants, sponsorship, advertising and membership fees may fund community broadcasting services.¹⁸⁵ Community broadcasters have the potential to contribute significantly to external pluralism, as they are required to provide a distinct service dealing specifically with community issues that are not normally dealt with by any broadcasting service covering the same area.¹⁸⁶

Limitations on ownership of broadcasting licences imposed by the *IBA Act 1993* is another measure to try and ensure the establishment and existence of a range of services across the country. The Act limits the control of broadcast services to two FM and two AM radio licences, but prohibits the control of two stations with substantially overlapping coverage areas.¹⁸⁷ No person is allowed to exercise control over more than one private television licence.¹⁸⁸ A person is deemed to be in control or being in a position to exercise control over a licensee if he/she has equity

¹⁸¹ Decision of the IBA in, *Application for Amendment of Shareholding Structure of Kaya FM*, 1st September 1999, at 14 para. 22, available at: [<http://www.iba.za/prvradio.htm>]. See also the decision of ICASA in *East Coast Radio (Pty) Ltd, Jacaranda FM (Pty) Ltd and Radio Oranje (Pty) Ltd: Application for Amendment of Shareholding Structure*, 25th January 2002, available at: [<http://www.icasa.org.za>].

¹⁸² Section 2, *Broadcasting Act 1999*.

¹⁸³ *Ibid.*

¹⁸⁴ *Community Sound Broadcasting Services: Position Paper on Four-Year Licences* (IBA, 1997) p. 3 para. 2.1.2.1, available at: [<http://www.iba.org.za/compos.htm>].

¹⁸⁵ Section 2, *Broadcasting Act 1999*.

¹⁸⁶ Section 32(4)(a).

¹⁸⁷ Section 49, *IBA Act 1993*.

¹⁸⁸ *Ibid.*

shareholding in the licensee exceeding 25% or has other financial interests therein equal to at least 25% of the licensee's net assets.¹⁸⁹

The regulator may however exempt an applicant from the ownership limitations on good cause shown.¹⁹⁰ ICASA has held that the test applied in considering applications for exemptions from ownership limitations is two-pronged. First the regulator must be satisfied that an applicant has shown good cause for departing from the limitations imposed by the section, and secondly, that such departure would not amount to a negation of the objects and principles of the Act.¹⁹¹ From the only decision that the regulator has hitherto made on this point, it appears an applicant will only succeed in establishing a good cause if the exemption will significantly empower persons from historically disadvantaged backgrounds and in addition, offer local content which exceeds significantly the quotas set by the regulator.¹⁹²

Foreign ownership of broadcasting licences is limited to 20%.¹⁹³ The intention behind the provision was to allow South Africans to establish themselves in the sector before large international communications companies were able to dominate the market.¹⁹⁴ The regulator is prohibited from granting a licence to party political entities.¹⁹⁵

Cross-media control between the broadcast and print media is controlled, to avoid domination of both sectors by a few players. Limitations on cross-media control are determined by parliament on the recommendation of the regulator.¹⁹⁶ Under the current regulations, no person who controls a newspaper may acquire or retain financial control in both radio and television licensees.¹⁹⁷ A person is deemed to be in control or in a position to exercise control over a newspaper, if such a person is the publisher of the newspaper or where such a person is in a position, either alone or

¹⁸⁹ Schedule 2, *IBA Act 1993*, section 2.

¹⁹⁰ Section 49(6).

¹⁹¹ *East Coast Radio (Pty) Ltd and others*, n 181 above at 11 para.26.

¹⁹² *Ibid.*, at 16 para. 31.4.

¹⁹³ Section 48, *IBA Act 1993*.

¹⁹⁴ M. Langa, 'Competition and Ownership in the Media and Broadcasting Sector' a paper presented at a conference on Regulation and Competition – the Role of a Competition Authority in a Developing Economy, 18th April 2000, Johannesburg South Africa at 5, available at:

[<http://www.iba.org.za/chairperson.htm>]. (Langa is the former IBA and current chairperson of ICASA.)

¹⁹⁵ Section 51, *IBA Act 1993*.

¹⁹⁶ Section 50(1).

¹⁹⁷ Section 50(2)(a).

together with an associate, to exercise control, either directly or indirectly, over a significant proportion of the operations of the publisher in publishing the newspaper or exercise control over the selection or provision of a significant proportion of the material published in the newspaper.¹⁹⁸ Where the newspaper is published by a company, control is deemed where the person, either alone or together with an associate, is in a position to exercise control over such company.¹⁹⁹ On the other hand, a 20% shareholding in a radio or television licence is deemed to constitute control.²⁰⁰

In addition to limiting control over both sectors, no person who is in a position to control a newspaper may control a radio or television licence in an area where the newspaper has an average circulation of 20% of the total readership in the area, if the licence area of the broadcast licensee overlaps substantially with the circulation area of the newspaper.²⁰¹ The effect of this provision is that a newspaper will still be able to acquire or retain a financial interest in a radio or television licence but cannot be in a position of control over such licence if its readership exceeds the prescribed figure.²⁰² Commercial broadcasting licensees are required to fully disclose their shareholding and financial structures in their annual reports to assist the regulator in the enforcement of the cross-media ownership rules.²⁰³

Competition law principles are also applied to the broadcast industry in an attempt to ensure external pluralism. In issuing and amending licences, the regulator is required to ensure fair competition in the sector.²⁰⁴ The regulator however does not have exclusive competition jurisdiction over the licensees it regulates. The *Competition Act 1998* applies to all economic activity within or having an effect in the country,²⁰⁵ and section 3(1A)(a) provides that in so far as the Act applies to an industry, or sector of an industry that is subject to the jurisdiction of another regulatory authority, the Act must be construed as establishing concurrent jurisdiction. The manner in which the

¹⁹⁸ Schedule 2, section 2(1), *IBA Act 1993*.

¹⁹⁹ *Ibid.* Control is deemed where a person holds at least 25% of the equity shares of the company. (Schedule 2, section 3)

²⁰⁰ Section 50(2)(d).

²⁰¹ Section 50(2)(b). A substantial overlap is interpreted to mean an overlap by 50% or more. (Section 50(2)(c).

²⁰² *Triple Inquiry Report 1995*, n 173 above p. 75.

²⁰³ Section 50(2)(e), *IBA Act 1993*.

²⁰⁴ Section 2(h), *Broadcasting Act 1999* and sections 2(o) & 52(1)(d), *IBA Act 1993*.

²⁰⁵ Section 3(1), *Competition Act 1998*.

concurrent jurisdiction is exercised must be managed, to the extent possible, in accordance with any applicable agreement concluded between the Competition Commission and ICASA.²⁰⁶ The Commission is responsible for negotiating an agreement with ICASA to co-ordinate and harmonise the exercise of jurisdiction over competition matters within the broadcast sector, and to ensure the consistent application of competition principles.²⁰⁷

The envisaged agreement must: identify and establish procedures for the management of areas of concurrent jurisdiction, promote co-operation between the Commission and ICASA, and provide for the exchange of information and the protection of confidential information.²⁰⁸ A memorandum of agreement between the Commission and ICASA was signed in September 2002 establishing the manner in which the parties will interact with each other in respect of the investigation, evaluation and analysis of mergers and acquisitions and complaints involving broadcasting matters.²⁰⁹ The agreement is designed to assist the two regulators to form a working partnership. The two regulators will continue to make independent determinations on the basis of the criteria and mandates of their respective legislation and none of their respective powers will be waived. The Commission will evaluate a proposed merger or acquisition in terms of the objects of the *Competition Act 1998*, while ICASA will also consider applications to transfer licences from one entity to the merged or acquiring entity in terms of the *Broadcasting Act 1999* and *IBA Act 1993*.²¹⁰

In the first case to come before the regulators after the establishment of concurrent jurisdiction, the two regulators arrived at different determinations. The Commission approved a proposed merger between New Africa Investment Limited (Nail) and Kagiso Media that would have given Nail control over three FM radio stations. The Commission found that the transaction would not lessen competition. However, ICASA rejected an application to amend the licences involved, holding that the *IBA Act 1993* did not allow any one person to control more than two FM radio licences

²⁰⁶ Section 3.

²⁰⁷ Section 21(1)(h).

²⁰⁸ Section 8.

²⁰⁹ The memorandum is available at: [<http://www.compcom.co.za>].

²¹⁰ *East Coast Radio (Pty) Ltd and others*, n 181 above and 'Kagiso Nails Media Merger', *Business Report* 11th December 2001, p. 2, available at: [<http://www.businessreport.co.za>].

and that there was no good cause shown to justify departure from the limitations imposed by the Act.

b. *Regulating for Internal Pluralism*

Internal pluralism in the context of broadcasting is concerned with the content of programmes provided by licensees, whether the programmes offered provide diverse views, opinions and perceptions to the public they serve. In pursuit of this objective, both the *IBA Act 1993* and *Broadcasting Act 1999* have provisions intended to secure internal pluralism in programming. In terms of the latter, programming provided by the country's broadcasting system must be varied and comprehensive, by providing a balance of information, education and entertainment meeting the entire needs of the population in terms of age, race, gender, interests and backgrounds. Programmes must give citizens an opportunity to receive a variety of points of view on matters of public concern.²¹¹ Broadcast services are therefore required to provide regular news services, actuality programmes on matters of public interest, programmes of political issues of public interest and programmes on matters of international, national, regional and local significance.²¹²

Specific obligations are imposed on each of the three categories of licensees to ensure pluralism in their programming. Public broadcasters must strive to provide high quality programmes that reflect the diverse cultural and multilingual nature of the country and of all its cultures and regions to audiences.²¹³ They must provide educational programming including both curriculum based and informal educative topics from a wide range of social, political and economic issues.²¹⁴ Public broadcasters are also required to provide news and public affairs programming which meets the highest standards of journalism, as well as fair and unbiased coverage, impartiality, balance and independence from government, commercial and other interests.²¹⁵

²¹¹ Section 3(5)(a) & (d).

²¹² Section 2(c), *IBA Act 1993*.

²¹³ Section 10(b) & (c), *Broadcasting Act 1999*.

²¹⁴ Section 10(e).

²¹⁵ Section 10(d).

Programmes provided by public broadcasters must be made by the SABC as well as those commissioned from the independent production sector.²¹⁶ The independent production quota requirement is an important mechanism for achieving diversity in programming for it encourages a wide range of views and experiences to be reflected on air, and creates opportunities for a great number of people to enter the broadcast production industry, particularly those from the historically disadvantaged backgrounds. Under the current regulations, public television licensees are under an obligation to ensure that at least 40% of their local content programming consists of programmes that are independent television productions.²¹⁷ The commissioning procedures for independent productions must be fair, transparent and non-discriminatory.²¹⁸ The above obligations in respect of public broadcasters apply to both the public and commercial services of the SABC.

Programming by commercial broadcasters must, as a whole, provide a diverse range of programming addressing a wide section of the South African public.²¹⁹ In as far as content obligations are concerned, a distinction is made between free-to air broadcast services and subscription services. The government recognises that the former, by their nature, are more accessible to a greater number of the public and therefore can meet public policy goals in a way that the subscription sector cannot.²²⁰ Free-to-air services are required to provide programming that reflects the culture, character, needs and aspirations of the people in the regions that they are licensed to serve.²²¹ They must include news and information programmes on regular basis, including discussion on matters of national and regional significance and must meet the highest standards of journalist professionalism.²²² Free-to-air commercial television licensees are also subject to similar independent production requirements as public television licensees.

²¹⁶ Section 10(h).

²¹⁷ *ICASA South African Television Content Regulations 2002*, para. 6, available at: [<http://www.icasa.org.za>].

²¹⁸ *Ibid.*, para. 7.

²¹⁹ Section 30(1)(a), *Broadcasting Act 1999*.

²²⁰ *White Paper on Broadcasting Policy*, n 64 above para. 3.1.

²²¹ Section 30(2)(a), *Broadcasting Act 1999*.

²²² Section 30(2)(c) & (d).

The regulator determines the content of programming by commercial subscription broadcasting services.²²³ At the moment, there is only one subscription service provider. Save that it must ensure that a weekly average of 8% of its programming must be local content,²²⁴ the service provider is not subject to similar content obligations that apply to free-to-air broadcasters, which seek to ensure internal pluralism.

Community broadcasters must focus on the provision of programmes that highlight grassroots community issues such as developmental issues, basic information, general education and the reflection of local culture. Programmes offered must promote the development of a sense of common purpose with democracy and improve quality of life.²²⁵

In addition to content obligations imposed by the *Broadcasting Act 1999*, the *IBA Act 1993* also imposes some content obligations on broadcasters. Licensees are required to give equal treatment to political parties during election period. If during an election period the coverage of any broadcasting service extends to the field of elections, political parties and issues related thereto, licensees shall afford reasonable opportunities for the discussion of conflicting views and shall treat all parties equitably.²²⁶ In the event of any criticism against a political party being levelled in a particular programme without such party having been afforded an opportunity to respond or without the view of such political party having been reflected, a licensee shall be obliged to afford such party a reasonable opportunity to respond to the criticism.²²⁷ The regulator issues regulations and guidelines during an election period that seek to ensure that all parties are treated equitably by the broadcast media. The regulations address, *inter alia*: (i) the monitoring and regulation of editorial coverage of the election through assessment and adjudication of complaints by the public and political parties; (ii) implementation of a system to allocate party election broadcasts equitably to political parties; and (iii) implementation and regulation of a system to

²²³ Section 30(3).

²²⁴ *Television Content Regulations 2002*, n 217 above para. 5.

²²⁵ Section 32(4)(c) & (d), *Broadcasting Act 1999*.

²²⁶ Section 61, *IBA Act 1993*.

²²⁷ *Ibid.*

ensure that all political parties have a like opportunity to book political advertisements.²²⁸

All broadcasting licensees must adhere to a Code of Conduct for Broadcasting Services drafted by the regulator.²²⁹ A licensee may be exempted from the application of the code if he/she is a member of a body that has proved to the satisfaction of the regulator that its members subscribe and adhere to a code of conduct enforced by that body, provided the code and disciplinary mechanisms in such code are acceptable to the regulator.²³⁰ Regarding the issue of internal pluralism, the code provides that news shall be reported truthfully, accurately and fairly. News shall be presented in the correct context and in a balanced manner, without intentional or negligent departure from the facts. Where it subsequently appears that a broadcast report was incorrect in a material respect, it shall be rectified forthwith, without reservation or delay.²³¹ Licensees shall be entitled to comment on and criticise any actions or events of public importance.²³² The provision guarantees licensees editorial independence and is important, especially, in respect to public broadcasters. In presenting a programme in which controversial issues of public importance are discussed, a licensee shall make reasonable efforts to fairly present significant points of view either in the same programme or in a subsequent programme forming part of the same series of programmes presented within a reasonable period of time and in substantially the same time slot. Further, any person whose views have been criticised in a programme on a controversial issue of public importance shall be given a reasonable opportunity by the licensee to reply to such criticism, should that person so request.²³³

Compliance with the code of conduct, provisions of the *IBA Act 1993* and licence conditions by broadcasting licensees is monitored by the Broadcasting Monitoring

²²⁸ Cf. *1999 Elections Regulation and Guidelines*, available at: [<http://www.icasa.org.za>].

²²⁹ A new code of conduct replacing section 56(1) and Schedule 1 of the *IBA Act 1993* came into effect on 4th February 2003, available at: [<http://www.icasa.org.za>].

²³⁰ Section 56(2), *IBA Act 1993*. There are no self-regulatory broadcasting structures recognised by ICASA at the moment, but at the time of writing, ICASA was considering the recognition of the Broadcasting Complaints Commission of South Africa, a self-regulatory organisation established by the National Association of Broadcasters, which includes the SABC, M-Net and other broadcasters.

²³¹ Para. 3, of the Code of Conduct.

²³² *Ibid.*, para. 35.

²³³ *Ibid.*, para. 36.

and Complaints Committee (BMCC), a committee of ICASA.²³⁴ The committee consists of five members, a chairperson who must be a judge or a former judge of the Supreme Court, or an advocate or attorney of at least ten years' standing or a magistrate or retired magistrate with at least ten years experience, an ICASA councillor, and three other members.²³⁵ The BMCC receives and adjudicates complaints from the public with regard to licence conditions, and is also entitled to initiate its own investigation into suspected non-compliance by a broadcaster. Upon making a finding that any complaint adjudicated by it is justified, the committee makes recommendations to ICASA as to the remedial measures to be taken.²³⁶ Measures that can be taken against a recalcitrant licensee, which will have a bearing on the programme content, include an order to broadcast a particular programme, or another version of the programme complained of or directing a licensee to publish the findings of the committee.²³⁷

The BMCC must keep a record of all complaints received by it and of all its proceedings, rulings and findings. These are public documents and should be kept at ICASA's offices.²³⁸ It appears the enforcement of provisions relating to internal pluralism in programming have not been as contentious as those relating to 'taste and decency'.²³⁹ The regulator has observed that the provisions of the old code relating to news and current affairs were one of the most detailed and comprehensive.²⁴⁰ These provisions have therefore been retained in the new code. The only change relates to the replacement of the concept of objectivity in the old code with the notion of fairness in the presentation of news and current affairs. All complaints relating to these provisions of the code have hitherto either been settled or withdrawn before determination by the committee, and have also not yet been subjected to scrutiny by the courts.²⁴¹

²³⁴ Section 62(1), *IBA Act 1993*.

²³⁵ Section 22.

²³⁶ Section 64.

²³⁷ Section 66(1).

²³⁸ Section 63(9).

²³⁹ Cf. *The Islamic Unity Convention v Independent Broadcasting Authority and others* 2002 4 SA 294.

²⁴⁰ *Position Paper on the Revision of the IBA's Code of Conduct for Broadcasters 1999* (IBA, 1999), available at: [<http://www.iba.org.za/broad.html#9>].

²⁴¹ *ICASA Annual Report: 1st July 2000 – 31st March 2001* (ICASA, 2001) p. 14, available at: [<http://www.icasa.org.za>].

c. *Regulating for Access*

The number of broadcasting services provided by public, commercial and community broadcasters appear to offer real choice to South Africans. But large sections of the population still have no choice of services and programming, and some do not even receive services at all. There are several reasons for this anomaly, and here I highlight only those relevant to the question of access.²⁴² Most of the services available, especially those offered by commercial broadcasters, prefer to use English language, which is not the language of communication and interaction in the daily lives of the majority of South Africans. Many people do not have access to television because they cannot afford the financial resources to purchase either terrestrial or satellite television services, while many of those who can afford the cost, cannot carry the extra burden of paying subscription fees for the services. The broadcast network leaves major gaps in the provision of free television services to the country at large. The regulatory framework under the *Broadcasting Act 1999* is therefore underpinned by a desire to overcome some of these problems in order to ensure access to broadcasting services by the greatest possible number of the citizens. It does so mainly by imposing specific obligations on licensees.

Universal access or availability of broadcasting services, as observed earlier, is one of the core criteria of PSB and is recognised in the South African broadcasting regulatory legal framework. The SABC is under an obligation to make its services available throughout the country in all the official languages.²⁴³ In 1995 the IBA set a target for national public broadcasters to reach 80% of the population, increasing to 90% within five years for radio and that at least one of the public television station services reach 75% of the population.²⁴⁴ The SABC was therefore called upon to extend its transmitter network to meet the targets. PSB has to operate its services in the interest of the broader public, which means its services should be available to each and everyone without discrimination on the basis of the recipient's ability to pay for the service. The policy on broadcasting, consistent with this ideal, is for services

²⁴² See generally, *White Paper on Broadcasting Policy*, n 64 above.

²⁴³ Sections 8(a) & 10(1)(a), *Broadcasting Act 1999*.

²⁴⁴ *Triple Inquiry Report 1995*, n 173 above p. 46.

provided by public broadcasters to be free at the point of delivery.²⁴⁵ The *Broadcasting Act 1999* does not expressly provide for public broadcasting services to be free at the point of delivery, but that this is so can be inferred from section 10(2). The provision does not empower the SABC to draw revenues from subscription fees.

In an effort to ensure universal access to commercial broadcasting services, the regulator is required to see to it that, when viewed collectively, commercial broadcasters provide programming in all South African official languages, within a reasonable time extend their services to all parts of the country and provide comprehensive coverage of the areas which they are licensed to serve.²⁴⁶ The regulator is granted powers to impose licence conditions or obligations appropriate to a given licence in order to promote the objects of both the *IBA Act 1993* and *Broadcasting Act 1999*.²⁴⁷ The regulator has, in some cases, used this power to impose obligations on commercial broadcasters intended to ensure that the latter's services are accessible to the majority of the citizens. For example, when inviting applications for a licence for the free-to-air commercial television station, the IBA, in the light of the fact that such service was likely to provide the only accessible alternative to the public broadcaster for the majority of South Africans for some time, set a minimum coverage of at least 50% of the population from the time it went on air, increasing to 75% within three years.²⁴⁸ The regulator also indicated that even though it will not predetermine the languages on the private television station, it would favour applicants who intend to include languages that were not official during the apartheid era.²⁴⁹

The South African broadcasting policy argues for priority to be given to free-to-air commercial broadcasting services, especially radio, given that many of the citizens cannot afford costs associated with receiving television services. It also calls for the imposition of public service obligations on all distribution services, including in particular, carriage of public service channels.²⁵⁰ The first argument has not found its

²⁴⁵ *White Paper on Broadcasting Policy*, n 64 above para. 5.3.1.

²⁴⁶ Section 30(1)(b) & (d), *Broadcasting Act 1999*.

²⁴⁷ Section 43(2), *IBA Act 1993*.

²⁴⁸ *Position Paper for the Introduction of the First Free-to-Air Private Television Service*, n 163 above para. 6.1.

²⁴⁹ *Ibid.*, para. 6.4.

²⁵⁰ *White Paper on Broadcasting Policy*, n 64 above paras. 3.1 & 5.3.3.

way into the *Broadcasting Act 1999*. As regards the second, the regulator is required to conduct an inquiry to determine licence conditions for multi-channel distribution services.²⁵¹ The regulator has already published a discussion paper on satellite broadcasting that, among others, solicits views on whether 'must carry' obligations of public service channels must be imposed on satellite broadcasters.²⁵² *M-Net*, the only multi-channel distributor at the moment, is therefore not obligated to carry public service channels.

Another hurdle to universal access is the uneven distribution of broadcasting network in the country. By the end of the year 2000, approximately 18% of South Africans, especially those in the poor remote areas, did not have the necessary terrestrial infrastructure to receive free-to-air broadcasting signals.²⁵³ During the apartheid era, signal distribution was monopolised by the SABC, through its wholly owned subsidiary, Sentech (Pty) Ltd. The restructuring of the signal distribution sector to make it more competitive was, during the transition to democracy, seen as necessary to achieve universal access goals to broadcasting services. The *IBA Act 1993* therefore provided for three categories of signal distribution licences: a common carrier who shall be obliged, subject to its technological capacity, to provide broadcasting signal distribution to broadcasting licensees upon their request on an equitable, reasonable, non-preferential and non-discriminatory basis; a person who is to provide broadcasting signal distribution for broadcasting licensees on a selective and preferential basis; and a broadcasting licensee who chooses to provide, either wholly or partly, broadcasting signal distribution for himself/herself but does not provide the same for any other broadcasting licensee.²⁵⁴

In 1996 the government converted Sentech (Pty) Ltd into a public company with the state as the sole shareholder. The main objects of the company is to provide, as common carrier, broadcasting signal distribution to licensees, in accordance with the *IBA Act 1993*.²⁵⁵ The company was charged with the responsibility of establishing a network covering the whole country. Today the company claims that it is able to

²⁵¹ Section 33(1), *Broadcasting Act 1999*.

²⁵² *Discussion Paper on Satellite Broadcasting 1999* (IBA, 1999) para. 9.5.3, available at: [<http://www.iba.org.za/satellite.htm#1>].

²⁵³ *MDDA Position Paper*, n 49 above p. 15.

²⁵⁴ Sections 33(1) and 37, *IBA Act 1993*.

²⁵⁵ *Sentech Act* no. 63 Of 1996, available at: [<http://www.gov.za.gazette/acts/1996/a63-96.htm>].

distribute broadcasting signals to every corner of the country, however, its coverage is determined by the coverage obligations of the broadcasting licensees on whose behalf it distributes broadcasting signals.²⁵⁶

Further to solving problems of network coverage, the regulator allows for the erection of self-help stations.²⁵⁷ These are community owned relay stations funded by communities which transmit signals of broadcasters within the latter's respective licence areas in cases where, for technical reasons, the broadcasters' signals cannot be received.²⁵⁸ Self-help stations are considered to be extensions to broadcasters' networks, and accordingly, an application for such stations must be made to the regulator by the broadcaster concerned or his/her appointed agent. Self-help stations do not absolve broadcasters of their coverage obligations, broadcasters are still expected to extend their networks to areas where there are such stations.

d. Structural Organisation of the Broadcasting Regulator

Regulation of broadcasting in South Africa was undertaken by the IBA from 1994 to June 2000, when the IBA was dissolved and its functions transferred to ICASA. A brief history of the origins of the IBA is essential for understanding the nature and attributes of the current regulator. During South Africa's transition to democracy, it became apparent that free and fair elections would not be possible without an impartial broadcasting sector. Broadcasting was then tightly controlled by the apartheid state. It was therefore agreed at the multi-party negotiations that led to the first democratic elections to establish an independent broadcasting regulator. Legislation was drafted and agreed to at the negotiations, culminating in the enactment of the *IBA Act 1993*, which provides for regulation of broadcasting in the public interest and established an independent broadcasting regulator. The first IBA Council was appointed in 1994 after a public process of nominations and hearings.

²⁵⁶ See [<http://www.sentech.co.za/profile/coverage/htm>].

²⁵⁷ *Discussion Paper on Self-Help Stations* (IBA, 1999), available at: [<http://www.iba.org.za>].

²⁵⁸ There currently about 720 television self-help stations in operation.

There was consensus during the drafting of the *IBA Act 1993* that, in order to fulfil its mandate, the regulator's independence had to be inviolable.²⁵⁹ Section 3 of the *IBA Act 1993* therefore guaranteed the independence of the IBA against political or other bias or interference and provided that the regulator was to be wholly independent and separate from the state. At its inception, the IBA had both regulatory and policy-making powers, as this dual role ensured it as much independence as possible throughout the transitional period.²⁶⁰

The independence of the broadcasting regulator was considered so important that the Constitutional Assembly that drafted South Africa's final constitution saw fit to include a provision guaranteeing its independence in the constitution. Section 192 of the constitution thus requires national legislation to establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society. The provision is in chapter 9 of the constitution, which establishes a number of institutions said to be supporting constitutional democracy.²⁶¹ These institutions are supposed to be independent, subject only to the constitution and the law, and must be impartial and exercise their powers and perform their functions without fear, favour or prejudice.²⁶² Although not expressly stated in section 181(1) of the constitution, the broadcasting regulator is widely accepted to be one of the institutions supporting constitutional democracy.²⁶³

There have been attempts by the Constitutional Court to give legal meaning to the independence of the chapter 9 institutions. In the first decision, the court held that factors that are relevant to the determination of the independence and impartiality of chapter 9 institutions include provisions governing appointment, tenure and removal of members of the institution as well as those concerning institutional

²⁵⁹ Duncan, n 66 above p. 165.

²⁶⁰ *White Paper on Broadcasting Policy*, n 64 above para. 1.3.5.

²⁶¹ Section 181(1) of the constitution lists the Public Protector, Human Rights Commission, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, Commission for Gender Equality, Auditor General and Electoral Commission, as institutions that support constitutional democracy.

²⁶² Section 181(2) of the Constitution.

²⁶³ See Duncan, n 66 above p. 171; M. Langa, 'Independently Regulating the Broadcasting Market in South Africa', at 4, available at: [<http://www.iba.org.za/regulating.htm>] and Schedule 1 of the *Public Finance Management Act 1999*.

independence.²⁶⁴ In a subsequent case, the court noted two factors that impact on the institutional independence of chapter 9 institutions: financial independence and administrative independence.²⁶⁵ The first implies the ability to have access to funds reasonably required to enable an institution to discharge the functions it is obliged to perform under the constitution and relevant legislation. The court explained that parliament must consider what an institution reasonably requires and deal with requests for funding rationally, in the light of other national interests. It is for parliament, and not the executive arm of government, to provide for funding reasonably sufficient to enable an institution to carry out its mandate. An institution must, accordingly, be afforded an adequate opportunity to defend its budgetary requirements before parliament or its relevant committees. The second factor implies that there will be control over those matters directly connected with the functions that an institution has to perform. The executive cannot therefore instruct a chapter 9 institution how it should carry out its mandate.

The IBA has a unique history. Unlike regulatory bodies in mature democracies, it was established as an expression of a political struggle that sought to free broadcasting and render it accessible to all South Africans. It is therefore not surprising that the guarantee of its independence found its way into the constitution and also enjoyed both regulatory and policy making powers at its inception. These factors ensured the regulator maximum administrative independence. The policy-making powers of the IBA were later to be the subject of controversy in the white paper on broadcasting. The government felt that the dual powers enjoyed by the IBA were not in accordance with best international practices, obscured the different roles and responsibilities of the players involved in the regulatory process and fundamentally undermined public accountability.²⁶⁶ In the government's view, policy-making should be a shared responsibility of public authorities and institutions, parliament, government and the regulator.²⁶⁷ The government's position was fully supported by the constitution, which assigns policy-making powers to the executive.²⁶⁸ The *IBA Act 1993* was thus

²⁶⁴ *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 1996 (4) SA 744 at 823.

²⁶⁵ *New National Party of South Africa v Government of the Republic of South Africa* 1999 (3) SA 191 at 231.

²⁶⁶ *White Paper on Broadcasting Policy*, n 64 above para. 1.3.5.

²⁶⁷ *Ibid.*

²⁶⁸ Section 85(2) of the Constitution.

amended in 1999 to give the minister the power to issue to the regulator policy directions of general application on matters of broad national policy, which must be consistent with the objects of the Act and the *Broadcasting Act 1999*.²⁶⁹

While the IBA enjoyed administrative independence, the same could not be said of its financial independence, its budget was appropriated through the department of communications as a line item in the latter's budget and not directly by parliament. The IBA was not in a position to approach the ministry of finance directly to press for its own budget.²⁷⁰ The arrangement came under attack from various quarters as it was seen as a subtle tool by the government to exert control over the regulator. The IBA was always allocated lower figures than requested, and such cuts in its budgets were a serious blow to its independence as it prevented it from pursuing its mandate as intended.²⁷¹

In the light of the experiences and developments during the IBA's era, I now turn to the new regulator. ICASA is a merger between the IBA and the telecommunications regulator. The merger was necessitated by convergence of telecommunications, broadcasting and information technologies.²⁷² While the regulatory functions over broadcasting and telecommunications were merged into a single regulator, the underlying legislation regulating the two sectors was left intact. So, in effect, broadcasting and telecommunications are still operating separately, but under a single structure. ICASA has two departments, one responsible for regulating broadcasting in accordance with the *IBA Act 1993* and *Broadcasting Act 1999* and another regulating telecommunications in accordance with the *Telecommunications Act 1996*.

ICASA acts through a council of seven members appointed by the president on the advice of the National Assembly.²⁷³ The manner of appointment must ensure participation by the public in the nomination process and be open and transparent.²⁷⁴ The councillors must be people who are committed to freedom of expression, fairness and accountability, and when viewed collectively, should represent a cross-section of

²⁶⁹ Section 13A, *IBA Act 1993*.

²⁷⁰ Langa, n 263 above at 5.

²⁷¹ Duncan, n 66 above p. 173.

²⁷² *White Paper on Broadcasting Policy*, n 65 above para. 11.3.

²⁷³ Section 3 (2), *ICASA Act 2000*.

²⁷⁴ Section 5(1).

the population and should possess expertise in the fields of broadcasting and telecommunications policy, engineering, technology, frequency band planning, law, economics, business practice and finance.²⁷⁵ The chairperson of the council holds office for a period of five years, while the other councillors are appointed for four-year terms. Councillors are eligible for reappointment after the expiration of their terms.²⁷⁶ A councillor may be removed from office by a resolution of the National Assembly to that effect on grounds of misconduct, incompetence, absenteeism from three consecutive council meetings without good cause and for conflict of interests.²⁷⁷

ICASA's administrative independence is expressly guaranteed. The regulator is independent and subject only to the constitution and the law, and must be impartial in the performance of its functions. The regulator must further function without any political or commercial interference.²⁷⁸ It has been argued that section 13A of the *IBA Act 1993*, which empowers the minister to give policy directives and to direct the regulator to undertake certain investigations or inquiries or to consider any matter which the minister places before it, undermines the regulator's administrative independence.²⁷⁹ Such fears however seem ill founded. Even though the regulator is required to consider any policy directive issued by the minister, the minister cannot issue a directive regarding the granting of a licence or amendment, suspension or revocation of a licence.²⁸⁰ No directive shall also be made which interferes with the independence or affects the powers of the regulator.²⁸¹ Furthermore, even though ICASA no longer has policy-making powers, the minister is required to consult the regulator before issuing any policy directive.²⁸²

The regulator's financial independence has been enhanced following the decision in *New National Party of South Africa v Government of the Republic of South Africa* (supra). ICASA is now financed from money appropriated directly by parliament.²⁸³ Instead of submitting its budget through the department of communications like its

²⁷⁵ Section 5(3).

²⁷⁶ Section 7.

²⁷⁷ Section 8.

²⁷⁸ Section 3(3) & (4).

²⁷⁹ Langa, n 263 above at 5.

²⁸⁰ Section 13A(5)(c), *IBA Act 1993*.

²⁸¹ Section 13A(5)(d).

²⁸² Section 13A(6).

²⁸³ Section 15(1), *ICASA Act 2000*.

predecessor, ICASA submits its budget directly to the national treasury in accordance with the *Public Finance Management Act 1999*.²⁸⁴ When the annual budget is introduced in the National Assembly, the regulator's chief executive officer is required to submit to parliament the regulator's budgetary application.²⁸⁵ The new procedure introduces a measure of transparency in the funding of the regulator thus excluding the possibility of using budget cuts by the executive to undermine the independence of the regulator. The regulator is however not allowed to retain any revenue received in a manner other than appropriation from parliament. Revenue received from other sources must be paid into the national revenue fund.²⁸⁶

ICASA is accountable to parliament through the minister of communications.²⁸⁷ The regulator is required to prepare annual reports, which should provide information relating to licences granted, renewed, amended, suspended or revoked. The minister may also require other information to be included in the annual reports. In addition, the regulator must also prepare its annual financial statements. These are then submitted to the minister who must table them before parliament within thirty days.²⁸⁸

e. Evaluation of the Regulatory Structures

The South African broadcasting industry has been fundamentally transformed since 1994. Much of the transformation was overseen by the IBA, which was created to ensure the democratisation and diversification of broadcasting. With the dissolution of the IBA in 2000, the process is continuing under ICASA. The process was and still is mainly guided by the *IBA Act 1993*, which establishes an institutional framework aimed at securing a plurality of independent broadcasters. To attain this objective, the Act emphasises regulating the market for broadcasting services in the interest of viable competition and diversity by limiting cross-media ownership and encouraging ownership of broadcasting services by historically disadvantaged groups. There is an assumption that greater diversity of ownership will lead to greater pluralism of opinions and programming. Democratisation of the media is therefore equated with

²⁸⁴ Act no. 1 of 1999, available at: [<http://www.gov.za/acts/99index.html>].

²⁸⁵ Section 27(4).

²⁸⁶ Section 15(3), *ICASA Act 2000*.

²⁸⁷ Section 16(1) & (2).

²⁸⁸ Section 16(4).

the introduction of more competition and the entry of 'black empowerment' capital into the media market.²⁸⁹ In addition to opening the broadcasting industry to competition, the *IBA Act 1993* also called for the transformation of the SABC into a true public broadcaster.

The first step the IBA took towards the transformation of the SABC was to conduct an inquiry that, among other things, identified the mandate and obligations of public broadcasters.²⁹⁰ After identifying these, the inquiry further found that radio was likely to remain the medium most accessible to the vast majority of the citizens because it was cheaper than television, and also in the light of the high levels of functional illiteracy in the country, the majority of the citizens rely on radio than the print media for information.²⁹¹ The SABC, accordingly, was required to restructure its radio services in order to provide full-spectrum public service radio stations in all eleven official languages.²⁹² These stations today reach over 80% of their target audiences, and in most rural areas, these are the only services that people have access to.²⁹³ Public television services were also restructured in order to fulfil their overall public service obligations. Rather than separating white and black audiences on separate channels as in the past, the new portfolio combines and mixes different language groups in different proportions in the SABC's three channels.²⁹⁴ *SABC2* has the largest footprint covering over 80% of the country, followed by *SABC1* with over 50% and *SABC3* is largely restricted to metropolitan areas.²⁹⁵ The latter is meant to cross-subsidise the public service programming which is mainly concentrated on the other two channels with the more extensive broadcast footprints.

The board of the SABC is appointed in an open and transparent manner and the public broadcaster is guaranteed editorial independence. There is no evidence of the government directly interfering with the editorial policy of the public broadcaster.²⁹⁶ Commercial interests pose the greatest threat to the public broadcaster's independence

²⁸⁹ See generally, C. Barnett, 'The Contradictions of Broadcasting Reform in Post-apartheid South Africa' (1998) 78 *Review of African Political Economy* 551 at 553.

²⁹⁰ *Triple Inquiry Report 1995*, n 173 above.

²⁹¹ *Ibid.*, p. 41.

²⁹² See chapter 3 at 3.3.2 for details of the public radio stations.

²⁹³ *MDDA Position Paper*, n 49 above p. 22.

²⁹⁴ See chapter 3 at 3.3.2 for the language combinations and target audiences of the SABC's channels.

²⁹⁵ *This is the SABC* (SABC Corporate Communications Department, 2000) p. 15.

²⁹⁶ Burns, n 24 above p. 320.

and delivery of its public service obligations. As observed earlier on, the SABC relies heavily on advertising revenue. Advertising has an impact on the form and content of programming in that it ensures that programming is geared to delivering audiences to advertisers. The restructuring of the SABC's television services resulted in the loss of many of its white audiences, who are the main target for the advertising industry. The loss of these audiences meant that advertisers had fewer opportunities to reach affluent consumer audiences through the SABC's television services. The changes in television audience profile led to changes in the distribution of advertising expenditure across different media forms. Television's share of advertising expenditure declined relative to other media outlets in 1996, mainly due to a shift to newspapers, especially the Afrikaans language press.²⁹⁷

The loss of advertising revenue caused a financial crisis at the SABC that forced a resources review.²⁹⁸ The consultants who undertook the review recommended wide ranging cuts to programming and services, resulting in a redefinition of the SABC's core mandate as being news and information, rather than full-spectrum programming.²⁹⁹ In essence, these recommendations advocated the SABC should stop being a programme-producer (except for news), and instead become a publisher-producer. The latter was seen to be in line with a popular perception in the broadcasting industry that outsourcing programming could foster content diversity in ways that were not simply possible if all programmes were to be made on an in-house basis. The SABC management accepted these recommendations and implemented them in 1997. This resulted in the restoration of some degree of financial stability to the corporation.³⁰⁰ The restructuring led to the SABC cutting back on local content levels and the increased usage of English language in place of multi-lingual programming. The predominant use of English language in the SABC's television services poses the risk of marginalizing an estimated 3,5 million illiterate adult South Africans, the majority of whom are based in the rural areas where the only accessible broadcast signals are those of the public broadcaster.

²⁹⁷ Barnett, n 289 above at 559.

²⁹⁸ The review was done by international change management consultants, McKinsey and Associates.

²⁹⁹ Duncan, n 66 above p. 128.

³⁰⁰ Barnett, n 289 above at 561.

In order to ensure the sustainability of the public service mandate, the *Triple Inquiry* had recommended that the SABC derive its funding from a mix of sources, including advertising, licence fee and government grants. Parliament was further required to provide funding on a triennial basis for the cost of provincial split time radio stations, the cost of increasing African languages and local content television programming on the SABC and the cost of educational programming.³⁰¹ At about the same time, the government adopted a new macroeconomic policy that seeks to achieve social reforms by adjusting the economy to the needs and priorities of global markets. The plan shifts the bulk of service delivery onto the private sector through privatisation and other business friendly policies.³⁰² The government, consistent with its new economic policy, had to find ways of reducing the dependency of the SABC on state funding.

The resources review exercise had recommended the corporatisation of the SABC to make it self-sufficient. The recommendation became the government's solution to gearing the SABC to self-sufficiency. It was subsequently adopted and implemented through the *Broadcasting Act 1999*. The SABC was reorganised into two arms, a public and commercial one. The two are to be administered separately, with the latter to be operated in an efficient manner so as to maximise revenues to the state.³⁰³ The commercial arm is to subsidise the public services to the extent recommended by the SABC's governing board and approved by the minister of communications. The arrangement gives the minister extraordinary powers of control over the SABC's finances. The minister has power to veto the amount set aside by the board for cross-subsidisation and at the same time, the minister must receive a dividend from the commercial arm on behalf of government. This makes the minister both a player and a referee. As a player, the minister will need to ensure that a high dividend is returned to make the SABC's services attractive to potential investors, and as a referee, the minister has to adjudicate on the amount that is needed by the public services from the profits of the commercial services. If the amount proposed by the board for cross-subsidisation threatens the minister's interests, the minister can veto the board's

³⁰¹ *Triple Inquiry Report 1995*, n 173 above p. 9.

³⁰² See chapter 3 at 3.3.3.

³⁰³ Section 11(1)(e), *Broadcasting Act 1999*.

recommendation.³⁰⁴ The arrangement seriously undermines the power of the board to improve the quality of PSB. The board may wish to invest more of the commercial arm's profits into public service programming, while the minister on the other hand may want to pay a high dividend to the state, to be used in the provision of other services, thus creating a conflict. It would have been preferable to leave the final decision to the board, which at the end of the day, is accountable to the public for the performance of the public broadcaster's mandate.

The overall effect of the implementation of the recommendations of the resources review exercise has been to further entrench the SABC's dependence on commercial revenue resources, a dependence that has significant practical and political implications for the public broadcaster's public service mandate. Reliance on advertising revenue inevitably leads to commodification of programming. The ruling party has recently accused the SABC of failing to meet its mandate as it was biased towards entertainment instead of programmes on information and education and the use of more African languages.³⁰⁵ Ironically, the government's economic policies are largely to blame for the failure by the SABC to fulfil its public service mandate. Reduced public funding led to the commercialisation and hence the commodification of the SABC's programming.

The requirement of outsourcing programmes has not been very successful in bringing about diversity in programming as was originally envisaged. A recent survey shows that out of over 150 production companies registered in South Africa, only 15 produce more than 90% of all South African feature films and television productions.³⁰⁶ Most of these production companies are concentrated in three of South Africa's nine provinces, which lead to serious questions about the ability of the independent production sector to produce representative programming. Some observers have argued that production houses need to be based in areas that they are making programmes about in order to reflect local needs correctly.³⁰⁷ The public broadcaster should, ideally, utilise production companies from a range of different provinces. It

³⁰⁴ Duncan, n 66 above p. 149.

³⁰⁵ *Freedom of Expression News: Weekly Reports*, 14th May 2002, available at: [<http://www.fxj.org.za/2002/14-5-2002.0.htm>].

³⁰⁶ *Position Paper South African Content on Television and Radio* (ICASA, 2002) p. 18, available at: [<http://www.icasa.org.za>].

³⁰⁷ Duncan, n 66 above p. 144.

must especially be encouraged to commission productions from companies which are controlled by previously disadvantaged communities. Commissioning procedures must be fair and transparent in order to have the public's confidence.

The ability of outsourcing programmes to ensure diversity and pluralism, especially in commercial broadcasting, is further undermined by a developing trend of re-concentration of the media, especially that involving the broadcast media and production companies. Media conglomerates are either buying up existing production companies, or establishing entirely new ones under their control.³⁰⁸ The provisions limiting cross-ownership between various media sectors, unfortunately, are not designed to deal with this new development. There is therefore an urgent need to review provisions on cross-media control in order to extend them to the independent television production sector, if outsourcing of programmes is to deliver diverse programming.

The IBA introduced diversification of both radio and television in terms of ownership and programming, increasing choice for audiences and facilitating the entry of previously marginalized groups into structures of ownership. Following a recommendation of the *Triple Inquiry* to sell six of the SABC's radio stations, the IBA ensured that these stations were not simply sold to the highest bidders, but consistent with the objectives of the *IBA Act 1993*, to bids from groups composed of diverse range of communities. Private groups, including black empowerment groups, now own these stations.³⁰⁹ In 1997 the IBA licensed a further eight new commercial radio stations. Many new media owners have emerged through the licensing process, with strong black economic empowerment participation.³¹⁰ The free-to-air commercial television station, *e-tv*, is 80% owned by a local company that is dominated by the investment vehicles of workers' unions. Disabled and youth groups, unfortunately, were not able to sustain their shares within the empowerment consortium.³¹¹

³⁰⁸ Ibid., p. 145.

³⁰⁹ See table 4(b) in chapter 3. Some of the prominent black empowerment groups that have stakes in these radio stations include Kagiso Media and New Africa Investment Limited (Nail).

³¹⁰ *MDDA Position Paper*, n 49 above p. 15.

³¹¹ Ibid.

Public service obligations are imposed on commercial broadcasters to ensure that their services provide choice to citizens. Unfortunately the current commercial radio stations are unevenly distributed and serve mostly the lucrative metropolitan areas. For example, out of the fifteen commercial radio stations in operation, seven operate in one province alone.³¹² The *Triple Inquiry* recommended that in licensing private radio, the regulator must ensure that services are evenly distributed to serve both metropolitan and rural areas.³¹³ The recommendation was made after the commercial radio stations were already in operation. ICASA has resolved to correct this imbalance by licensing more commercial radio services to cover areas currently not serviced by private radio.³¹⁴ The fact that none of these commercial radio stations broadcasts in an African language means that their services are not accessible to a majority of South Africans who are not competent in English and Afrikaans. The situation is contrary to the objects of the *Broadcasting Act 1999*, which, among other things, requires commercial broadcasting services as a whole to provide programming in all official languages.³¹⁵ The regulator therefore has an obligation to try and increase services that will provide programming in African languages, alternatively, to persuade the current services to provide multi-lingual programming.

The IBA was also able to provide diversity and choice to a large number of South Africans through community radio. Over 80 community radio stations have been licensed, serving mainly geographic communities and communities of interest. However, it has become evident that the distribution of community radio stations within the country's nine provinces is unequal, and reflects uneven historical developments in the country as a whole. The least developed provinces have fewer community radio stations, with the majority of the stations concentrated in the highly industrialised provinces. ICASA has recently noted that it has 232 applications for community radio licences, but many are competing for the same frequencies in the urban areas. The regulator therefore said it could not on its own address the need to

³¹² The distribution of commercial radio services in South Africa's nine provinces is: Gauteng 7, Western Cape 4, Kwazulu-Natal 2, Eastern Cape 1 and Free State 1. Four provinces, which happen to be the poorest, do not have commercial radio services.

³¹³ *Triple Inquiry Report 1995*, n 173 above p. 29.

³¹⁴ M. Langa, 'The Challenges Ahead: Regulating in 2002 and Beyond' a paper delivered at the National Association of Broadcasters Annual General Meeting, 27th February 2002, available at: [<http://www.icasa.org.za>].

³¹⁵ Section 30(1)(b), *Broadcasting Act 1999*.

promote community radio licensing in under-serviced areas.³¹⁶ In view of this, ICASA welcomes the establishment of the MDDA.³¹⁷ The agency will provide for community and small commercial media projects, and should therefore address exclusion and marginalisation of disadvantaged communities from access to the media and media industry.

The provisions of the *IBA Act 1993* on limitations on ownership of broadcasting licences have been successful in preventing the domination of the broadcast sector by a few players, a feature that characterises the print sector. These provisions have consequently been severely criticised by media conglomerates that harbour expansionist ambitions as insufficient to allow a company to achieve critical mass in the broadcasting marketplace.³¹⁸ In September 2002 the regulator released a discussion paper that reflects on the failures and successes of the last six years of commercial broadcasting. The paper invites comments from the public with a view of re-evaluating existing policies.³¹⁹ The process is expected to culminate in the adoption of a position paper and recommendations to parliament for the amendment of the relevant legislation. Provisions on limitations on ownership of licences are some of the issues to be evaluated to determine whether they are still relevant or need amendment in order to ensure that ICASA meets its mandate to regulate broadcasting in the public interest. The consultative process is also evaluating the question of what constitutes control of a broadcasting licensee. The regulator has however hinted that the principles of diversity of ownership and black economic empowerment are 'not up for sale'.³²⁰

The question of cross-media control is also important for democratic communication. The *IBA Triple Inquiry* observed that control of a number of media outlets in both the print and broadcast sectors by one entity has the objective of subjecting the spreading of ideas and views to the control of one person.³²¹ In the view of the inquiry,

³¹⁶ *MDDA Position Paper*, n 49 above p. 17.

³¹⁷ *ICASA's Submission on the Media Development and Diversity Agency Bill*, 27th February 2002, available at: [<http://www.icasa.org.za>].

³¹⁸ Langa, 'Role of a Competition Authority in a Developing Economy', n 194 above at 4.

³¹⁹ *Discussion Paper on the Review of Ownership and Control of Broadcasting Services and Existing Commercial Licences*, available at: [<http://www.icasa.org.za>].

³²⁰ Langa, 'The Challenges Ahead: Regulating in 2002 and Beyond', n 314 above at 5.

³²¹ *Triple Inquiry Report*, n 173 above p. 71.

multiplying the number of media owners or controllers in both the broadcast and print sectors, coupled with structural independence or autonomy, would increase the probability of diversity of information. And further that, effective competition amongst controllers or owners may lead to quantitative differentiation between the products offered by each of them and thereby favour editorial diversity.³²²

As soon as the broadcasting sector was opened up to competition, there were immediately some developments towards domination of both sectors by certain media groups. For example, the black empowerment company, New Africa Investment Limited (Nail), owns the biggest daily and Sunday circulations, the *Sowetan* and *Sunday Times* through its subsidiaries, New Africa Publications and Times Media Limited, respectively. These papers have over 50% of their circulation in the Gauteng province. Nail, through another subsidiary, New Africa Media, hold a controlling stake in *Jacaranda FM*, which also broadcasts in the Gauteng province. The company also controls about three leading television production companies, which have done significant productions for the SABC.³²³ The scenario places Nail in a position where it can significantly control the dissemination of information in the Gauteng province, which according to the *Triple Inquiry* is undesirable as it threatens editorial diversity.

The provisions of the *IBA Act 1993* on cross-media control were drafted with the intention of prohibiting domination of both the broadcast and print media sectors by a single or few players. What is important about the provisions is that they not only prohibit developments towards domination of both sectors, but also require entities that are now in a dominant position in both sectors to relinquish control over one sector. The provisions have been in operation for close to two years, but the regulator has not yet called upon Nail to relinquish its control over *Jacaranda FM*. It was expected that the issue would have been brought up in October 2002 when the licensee was due to apply for renewal of its licence. However, it seems the issue has not yet been raised. The regulator is perhaps waiting for the outcome of the consultative process on the review of the provisions on limitation of ownership of licences.

³²² Ibid.

³²³ Duncan, n 66 above pp. 144 – 5.

The government of South Africa is committed to making universal access to broadcasting services a reality to all its citizens. It has argued for priority to be given to free-to-air services, and more importantly, it approved the *Triple Inquiry's* recommendation to convert Sentech (Pty) Ltd into a public company with signal distribution common carrier obligations. The company now has an obligation to develop a network that covers the whole country and must ensure that various categories of broadcasting licensees have access to signal distribution at a tariff appropriate to and commensurate with the service. The challenge is now on the regulator to allocate licences in such a manner that the whole country will have access to a reasonable number of broadcasting services offering citizens diversity and choice. The requirement that broadcasting services be provided in all of South Africa's official languages has greatly improved the accessibility of services to most people, especially the illiterate rural population.

Improvements to signal distribution, provision of free-to-air services and increased use of African languages will, unfortunately, not guarantee access to broadcasting services to all South Africans. There are many citizens who, due to socio-economic problems such as poverty and unemployment, would not afford the cost of buying and maintaining receiving equipment for broadcasting services. Failure to address the needs of these unfortunate citizens will further marginalize and exclude them from the whole society.

There is no doubt that since the democratisation of the media in South Africa in 1994, great strides have been made towards ensuring pluralism in the sector. The concept of pluralism in the country derives from section 2 of the *IBA Act 1993*, which identifies three facets of diversity: diversity based on editorial content, diversity based on the number of channels and diversity based on media owners or controllers. The regulatory framework embraces all the three facets on the basis that their combination is more likely to bring greater diversity in the provision of programming.

Diversity of editorial content is achieved by imposing programme obligations on broadcasters. These obligations derive from the public service obligations identified by the regulator and the Code of Conduct for Broadcasting Services. Despite commercial pressures discussed above, especially with regard to the SABC, these

obligations have ensured the provision of a diverse range of programming possible under the circumstances. A three-tier system of broadcasting licences coupled with limitations on the number of licences that an entity may hold guarantees diversity of channels. Even though public broadcasting services still dominate the broadcast sector, commercial and community radio stations have emerged to give choice to many citizens. The licensing process has enabled the representation of historically disadvantaged communities in the ownership of the broadcast media. Today black empowerment groups and workers' unions hold substantial stakes in media companies. However, other segments of the historically disadvantaged communities have not yet been able to have access to ownership of the broadcast media. Hopefully, the newly established MDDA, whose primary objective is to assist community and small-scale commercial media will play a significant role in empowering those that have been left out.

The success of the regulation of the broadcast media in South Africa is arguably due to two factors. First, the government has provided a fairly detailed legal framework setting out the objectives for regulation of the industry and how to attain them. And secondly, the now defunct IBA and its successor, ICASA, have shown commitment to the objectives of regulation set out in the relevant legislation and have also maintained their independence from both the government and commercial pressures in the performance of their functions.

5.4 Conclusion

The regulatory framework and situation of the print media in Botswana and South Africa is almost identical. There are no licensing requirements and newspapers are generally free to publish what they want, subject only to the general law. However, this has not led to greater diversity and pluralism. Botswana has fewer publications mainly due to its small population size which cannot support a media network of scale. South Africa on the other hand, despite its reasonably healthy economy, also has few titles compared to its population size. Entry costs into the newspaper industry

in South Africa are high due to concentration of ownership in the sector.³²⁴ Even though mergers and acquisitions in the sector have been subject to competition law since 1979, this has not been able to prevent the development of an oligopoly that characterises the sector today. In Botswana, the absence of control measures over ownership of newspaper titles is slowly leading towards domination of the sector by a few players.

Distribution of newspapers in the two countries is biased in favour of urban audiences. Advertisers significantly influence content of newspapers due to the latter's dependency on advertising revenue. Newspapers therefore find themselves under pressure to provide content that will deliver affluent audiences to advertisers. It is for this reason that the content of newspapers in the two countries caters mainly for the needs of middle to upper income urban audiences neglecting the needs of poor, mostly rural audiences. Cultural and regional diversity and promotion of titles in indigenous African languages, the ideals of democratic communication, are thus sacrificed in the pursuit of commercial imperatives. Furthermore, newspapers often have to compromise their duty to disseminate information to the public by avoiding reporting on issues that may annoy or embarrass major advertisers, resulting in loss of patronage. For example, the government of Botswana instructed all its departments and parastatal bodies to withdraw advertising from the *Guardian* and *Midweek Sun* after a series of articles published by the two papers critical of both the president and his deputy.³²⁵ The government and the public sector in Botswana are the major advertisers in the press as the private sector is relatively small. Threats by major advertisers to starve a newspaper of advertising inevitably induce self-censorship to avoid losing advertising revenue, which may result in the closure of the paper.

Concentration of ownership and commercialisation of the press are serious threats to pluralism and diversity in the press sectors of both countries. There is an urgent need to promote a multiplicity of autonomous and independent newspaper titles at national, regional and local levels, and titles in indigenous African languages in both countries that will offer diverse political and cultural content. South Africa relies on

³²⁴ *Media Concentration and its Impact in South Africa, Botswana, Lesotho and Swaziland*, n 47 above p. 15.

³²⁵ For a detailed discussion of the case and the resulting litigation, see chapter 3 at 3.2.3.

competition law to provide for a multiplicity of autonomous and independent titles. The ability of competition law to guarantee external pluralism in the press is doubtful. In nearly all countries that rely on competition law in order to ensure pluralism in the press industry, a dramatic increase in concentration of ownership has been noted over the past ten years.³²⁶

Competition law is a weak instrument to secure a multiplicity of autonomous players in the press because it is generally concerned with securing economic objectives and is not designed to deliver diversity and plurality in the media.³²⁷ The *East Coast Radio (Pty) Ltd and others* (supra) case demonstrates the inadequacy of competition law in this regard. The case shows that competition law is concerned primarily with the operation of economic markets rather than with the distinctive wider needs of public policy in relation to the media, especially, the need to ensure diversity of views and opinions from autonomous outlets.

In the UK the press is subject to special ownership rules over and above competition law in order to address the special needs of the sector that general competition law often overlooks. Under the *Fair Trading Act 1973*, most newspaper mergers are subject to a stricter regime than general mergers. Mergers involving newspapers with an average circulation of 500 000 copies (including the paper to be acquired) must have the consent of the Secretary of State for Trade and Industry. Such consent must be given after a report from the competition authority. The minister, however, has discretion to give consent to a proposed merger under certain circumstances without a report from the competition authorities.³²⁸ Newspaper transfers are judged against a public interest test, which specifically requires the competition authorities to take into account the need for accurate presentation of news and free expression of opinion by avoiding concentration of ownership in a few hands. The statutory provisions do not prescribe any particular limit on concentration. Unfortunately, the special regime has

³²⁶ S. Coliver, 'Comparative Analysis of Press Law In European and Other Democracies' in S. Coliver (ed) *Press Law and Practice: A Comparative Study of Press Freedom in European and Other Democracies* (Article 19, 1993) 255 at 260.

³²⁷ See Department of National Heritage, *Media Ownership and Control: The Governments Proposals*, Cm 2872 (1995) paras. 1.4 & 5.8, and Department for Culture, Media and Sport, *Consultation on Media Ownership Rules (2001)* para. 1.10, available at: [<http://www.culture.gov.uk/creative/index.html>].

³²⁸ Section 58, *Fair Trading Act 1973*.

failed to secure external pluralism in the print media.³²⁹ The procedure is said to have not proved capable of resisting commercial responses to loss-making ventures such as quality newspapers.³³⁰ Other commentators attribute the failure of the regime to the wide discretion given to the Secretary of State which, they argue, has not noticeably been used to further media pluralism, and hence the undesirability of having a politician making important decisions in such a sensitive area as media regulation.³³¹

An alternative to competition law in the endeavour to guarantee a plurality of players in the press is to limit control by persons over titles in circulation. In France it is unlawful to buy or take over control of a daily newspaper if, as a result, a person would own or control, directly or indirectly, daily newspapers whose combined circulations would exceed 30% of the circulation of all dailies in the country.³³² In Italy, no one may control more than 20% of the total daily newspaper circulation, or more than 50% of a total regional or inter-regional circulation.³³³

Competition law alone has so far failed to deliver external pluralism in the press in South Africa or in any other country. A further weakness of competition law to ensure pluralism in the sector is its inability to break existing monopolies unless it can be proved that there is unfair competition. If competition law is to guarantee pluralism in the press sector, there is need to refine its application. An arrangement similar to the South African broadcasting regulatory framework whereby there is concurrent jurisdiction between the Competition Commission and the regulator is appealing. Botswana and South Africa should consider establishing entities, independent of both governments and commercial interests, to work with competition authorities to oversee mergers and acquisitions in the press. The mandate of such bodies would be

³²⁹ It has been observed that two groups, News Corporation and the Mirror Group, who between them control about 63% of the national newspaper circulation, dominate the print media. (See Feintuck, n 70 above, p. 107).

³³⁰ T. Gibbons, 'Aspiring to Pluralism: The Constraints of Public Broadcasting Values on the Deregulation of British Media Ownership' (1998) 16 *Cardozo Arts and Entertainment Law Journal* 475 at 479.

³³¹ E. Barendt & L. Hitchens, *Media Law: Cases and Materials* (Pearson Education Limited, 2000) p. 244.

³³² R. Errera, 'Press Law in France', in S. Coliver (ed) *Press Law and Practice: A Comparative Study of Press Freedom in European and Other Democracies*, n 326 above 57 at 61.

³³³ A. Harcourt, 'The European Commission and Regulation of the Media Industry' (1998) 16 *Cardozo Arts and Entertainment Law Journal* 425 at 431.

to make sure that mergers and acquisitions are consistent with the public interest in maintaining external pluralism in the press.

The other option will be to limit control by entities over newspapers in circulation. This method probably has the potential of guaranteeing a greater number of players in the market than competition law as it can also be used to break up existing monopolies.³³⁴ It may be the best option for bringing about external pluralism in the press in both Botswana and South Africa. Three groups dominate the South African press industry and a law that can break up this oligopoly seems to be the only way to create external pluralism in the sector. In Botswana one company is already controlling over 65% of the private national newspaper circulation, and given the unlikelihood of an emergence of a serious competitor, limiting control over titles in circulation would appear to be the only way to guarantee external pluralism.

The press must provide the public with a variety of media content, reflecting different political and cultural views. In Botswana and South Africa the press has not been able to effectively provide such content due to concentrations in ownership and commercial pressures. The dominant media houses in South Africa have developed a tendency of centralising editorial content across titles by establishing a common pool of reporters to cover different fields, who then supply all titles within the group with copy.³³⁵ The arrangement has resulted in titles offering identical content. Commercialisation, as discussed above, also dictates content of papers in that, for a paper to survive, its content must appeal to audiences that will guarantee advertisers the highest returns.

In broadcasting, positive obligations are imposed on licensees to provide diverse programming to cater for the needs of all citizens, but such an intervention in the press is considered a violation of press freedom.³³⁶ The constitutions of Botswana and South Africa have adopted this worldwide double standard in the regulation of the broadcast and print media such that imposing any positive content obligations on the

³³⁴ Such a law may be applied in a similar manner to the cross-ownership provisions in the South African *IBA Act 1993*, which not only prohibits developments towards domination, but also requires entities that are now dominant in both sectors to give up control over one sector.

³³⁵ *Media Concentration and its Impact in South Africa, Botswana, Lesotho and Swaziland*, n 47 above p. 16.

³³⁶ See chapter 2 at 2.4.2.

latter would be unconstitutional. Diversity of content in the press can be promoted by reducing reliance of newspapers on advertising revenue, breaking up existing press monopolies and encouraging greater diversity in the ownership of newspapers.³³⁷ Reducing newspapers' reliance on advertising revenue would enhance their independence from commercial interests when reporting on matters of public interest. Breaking up monopolies may result in several players in the market thus maximizing opportunity for diversity of viewpoint. And encouraging diversity of ownership of newspapers, especially by those sections of the population who are excluded or marginalized, can also promote diversity of content by providing content relevant to these groups, which is usually not covered by mainstream newspapers.

Some countries provide government subsidies to certain newspapers experiencing financial difficulties in order to preserve diversity in the sector. Such subsidies are either direct cash grants or indirect, such as concessions on taxes and/or postal or telephone rates.³³⁸ South Africa has recently established the MDDA to redress the exclusion and marginalisation of a vast range of groups and interests from access to the media. The agency is charged with the responsibility of promoting diversity in the media by encouraging ownership and control of the media by historically disadvantaged communities as well as by historically diminished indigenous language and cultural groups. The agency should pave way for the emergence of small commercial and community newspapers and, hopefully, titles in indigenous African languages, thus providing an alternative to the mainstream newspapers thereby promoting diversity of content in the press.

The government of Botswana does not have a mechanism in place to promote diversity in the press. It has however maintained that the *Daily News* provides an alternative to the private press. The major weakness of the *Daily News*, as an alternative to the private press is that it does not enjoy editorial independence and it is expected to communicate mainly government policies to the people. The government should therefore consider introducing a policy, similar to the South African, which will encourage the emergency of small commercial and community newspapers in

³³⁷ J.A. Barron, 'VIACOM-CBS MERGER: Structural Regulation and the Diversity Rationale' (2000) 52 *Federal Communications Law Journal* 555 at 557 – 558.

³³⁸ Coliver, n 326 above p. 261. See also Council of Europe, *Recommendation No. R (99) 1: On Measures to Promote Media Pluralism*.

order to enhance diversity of content in the press. The government could discontinue the *Daily News* and divert funds that are currently used in its publication for the assistance of community and small commercial newspapers.

The MDDA in South Africa is primarily to assist in the development of community and small commercial media and does not include assistance to mainstream newspapers facing financial difficulties. It is in the best interests of pluralism and diversity in the press for governments to also assist mainstream newspapers that are facing financial problems, especially where this is due to loss of advertising revenue resulting from a publication's editorial policy. Such assistance may enhance the independence of the press from commercial pressures when reporting on issues affecting major advertisers or sponsors. Funding for such assistance may be drawn from the private sector in the form of a special levy, complimented with government grants.

While the regulatory framework and experiences of the print media in Botswana and South Africa have a lot in common, the broadcasting sectors are worlds apart. South Africa has a comprehensive broadcasting regulatory framework, which aims at guaranteeing diversity of channels, owners or controllers and content in the industry. Botswana on the other hand is in the process of developing her own framework.

In the relatively short time that the South African regulatory framework has been in place, it has arguably been successful in bringing about diversity and pluralism in broadcasting. The post-democratic order facilitated the establishment of a public service broadcaster, the SABC, whose independence is guaranteed by law. Independence of PSBs is a principle now embraced by almost all modern democracies. The Council of Europe urges all its members to enact laws to guarantee the editorial and institutional autonomy of such broadcasters.³³⁹ In practice, the promotion of a PSB's independence is usually guaranteed through a board of directors

³³⁹ Council of Europe, *Recommendation No. R (96) 10: On the Guarantee of the Independence of Public Service Broadcasting*. The Supreme Court of Ghana has held: 'The state-owned media are national assets: they belong to the entire community, not to the abstraction known as the state; nor to the government in office, or to its party. If such national assets were to become the mouthpiece of any one or combination of the parties vying for power, democracy would be no more than a sham'. (*New Patriotic Party Ghana v Ghana Broadcasting Corporation*, 30 November 1993, Writ No. 1/93, p. 17, quoted in Mendel, n 72 above p. 8.)

or governors, which acts as a shield against government interference and a mechanism of accountability to the public. Given the role played by such boards, it is important that they must be independent of political interference. The manner of appointment and tenure of office of their members is therefore crucial. South Africa is one of the few countries in the world where the governing board of its PSB is appointed in the most democratic manner.³⁴⁰ The president on the advice of the National Assembly appoints members of the SABC's board after an open nominations process. Members of the board can only be removed from office by a resolution of the National Assembly. The South African model of guaranteeing the institutional independence of the PSB is worth emulating, especially, by developing democracies such as Botswana where PSBs are prone to government interference.

South Africa has so far avoided concentration of ownership in the broadcast media and domination of both the broadcast and print media by a few players. This has been achieved through setting limits on the activities of media operators according to media reach and share ownership. An entity is only allowed to control one television licence, two FM radio licences and two AM radio licences, and cannot control two radio licences with substantially overlapping coverage areas. Further, an entity that controls a newspaper cannot control both a television and radio licensee. An entity which controls a newspaper may not have control over a radio or television licensee in an area where the newspaper has an average circulation of 20% of the total readership in the area, if there is a substantial overlap between the coverage area of the broadcast licensee and circulation area of the newspaper.

An alternative method, which is used in Germany, to avoid the domination of both the print and broadcast media by the same players, is the limitation of media ownership on the basis of the audience share controlled by individual media owners.³⁴¹ The concept is premised on the argument that the similarity of functions which newspapers and broadcasters undertake in terms of collecting, editing and disseminating information, news and entertainment means that there are obvious and

³⁴⁰ By contrast the governing boards of PSBs in most mature democracies are appointed by the government in power. For example, in Australia and Canada Cabinet appoints the boards of their PSBs while in the UK the Prime Minister appoints the BBC's board.

³⁴¹ P. Humphreys, 'The Goal of Pluralism and the Ownership Rules for Private Broadcasting in Germany: Re-regulation or De-regulation?' (1998) 16 *Cardozo Arts and Entertainment Law Journal* 527 at 534 – 535.

natural synergies between companies within each sector, and that it is in the interests of both the industry and the consumer to allow larger media companies to develop.³⁴² While there is an acknowledgement that media power and its relationship with pluralism is an appropriate issue for public policy, it is argued that a more sophisticated way of squaring that power with the economic advantages of joint ventures and mergers is necessary. The concept of 'market share' is therefore used for purposes of determining an entity's influence in the media market. The basic idea that underlies this concept is that media power should be assessed by reference to the influence that it has on its readership and audience. Rather than regulating crudely in terms of individual media sectors, there should be an attempt to quantify the relative impact of different kinds of media on the individuals who use them.³⁴³ Market share is calculated by adopting a measurement of audience share for television and radio, and circulation figures for newspapers. The process involves detailed quantitative rules governing the accumulation of mono-media and cross-media interests and the prevention of entities from accumulating licences beyond certain limits.³⁴⁴

The market share approach has, however, resulted in increased concentrations and cross-ownership between different media in Germany.³⁴⁵ The approach demonstrates the tension between the public interest in having a multiplicity of autonomous voices in the media and the economic imperative of encouraging larger media groups that can compete on the global stage. It tends to favour economic imperatives at the cost of the public interest in ensuring diversity and pluralism in the media industry.³⁴⁶ The South African approach, which emphasises a multiplicity of autonomous players in the media, is therefore attractive for purposes of ensuring democratic communication and would be suitable for Botswana, as the draft national broadcasting policy correctly recommends.

A further notable feature of the South African regulatory system that has prevented the domination of the broadcast industry by a few players is the concurrent

³⁴² Cf. *Media Ownership and Control: The Governments Proposals*, Cm 2872 (1995), n 327 above para. 5.22.

³⁴³ Gibbons, n 330 above at 479.

³⁴⁴ Humphreys, n 341 above at 542 – 543.

³⁴⁵ *Ibid.*

³⁴⁶ G. Doyle, 'Regulation of Media Ownership and Pluralism in Europe: Can the European Union Take Us Forward?' (1998) 16 *Cardozo Arts and Entertainment Law Journal* 451 at 463.

jurisdiction exercised by the competition authority and the regulator over mergers and acquisitions. Competition law on its own, as noted above, is inadequate to secure pluralism in the media. An arrangement whereby there is concurrent jurisdiction between the competition authority and the broadcast regulator helps to ensure that mergers that do not threaten competition, but pose threats to plurality, do not go through as was demonstrated in *East Coast Radio (Pty) Ltd and others* (supra). A reading of section 15 of Botswana's *Broadcasting Act 1998* seems to imply that there will be concurrent jurisdiction between the proposed competition authority and the NBB as it requires changes in the proprietorship of broadcasting licensees to be approved by the board.

Efforts by South Africa to ensure universal access by all its citizens to broadcasting services should be another valuable lesson for Botswana. In addressing the problem of uneven distribution of broadcasting infrastructure in the country, South Africa converted the then SABC's signal distribution subsidiary into a public company with common carrier obligations. The company has been able to develop a broadcasting network covering almost the whole country, thus making broadcasting services potentially available throughout the country. The company is required to provide signal distribution services at an equitable and reasonable cost. This guarantees access by broadcasters, especially community and small commercial broadcasters, who would otherwise not afford the cost of signal distribution equipment, to have access to the airwaves. In Botswana, the state owned broadcasters' signal distribution network is currently not available to other broadcasters. In the light of the country's economically weak media market, broadcasters will find it hard to invest in the costly broadcasting infrastructure. The national broadcasting network is a public asset and it is therefore in the public interest to allow other broadcasters use of the facilities at a reasonable cost. Thus the recommendation in the draft national broadcasting policy for the privatisation or transformation of the signal distribution section of DIB into an independent entity that will provide services to all broadcasters is welcome. There is also a need for the network to be improved so that it covers the entire country.

The achievements in the regulation of South Africa's broadcast media are attributable to a large extent to the qualities of its sector regulator. The regulator enjoys both institutional and financial independence consistent with internationally recognised

standards.³⁴⁷ Botswana's NBB unfortunately does not enjoy the same independence, especially financial independence. The NBB is funded through an executive arm of government. The Constitutional Court of South Africa rejected a similar arrangement with regard to the ICASA on the basis that it compromised the independence of the regulator. The funding arrangement for the NBB has already exposed the vulnerability of the regulator to manipulation by the executive. The executive refused to provide adequate funding for the broadcasting policy consultative process. A donor subsequently provided funding. Had the donor not stepped in, the mandate of the NBB would have been seriously undermined because it would not have been able to engage in a comprehensive policy development process.

Internal pluralism in broadcasting in most countries is ensured by the imposition of positive programme requirements on licensees. South Africa has adopted the same approach. One of the core criteria of PSB is the provision of high quality programmes in all genres. A PSB must be a benchmark for quality programming. To achieve this, a PSB must be well resourced in order to maintain high ethical, technical and production standards. Traditionally, PSBs have been largely funded through public allocations; either from general government resources as in Australia and Canada, or through the collection of a broadcasting fee, as in France and the UK. In recent years governments have been adopting neo-liberal policies that emphasise government downsizing. The move has resulted in reductions in public financial support for public services, including public service media. As an alternative to full government funding, many PSBs now look to commercial activities, mainly advertising, to generate supplementary funding. The danger of PSBs' reliance on advertising revenue is that commercial imperatives may cause them to simply mimic commercial broadcasters by basing their programming choices on popularity rather than quality.

The SABC is funded through a mix of advertising, licence fee and government grants. The corporation however relies heavily on advertising revenue and this has resulted in the commodification of its programmes, thus resulting in low quality programming as most of its programmes are designed to appeal to advertisers. In Botswana state owned broadcasters are funded through government grants. It has been argued that the

³⁴⁷ Cf. Council of Europe, *Recommendation Rec (2000) 23: On the Independence and Functions of Regulatory Authorities for the Broadcasting Sector*.

danger with this method of funding is that it tends to create broadcasters inextricably linked to prevailing political climates and could lead to loss of management or editorial independence.³⁴⁸ The argument correctly reflects the situation of the state owned broadcasters in Botswana, where the government has turned them into its mouthpieces. The challenge in both countries is to secure adequate funding for PSB that will not compromise the quality of programming.

The licence fee has been successful in guaranteeing the independence of the BBC from both political and commercial pressures and in delivering high quality programmes in the UK.³⁴⁹ A broadcasting fee is relatively insulated from government interference and provides consistent levels of funding over time. The UK model has fared much better because the BBC enjoys high levels of credibility and a much larger number of people own television sets and can afford to pay licence fees. While this method is appealing, it will not be able to provide adequate funding for PSB in Botswana and South Africa. Many people are poor and cannot afford to pay a licence fee. For this reason, it will be in the best interests of the PSBs in the two countries to supplement the licence fee with either advertising revenue or government grants or both, as this will assure them adequate funds to execute their mandates effectively. Botswana should therefore consider introducing a licence fee for television sets. The government in consultation with the NBB should set the fee.

The risks of relying on government grants and advertising have been noted, but in the case of Botswana and South Africa, these appear to be the only workable alternatives or supplements to the licence fee. What is important is to put in place measures that will ensure that these forms of funding do not interfere with the independence and/or quality of programming of PSBs. In the case of government funding, a transparent framework must be put in place to guard against government's undue control or interference with the PSB's editorial independence. Funding for PSBs should be directly appropriated by parliament, with the governing board allowed to defend budgetary requirements before a committee of parliament. The board should have the exclusive right to decide the budget of the PSB and be accountable to the public

³⁴⁸ Department for Culture, Media and Sport, *The Future Funding of the BBC: Report of the Independence Review Panel* (July 1999) pp. 66 – 68.

³⁴⁹ *Ibid.*, p. 140.

through parliament. Where the governing board enjoys institutional independence, this should be able to insulate the PSB from government interference. A limited amount of commercial advertising should be allowed on PSBs. Resources from public sources should form the bulk of funding for PSB. This should protect the broadcasters from commercial pressures and lead to high quality programming instead of mass appeal, and often low quality, programming.

The South African regulatory framework compares favourably with frameworks in mature democracies. It has been relatively successful in creating both external and internal pluralism in the sector and laying a foundation for achieving universal access to broadcasting services. There is, however, still a lot to be done to perfect the system and prospects in this regard are promising. Botswana has just recently published a draft national broadcasting policy that will form the framework for the regulation of the broadcast sector. The principles embodied in the draft policy, if implemented properly, should be able to enhance the sector's democratic mandate and ensure universal access to citizens to broadcasting services. The South African experience in the regulation of the broadcast sector should be a valuable point of reference for Botswana in the development and implementation of her own regulatory framework.

There are some socio-economic aspects relating to access, which the governments and sector regulators of both countries need to address in order to ensure access by all citizens, especially the poor, to broadcasting services. In chapter 3, I observed that broadcasting is the most accessible media to the majority of the citizens of Botswana and South Africa. Because of the low literacy rates in both countries, many people depend on the broadcast media, in particular radio, for essential information. Unfortunately, a number of people in both countries cannot afford the cost of buying and maintaining radio sets, while many more cannot afford televisions. Economic circumstances therefore deprive a large number of people access to an essential facility. The governments of the two states should assist the poorer sections of the society to gain access to broadcasting services. This can be achieved by setting up centres in villages and towns where the public can access radio and television services. Priority in the granting of licences should be given to free-to-air services as many people cannot afford subscription fees.

Public broadcasters, who in some areas are the only available services, currently dominate the broadcast media in Botswana and South Africa. More services should be encouraged to enter the market in order to provide for diversity of viewpoints. The MDDA in South Africa will hopefully lead to the emergence of more community and small commercial broadcasters, thus enhancing diversity. Botswana should consider a similar assistance programme.

CHAPTER 6

MEDIA FREEDOM AND ACCESS TO OFFICIAL INFORMATION

6.1 Introduction

Information is important for the maintenance of modern democracies. In terms of the democracy argument for freedom of speech, citizens in a democracy, as the ultimate decision-makers, need extensive information to make intelligent political choices.¹ In consequence, one safeguard that is increasingly seen as necessary to enhance participatory democracy is the principle of access to official documents, in whatever form they are kept. The principle guarantees that the citizen can follow and participate in the decision making process undertaken by political bodies and administrators. Access by the public to official documents also makes administrators more efficient, as transparency means that civil servants know that they are in the public eye and that their work is subject to public scrutiny and comment.² The importance of the public's right to access official information in modern democracies is evidenced by the growing number of statutory enactments in all regions of the world requiring disclosure of official documents.³

The democracy argument for freedom of speech identifies two key functions for the media in a democracy. First, the informative function, i.e., facilitating the flow of information necessary for citizens to make informed decisions. Second, the watchdog function, i.e., ensuring independent criticism and evaluation of the established power of government or other institutions that may usurp democratic power. In order to effectively perform these functions, the media must have access to information,

¹ See chapter 2 at 2.2.3.

² M. O'Neill, 'The Right of Access to Community-Held Documentation as a General Principle of EC Law' (1998) 4 *European Public Law* 403 at 406. See also the preamble to *Recommendation Rec (2002) 2: On Access to Official Documents* of the Council of Europe.

³ Sweden was the first country to enact legislation giving effect to the public's right to access official documents in 1766 and was followed by Finland in 1951, Denmark in 1964, USA in 1966, Norway in 1970 and Australia, Canada and New Zealand in the early 1980s. Many other countries have now enacted similar legislation. The Council of Europe in fact urges all its member states to enact laws giving the public a right of access to official documents in line with *Recommendation Rec (2002) 2*.

especially government documents. In the USA, it has been observed that when Congress enacted the federal Freedom of Information Act (FoIA) in 1966, its primary users were expected to be journalists. Journalists were alarmed at the growing trend towards government secrecy and took the lead in lobbying for its passage.⁴ However the federal FoIA, like many other countries' FoI laws does not expressly guarantee the media the right of access to official documents. FoI laws generally guarantee the public a right of access to official documents and do not expressly cite the right of the media. Media representatives share the right of access with the general public.⁵

FoI laws address similar issues. In general, such laws guarantee the public a right (subject to certain exceptions) to access official documents. The similarity of these laws reflects the commonality of the problems that any such law must consider. Common issues addressed by FoI laws include: the scope and coverage of the law; exemptions from disclosure; obligations of government officials in ensuring access by the public to official documents; methods of enforcing the right to access official documents by the public and the rights of those persons and groups that submit information to the government.⁶ The experience of countries with FoI legislation is varied, but since the laws address similar issues, over time, authoritative statements by international bodies, court decisions and national practices have elaborated certain, arguably minimum, standards which such laws and policies must meet.⁷

In this chapter I briefly look at the minimum standards on which any law or practice intended to give a meaningful right to the public to access official documents should be premised. Discussion of these minimum standards acts as a prelude to a more detailed examination of the laws and practices in both Botswana and South Africa, which give the public a right to access official documents. In examining the laws and practices in the two countries, the aim will be to determine the extent to which these compare with the minimum standards alluded to above. To the extent that the laws

⁴ W. Overbeck, *Major Principles of Media Law* (Harcourt Brace College Publishers, 1994) p. 270.

⁵ M.E. Price & P. Krug, *The Enabling Environment For Free and Independent Media* (Centre for Socio-Legal Studies, Wolfson College, Oxford, 2000).

⁶ R.G. Vaughn, *Freedom of Information* (Dartmouth, 2000) p. xi.

⁷ See generally, *Report of the United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, UN Doc. E/CN.4/2000/63 para. 44 (18th January 2000); *The Public's Right to Know: The Principles on Freedom of Information Legislation* (Article 19, 1999); Council of Europe *Recommendation Rec(2002)2*, n 2 above and J. Doyle, 'Freedom of Information: Lessons from the International Experience' (1996 – 7) 44 (4) *Administration* 64.

and practices in the two countries fall below the minimum standards, suggestions will be made as to how the public's right, especially the media's right, to access official documents in the two countries can be enhanced.

6.2 Minimum Standards on Access to Official Documents

The right to information is guaranteed in international law as part of the guarantee of freedom of expression.⁸ The content of the right to information mainly gives the public an enforceable legal right to access official documents held by public bodies upon submission of a request. International human rights instruments that guarantee the right to information however do not stipulate standards that states should adopt in order to give practical effect to the right. Many countries around the world have therefore enacted varying laws giving effect to a right of access to official documents. International and intergovernmental bodies such as the UN, European Community and Article 19: the Global Campaign for Free Expression have drawn up sets of principles, which they recommend to states to adopt in order to give effect to the right to information.⁹ Some of the principles recommended by these organisations are already reflected in access to information laws of a number of states around the world.

From the laws and regulations adopted by various countries, and international and intergovernmental organisations, one can identify four minimum requirements that must be met in order that the right to information be realised.¹⁰ These requirements include:

- i. A legal presumption that all information held by specified public bodies is subject to disclosure;

⁸ Article 19(2) ICCPR; Article 9(1) ACHPR; Article 13(1) ACHR and Article 10(1) ECHR. This is more fully discussed in chapter 4 at 4.2.1 – 4.2.5.

⁹ *Report of the United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, n 7 above, *The Public's Right to Know: The Principles on Freedom of Information Legislation*, n 7 above and *Council of Europe Recommendation Rec (2002) 2*, n 2 above.

¹⁰ For various formulations of these common features of FoI laws, see Doyle, n 7 above at 80, *The Public's Right to Know*, n 7 above and *Global Trends on the Right to Information: A Survey of South Asia* (Article 19, 2001) p. 8.

- ii. An obligation that those public bodies covered by the law publish and disseminate key categories of information about themselves;
- iii. A requirement that exceptions to disclosure of information are clearly and narrowly drawn and subject to a harm test and a public interest override; and
- iv. A requirement that requests for information are processed rapidly and fairly and an appeals system established to review cases where access is refused.¹¹

Each of these requirements is considered in more detail below.

6.2.1 *Presumption of Disclosure*

FoI legislation is generally guided by the principle of maximum disclosure. Access to official documents is the rule and confidentiality the exception, in cases where other legitimate interests take precedence. The term ‘official documents’ is given a broad definition to include all records held by public bodies regardless of the form in which the information is stored and covers documents produced by public bodies and documents emanating from third parties that have been received by public bodies.¹²

There is no universally accepted definition of a ‘public body’ for the purposes of the scope of FoI laws. It has been argued that for the purposes of disclosure of information, the definition of a public body should focus on the type of service provided by a body rather than on formal designations. Thus, public bodies should include all branches and levels of government, elected bodies, bodies that operate under statutory mandate, public corporations, judicial bodies and private bodies that carry out public functions.¹³ The Council of Europe recommends that the definition of public bodies should cover government and all administrative bodies at national,

¹¹ For various formulations of these common features of FoI laws, see Doyle, n 7 above at 80, *The Public’s Right to Know*, n 7 above and *Global Trends on the Right to Information: A Survey of South Asia* (Article 19, 2001) p. 8.

¹² See *The Public’s Right to Know*, n 7 above, principle 1 and *Explanatory Memorandum to the Recommendation Rec. (2002) 2 of the Committee of Ministers to Member States on Access to Official Information*, para. 7. In the US, Congress passed the *Electronic Freedom of Information Act Amendments of 1996* in order to expand the scope of the FoI Act of 1966 to cover electronic records.

¹³ *The Public’s Right to Know*, n 7 above, principle 1.

regional or local level, with the term ‘government’ covering both political bodies and administrative bodies.¹⁴ It further recommends that natural or legal persons who perform public functions or exercise administrative authority as provided by the law should also be regarded as public bodies.¹⁵ FoI legislation in many countries today applies to government departments and most government agencies including the security intelligence services and the police.¹⁶

6.2.2 *Obligation to Publish and Disseminate Key Information*

There is little benefit in having a right to information if that right cannot be exercised due to practical difficulties in acquiring it. Where the public does not have the means of knowing what information a public body holds, it will be difficult for them to exercise their right to information. Most FoI laws therefore commit public bodies to conduct active communication policies to ensure that they make available to the public any information that is deemed useful in a transparent democratic society. Such information includes: operational information about how a public body functions; guidance on processes by which members of the public may provide input into major policy or legislative proposals and the content of any decision or policy affecting the public, along with reasons for the decision and background material of importance in framing the decision.¹⁷

In order to enable the public to know what documents are in their possession, FoI laws require public bodies to maintain registers of documents drawn up or received by them.¹⁸ These registers provide the public with general information on documents kept by a public body and also indicate where the document is located.

¹⁴ *Explanatory Memorandum to the Recommendation Rec. (2002) 2*, para. 5.

¹⁵ *Ibid.*, para. 6.

¹⁶ For example, see FoI laws of Canada, New Zealand and USA. However, in a number of countries, among them the UK and Australia, security intelligence services are excluded from the ambit of the law.

¹⁷ See *The Public's Right to Know*, n 7 above, principle 2; USA *Freedom of Information Act*, section 552 (1)(D) and *Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30th May 2001 Regarding Public Access to European Parliament, Council and Commission Documents*, Article 12 (2) & (3).

¹⁸ For example see, USA *Freedom of Information Act* section 552 (a)(2)(E); Chapter 15 of the *Swedish Secrecy Act* and Article 11 *Regulation (EC) No 1049/2001*.

6.2.3 *Exceptions to Disclosure of Information*

Birkinshaw argues that the term ‘freedom of information’ is something of a misnomer for it does not mean free unrestrained access to all information or documents held by public bodies. Freedom of information, in his view, means access to information held by public bodies as a presumptive right for citizens and others, unless there are good grounds for denying access because of exemptions, which the body denying has to justify, or because information has been excluded on grounds that are accepted politically.¹⁹ Without any doubt, this observation is correct, for even in international human rights instruments freedom of information is not an absolute right as there are qualifications in that the right must be reconciled with other social interests. These instruments provide a list of interests that shall be protected by secrecy. A comparison of the lists in the various instruments reveals that the content is largely the same. In terms of the international human rights instruments, a right to official information or documents may be restricted to protect: national security, law enforcement, individual privacy, commercial secrecy, public safety and the integrity of government decision-making processes.²⁰

In order to ensure that exceptions to freedom of information do not negate the essence of the right, international human rights instruments require that exceptions to disclosure of information should be clearly and narrowly drawn and subject to strict harm and public interest tests.²¹ A refusal to disclose information must meet the following three-part test:

- i. The information must relate to a legitimate aim listed in the law. FoI laws must therefore provide a complete list of legitimate aims (similar to exceptions recognised by international human rights instruments) that may justify non-disclosure;
- ii. Disclosure of information must threaten to cause substantial harm to the legitimate aim identified. It is not sufficient that information simply

¹⁹ P. Birkinshaw, ‘Open All Hours: The Impact of the Labour Government’s Legislation on Freedom of Information’ (2001) 54 *Current Legal Problems* 179.

²⁰ See Articles: 19(2) - ICCPR; 13(2) – ACHR; and 10(2) – ECHR.

²¹ Articles: 19(2) ICCPR; 27 – 29 ACHPR; 13(2) ACHR; and 10(2) ECHR. For a detailed discussion of this test, see chapter 4 at 4.3.

fall within the scope of a legitimate aim listed in the law, a public body must also show that the disclosure of the information would cause substantial harm to that legitimate aim;

- iii. The harm to the aim must be greater than the public interest in having the information. Even where disclosure of information would cause substantial harm to a legitimate aim, the information should still be disclosed if the benefits of disclosure outweigh the harm.

Further to the strict harm test, it has also been argued that exceptions to disclosure of information must be based on the content, rather than the type, of the document. Consequently, no public body, even security agencies, should therefore be excluded from the ambit of the law, even if the majority of its functions fall within the zone of exceptions.²²

A cursory survey of FoI laws of some mature democracies and regulations adopted by some international bodies shows that these have adopted generally the same exceptions to disclosure of information as those provided under international human rights instruments.²³ However, none of these laws or regulations goes as far as embracing the strict harm test in whole. FoI laws of various countries provide for mandatory and discretionary exemptions from disclosure of information.²⁴ Mandatory exemptions require the withholding of certain documents from the public. The exemptions are class, rather than content based, contrary to the spirit espoused in international human rights instruments. Mandatory exemptions relate mainly to information involving: international relations, military secrets, personal information and information supplied by, or relating to, bodies dealing with security matters. These exemptions are not subject to an overriding public interest disclosure test.²⁵

²² *The Public's Right to Know*, n 7 above, principle 4.

²³ See the FoI laws of USA, Canada, Australia, Sweden, New Zealand and UK and *Regulation (EC) No 1049/2001 of the European Parliament and of the Council*.

²⁴ For example see FoI laws of USA, Sweden, Canada, Australia, New Zealand and UK.

²⁵ For a brief discussion of mandatory exemptions clauses of the FoI laws of the USA, Canada, Australia, New Zealand, and the UK, see P. Birkinshaw, *Freedom of Information: The Law, the Practice and the Ideal* (Butterworths, 2001) chapters 2 & 6. See also I. Osterdahl, 'Openness v. Secrecy: Public Access to Documents in Sweden and the European Union' (1998) 4 *European Law Review* 336.

Discretionary exemptions only authorize, but do not require the withholding of documents by a public body. It is probably in respect of this category of exemptions that there has been willingness by a majority of jurisdictions to construe and apply exemptions to disclosure of information strictly and in a manner that does not defeat the general right of access to official information. Most FoI laws incorporate a harm test and the proportionality principle, i.e., a principle of balancing the interests of public access to documents against the interest protected by the limitations when dealing with discretionary exemptions.²⁶ In addition, the fact that a document contains information which would be exempt from disclosure is an insufficient basis for a public body to withhold the entire document, public bodies are obligated to release all portions of a document that can be reasonably segregated from those portions of the document that are exempt.²⁷

6.2.4 Requests for Information and Review of Refusals

News is a perishable commodity. Delay in the dissemination of information may well rob it of its value to the public. In recognition of this fact, it has been argued that requests for information, especially by representatives of the media, should be processed rapidly and fairly.²⁸ FoI laws around the world generally require requests for information to be submitted in writing, but more importantly, the exercise of the right to official information does not require individuals to demonstrate a specific interest in the information sought. A period ranging from fifteen to thirty working days is given in the laws of various countries to public bodies to respond to requests for information. Journalists tend to need information too quickly to wait for formal requests to be honoured by slow moving bureaucracies. In the light of the periods that public bodies are given under FoI laws to respond to requests, it would appear that representatives of the media would rather rely on leaks from public officials rather than use FoI laws, in order to avoid delays in responses to their requests. In the early nineties in the USA, it was observed that due to delays in releasing information under the FoIA, the main users of the Act had turned out to be corporations, academic

²⁶ J. Wadham, J Griffiths & B. Rigby, *Blackstone's Guide to the Freedom of Information Act 2000* (Blackstone Press Limited, 2001) p. 67.

²⁷ Vaughn, n 5 above p. xii.

²⁸ *The Public's Right to Know*, n 7 above, principle 5.

researchers and private individuals with special interests in particular topics.²⁹ The 1996 amendments to the Act therefore introduced an expedited procedure for accessing official information by, among others, media representatives. Under this procedure an agency is required to respond to a request within ten days where a requester is a person primarily engaged in the dissemination of information to the public and can show that the request involves matters on which there is an urgent need to inform the public concerning actual or alleged federal government activity.³⁰

FoI laws provide that once a public body has received a formal request for a particular official record, the body must respond by either providing the record or denying the request. When granting access to a record, public bodies normally charge a fee intended to compensate it for the actual costs incurred in finding a record.³¹ In the event of a refusal, public bodies are required to give substantive written reasons for the refusal.³² If a request is denied, the requester is granted a right to appeal the denial. FoI laws of most countries make provision for internal appeals to a designated higher authority within a public authority, with the power to review the original decision. Decisions of higher authorities can be appealed to independent administrative bodies and, in some countries, directly to courts of law.³³

In some jurisdictions, notably the USA, when a person appeals against a refusal by a public body to the courts, no deference is given to the public body's decision or findings of fact. The court conducts a *de novo* review of the public body's decision and the public body bears the burden of proving that its withholding of the requested documents is authorized by the law.³⁴ However, it appears that in other jurisdictions, administrative tribunals and courts of law reviewing refusals by public bodies to disclose documents do not have the power to review the case on the merits but are only limited to the question of whether a public body has acted reasonably. In *Heidi Hautala v E.U. Council*, the Court of First Instance of the European Communities held that:

²⁹ Overbeck, n 4 above p. 270.

³⁰ Section 552(a)(6)(B).

³¹ *Explanatory Memorandum to the Recommendation Rec. (2002) 2* para 50.

³² *Report of the United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, n 7 above.

³³ *The Public's Right to Know*, n 7 above, principle 5.

³⁴ Section 552(a)(4)(B).

'...review by the Court of First Instance must be limited to verifying whether the procedural rules have been complied with, the contested decision is properly reasoned, and the facts have been accurately stated, and whether there has been a manifest error of assessment of the facts or a misuse of powers'.³⁵

The former approach is more attractive as it subjects decisions of public bodies to scrutiny by independent entities such as courts of law. The involvement of the courts in reviewing the merits of decisions by public bodies may ensure that due attention is given to resolving difficult questions and that a consistent approach to freedom of expression issues is promoted.

6.3 Accessing Official Information In Botswana

6.3.1 *Background to the Right of FoI in Botswana*

FoI is guaranteed under the constitution of Botswana.³⁶ The constitutional provision guaranteeing the freedom is modelled on Article 10 of the ECHR. In *Leander v Sweden*³⁷ the ECtHR held that the right of access to information basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him/her. The constitution of Botswana, like the ECHR, therefore guarantees a passive right to receive information. It does not impose positive obligations on the state to gather and disseminate information.³⁸ Despite the importance of the right of FoI in the maintenance of democracy, and a general trend in most modern democracies where access to information laws have been enacted giving the public an active right of access to official documents, Botswana has not yet enacted a law giving the public an active right to official documents.

³⁵ [1999] 3 CMLR 528 at 540 para 72.

³⁶ Section 12(1).

³⁷ (1987) 9 EHRR 433. See further, O'Neill, n 2 above at 419 for a discussion of Article 10 of the ECHR and the right of access to official documents.

³⁸ See chapter 4 at 4.4.1 for a detailed discussion of this point.

In 1997 a Presidential Task Group for a Long Term Vision for Botswana recommended to the government the introduction of a FoI Act that will protect the rights of citizens to have access to information, and to ensure the accountability of all public and private institutions.³⁹ The government responded the following year by inviting media stakeholders to submit proposals for such a law. The latter duly submitted their proposals in mid 2000. The government is now consulting with media stakeholders and the process is expected to culminate in the publication of a FoI Bill.⁴⁰

The constitutional guarantee aside, Botswana's past association with Britain has had an influence on the status and the government's attitude to the right to FoI in the country. In 1885 Botswana, then Bechuanaland became a British Protectorate. In 1966 when it was granted independence, the new state of Botswana inherited from Britain a legacy of a culture of secrecy in government and the common law. A hallmark of the traditional Westminster style of government was that all official information was secret unless the government chose to disclose it. Openness and transparency were alien concepts in British government administration.⁴¹ Civil servants justified the secrecy of their service by reference to the theory of ministerial responsibility, which requires information requested by representatives of the public to be forthcoming only from, or with the approval of, ministers responsible for Whitehall departments.⁴² In practice, however, ministerial involvement in departmental decisions occurs only at levels of high policy. Ministers neither control nor are answerable for thousands of decisions made by middle-ranking departmental officers. The secrecy ethos of British governments was enforced on civil servants by the criminal law through the Official Secrets Act and other supporting legislation.⁴³

³⁹ *Long Term Vision for Botswana: Towards Prosperity for All* (Government Printer, 1997) p. 35.

⁴⁰ Interview with Ms Segakweng Tsiane, Deputy Permanent Secretary in the Office of the President. (Gaborone, 01st November 2001).

⁴¹ S. Palmer, 'Freedom of Information: The New Proposals' in J. Beatson & Y. Cripps (eds.) *Freedom of Expression and Freedom of Information: Essays in Honour of Sir David Williams* (Oxford University Press, 2000) 249 at 250

⁴² G. Robertson & A. Nicol, *Media Law* (Sweet & Maxwell, 2002) p. 553.

⁴³ *Ibid.*

In Botswana civil servants are subject to the *National Security Act 1986*,⁴⁴ a law that governs national security and other activities prejudicial to the interests of the nation. This position is apparently sanctioned by the constitution, which provides that nothing contained or done under the authority of any law shall be held to be inconsistent or in contravention of both the rights to freedom of expression and FoI to the extent that the law in question makes provision that imposes restrictions upon public officers and employees of local government bodies. Such restrictions must however be shown to be reasonably justifiable in a democratic society.⁴⁵ In terms of the *General Orders Governing the Conditions of Service of the Public Service 1987 (General Orders 1987)*,⁴⁶ all civil servants upon appointment must sign a declaration acknowledging their obligations under the *National Security Act 1986*. An officer is however bound by the Act whether or not he/she has signed the declaration.⁴⁷ In terms of section 4(1), it is unlawful for any person who had obtained official information (in whatever form) as a result of his/her present or former position as a civil servant to reveal that information without authorisation. The prohibition is enforced by the possibility of up to thirty years imprisonment, applied indiscriminately to all government information, regardless of subject or triviality.⁴⁸

The ambit of the section is very wide, and as shall be demonstrated later, it renders all government information, save information on established policies, not subject to disclosure to the public. The subjection of civil servants to the *National Security Act 1986* has fostered a culture of secrecy in government making it difficult for the public and media representatives to access official documents.⁴⁹ The position is aggravated by the fact that there is no protection given to whistleblowers. Section 4(1)(b) provides that in the absence of authorisation, a person may escape liability for disclosure of official information by demonstrating that the disclosure was made to 'a person to whom it is in the interest of Botswana his duty to communicate it'. While

⁴⁴ Cap. [23:01].

⁴⁵ Section 12(2), constitution of Botswana.

⁴⁶ *General Orders 1987: General Orders Governing the Conditions of the Public Service* (Government Printer, 1987).

⁴⁷ General Order 206(1).

⁴⁸ Section 4(1), *National Security Act 1986*, is a catch-all provision modelled on the infamous section 2 of the UK *Official Secrets Act 1911*. See *Departmental Committee on Section 2 of the Official Secrets Act 1911*, Cmnd. 5104 (1972) para. 17.

⁴⁹ S.T. Sechele, 'The Role of the Press in Independent Botswana' in W.A. Edge & M.H. Lekorwe (eds.) *Botswana: Politics and Society* (J.L. Van Schaik Publishers, 1998) 412 at 417.

there is a view that the phrase ‘interest of Botswana’ is synonymous with the ‘public interest’ and that the clause provides an exemption from liability in exceptional cases of disclosures in the public interest, this view was rejected by the UK courts when interpreting a similar provision. It would appear that ‘duty’ means an official duty and not a moral or civic duty.⁵⁰ A civil servant who thus leaks information on government wrongdoing to the media faces the threat of prosecution under the *National Security Act 1986* or the danger of disciplinary sanction, which may result in a transfer, demotion or even dismissal.

The notion that the operations of government should be secret had a pervasive influence in the common law. Generally, information is not freely available unless the person who has it is either willing to make it available or is subject to some kind of enforceable duty to make it available. The common law imposed no duty to make information available except in particular situations where a right of access to information of a particular kind or documents arose as a result of a specific contractual, equitable or other legal relationship.⁵¹ The common law did not develop a concept of FoI, let alone a body of jurisprudence based on such a concept.⁵² Under the common law therefore, there was no general right of access to government information, which was in conformity with the culture of secrecy concerning the operations of government in Britain.

The denial by the common law of a general right to government information has hampered the development of the right to FoI in Botswana. Even though many people, especially media representatives, are aggrieved by the government’s culture of secrecy, no one has so far taken his/her grievance to the courts. The lack of precedent recognising an enforceable active right to information in the common law is arguably one of the reasons for the reluctance of aggrieved parties to take the matter before the courts.

⁵⁰ *R v Ponting* [1985] Crim. I.R. 318. For a discussion of the case see: R.M. Thomas, ‘The British Official Secrets Acts 1911 – 1939 and the Ponting Case’ (1986) *Criminal Law Review* 491 at 499.

⁵¹ A. Mason, ‘The Relationship Between Freedom of Expression and Freedom of Information’ in Beatson & Cripps (eds.), n 41 above 225 at 233.

⁵² *Ibid.*

Even though an active right to official documents is currently not recognised in Botswana, there are some measures in place aimed at enabling the public to have access to official information. A vast quantity of official information is released through various radio and television programmes carried over state owned media and publications issued by various ministries and departments.⁵³ The problem with disseminating official information in this manner is that it enables the public access to ‘authorised’ or ‘vetted’ information and does not give the public a right of access to the actual official documents. The consumer of information has a right to a free flow of information rather than information that is tainted at its source and selectively channelled to suit the interests of the information supplier. State owned media and official government publications are expected to toe the official line in their reportage, thus the information that they disseminate turns out in most cases to be designed to support a particular government position instead of presenting the full facts to the public.⁵⁴ Official information is also released to the public in the form of press releases from press officers attached to government departments. Disclosure of information by press officers is however tightly controlled under the *General Orders 1987* to ensure that it conforms to the country’s ethos of secrecy in government.

6.3.2 Disclosure of Official Information Under General Orders 1987

General Order 207 prohibits a public officer from revealing, directly or indirectly any information or knowledge that he/she has acquired or the contents of any documents to which he/she has had access in the course of his/her official duties. The prohibition extends to communications to the media on questions of government policy or business. The expression ‘communications to the media’ is given a wide meaning to include not only formal written communications or formal interviews, but also casual conversations with members of the media.⁵⁵

For purposes of making communications to the media, heads of government ministries and heads of non-ministerial departments are required to nominate press

⁵³ It would appear that the government is fully convinced that this is the most effective way of disseminating official information. This view is based on the writer’s interview with the Deputy Permanent Secretary in the Office of the President, n 40 above.

⁵⁴ The question of the editorial independence of state owned media is treated in chapter 3 at 3.2.

⁵⁵ General Order 207(5).

officers authorised generally or specifically to disclosure official information to the media. Press officers are only allowed to release information relating to government policy that has been established and made public.⁵⁶ General Order 207, which is supposed to give the media a right of access to official information, has, ironically, turned out to be more of an impediment to the exercise of the right. A comparison of the provisions of the General Order with the minimum standards on access to official information discussed above reveals the inadequacies of the former.

The minimum standards on access to official information support a principle of maximum disclosure of official documents. General Order 207 on the other hand incorporates a presumption of secrecy. It makes provision for the disclosure of a limited category of official information, i.e., information relating to established government policies that have been made public. Information from other government documents is not subject to disclosure under the General Order. The situation thus created is unsatisfactory as many decisions that vitally affect individuals and communities are taken by civil servants and are found in documents that do not necessarily deal with policy matters. It is in the public interest to allow the public to inspect information accumulated and acted upon by administrators. The General Order does not give the public a right of access to official documents, rather, to information contained in the documents. The position is objectionable as it presents the government with an opportunity to 'doctor' information to suit its own needs. It is desirable that access should be allowed to the actual official documents.

While the minimum standards on access to official information encourage public bodies to publish and disseminate key categories of information about themselves, General Order 207 does not impose any equivalent obligations on ministries and government departments. There is therefore no obligation on public bodies to make important information about themselves available to the general public, nor is there a duty to keep registers of information received and kept. Under these circumstances, the public cannot fully exercise the right to FoI, as it is almost impossible to know what information a public body holds.

⁵⁶ General Order 207(2) & (3).

The constitution of Botswana permits restrictions on the exercise of the right to FoI in the interests of: national defence; public safety; public order; public morality; public health; protection of reputations, rights and freedoms of other persons or private lives of persons concerned in legal proceedings; prevention of disclosure of information received in confidence; maintenance of the authority and independence of the courts and regulation of educational institutions in the interests of persons receiving instruction therein.⁵⁷ Further, as noted above, restrictions may be imposed on the right of freedom of expression of public officers, which has an effect on the exercise of the right to FoI by the general public. Although the restrictions under the constitution are broader than those permitted under international human rights instruments, the constitutional provision incorporates the harm and public interest tests. Restrictions to the right to FoI must be done under the authority of law and shown to be reasonably justifiable in a democratic society.⁵⁸

General Order 207 imposes blanket secrecy on all government information, except information on policies that have been established and made public. The General Order does not embrace the harm and public interest tests in the disclosure of information. Access to information, especially official documents, is now regarded as essential in modern democracies as it encourages informed participation by the public in matters of common interest. A presumption of secrecy over all government information or documents can therefore not be justifiable in a democracy, a condition that the constitution of Botswana imposes on restrictions to the exercise of the rights of freedom of expression and FoI. In the light of this observation, the constitutionality of General Order 207, in as far as it imposes a general presumption of secrecy over all government information, is in serious doubt.

An access to information regime must provide for requests to be processed rapidly and fairly and further provide for an appeals system where access is refused. General Order 207 does not provide for time limits within which press officers should respond to requests, nor does it provide for appeals against refusals to disclose information. The absence of time limits is compounded by bureaucratic rules and arrangements.

⁵⁷ Section 12(2)(a) & (b).

⁵⁸ See chapter 4 at 4.5.1 for a detailed discussion of section 12(2) of the constitution and how it incorporates the harm and public interest tests.

The style of administration of the civil service is hierarchical and strangled with red tape, with long reporting lines and top-heavy management. Even though each government ministry or department is supposed to have a press officer to handle requests for information, the officers have not been empowered to release information without authorisation from their heads of departments. There have been instances where press officers have incurred the wrath of their superiors for releasing official information without first seeking clearance with them.⁵⁹ In most cases, those who submit requests for information are therefore told to wait while press officers consult their superiors, resulting in unnecessary delays in the disclosure of information.

It has been observed that a culture of secrecy in government seems to foster a sense of self-importance in the civil service.⁶⁰ In the opinion of the editor of *Mmegi*, the observation is true in the case of Botswana. He notes that:

'...it is common to come across arrogant and rude senior government officials who will either refuse to answer legitimate questions from the private media or ask for a list of questions to be sent and then sit on them until the paper has gone to press or not answer them at all'.⁶¹

One is inclined to concur with the editor's observation given the acrimonious relationship that exists between the private media and government officials arising from the media's critical style of reportage of government activities.⁶² Government officials are more likely to be difficult and arrogant when dealing with representatives of the media under the prevailing circumstances. The attitude of government officials to the media is aided by the fact that they are not bound to give reasons for their refusal to disclose information. The lack of transparency in the process means decisions of government officials are not subject to public scrutiny and comment. Since government officials do not have to account to the public for their actions, this has resulted in inefficiency in the administration of the access to information regime under General Order 207. The plight of information seekers is further worsened by the

⁵⁹ Information supplied to the writer by some press officers who wished to remain anonymous for fear of reprisals from their supervisors.

⁶⁰ Robertson & Nicol, n 42 above p. 554.

⁶¹ S.T. Sechele, *Deepening Democracy or Creeping Authoritarian Rule? Media/Government Relations in Botswana in Historical Perspective* (Unpublished Master of Public Administration dissertation, University of Botswana, June 2000) p. 120.

⁶² See chapter 3 at 3.2.3.

absence of an appeals process against refusals to disclose information. The status quo allows government officials to unjustifiably withhold official information from the public especially representatives of the media with impunity.

The above discussion of regulations and practices that have been adopted by the state of Botswana in order to enable the public and media representatives to have access to official information shows that the measures in place are hopelessly inadequate to ensure the full enjoyment of the right to FoI. In fact, the measures adopted by the state do not come anywhere near the minimum standards on which any law or practice on access to information should be premised. The government's willingness to consider enacting a FoI Act should therefore be welcomed. It is also commendable that the government has seen it fit to involve media stakeholders in the formulation of the law. At the moment we can only wait for the publication of the Bill and hope that the proposed law will be premised on the minimum standards on access to information outlined above.

While a FoI Act based on these standards will no doubt improve the enjoyment of the right of FoI, its implementation will be difficult under the prevailing culture of secrecy in government. There is an urgent need to do away with bureaucratic bottlenecks that impede the free flow of information without having to wait for the enactment of the proposed law. The government should immediately discard its culture of secrecy and become more open and transparent in the conduct of its business. Relaxing the application of the *National Security Act 1986* to public officers, and introducing some measure of protection for public officers who leak information to the media on government wrongdoing, are necessary steps towards openness and transparency. Government ministries and departments should be encouraged to engage in active disclosure, in the normal course of their activities, of information and documents containing information relating to: key operational information; types of information that the public body holds; information on how to submit requests for information and the content of decisions or policies affecting the public. Such preparatory steps would ensure that when the proposed FoI Act is eventually passed, it does not simply become a potentially confrontational arrangement under which nothing is released unless someone has specifically asked for it.

6.4 Accessing Official Information in South Africa

6.4.1 *Background to the Right of FoI in South Africa*

The pre-democratic South Africa had inherited from Britain the Westminster system of parliamentary sovereignty and responsible government that, as has been observed, tended to be secretive.⁶³ The situation got worse after the minority Afrikaner ruling party adopted a policy of racial segregation, otherwise known as apartheid. Successive apartheid governments passed a battery of national security laws designed to shroud the conduct of the executive and administrative branches of government in secrecy in order to conceal atrocities committed by its agents on opponents of the system.⁶⁴ The apartheid government was thus characterised by a culture of secrecy, disinformation and restrictions on media freedom.⁶⁵ Consequently, opponents of the apartheid state came to see unrestricted access to official information as a cornerstone of transparent, participatory and accountable governance.

The preamble to the 1996 constitution declares, *inter alia*, that it sets a foundation for a democratic and open society. One way in which the constitution seeks to ensure an open and democratic society is by guaranteeing the public a right to any information held by the state.⁶⁶ The importance of this right was highlighted by the High Court in *Phato v Attorney General, Eastern Cape*.⁶⁷ The court held that the constitutional right of access to official information excluded the perpetuation of the old apartheid system of administration in which it was possible for government to escape liability by

⁶³ G.E. Devenish, *A Commentary on the South African Bill of Rights* (Butterworths, 1999) p. 437.

⁶⁴ Such laws include: *Defence Act 44 of 1957; Armaments Development and Protection Act 57 of 1968; National Supplies Procurement Act 89 of 1970; Petroleum Products Act 120 of 1977; National Key Points Act 102 of 1980 and Protection of Information Act 84 of 1982.*

⁶⁵ *Communications 2000: A Vision for Government Communications in South Africa (COMTASK)* (Report of the Task Group on Government Communications, 1996) para. 2.1, available at: [<http://www.gcis.gov.za/ourdept/comtask1.htm>].

⁶⁶ Section 32(1) provides:

‘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.’

⁶⁷ 1995 1 SA 799.

refusing to disclose information, and that it also promotes public confidence in the administration of public affairs.⁶⁸

The constitution protects an ‘unqualified’ right of access to information held by the state,⁶⁹ which can be limited only in terms of law of general application to the extent that the limitation is reasonable in an open and democratic society.⁷⁰ Parliament was required to enact legislation giving effect to the constitutional right and to provide for reasonable measures to alleviate the administrative and financial burden of the exercise of the right on the state. In February 2000 the *Promotion of Access to Information Act*⁷¹ (hereinafter referred to as *AIA*) was enacted and came into operation on 9th March 2001. Its objects, among others, are to:⁷²

- i. Give effect to the constitutional right of access to any information held by the state;
- ii. Subject the exercise of the right to justifiable limitations aimed at the reasonable protection of privacy, commercial confidentiality and effective, efficient and good administration;
- iii. Establish voluntary and mandatory mechanisms or procedures to give effect to the right of FoI swiftly, inexpensively and effortlessly as reasonably possible; and
- iv. Promote transparency, accountability and effective governance of all public bodies.

A question arises from the enactment of the *AIA*. What is the status of the right of access in section 32(1) of the constitution? Does the Act replace the constitutional

⁶⁸ Ibid., at 815. (The court was then making reference to section 23 of the South African Interim Constitution of 1993, which provided that: ‘Every person shall have the right of access to all information held by the state or any of its organs at any level of government in so far as such information is required for the exercise or protection of any of his or her rights.’ The decision is also relevant to section 32(1), which is wider in application than section 23 of the Interim Constitution. While the latter protected a ‘need to know’ in that information must be required for the exercise or protection of a right, the former protects a ‘right to know’, i.e., reasons for requiring access to the information are irrelevant).

⁶⁹ The right is unqualified in the sense that unlike access to information held by a private person, where the requester need to prove that the information is required for an exercise or protection of rights, there is no equivalent qualification to requests for official information.

⁷⁰ Limitations to fundamental rights guaranteed under the Bill of Rights must conform to the limitation clause in section 36 of the constitution. See chapter 4 at 4.5.2.

⁷¹ Act no. 2 of 2000, available at: [<http://www.gov.za/acts/00index.html>].

⁷² Section 9, *AIA*.

right or does the constitutional right still stand and can be directly relied on? The issue has not yet come before the courts, but commentators on the situation appear to be in agreement that the *AIA* merely provides an elaborated and detailed expression of the access right and remedies to vindicate it, but does not replace the constitutional right.⁷³ The argument is persuasive for if the Act was to be seen as replacing the constitutional right, one would reach the absurd situation where a right entrenched in the Bill of Rights could be simply amended by ordinary legislation. There still remains a freestanding constitutional right of access to information even after the commencement of the *AIA*. In practice it appears that direct reliance on the constitutional provision will only be allowed in exceptional cases due to the doctrine of a voidance, which dictates that remedies should be found in the common law or legislation before resorting to constitutional remedies.⁷⁴

The constitutional provision can arguably be directly relied on in three circumstances.⁷⁵ First, it could be relied on to challenge the *AIA* itself. For example, the Act exempts cabinet documents from its ambit.⁷⁶ The blanket exemption of cabinet documents may be challenged as contrary to section 32(1) of the constitution. Secondly, the constitutional right may be relied on to challenge any legislation passed subsequent to the *AIA* that infringes on the right of access to state information. And thirdly, to the extent that the *AIA*'s scope is narrower than the constitutional right (e.g. it does not cover cabinet documents), the latter can be directly relied on to seek access to information that would not be available under the former.

6.4.2 Accessing Official Information Under the *AIA*

The *AIA* overrides any other legislation dealing with disclosure of official information. The Act applies to the exclusion of any provision of other legislation that prohibits or restricts the disclosure of a record of a public body or that is materially

⁷³ J. de Waal *et al*, *The Bill of Rights Handbook* (Juta & Co Ltd, 2001) p. 530, and C.V. Burgess, 'Accessing Official Information and Access to Private Information: A South African Overview' paper presented at the Fourth Southern African Media Lawyers' Conference, held in Harare, Zimbabwe, 30th November – 1st December 2001, at 2.

⁷⁴ In *S v Dlamini* 1999 4 SA 623 at para. 27, the Constitutional Court held that: '*as a matter of judicial policy, constitutional issues are generally to be considered only if and when necessary to do so*'. Further, see de Waal, n 72 above, chapter 3, on the doctrine of avoidance.

⁷⁵ *Ibid.*, p. 531.

⁷⁶ Section 12(a), *AIA*.

inconsistent with the objects or specific provisions of the Act.⁷⁷ Thus national security legislation such as the *Protection of Information Act 1982*, which prohibits disclosure of a wide-range of security related information, no longer applies to requests for information made under the *AIA*. On the other hand, the *AIA* and other legislative measures providing for access to official information are to be read as supplementary to each other.⁷⁸ Given that the *AIA* is the main law giving effect to the right of access to official information, I examine below certain provisions of the Act to determine to what extent it compares with the minimum standards on which an access to information law should be premised.

a. Scope of Application of the *AIA*

The *AIA* gives effect to the constitutional right of access to information held by the state by guaranteeing the public a right to request access to records of public bodies. Public bodies have a concomitant duty to allow access to requested records unless a record is exempted from disclosure under the provisions of the Act.⁷⁹ The public has a right of access to ‘records’ as opposed to ‘information’ held by public bodies. The concept of a ‘record’ is preferable to that of ‘information’ as access to actual records containing the information required reduces the temptation by government officials to doctor information to suit their own needs. It is an offence under the Act for a person, with intent to deny a right of access to a record, to destroy, alter, damage, conceal or falsify a record.⁸⁰ The *AIA* defines the term ‘record’ as ‘any recorded information, regardless of form or medium’ in which it is stored.⁸¹ The definition is broad and it is significant, especially in the electronic age that the definition is based on the concept of ‘recorded information’ rather than that of a written document.

The *AIA* applies to records of public bodies regardless of when the record came into existence.⁸² To qualify as a ‘record of a public body’, a record must either be in the

⁷⁷ Section 5.

⁷⁸ Section 6(a). An example of a provision that is supplementary to the *AIA* is section 32 of the *National Environment Management Act 107 of 1998*, which gives the public a right of access to information held by the state and its organs relating to the environment.

⁷⁹ Section 11(1), *AIA*.

⁸⁰ Section 91.

⁸¹ Section 1.

⁸² Section 3(a).

possession or under the control of the body at the time of the request. In other jurisdictions with FoI legislation such as the US, the test for determining whether a record is an 'agency record' is restrictive. The US Supreme Court has held that the determination of the issue involves a two-pronged test: First, a federal government agency must either have created or obtained the record and have possession of it at the time of the request. Secondly, the agency must be in control of the requested record at the time of the request in the sense that the record must have come into the agency's possession in the conduct of its official duties.⁸³ The *AIA* opts for a wider application in that possession or control will suffice.⁸⁴

The Act also defines a 'public body' broadly by focusing on both formal designations and type of service provided by an entity. A public body is thus defined as either 'any department of state or administration in the national, provincial or municipal sphere of government', or 'an entity exercising a power or performing a duty or public function in terms of the constitution or any legislation'.⁸⁵ It is instructive to note that this definition is similar to the definition of an 'organ of state' in the constitution.⁸⁶ The jurisprudence of the courts concerning the constitutional provision should therefore be of assistance in interpreting the definition of a public body in the *AIA*. Courts distinguish between two types of organs of state: the public service and institutions outside the public service that are controlled by the state. The latter includes those entities where the majority of the members of the controlling board are appointed by the state or where the functions of a body and their exercise is prescribed by the state to such an extent that it is effectively in control.⁸⁷ Parastatals, partially privatised parastatals and non-governmental institutions performing public functions in terms of the constitution or legislation have been held to be organs of state under this test.⁸⁸ These institutions are arguably covered by the *AIA*, in addition to entities in any branch of the state at any of its three levels, legislature, judiciary and executive.

⁸³ *United States Department of Justice v Tax Analysts* 492 US 136 (1989).

⁸⁴ See I. Currie & J. Klaaren, *The Promotion of Access to Information Act Commentary* (Siber Ink, 2002) pp. 43 – 42, para. 4.4.

⁸⁵ Section 1, *AIA*.

⁸⁶ Cf. Section 239 of the constitution of South Africa 1996.

⁸⁷ *Directory Advertising Costs Cutters CC v Minister for Posts, Telecommunications and Broadcasting* 1996 3 SA 800 at 810.

⁸⁸ For example see: *Goodman Bros (Pty) Ltd v Transnet Ltd* 1998 4 SA 989; *Inkatha Freedom Party v Truth and Reconciliation Commission* 2000 3 SA 119 and *Lebowa Mineral Trust v Lebowa Granite (Pty) Ltd* 2002 3 SA 30.

Despite the generosity of the scope of its application, the *AIA* does not apply to certain public bodies. It does not apply to records of cabinet and its committees.⁸⁹ It would appear that the exemption of cabinet records is one of the surviving legacies from the Westminster tradition of government, based on the doctrine of ministerial collective responsibility.⁹⁰ The blanket exemption of cabinet records from the application of the *AIA* is clearly a limitation of the constitutional right of access to information and arguably places its constitutionality in doubt. However, the exemption of cabinet records from the scope of the *AIA* does not exclude them from the direct application of the constitutional provision.

Records of the judicial functions of a court or a special tribunal are also excluded from the operation of the *AIA*.⁹¹ The exemption is designed to ensure that the rules and procedures developed to facilitate the efficient functioning of the courts, the fairness of litigation and the finality of judicial decisions are not affected by the access to information procedures of the *AIA*.⁹²

b. Publication Obligations

The *AIA* establishes an almost entirely request-based system of access to records held by public bodies. There are no mandatory provisions in the Act requiring proactive disclosure of documents of significant public interest. However, every public body is required to publish a manual (to be updated at intervals of not more than one year) that provides, *inter alia*.⁹³

- i. Sufficient information to facilitate a request for access to records of the body by giving a description of the subjects on which the body holds and the categories of records held on each subject; and

⁸⁹ Section 12(a), *AIA*.

⁹⁰ The UK FoI Act does not apply to cabinet. (See Schedule 1, which specifies public bodies subject to the Act.) And of the leading Westminster forms of government, Australia and Canada also exempt cabinet records from the jurisdiction of their access to information legislation. See sections 34 and 26 of their access to information legislation, respectively.

⁹¹ Section 12(b), *AIA*.

⁹² Currie & Klaaren, n 84 above p. 57 para. 418.

⁹³ Section 14(1)(d) & (e), *AIA*.

- ii. Categories of records of the public body which are available without a person having to request access in terms of the Act.

The first requirement is very important, as it requires every public body to create a form of index of records it holds. Indexes make the exercise of the right of access to information easier as they give the public an idea of what records a particular body holds. The absence of mandatory provisions in the Act requiring disclosure of documents of significant public interest is a serious loophole that may lead to a situation where records of public bodies are not released to the public unless specifically requested. Such a scenario will be highly regrettable, as it will negate the very essence of an access to information legislation - the promotion of openness and transparency in government.

Government departments are encouraged under a separate system to make their non-secret documents available to the public via government technology network as well as public libraries and other information centres throughout the country.⁹⁴ The second requirement that manuals should provide a list of records that have already been made available to the public presupposes that government departments will publish the majority of their documents under the GCIS arrangement.

c. Exemptions

The *AIA* gives a list of twelve grounds for refusal of access to records of public bodies. In general, these grounds seek to protect interests relating to: privacy, individual safety, public safety, national security, commercial and other confidentiality, law enforcement and integrity of government decision-making

⁹⁴ Following a recommendation of the COMTASK, the government established a Government Communications and Information System (GCIS) in May 1998. The main aim of the GCIS is to take responsibility for communication between the government and the public. In order to foster a more positive communication environment, GCIS encourages government departments to make available to the public their non-classified documents through its technology network. It maintains a website at: [<http://www.gcis.gov.za>].

processes.⁹⁵ Some of these exemptions are mandatory while others are discretionary. The Act uses the terms ‘must refuse’ and ‘may refuse’ to indicate a compulsory and a discretionary ground, respectively.⁹⁶ Generally, where rights or interests of third parties are implicated, the Act grants a mandatory exemption to disclosure, and where rights or interests of a public body that holds a record, or the public interest are implicated refusal to disclose is usually discretionary.⁹⁷

The *AIA* provides a mandatory public interest override with respect to all the grounds of refusal that may be used by a public body except one – the one relating to certain records of the revenue service.⁹⁸ For the override to apply, two conditions must be satisfied.⁹⁹ First, disclosure of a record should reveal evidence of substantial contravention of, or failure to comply with the law; or an imminent and serious public safety or environmental risk.¹⁰⁰ And secondly, the public interest in the disclosure of a record should clearly outweigh the harm contemplated in the provision in question. A number of commentators have suggested that where the first condition is satisfied, the second would necessarily also be satisfied.¹⁰¹ However, the wording of section 46 contemplates a two-part test, which suggests that the public interest in the disclosure of a record that reveals evidence of an imminent and serious public safety or environmental risk or contravention of the law may not clearly outweigh the harm contemplated. In applying the override, public bodies are therefore required to strike a balance between the harm that may result from disclosure of a record and the public interest in making a disclosure.

⁹⁵ The specific grounds of refusal in brief relate to: Privacy of third persons (section 34); certain records of the South African Revenue Service (section 35); commercial information of third party (section 36); confidential information of third party (section 37); safety of individuals and protection of property (section 38); bail proceedings, law enforcement and legal proceedings (section 39); legal privilege (section 40) defence, security and international relations (section 41); economic interests and financial welfare of the Republic and commercial activities of public bodies (section 42); research information (section 43); operations of public bodies (section 44) and frivolous or vexatious requests or requests that will require substantial and unreasonable diversion of resources (section 45).

⁹⁶ Section 33 of the *AIA* provides that the mandatory grounds of refusal are those in sections 34; 35; 36; 37; 38; 39; 40 and 43.

⁹⁷ Currie & Klareen, n 84 above p. 106 para. 7.7.

⁹⁸ Section 46, *AIA*.

⁹⁹ *Ibid.*

¹⁰⁰ Section 1 defines ‘public safety or environmental risk’ to mean ‘harm or risk to the environment or the public (including individuals in their workplace)’ associated with a publicly available product or service, a substance released into the environment or intended for human or animal consumption, a means of public transport, or a manufacturing process or substance.

¹⁰¹ Currie & Klaaren, n 84 above p. 109 para. 7.13 and de Waal *et al*, n 73 above p. 545.

The override applies differently to mandatory and discretionary grounds of refusal. Where it affects a discretionary ground, in essence, it denies public bodies discretion to refuse disclosure of a record. In the case of mandatory grounds, the override authorises disclosure, notwithstanding the fact that the ground prohibits disclosure. The override is therefore so properly described in the case of mandatory grounds.¹⁰²

Exemptions to disclosure of records of public bodies are limitations to the constitutional right of access to information. In terms of the general limitation clause on rights guaranteed under the Bill of Rights,¹⁰³ limitations to rights must be read as narrowly as possible, consistent with their purpose of protecting specific rights.¹⁰⁴ The burden of justifying a limitation of a fundamental right rests with the party seeking to limit the right.¹⁰⁵ Public bodies therefore bear the burden of proving that a requested record falls within one of the exemptions listed in the Act, and must also justify a refusal to disclose.

The *AIA* adopts the three-part test in order to ensure that exemptions to disclosure of records of public bodies are clear and narrowly applied. First, as the *AIA* prevails over any other legislation relating to disclosure of official information, the Act provides a complete list of legitimate aims that may justify non-disclosure of a record. No other ground will be valid for refusing access to a record covered by the Act. The list of exceptions to disclosure in the Act, with the exception of certain records of the revenue service and frivolous and vexatious requests, correspond with the list of social interests identified in international human rights instruments that must be reconciled with the exercise of the right of FoI. One may therefore observe that the scope of the exceptions in the *AIA* are reasonable in the light of the minimum standards that such a law must be based.

Secondly, it has been argued that a narrow interpretation of exemptions to disclosure of official information demands that information should not simply fall within the scope of a legitimate aim listed in the law, but that a public body must also show that the disclosure would cause substantial harm to that legitimate aim. The *AIA* takes this

¹⁰² *Ibid.*, p. 109 para. 7.11.

¹⁰³ Section 36, constitution of the Republic of South Africa 1996.

¹⁰⁴ See chapter 4 at 4.5.2.

¹⁰⁵ *Ferreira v Levin NO* 1996 1 SA 984.

approach with respect to the majority of its exemptions. Most exemptions have a two-part structure. First, the content of the information in a requested record must fall within a specified category or class for the exemption to be applicable. Secondly, there must be a connection between disclosure of the information and a particular adverse consequence to the particular rights or interests that are protected by the exemption.¹⁰⁶ The need to demonstrate a basis for concluding that the rights or interests protected by the exemption will be adversely affected to the degree specified is a necessary condition for invoking that ground.

The *AIA* uses two distinct phrases, 'likely' or 'reasonably expected', to describe the degree of connection that must exist between the content of a record and the harmful consequence of release that the exemption aims to prevent. Courts in the country have not yet adjudicated upon the meaning of these two phrases. The Australian and Canadian access to information legislation uses the phrase 'reasonably expected', and has been subject to judicial interpretation by their respective courts. The phrase in both countries has been held to mean that for an exemption to apply, a public body must prove that there are real and substantial grounds for the expectation that harm will occur.¹⁰⁷ Thus grounds that are merely speculative, imaginable or theoretically possible will not be enough to justify an exemption. This strict approach in establishing a connection between the content of a record and the harmful consequence that an exemption aims to prevent no doubt narrows the scope of application of exemptions to disclosure. Courts in South Africa are more likely to adopt a similar approach in interpreting the phrase 'reasonably expected' in the *AIA*.

The question that remains is what degree of connection does the 'likely' test require? It has been argued that the test is more stringent than the 'reasonably expected' test, i.e. a lesser degree of probability is required for the latter than for the former test. In backing the argument, an observation is made that the phrase 'likely' is used in relation to the lesser important rights or interests that the exemptions seek to protect.¹⁰⁸ The argument is persuasive as it is consistent with spirit of the general limitation clause that exemptions to rights be interpreted narrowly. It is conceivable

¹⁰⁶ See Currie & Klaaren, n 84 above p. 99 para. 7.2.

¹⁰⁷ See *Canada Packers Inc v Canada (Minister of Agriculture)* 53 DLR (4th) 246 at 255, and *Searle Australia Pty Ltd v Public Interest Advocacy Centre & another* (1992) 108 ALR 163 at 175 – 176.

¹⁰⁸ Currie & Klaaren, n 84 above p. 102 para. 7.3.

that the legislature deliberately used the two sets of standards to demonstrate the difference in the importance of the rights and interests involved.¹⁰⁹

In the case of those exemptions where a public body only need to prove that a record falls within the scope of a legitimate aim listed in the law, the *AIA* tries to limit the scope of application of the exemptions by laying down objective jurisdictional facts, i.e., a state of affairs that must exist in an objective sense before a power can be validly exercised. The Act does so by avoiding the use of subjective terminology such as ‘in the opinion of’ or ‘is satisfied that’.¹¹⁰ This approach ensures that the categorisation of records is subject to review proceedings.¹¹¹

And thirdly, regarding the three-part test, the *AIA* incorporates a public interest override in the disclosure of information. As discussed above, the override will allow disclosure of information even where such disclosure will cause substantial harm, if the benefits of disclosure outweigh the harm.

Further, in ensuring that any derogation from the right of FoI remains within the limits of what is appropriate and necessary in achieving its aims, the *AIA* obligates public bodies to sever from a record any information that is subject to refusal and to disclose the remainder of the information.¹¹² The obligation to sever protected information from disclosable information arises where the latter may ‘reasonably’ be severed from the former. While courts in the country are still to expound what the test entails, jurisprudence from other jurisdictions with FoI laws which use a similar phrase to the *AIA*’s suggest that severance will be reasonably possible where a document with deletions remains meaningful and does not distort the original text.¹¹³

¹⁰⁹ The more stringent ‘likely’ test applies to exemptions aimed at protecting the following rights and interests: commercial information other than trade secrets (section 36(1)(b); information likely to prejudice or impair safety of property (section 38(b); economic interests and financial welfare of the state and commercial activities of public bodies (section 42(1) and research information (section 43). And the more lenient ‘reasonably expected’ test is used in relation to the more important rights and interests such as privacy, security of individuals, national security and integrity of government decision-making processes.

¹¹⁰ Currie & Klaaren, n 84 above p. 100 para 7.2.

¹¹¹ By contrast, subjective jurisdictional facts entrust to the repository of the power the sole and exclusive function of determining whether in its opinion the prerequisite facts exists. See *South African Defence and Aid Fund v Minister of Justice* 1967 1 SA 31.

¹¹² Section 28(1), *AIA*.

¹¹³ *Ottawa Football Club v Canada (Minister of Fitness and Amateur Sports)* [1982] 2 FC 480 (TD).

In addition, severance will not be reasonable if the disclosure of what remains provides clues to the contents of the deleted portions.¹¹⁴

d. Requests, Access and Appeal Procedures

The officials entrusted with the duties imposed on public bodies by the *AIA* to ensure access by the public to official information are information officers. These are the most senior employees of public bodies such as director-generals in government ministries and chief executive officers of parastatals.¹¹⁵ Information officers are allowed to designate and delegate their duties to deputy information officers, whose number in each public body will be such as is necessary to render the body as accessible as reasonably possible for those requesting its records.¹¹⁶ The *AIA*, like FoI laws in other countries does not expressly cite the right of the media to access records of public bodies. Media representatives therefore share the right of access with the general public.¹¹⁷

A request for access to a record of a public body must be made in the prescribed form to the information officer of the body.¹¹⁸ The form requires a requester to provide, among other things, sufficient particulars to identify the record, particulars of the requester and the manner of access preferred.¹¹⁹ Information officers are under a general duty to assist requesters to comply with the requirements of the Act in lodging requests.¹²⁰ The *AIA* does not require a requester to justify his/her request for access to a record of a public body.¹²¹

¹¹⁴ *Canada (Information Commissioner) v Canada (Solicitor General)* [1988] 3 FC 557 (TD).

¹¹⁵ Section 1, *AIA*. (The decision that implementation of the Act should be the responsibility of such senior officials was intended to ensure that the Act would be taken seriously and treated as a mainstream responsibility of public bodies. See Currie & Klaaren n 84 above p. 73 para. 6.1.)

¹¹⁶ Section 17, *AIA*. (In practice, heads of public bodies tend to appoint and delegate their duties and powers to deputy information officers, as the nature of their jobs does not allow them enough time to attend to requests for information by the public.)

¹¹⁷ Media representatives are however required to submit proof of the capacity in which they are making a request, when representing their media organisations. Section 18(2)(f), *AIA*.

¹¹⁸ Section 18(1).

¹¹⁹ Section 18(2). See Form A, *Regulations Relating to the Promotion of Access to Information No. R. 223* (Government Gazette No. 22125, 9th March 2001) available at: [<http://www.gov.za/gazette/regulations/2001/22125/pdf>].

¹²⁰ Section 19(1), *AIA*.

¹²¹ Section 11(3).

Information officers are required to respond to requests as soon as reasonably possible, but within 30 days after receipt of a request.¹²² The Act does not provide for an expedited access procedure especially by media representatives to information relating to news items of pressing public importance. The omission has raised fears among media practitioners that the time limits set in the Act may be used to prolong the supply of information.¹²³ Where an information officer decides to allow access to a requested record, the forms of access available are: (i) for written or printed records – a copy of the record or an opportunity to inspect the record, and (ii) for records stored in other forms – an opportunity to view, record or hear the record or a copy of the record in electronic form.¹²⁴ Where a requester has indicated a particular form of preferred access in his/her request, access must be granted in that form unless to do so would either interfere unreasonably with the administration of the public body, or would be detrimental to the preservation of the record or will amount to an infringement of the copyright of someone other than the public body.¹²⁵ The Act provides for payment of two types of access fees.¹²⁶ There is a standard request fee, and an access fee intended to compensate a body for the costs of making a copy of a record and the time spent searching for, and preparing a record.¹²⁷

Where a body refuses a request for access to a record, it must give notice of its decision to the requester within 30 days from the date of receipt of the request. Such notice must provide adequate reasons for the refusal, including the provision in the Act relied upon, and must also advise the requester of his/her right of appeal.¹²⁸ What will amount to adequate reasons will depend on the nature of the exemption relied upon. Some exemptions offer a categorical basis for refusal of access, therefore, to justify refusal on such an exemption, it will be enough for a public body to state that

¹²² Section 25(1). In order to avoid over burdening public bodies, the Act provided for extended periods for dealing with requests during the first two years of the operation of the Act. From March 2001 to March 2002, information officers had 90 days to respond to a request and from March 2002 to March 2003, they had 60 days. Thereafter the 30 days period came into operation. (Section 87(1), *AIA*).

¹²³ R. Louw, 'Goals and Expectations of the Media Lawyers' Conference' a paper presented at the Fourth Southern Africa Media Lawyers' Conference, held in Harare, Zimbabwe, 30th November – 1st December 2001.

¹²⁴ Section 29(2), *AIA*.

¹²⁵ Section 29(7).

¹²⁶ Section 22(2).

¹²⁷ The request fee is R35.00 and access fees range from R0.40 for a copy of an A-4 size page to R60.00 for copies of visual images. See Regulation 3(1), *Regulations Relating to the Promotion of Access to Information*, n 119 above.

¹²⁸ Section 25(3), *AIA*.

the record requested falls within a particular category that is protected. There is no need to prove that harm will flow from disclosure of the record. On the other hand, some exemptions have a two-part structure. First, the content of a record must fall within a specified exemption, and secondly, there must be a connection between disclosure of the record and a particular adverse consequence to the rights or interests protected by the exemption. In this case, reasons will have to be given to justify the categorisation of the record and the basis for concluding that disclosure will adversely affect the rights or interests protected to the degree specified by the Act.

The *AIA* provides two dispute resolution mechanisms for refusals of access to records of public bodies. There is a limited system of internal appeals to a higher authority within certain public bodies and a system of judicial review. Internal appeals are available only where the request was for information held by a 'department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government'.¹²⁹ An internal appeal is made from a decision of an information officer to a higher authority within or responsible for the same public body. In the case of government departments, decisions of information officers can be appealed to ministers responsible for those departments or a person designated by the minister to act as a higher authority within a public body under his/her control.¹³⁰ The internal appeal procedure is established to challenge the merits of decisions of information officers. A person to whom an internal appeal is made therefore steps into the shoes of the original decision-maker and decides the matter *de novo*.¹³¹

A requester who has been unsuccessful in an internal appeal, or is aggrieved by a decision of an information officer of a public body that does not have an internal appeal procedure, can make an application to a court for appropriate relief.¹³² An application can only be made if an aggrieved party has exhausted available internal appeal procedures.¹³³ The court hearing an application under the Act may grant, *inter alia*, an order confirming, amending or setting aside the decision that is the subject of

¹²⁹ Section 74(1).

¹³⁰ Section 1.

¹³¹ See Currie & Klaaren, n 84 above p. 203 para. 9.9.

¹³² Section 78(2), *AIA*. (The courts that have jurisdiction to entertain applications under the Act are the Constitutional Court, High Court and some Magistrates Court designated by the minister responsible for the administration of justice. (Section 1, *AIA*.)

¹³³ Section 78(1), *AIA*.

the application.¹³⁴ It is not clear from the *AIA* what powers a court will be exercising when entertaining an application under the Act. Will the court be exercising judicial review or an appellate jurisdiction? It is also not clear whether a court hearing an application under the Act has power to consider the matter *de novo* or if it is confined to the existing record. If the court will be exercising its judicial review powers when hearing an application under the *AIA*, it will be concerned only with the legality of the decision. Judicial review in South Africa now has a constitutional basis.¹³⁵ The common law principles that previously provided grounds for judicial review of administrative action have been subsumed under the constitution.¹³⁶ In terms of the constitution, a challenge to the validity of administrative action must be based on an allegation that one or more of the constitutional rights to lawful, procedurally fair and reasonable administrative action has been violated. In general, these principles require that: administrative decisions must be duly authorised by law; there must be no errors of fact or law contributing to the making of the decision; and the decision-maker must not abuse his or her discretion by acting for an ulterior purpose, in bad faith or by failing to consider the matter properly.¹³⁷ On the other hand, if the court will be exercising an appellate jurisdiction in an application under the *AIA*, it will be looking at the merits of the decision in question. Judicial review is therefore narrower than an appeal.

In the light of the uncertainty surrounding the role that a court will be playing when hearing an application under the *AIA*, some commentators argue that the court will be exercising a form of statutory judicial review. The argument is based on a convention in the country that courts only have appellate jurisdiction when it has specifically

¹³⁴ Section 82(a).

¹³⁵ Section 33(1), constitution of the Republic of South Africa 1996 provides: 'Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.' Parliament has enacted a law, *The Promotion of Administrative Justice Act No. 3 of 2000* to give effect to the constitutional right. This Act however does not apply to decisions taken under the *AIA*, which means that decisions taken under the *AIA* are governed directly by the constitutional provision.

¹³⁶ See *Pharmaceutical Manufacturers Association of SA: In re ex parte President of the Republic of South Africa* 2000 2 SA 674. (The leading authority on the ambit of the common law power of judicial review is the case of: *Johannesburg Consolidated Investment Company v Johannesburg Town Council* 1903 TS 111, where it was held that: 'Whenever a public body has a duty imposed on it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of the duty, this court may be asked to review the proceedings complained of and set aside or correct them'.)

¹³⁷ See de Waal *et al*, n 73 above, chapter 29.

been granted to them.¹³⁸ Assuming this argument to be correct, in an application under the *AIA*, a court will only be concerned with the legality of a decision of a public body and will give deference to the body's findings of fact. In such an application, the court may examine any record of a public body, and no record may be held from the court on any grounds.¹³⁹ However the court may not disclose to any person other than the public body concerned in the proceedings any record of the body which on request, may or must be refused in terms of the Act.¹⁴⁰

Judged against the minimum standards on which an access to information law should be premised, the *AIA* provides a fairly reasonable legal environment for the exercise of the right of access to information held by the state. The most outstanding parts of the Act are those relating to its scope of application and treatment of exemptions to disclosure of information. The Act supports the principle of maximum disclosure by establishing a presumption that all information held by public bodies is subject to disclosure unless specifically exempted under the Act. The Act adopts broad definitions of both the terms 'record' and 'record of a public body', thus ensuring that a wide range of information and entities within and outside the public service are covered by the Act. The *AIA*'s scope of application makes it one of the most liberal FoI laws in the world. However it is disappointing to observe that the Act fails to impose mandatory disclosure obligations on public bodies to publish and disseminate information of significant public interest.

The manner in which the *AIA* treats exemptions to disclosure of information is consistent with the principle that exemptions are limitations to rights and should therefore be clearly and narrowly drawn. The Act employs the three-part test to ensure that exemptions are clear and narrowly interpreted. The list of legitimate grounds in the *AIA* for refusing disclosure of information is not overbroad and compares favourably with the lists in international human rights instruments.

One of the objects of the *AIA* is to establish voluntary and mandatory mechanisms to give effect to the right of FoI as swiftly and inexpensively as reasonably possible. A

¹³⁸ Currie & Klaaren, n 84 above p. 203 para. 9.9.

¹³⁹ Section 80(1), *AIA*.

¹⁴⁰ Section 80(2).

closer look at the Act however shows that the enforcement mechanisms in the Act are inadequate, rather weak and expensive. From the point of view of the media, the Act fails to provide expedited access to information, which does not suit the media's special needs. The internal appeal process is not available in all public bodies, this deprives those aggrieved by decisions of public bodies without internal appeal processes an opportunity to have such decisions reviewed on their merits. Where there is no internal appeal, an aggrieved party's only available remedy is an application to court, and as observed above, the remedies available on review are narrower than those on appeal. Moreover, the internal appeal procedure, even where it is available, is not wholly satisfactory because of the proximity in the relationship between information officers and higher authorities. It is highly questionable whether higher authorities are sufficiently independent from information officers to provide a satisfactory remedy. An application to court is therefore arguably the only independent enforcement mechanism available to an aggrieved party. Enforcing the right of access to information directly through the courts is not satisfactory for two reasons. First, the power of the court in reviewing a decision of a public body is rather limited. A court will be confined to the question of the legality of a decision in question and is not free to review the merits of the decision. And secondly, litigation tends to be expensive and time-consuming and may therefore discourage the public from pursuing their rights. The enforcement mechanisms for the right of FoI in the *AIA* fail to match the minimum standards on access to information legislation.

6.5 Conclusion

Political experiences have influenced attitudes to the right of access to information held by the state in Botswana and South Africa. A culture of secrecy, disinformation and restrictions on media freedom during the apartheid era resulted in some of the worst human rights abuses in South Africa. Access to information held by the state is therefore seen as necessary to avoid the ills of the apartheid era, hence the prominence that transparency and openness are accorded in the constitution and laws of the new South Africa. Botswana, on the other hand, adopted a Westminster model of government at independence and has since been committed to multiparty democracy, periodic elections and has a fair track record on respect for human rights. In the

Westminster tradition, the right of access to information held by the state was not considered important until recently. The government now accepts that access to official information by the public is essential for the maintenance of a modern democracy.¹⁴¹ While the right is important to the public in general, it is perhaps more important to the media for the performance of their informative and watchdog roles. A FoI law should therefore be supportive to the media's role in a democracy.

Due to its unique political history, the *AIA* is one of the most liberal and comprehensive FoI laws in the world, in particular, with regard to its scope of application and exemptions. Although still new and untested in litigation, the *AIA* should serve as a useful template for any country that wishes to give a meaningful effect to the right of FoI. The *AIA* covers a wide range of public bodies, which gives it a comprehensive scope of application compared with FoI laws of other countries.¹⁴² The blanket exemption of cabinet from the scope of the *AIA* is however objectionable. The traditional rationale behind cabinet secrecy in Commonwealth jurisdictions is the protection of ministerial collective responsibility.¹⁴³ Disclosure of cabinet records could undermine the convention as it might reveal differences in cabinet, but does the convention really justify a blanket exemption for all cabinet records from disclosure? Certainly not all cabinet records will reveal differences among cabinet members. Records that are unlikely to undermine the convention should therefore be made available to the public unless exempted under the provisions of the Act. If there is a need to maintain the convention, this can be properly accommodated under the exemption protecting the integrity of the government decision-making processes.¹⁴⁴

The *AIA*'s approach in regard to exemptions to disclosure of information is worth emulating. Exemptions are based on the content rather than the type or origins of a record. Save for records of the revenue service, there are no class exemptions; non-disclosure of records is therefore justified on a case-by-case basis. Even though the *AIA* distinguishes between mandatory and discretionary exemptions, there is little

¹⁴¹ This is evidenced by the government's acceptance of the recommendations of the Presidential Task Group for a Long Term Vision for Botswana to pass a FoI law. See 6.3.1 above.

¹⁴² For example, FoI laws of Australia and UK do not apply to security intelligence services and the USA law does not cover the judicial and legislative branches of government.

¹⁴³ See *Attorney-General v Jonathan Cape Ltd* [1976] QB 752.

¹⁴⁴ Section 42, *AIA*.

practical difference between the two as records falling under mandatory head can still be disclosed if this will benefit the public interest.¹⁴⁵

While the scope of application and treatment of exemptions in the *AIA* create a favourable environment for the media to perform their democratic role, they need to be supported by effective enforcement mechanisms. A FoI Act must recognise that the media tend to need information too quickly to wait for formal requests to be honoured by slow moving bureaucracies. The law should therefore provide an expedited access procedure for the media to accommodate their particular needs.¹⁴⁶ To avoid abuse of such a procedure, the law should clearly stipulate when it can be resorted to.

A FoI law should offer independent, cheap and informal means of resolving disputes. In the USA disputes under the FoI Act are resolved directly by the courts. The arrangement has been criticised for failing to serve the best interests of the users of the law due to the expense, delay and formality associated with the courts.¹⁴⁷ The leading commonwealth jurisdictions have opted for independent administrative dispute resolution mechanisms such as Ombudsmen or Appeals Tribunals.¹⁴⁸ The latter are obviously attractive as they offer an informal and inexpensive means of settling disputes and have the potential of doing so more expeditiously than the courts. An ideal FoI law should combine the two dispute resolution mechanisms. First, an appeal against a decision of a public body should be made to an independent administrative body, which must have the power to review the merits of the decision. And secondly, any party aggrieved by a decision of an administrative body should be able to appeal to the courts, which must also have the power to review the merits of a decision of the administrative body. The involvement of the courts is crucial for ensuring that due attention is given to resolving difficult legal questions.

¹⁴⁵ Mandatory exemptions in most countries with FoI laws are not subject to a public interest override.

¹⁴⁶ For example, in 1996 the USA amended its FoI Act in order to provide an expedited request procedure by requesters who are primarily engaged in the dissemination of information to the public where it can be shown that a request involves matters on which there is an urgent need to inform the public concerning actual or alleged federal government activity. Section 552(a)(6)(B).

¹⁴⁷ P. Birkinshaw, 'Freedom of Information: The US Experience', *Hull University Law School, Studies in Law* (1991) at 23.

¹⁴⁸ See FoI laws of Australia, Canada, New Zealand and the UK.

The UN has observed that the right of access to information implies by its nature, a positive obligation on the state, not only to refrain from hindering access to information, but also to encourage the public in exercising their right of access by informing them of their activities.¹⁴⁹ Public bodies must therefore be obliged to adopt active communication policies by disseminating widely documents of significant public interest. Further, there must be provision for public education and dissemination of information regarding the right of access to information. While the *AIA* does not have mandatory disclosure provisions, it does provide for a guide on how to use the Act, aimed at the public and information officers.¹⁵⁰

Enforcement mechanisms aside, the *AIA* is one of the most progressive FoI laws in the world. Some countries have adopted a more conservative approach, a classic example being the UK, which has maintained class exemptions and rejected a serious harm test in favour of a simple prejudice test for the determination of exemptions.¹⁵¹ Botswana is more likely to take a conservative approach similar to that of the UK because of its historical links with the latter. It is, however, submitted that the South African approach offers a better framework for ensuring the full enjoyment of the right of access to official information. Anything short of the radical approach adopted in the *AIA* is unlikely to succeed in breaking up the prevailing culture of secrecy in government.

¹⁴⁹ *Report of the United Nations Special Rapporteur on the Promotion of the Right to Freedom of Opinion and Expression*, n 7 above para. 44. See also O'Neill, n 2 above at 425.

¹⁵⁰ Section 10, *AIA*. The task of compiling the guide is delegated to the South African Human Rights Commission. The first edition was published towards the end of 2001. See *The Promotion of Access to Information Act No 2 of 2000: A Resource Manual* (South African Human Rights Commission, 2001).

¹⁵¹ Birkinshaw, 'Open All Hours: The Impact of the Labour Government's Legislation on Freedom of Information', n 19 above.

PART IV

CHILLING THE MEDIA: TWO KEY RESTRAINTS ON MEDIA FREEDOM

CHAPTER 7

IMPACT OF NATIONAL SECURITY ON MEDIA FREEDOM

7.1 Introduction

All major human rights treaties permit restrictions on the freedoms of expression and information in the interest of protecting national security.¹ However, none of these treaties identifies precisely those state interests that will give rise to genuine national security concerns. Generally, states are accorded wide latitude in determining when national security is threatened. Recourse to national jurisprudence to assist in understanding what the concept encompasses is therefore not very helpful either as the concept, together with the related concepts of 'state security', 'internal security', 'public security' or 'public safety', tends to be vague at the municipal law level.²

It has been observed that national security is a compound of two complex ideas: the state or nation and security.³ At least four indispensable elements of the state have been developed within the framework of international relations: physical base of population and territory; governing institutions; sovereignty, in the sense of self-government; and compliance with certain values, such as the respect for democracy, which confer legitimacy on the state.⁴ All states in the international order that are comprised of these basic elements share certain fundamental concerns and values. These include: continued existence of the state; maintenance of its territorial integrity; survival of its governing institutions; independence from dictation by other states; and

¹ See Articles: 19(3)(b) ICCPR; 27(2) ACHPR; 13(2)(b) ACHR and 10(2) ECHR.

² See generally, S. Coliver, 'Commentary to: The Johannesburg Principles on National Security, Freedom of Expression, and Access to Information' (1998) 20 *Human Rights Quarterly* 12 at 13 and R.G. Atkey, 'Reconciling Freedom of Expression and National Security' (1991) 41 *University of Toronto Law Journal* 38 at 50. The problem of defining national security is also demonstrated in one of the USA's leading judicial analysis of the concept in: *New York Times Co. v United States* 403 US 713 (1971) at 719, where Black J observed: 'the word security is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment'.

³ L. Lustgarten & I. Leigh, *In From the Cold: National Security and Parliamentary Democracy* (Clarendon Press, 1994) p. 4.

⁴ *Ibid.*, p 5.

physical survival of its citizens.⁵ Any act that threatens to violate any of the above concerns or values will be considered a threat to the well-being and thus the security of a state. However national security cannot be defined or even discussed in the abstract. It is a complex and contentious concept. In the arena of world politics, in which co-operation, rivalry, law and anarchy coexist and overlap, the character, interests and vulnerability of each state will vary. The operative meaning of national security will therefore vary correspondingly for each state.⁶

In the Commonwealth, national security laws in most cases are based on the UK *Official Secrets Act of 1911*, and are notorious for their ambiguity. The primary focus of these laws is the proscription of conduct prejudicial to the safety or interests of the state or the communication or reception of secret information that is calculated to be or might be useful to a foreign power.⁷ The terms ‘interests of the state’ and ‘secret’ are commonly used in these laws, but no attempt is made to define them. The ambiguity surrounding the concept of national security is further exacerbated by the fact that governments have a tendency to misuse the concept by identifying their interests as political actors with the greater interests of the state. They fail to distinguish the security of the state from the security of their particular government or political party such that more often than not, national security is invoked to protect governments from inconvenient or embarrassing revelations that have nothing to do with the security of the state.⁸

Where the legislature has failed to provide for clarity in a law, it is normally left to the judiciary to fill the vacuum by interpreting the law to provide for certainty. Unfortunately, courts in countries around the world demonstrate the least independence and greatest deference to claims of government when national security

⁵ Ibid.

⁶ The ECtHR recognises these variations by allowing states a margin of appreciation in dealing with national security issues. Deference is given to local conditions and standards on certain issues for reasons of flexibility and in recognition of the diversity of the political, social, economic and other conditions in the various countries in the world. See *Handyside v UK* (1976) 1 EHRR 737 para. 24.

⁷ For a discussion of the UK Official Secrets Acts, see G. Robertson & A. Nicol, *Media Law* (Sweet & Maxwell, 2002) chapter 11. See also Atkey, n 2 above at 44, for the Canadian situation.

⁸ For example, in February 1996, the democratic government of South Africa forced employees of the ministry of health to sign declarations of secrecy under an apartheid era piece of legislation, *The Protection of Information Act of 1982*, in order to prevent the leaking of information in the wake of a scandal involving a government tender. See D. Sibongo & D. Lush, *So this is Democracy? Report of the Media in Southern Africa 1996* (MISA, 1997) p. 33.

is invoked. The source of this deference seems to be two-fold: (i) constitutional; that in terms of constitutional allocation of functions, the courts are not the proper forum to deal with the matter given the policy-oriented nature of the decisions involved, and (ii) practical; that judicial scrutiny is inconsistent with maintaining secrecy, especially within an adversarial system of justice.⁹

The ambiguity surrounding the concept of national security and the reluctance of the courts to scrutinise executive action where the concept is invoked has a chilling effect on media freedom. First, confidential sources become reluctant to make information available to the media for fear of personal consequences. And secondly, newspapers also become reluctant to make secondary disclosures for fear of prosecution.¹⁰ This is anomalous because under international law exemptions to fundamental rights and freedoms must be construed narrowly so as not to defeat the purpose of the rights protected.¹¹

Even though international human rights treaties do not give precise definitions of national security, international bodies, together with international law experts, have made attempts to define legitimate national security interests that should justify exemptions to the exercise of the freedoms of expression and information. On the other hand, the main human rights treaties adopt the three-part test in order to ensure that exemptions are construed narrowly. In this chapter I look at the international law definition of national security and the mechanisms in place to guard against its abuse. I then proceed to examine the concept of national security in the municipal laws of Botswana and South Africa and its impact on media freedom. The examination of national security in the laws of the two states will inevitably involve a comparison of the approaches taken in these laws to international law, which provides the minimum standards below which no member of the international community should fall. If the

⁹ The House of Lords has observed that: '*National security is the responsibility of the executive arm of government; what action is needed to protect its interests is ... common sense itself dictates, a matter upon which those upon whom the responsibility rests, and not courts of justice, must have the last word. It is par excellence a non-justiciable question. The judicial process is totally inept to deal with the type of problems which it involves*'. Per Lord Diplock in *Council of Civil Service Unions v Minister of the Civil Service* [1985] AC 399 at 412. For similar sentiments see: Stewart J in *New York Times Co. v United States*, n 2 above at 728 – 30.

¹⁰ Cf. *Secrets, Spies and Whistleblowers: Freedom of Expression and National Security in the United Kingdom* (Article 19 & Liberty, 2000) chapter 6. Available at: [<http://www.article19.org/docimages/794.htm>].

¹¹ See chapter 6 at 6.2.3.

laws in the two states do not measure up to the international law standards, suggestions will be made on how the situation can be improved in order to enhance the enjoyment of media freedom.

7.2 National Security under International Law

7.2.1 *Defining Genuine National Security Interests*

The ambiguity surrounding the concept of national security is partly due to failure by international human rights treaties to provide a definition of what the concept comprises, against which national interpretations may be compared. A uniform interpretation of limitations on rights guaranteed under international human rights treaties is important for the protection of human liberties. Today some of the most serious violations of human rights and fundamental freedoms are justified by governments as necessary to protect national security. This is due to the elasticity of the concept and the absence of clear principles that adequately safeguard the freedoms of expression and information as well as the prerogative of governments to limit the freedoms when necessary to protect legitimate national security interests.

In an attempt to fill the vacuum resulting from the failure by human rights treaties to give a definition of national security, significant contributions have been made by experts in international law. In 1985 a group of experts convened by the International Commission of Jurists and partner organisations drafted the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* (hereinafter *Siracusa Principles*).¹² These Principles are aimed at promoting a uniform interpretation of limitations on rights in the Covenant. Principles 29 – 32 address national security in the following terms:

¹² UN Doc. E/CN.4/1985/4, Annex no. 30 (1985). The Principles are reprinted in: 'The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights' (1985) 7 *Human Rights Quarterly* 3.

29. *National security may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against the use of force.*
30. *National security cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order.*
31. *National security cannot be used as a pretext for imposing vague or arbitrary limitations and may only be invoked when there exist adequate safeguards and effective remedies against abuse.*
32. *The systematic violation of human rights undermines true national security and may jeopardize international peace and security. A state responsible for such violation shall not invoke national security as justification for measures aimed at suppressing opposition to such violation or at perpetrating repressive practices against its population.*

In defining 'security' the *Siracusa Principles* draw a parallel to the use of 'security' in the UN Charter.¹³ The Charter is dedicated to the maintenance of peace between nations and the security of each nation. Article 2(4) of the Charter forbids the use of force or the threat of force against the political independence or territorial integrity of another state. The *Siracusa Principles* are thus premised on the basis that this prohibition implies that national security entails protection of territorial integrity and political independence of a state against force or the threat of force.¹⁴ In terms of Principles 29 and 30, national security interests can only justify the limitation of rights guaranteed under the Covenant to protect the existence, the territorial integrity or the political independence of a nation. Consequently, it has been argued that genuine national security interests would justify the adoption of laws concerning treason, espionage, sabotage, sedition, terrorism, the protection of military secrets or the imposition of special limits on members of the armed forces.¹⁵

Principles 31 and 32 stress the need to avoid vague or arbitrary limitations and for states to have adequate safeguards and effective remedies against abuse. A further important qualification is the link that the Principles establish between national security and the respect for fundamental rights and freedoms. The security of a state is

¹³ B.B. Lockwood, J. Finn & G. Jubinsky, 'Working Paper for the Committee of Experts on Limitation Provisions' (1985) 7 *HRQ* 35 at 71.

¹⁴ *Ibid.*

¹⁵ A. Kiss, 'Commentary by the Rapporteur on the Limitation Provisions' (1985) 7 *HRQ* 15 at 22.

worthy of protection in a derivative sense, i.e., because of its purported necessity for the well being of its citizens. Respect for basic human rights is therefore an important component of national security.¹⁶

A further attempt to define national security was undertaken by a group of experts in international law, national security and human rights convened by Article 19, the International Centre Against Censorship, through the adoption of the *Johannesburg Principles: National Security, Freedom of Expression and Access to Information* (hereinafter *Johannesburg Principles*).¹⁷ Principle 2 provides:

- (a) *A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use of force, or its capacity to respond to the use of threat of force, whether from external source, such as a military, or an internal source, such as incitement to violent overthrow of the government.*
- (b) *In particular, a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest.*

Principle 2(a) envisages that legitimate national security interests should be limited to preventing violence aimed at changing a country's government, institutions, or borders; prevention of espionage; and protecting genuine military secrets, such as the movement of troops and details of weapons design.¹⁸ The *Johannesburg Principles* expand on the *Siracusa Principles* in two ways. First, the former refers to protection of the existence of a 'country' rather than a 'nation'. The drafters did not use the term 'nation' because of the too frequent abuse by governments of their authority to defend the 'nation' to justify measures aimed at the hegemony of the majority national group

¹⁶ The relationship between national security and the respect for human rights is best illustrated in the speech of Lord Donaldson MR in: *R v Secretary of State ex parte Cheblak* [1992] 2 ALL ER 319 at 334, where he observed: '... although they give rise to tensions at the interface, national security and civil liberties are on the same side. In accepting as we must, that to some extent, the needs of national security must displace civil liberties, albeit to the least possible extent, it is not irrelevant to remember that the maintenance of national security underpins and is the foundation of all our civil liberties'.

¹⁷ The *Johannesburg Principles* were adopted on 1st October 1995, and are reprinted in *Media Law and Practice in Southern Africa*, Vol. 3 (Article 19, 1996).

¹⁸ Coliver, n 2 above at 22.

or heritage.¹⁹ And secondly, Principle 2(a) requires that, not only must the genuine purpose of the restriction be to protect national security, but also, the restriction must have the ‘demonstrable effect’ of doing so.

Both the *Siracusa* and *Johannesburg Principles* reveal an arguably broad consensus among international law experts that any restriction justified on national security grounds must be necessary to protect a country’s political independence or territorial integrity from the use, or threatened use, of force.²⁰ The Principles recognise that states need to have effective tools to combat the threat posed to their democratic institutions and population by violent and subversive forces. They further recognise that secrecy and non-disclosure of sensitive information are essential to ensure the effectiveness of those tools. Although these Principles are not binding on states, the UN has endorsed them.²¹ If states were to be guided by these Principles in determining genuine national security interests, a measure of certainty may be achieved in defining what the concept encompasses. Certainty in what national security entails is crucial for establishing a proper balance between the exercise of the freedoms of expression and information and the protection of national security.

7.2.2 *Legitimacy of Restrictions Based on National Security*

Due to the ambiguity of national security, governments are often tempted to use the pretext of the concept to place unjustified restrictions on the exercise of the freedoms of expression and information to suppress embarrassing disclosures. The main human

¹⁹ Ibid., at 20.

²⁰ See: UN Special Rapporteur on Freedom of Expression and Opinion’s 1995 Report, where he wrote: ‘For purposes of protecting national security, the right to freedom of expression and information can be restricted only in the most serious cases of a direct political or military threat to the entire nation’. UN Doc. E/CN.4/1995/32 para. 48 (14th December 1994), Nowak also wrote: ‘... restrictions on freedom of expression and information to protect national security are permissible only in serious cases of political or military threat to the entire nation. For instance, the procurement or dissemination of military secrets may be prohibited for this reason. Publication of a direct call to violent overthrow of the government in an atmosphere of political unrest or propaganda for war ... as well falls within this ground for restriction’. M. Nowak, *UN Convention on Civil and Political Rights: CCPR Commentary* (N.P. Engel, 1993) p. 355; and E. Evatt, ‘The International Covenant on Civil and Political Rights: Freedom of Expression and State Security’, in S. Coliver *et al* (eds.) *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information* (Kluwer Law International, 1999) (hereinafter *Secrecy and Liberty*) 83 at 84.

²¹ For the *Johannesburg Principles*, see, UN Special Rapporteur on Freedom of Expression and Opinion’s 1995 Report, n 20 above, and the *Siracusa Principles* were endorsed by the UN Sub-Commission Special Rapporteurs, Mssrs. Danilo Turk and Louise Joinet in: ‘The Right to Freedom of Opinion and Expression: Final Report’, UN Doc. E/CN.4/Sub.2/1992/9 (14th July 1992).

rights treaties adopt the three-part test to assess the legitimacy of restrictions on fundamental freedoms to guard against abuse.²² In this part, I briefly examine how the organs charged with interpreting and applying these treaties apply the test. In particular, whether the test is adequate for ensuring that exemptions based on national security are construed narrowly so as not to negate the essence of the freedoms of expression and information.

First, the three-part test requires that a restriction must be prescribed by law. To satisfy this requirement, a restriction must have some basis in, and comply with, the law of the country concerned, which may be a statute but also unwritten laws such as the common law.²³ The law must be adequately accessible and formulated with sufficient precision to enable a person to regulate his/her conduct. A person must know with reasonable certainty what the law is and what actions are in danger of breaching the law.²⁴ An inadequate demarcation of an area of risk affords neither notice to a person of conduct that is potentially criminal or an appropriate limitation upon the discretion of the authorities seeking to enforce the law. If a law is too vague or general, the restriction may not satisfy the requirement 'prescribed by law'. However, due to variances in the operative meaning of national security, the ECtHR recognises the difficulty of framing laws addressing the issue with absolute precision. A certain degree of flexibility is therefore allowed to enable national courts to assess whether genuine national security interests are at stake on a case-by-case basis.²⁵ Similarly, the UN Human Rights Committee (hereinafter HRC) will not find a violation of the Covenant in an individual case if a law which may be too broad in

²² See chapter 4 at 4.3.

²³ The Inter-American Court of Human Rights (IACtHR) in: *The Word Laws in Article 30*, Advisory Opinion OC-6186 of 9 May 1986, Series A No. 6, has however held that the word 'laws' refers to formal laws passed by the legislature and promulgated by the executive branch, pursuant to the procedure set out in the domestic law of each state. And this has led some commentators to argue that rules of the common law cannot lawfully restrict the right of freedom of expression under the ACHR. See V. Krsticevic *et al.* 'The Inter-American System of Human Rights Protection: Freedom of Expression, "National Security Doctrines" and the Transition to Elected Governments' in *Secrecy and Liberty*, n 20 above 161 at 173.

²⁴ *Sunday Times v UK* (1979) 2 EHRR 245 at para. 49. The Inter-American Commission on Human Rights has also observed that, "When freedom of the press is at stake, any restrictions must be clearly established so that anyone may know precisely what activities are prohibited or may be subject to censorship." *Report on the Situation of Human Rights in Nicaragua*, Inter-American Commission of Human Rights, O.A.S. Doc. OEA/Ser.L/V/II.53, doc.25 (1981) at 118, para. 6.

²⁵ *Baskaya and Okuoglu v Turkey* (App. nos. 23536/94 and 24408/94, 8th July 1999) para. 39.

scope to be a justifiable restriction in itself, is nevertheless applied compatibly with the Covenant in the particular case.²⁶

Laws restricting the freedoms of expression and information must themselves be compatible with the minimum standards of the rule of law. The HRC in fact requires laws restricting fundamental freedoms to be in accordance with the provisions, aims and objectives of the Covenant.²⁷ There must be some measure of legal protection in the domestic law against arbitrary interference by public authorities with fundamental freedoms.²⁸ If a law confers discretionary power on public authorities, the law must indicate the scope and manner of exercise of any such discretion with sufficient clarity to protect individuals against arbitrary interference with their rights and must afford adequate safeguards against abuse.²⁹ The guarantee of adequate legal protection in relation to the freedoms of expression and information under the human rights treaties takes on further significance when taken together with the Articles that guarantee a person the right of access to domestic courts in the determination of one's civil rights and obligations.³⁰

Secondly; the purpose of any law restricting the freedoms of expression and information must be legitimate in accordance with the human rights treaty in question. All the main human rights treaties recognise the protection of national security as a permissible ground for restrictions on the two freedoms.³¹ To be legitimate, not only must the purpose invoked by a government be one that falls within the limitation list, but also, the concrete measures taken by the government must have been genuinely directed towards achieving that aim.³² Consistent with this approach, to satisfy the HRC that restrictions based on national security are legitimate, a state must establish

²⁶ *Faurisson v France*, Communication No. 550/1993 views adopted 8th November 1996. (Summary in Evatt, n 20 above at 94–95.)

²⁷ *Toonen v Australia*, Communication No. 488/1992, views adopted 8th March 1994. (Summary in Evatt, n 20 above at 87)

²⁸ The IACtHR has held that each state must provide 'an effective judicial remedy for violations of fundamental rights'. See: *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 of the American Convention)*, OC-9/87 of 6th October 1987, Series A, No. 9, at para. 23. (Cf. *Malone v U.K.* (1984) 7 EHRR 14 at para. 67.)

²⁹ *Tolstoy Miloslavsky v U.K.* (1995) 20 EHRR 442 at para 37.

³⁰ Articles: 26 ICCPR; 8 ACHR and 6 ECHR, and P. Mahoney & L. Early, 'Freedom of Expression and National Security: Judicial and Policy Approaches Under the European Convention on Human Rights and Other Council of Europe Instruments' in *Secrecy and Liberty*, n 20 above 109 at 113.

³¹ See n 1 above.

³² The ECtHR has held that its supervision of a state's margin of appreciation concerns both the aim of the measure challenged and its necessity. See *Handyside v U.K.* n 6 above, para 49.

that: (i) there exists a threat to the nation as a whole; and (ii) the expression at issue has caused or contributed to that threat.³³ It is however disappointing to note that in practice the international human rights treaty bodies have rarely challenged a government's assertion that a restriction was genuinely aimed at protecting national security.³⁴ The reluctance is perhaps due to the absence of a clear definition of what the concept of national security entails, offering a basis for the international bodies to define limits to conduct of states where the concept is invoked.

Thirdly, the three-part test requires that a restriction must be necessary to protect the interest claimed. To satisfy this requirement, the restriction in question must be: (i) necessary and (ii) proportionate to the legitimate aim pursued. Necessity requires a government to adduce sufficient and relevant evidence showing that there is a pressing social need for the restriction.³⁵ International human rights treaties enforcement bodies judge restrictions to fundamental rights and freedoms against the needs of a democratic society, i.e. restrictions must be shown to be necessary in a democratic society.³⁶ Restrictions must also be proportionate to the public interest served. The public ends served by the restriction must be weighed against its detrimental effects on the individual's rights and freedoms. The application of this balancing test in cases involving national security claims is demonstrated in two cases that came before the ECtHR. Both cases involved attempts by the governments of the UK and Netherlands to suppress dissemination of information claimed to be inimical to the national security of the two states. The information was already in the public domain at the time the governments were seeking the suppression of its dissemination. In both cases the court found that legitimate national security interests

³³ Evatt, n 20 above at 88.

³⁴ Coliver, n 2 above at 27 and A. Nicol, G. Millar & A. Sharland, *Media Law and Human Rights* Blackstone Press Limited, 2001) p. 180.

³⁵ Cf. *Handyside v U.K.*, n 6 above, para. 49.

³⁶ Article 10(2) ECHR. While the ICCPR and ACHR do not expressly provide that restrictions to the freedoms of expression and information must be necessary in a democratic society, the HRC and IACtHR, respectively, have held that restrictions on the two freedoms must be judged against the legitimate needs of democratic societies and institutions: *M.A. v Italy*, Communication No. 117/1981, Selected Decisions Under the Optional Protocol, Vol. 2, 17th to 32nd Sessions (1990) at 31 and *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Articles 13 and 29 American Convention on Human Rights)*, Advisory Opinion OC-5/85, Series A, No. 5 para. 42 (13 November 1985)

were at stake, but that the restrictions sought were no longer necessary as the information was already in the public domain.³⁷

In the determination of the issue of ‘necessity in a democratic society’, the ECHR and ACHR allow states a margin of discretion or appreciation. Deference is given to local conditions and standards on certain issues for reasons of flexibility and in recognition of the diversity of the political, social, economic and other conditions in the various countries of the world.³⁸ This is especially important in cases involving national security, given that the concept varies depending on the character, interests and vulnerability of each state. The ACHR however provides for a narrower margin of appreciation by specifying that states may not use prior censorship.³⁹ The HRC on the other hand does not apply the margin of appreciation in relation to national security restrictions to freedom of expression. The Committee requires states to establish the circumstances said to make a restriction on the freedom necessary and reserves for itself the determination of whether the particular restriction is compatible with the Covenant.⁴⁰

The margin of appreciation is however subject to supervision by the international bodies charged with the enforcement of the treaties.⁴¹ Whilst all restrictions to the freedoms of expression and information have to be justified as necessary in a democratic society, the level of protection afforded to the individual, and conversely, the area of discretion open to the state will vary according to the context. International bodies apply a sliding scale of protection. Political speech and political comment by the media enjoy the highest level of protection because of the critical role political dialogue plays in a democratic society.⁴² A state is required to adduce convincing

³⁷ *Guardian and Observer v UK* (1991) 14 EHRR 153 and *Vereniging Bluf! v The Netherlands* (1995) 20 EHRR 189.

³⁸ *Handyside v U.K.*, n 6 above at para. 24 and *Enforceability of the Right to Reply or Correction*, *American Convention on Human Rights Articles 14(1), 1(1)*, Advisory Opinion OC-7/86 of August 29, 1986, Series A, No. 7, para.27.

³⁹ *Krsticevic et al.*, n 23 above at 178.

⁴⁰ *Evatt*, n 20 above at 90.

⁴¹ The ECtHR in *Baskaya and Okuoglu v Turkey*, n 25 above at para. 61 held: ‘*The adjective “necessary”, within the meaning of Article 10(2), implies the existence of a “pressing social need”. The Contracting States have a certain margin of appreciation in assessing whether such need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by independent court. The Court is therefore empowered to give the final ruling on whether a “restriction” is reconcilable with freedom of expression ...*’.

⁴² *Erdogdu v Turkey* (2002) 34 EHRR 433 para. 62, and *Mahoney & Early*, n 30 above at 116.

evidence to justify restricting the flow to the public of information and opinion on matters in the political arena.

The issue of national security has not often been litigated before international human rights treaties enforcement bodies. A combination of this fact, together with the reluctance of the bodies to challenge governments' claims of national security have stunted the development of jurisprudence that can guide national courts in the determination of what the genuine concerns of the concept encompass. However, the international bodies' application of the three-part test presents some valuable lessons for states that, if heeded to, could enhance the enjoyment of the freedoms of expression and information. In examining the impact of national security on media freedom in Botswana and South Africa, this chapter looks at three issues arising from the requirements of the three-part test that are critical to the media in the performance of their democratic role and how they are addressed in the laws of the two states.

First, any encroachment on media freedom that is based on national security grounds must be authorised under a law that meets the minimum standards of the rule of law. This entails that a law must provide for legal certainty. Thus, this chapter looks at how national security is defined in the laws of the two states. Secondly, a restriction must be shown to be genuinely aimed, both in theory and practice, at protecting national security, and adequate, legally binding safeguards against abuse must be available. Courts play a prominent role in the protection and enforcement of civil liberties. Uncritical deference of national courts to governments' claims of national security therefore places the adequacy of legal protection afforded to media freedom in municipal courts in serious doubt. This chapter will examine the attitude of the courts of Botswana and South Africa to their governments' claims of national security.

And finally, the requirements of necessity in a democratic society entails that the mere principle of protection of state secrets will not suffice to justify in all circumstances prevention of and punishment for disclosure of information. The necessity of a restriction must always be evaluated in the light of the fundamental values underpinning a democratic society. This is important in regard to the protection of public servants who blow the whistle on government wrongdoing. As observed in the

introduction to this chapter, where whistleblowers and the media are not granted immunity from prosecution for disclosures that are in the public interest, they become reluctant to communicate important information to the public for fear of prosecution. This chapter also examines whether the laws of the two states give any protection to whistleblowers and the media for disclosures that are in the public interest.

7.3 Media Freedom and National Security in Botswana

The *National Security Act 1986* (hereinafter *NSA*)⁴³ is the main statute dealing with national security matters in Botswana. The Act was enacted in response to destabilising violence directed at the country by the South African apartheid regime in the 1980s, and contains features of the UK *Official Secrets Act 1911* (hereinafter *OSA*).⁴⁴ At the time of writing, there were still no prosecutions under the Act.⁴⁵ Courts in Botswana therefore have not yet had opportunity to expound the provisions of the Act. Thus guidance in interpreting the Act will be sought from the jurisprudence developed by other jurisdictions with similar provisions.⁴⁶

The Act is however occasionally invoked either as a threat or an excuse by public officers who are unwilling to answer questions from the media. An example of the extent to which public officers would go in using the Act to scare the media can be demonstrated by an incident in March 1996. The police threatened to bring a charge under the Act against an investigative journalist who had sourced a transcript in which a parent had confessed to having played a part in the murder of his daughter, which was being investigated by the police at the time, unless the journalist disclosed his source.⁴⁷

⁴³ Act no. 11 of 1986 [Cap. 23:01].

⁴⁴ For a brief background to the Act, see J.J. Zaffiro, 'The Press and Political Opposition in an African Democracy: The Case of Botswana' (1989) 27 *Journal of Commonwealth and Comparative Politics* 51 at 66.

⁴⁵ There was however an attempt to prosecute a journalist and *Mmegi* newspaper in 1992 for 'unlawful receipt of an official document marked secret and publication of classified information' under section 4(3), but the charges were dismissed by the High Court in February 1996 after the State had failed to proceed with the prosecution. See Sibongo & Lush, n 8 above, p. 5.

⁴⁶ For example, in *S v Harrington* 1989 2 SA 348, the Zimbabwean Supreme Court when interpreting the country's *Official Secrets Act* Chap. 97(Z) held that since the Act was based on the UK *Official Secrets Act 1911*, it should derive assistance from the latter in construing the provisions of the former.

⁴⁷ See Sibongo & Lush, n 8 above p. 5.

7.3.1 *Definition of National Security in the Act*

The aim of the *NSA* is to make provision for ‘national security’ and ‘other activities prejudicial to the interests of the nation’. Following from its objects, one would have expected the Act to make a clear distinction between those acts that are a threat to national security and those that are merely prejudicial to the safety and interests of the nation. Unfortunately the Act does not categorise offences in accordance with its objects. The terminology employed in all the offence creating sections is the prevention of acts prejudicial to the safety and interests of the nation. The expression is not defined in the Act. Further, the Act also does not explain the relationship between this concept and that of national security. The two concepts are not synonymous. While a threat to a state’s national security is certainly prejudicial to the nation’s interests, the reverse is not always true.

The Act offers a definition of the expression ‘security or defence of Botswana’, albeit, in a narrow sense regarding disclosure of information relating to the army and police services.⁴⁸ ‘Information relating to the defence or security of Botswana’ is defined as including (but without derogation from the generality of the ordinary meaning of the expressions) information relating to the movements or locations of the defence force or police force, the steps taken to protect any vital installations or prohibited places and the acquisition or disposal of munitions of war.⁴⁹ The provision refers to the ‘defence’ or ‘security’ of Botswana. The question that arises is: what is the relationship between these two concepts? The House of Lords has held that the two concepts are the same. Lord Diplock observed that the early terminology of ‘defence of the realm’ has been replaced in many countries by the expression ‘national security’ due to the influence of the ECHR, which employs the latter terminology.⁵⁰

⁴⁸ Section 4(4) of the *NSA* provides: ‘Any person who communicates any information relating to the defence or security of Botswana to any person, other than a person to whom it is in the interest of Botswana his duty to communicate it shall be guilty of an offence and liable to conviction to imprisonment for a term not exceeding 25 years’.

⁴⁹ *Ibid.*, section 4(5).

⁵⁰ *Council of Civil Service Unions v Minister of the Civil Service*, n 9 above at 410. For a more detailed discussion of the use of the terms, see I. Cameron, *National Security and the European Convention on Human Rights* (Kluwer Law International, 2000) pp. 39 – 56.

For purposes of the discussion of the *NSA*, the terms 'defence' and security' are therefore treated as the same, and that they refer to the concept of national security.

The definition of national security in the *NSA* makes the assumption (by referring to the 'general' or 'ordinary' meaning of the expressions) that there is a universally agreed definition of the concept of national security. On the contrary, as has been observed above, national security is a contentious concept. State practices differ in their determination of the components of national security matters. For example, there are those whose definition of the concept is closer to the one put forward by international law experts such as Australia⁵¹ and Canada⁵², while other states, such as the USA, extend the ambit of the concept to economic interests.⁵³ An attempt at defining national security by reference to its 'ordinary' or 'general' meaning thus does not provide for clarity that is required in a law limiting important freedoms.

Not only is the definition of national security in the *NSA* vague, it is also narrower than the one by international law experts. The former is primarily concerned with protection of military secrets and acts of sabotage against essential services and protected places, and does not cover offences relating to espionage or leakage of other official information that may harm genuine national security interests. These latter offences are covered elsewhere in the Act. It will therefore be absurd to come to the conclusion that section 4(4) is the only provision dealing with national security matters especially in the light of the definition of the concept in section 4(5), which expressly provides that it does not derogate from the general or ordinary meaning of the term. To the extent that the definition of the term 'security' in the Act is expressly limited to an offence under section 4(4), the definition cannot be extended to the interpretation of these other provisions. The *NSA* therefore does not give an exhaustive definition of the concept of national security.

The failure to provide clear definitions of the concepts of national security and actions prejudicial to the interests of the nation, and to distinguish between acts that are a threat to each of these concepts in the *NSA* gives the impression that the concepts are

⁵¹ Section 4, *Australian Security Intelligence Organization Act of 1974*.

⁵² Section 2, *Canadian Security Intelligence Services Act of 1985*.

⁵³ See W.C. Banks & M.E. Bowman, 'Executive Authority for National Security Surveillance' (2000) 50 *American University Law Review* 1 at 8.

used synonymously. The government seems to be subscribing to this view. Public officers are operating under the mistaken view that any conduct prohibited under the Act relates to national security.

Media freedom faces a serious threat from some provisions of section 4. In general terms, the provision makes it unlawful for any person who has obtained any official information as a result of his/her present or former position as a public servant or government contractor to reveal that information without authorisation. With the exception of subsections (4) and (5), section 4 is a replica (with minor changes) of section 2 of the *OSA*.⁵⁴ The latter provision was notorious for its vague language and its almost unlimited breadth in its scope of application,⁵⁵ and these are replicated in Section 4 of the *NSA*. The most notorious provision, as far as the media is concerned, is section 4(1)(b), which reads:

4. (1) Any person, having in his possession, or control, any secret official codes, password, sketch, plan, model, note, document, article or information that relates to or is used in a prohibited place or anything in such a place, or that has been made or obtained in contravention of this Act, or that has been entrusted in confidence to him by any person holding office under the Government, or as a person who is or was party to a contract with the Government or a contract the performance of which in whole or in part is carried out in a prohibited place, or as a person who has been employed by or under a person who holds or has held such an office or is or was a party to such contract –

(a) ...

(b) communicates the codes, password, sketch, plan, model, article, note, document or information to any person other than a person to whom he is authorised to communicate with, or to a person to whom it is in the interest of Botswana his duty to communicate it;

(c) ...

shall be guilty of an offence and liable on conviction to imprisonment for a term not exceeding 30 years.

The above provision impacts negatively on media freedom in that it prohibits a public servant from communicating official information to any person other than a person to whom he/she is authorised to communicate with, or to a person to whom it is in the interest of Botswana his/her duty to communicate it. The crucial words: ‘authorised’,

⁵⁴ The section has now been repealed and replaced by the *Official Secrets Act 1989*.

⁵⁵ The provision generated a lot of literature in the UK. See; *inter alia*, *Departmental Committee on Section 2 of the Official Secrets Act 1911*, Vol. 1, Cmnd. 5104 (HMSO, 1972) (*Franks Committee Report*) and *Reform of the Section 2 of the Official Secrets Act 1911*, Cm. 408 (HMSO, 1988).

'interests of Botswana' and 'duty' are however not defined in the Act. In relation to the former, the *Franks Committee* observed that, in the UK, the actual practice within government rests heavily on a doctrine of implied authorisation, flowing from the nature of each Crown servant's job.⁵⁶ Thus communication of official information is proper if such communication can be fairly regarded as part of the job of the officer concerned. In Botswana, for a communication to be 'authorised', there must have been specific express authorisation from the head of a government department. The *General Orders Governing the Conditions of Service of the Public Service 1987* prohibits public servants from disclosing official information unless specifically authorised.⁵⁷ The doctrine of implied authorisation does not seem to be applicable in Botswana.

English law has developed some jurisprudence under the *OSA* that will be useful in attempting a definition of the words 'duty' and 'interests of Botswana' (or state), used in section 4 of the *NSA*. The definition of these terms in the UK has, however, been controversial. In *Chandler v D.P.P.*,⁵⁸ the majority of the House of Lords defined 'interest of the state' as identical with whatever the government of the day lays down as public policy.⁵⁹ Courts in South Africa and Zimbabwe have cited with approval this view when interpreting their respective laws, which are modelled on the *OSA*.⁶⁰ Zimbabwe's Official Secrets Act refers to the 'interests of Zimbabwe', and its Supreme Court appears to have concluded that this expression is synonymous with 'interest of the state'. The fact that the provision is moulded on the *OSA* seems to have been enough to convince the court to come to this conclusion without even scrutinising the particular wording of the Zimbabwean Act.⁶¹ It is however debatable whether the two expressions have the same meaning.

⁵⁶ *Ibid.*, *Franks Committee Report*, para. 18.

⁵⁷ The issue is more fully discussed in chapter 6 at 6.3.2.

⁵⁸ [1962] 3 ALL E.R. 142

⁵⁹ *Ibid.* See the speeches of Lord Devlin and Lord Pearce at 156 and 160, respectively.

⁶⁰ *S v Marais* 1971 1 SA 844 at 850 and *S v Harrington*, n 45 above at 357, respectively.

⁶¹ The Zimbabwean Supreme Court concluded by implication that 'interest of the state' and 'interest of Zimbabwe are the same from the following passage in the judgment: 'If the provisions of the statute sought to be construed have nothing to do with common law, the interpretation rendered to similar provisions in a foreign statute cannot be justifiably ignored. There is no common law involved in the English Secrets Act and its Zimbabwean counterpart'. *Ibid.*, at 356.

Lord Reid in the *Chandler* case observed that the question of what is in the interest of the state is posed more frequently in terms of what is in the public interest and, as a general rule, he did not subscribe to the view that the government or a minister must always have the final word on what is in the public interest.⁶² Professor MacCormick supports Lord Reid's opinion in an article where he argues that a primary interest of any state is an interest in the integrity of its constitution.⁶³ The argument is premised on the fact that states exist in virtue of constitutions and bodies of law so that a state can have no higher interest than that its constitution be sustained and upheld, and that this interest is fundamentally beyond any interest in securing the implementation of the policies of a government, however democratically elected.⁶⁴ He concludes that a state has an interest in the successful pursuit of government policies within the range of discretions constitutionally allocated to the executive branch under a given constitution.⁶⁵ The latter view is preferable over the majority view in the *Chandler* case because it is consistent with the concept of the 'rule of law', a hallmark of democratic society. However, it is doubtful whether courts in Botswana will be persuaded to adopt the minority view in light of a trend towards the majority view in countries such as Zimbabwe that have provisions similar to those of the *NSA*. The idea that the interests of the state is identical with whatever the government of the day lays down as public policy is highly objectionable given the propensity of governments to identify their interests as political actors with the greater interests of the nation.

The definition of 'interests of the state' has a bearing on the meaning to be ascribed to the word 'duty' as used in section 4 of the *NSA*. An argument was made during the trial of Clive Ponting in the context of section 2 of the *OSA* that the words 'interest of the state' should be treated as synonymous with the 'public interest'.⁶⁶ The idea behind the argument was to make a case for public servants who disclose official information to escape liability in exceptional cases where the communication was in the wider public interest. It was further argued that, if 'interest of the state' is treated

⁶² *Chandler v D.P.P.*, n 58 above, at 146.

⁶³ N. MacCormick, 'The Interest of the State and the Rule of Law' in P. Wallington & R.M. Merkin (eds.) *Essays in Memory of Professor F.H. Lawson* (Butterworths, 1986) 169.

⁶⁴ *Ibid.*, at 178.

⁶⁵ *Ibid.*, at 185.

⁶⁶ *R. v Ponting* [1985] I.R. 318. The case is discussed in: R.M. Thomas, 'The British Official Secrets Act 1911 – 1939 and the Ponting Case' (1986) *Criminal Law Review* 491.

as synonymous with the 'public interest', the word 'duty' should be interpreted to mean a moral or civic duty by a public servant to act in the public interest if he/she should find the government acting improperly. The court rejected the argument and opted for a narrow meaning of the word to mean 'official duty'.⁶⁷ Courts in Botswana are more likely to follow this precedent.

The *NSA* penalises the disclosure of official information obtained by a public servant in the course of his/her duties, however trivial the information and irrespective of the harm likely to arise from the disclosure. It would appear that the offence is one of strict liability.⁶⁸ Section 4(1)(b) is bolstered in its prohibition of disclosure of official information by section 5. The latter prohibits communication of 'classified'⁶⁹ information unless such communication has been authorised or is to a person whom it is in the interest of Botswana to make the communication. Section 5 has the trappings of section 4(1)(b) in that it employs vague language, has a wide scope of application and is also a strict liability offence.⁷⁰

A further inhibition to media freedom is posed by section 4(3). The provision makes receipt and retention of information obtained in contravention of the Act an offence punishable by imprisonment of up to 30 years. The provision is concerned with secondary disclosures of official information and specifically targets the media.⁷¹ The offence under this section however requires proof of *mens rea* and an accused person may escape liability by proving that a communication to him/her was done against his/her wish.

The provisions of the *NSA* relating to disclosure of official information are very broad and vague. Ambiguous legislation conflicts with the concept of the rule of law, as it

⁶⁷ *Ibid.*, at 499 – 500.

⁶⁸ See the case of *Fell* [1963] Crim. L. R. 207, 107 S.J. 97 summarised in, Thomas, n 66 above, at 494 – 5, where the English Court of Criminal Appeal held, regarding section 2 of the *OSA*: 'it is absolute and is committed whatever the document contains, whatever the motive for disclosure is and whether or not the disclosure is prejudicial to the state'. The *Franks Committee* also observed that there was nothing showing that *mens rea* was an ingredient of the offence. *Franks Committee Report*, n 55 above, para. 20.

⁶⁹ In terms of section 2, classified matter means any information or thing declared to be confidential. Classification is an administrative procedure done by authorised officers in government departments.

⁷⁰ Ignorance by an accused person of the fact that the information communicated was classified is not a defence to a charge under section 5(1). See section 5(2).

⁷¹ Cf. Robertson & Nicol, n 7 above p. 556.

does not afford adequate notice to a person of conduct that is potentially criminal. The rule of law is a component of 'prescribed by law' test. However, in the light of standards set by international human rights treaties enforcement bodies, it is unlikely that the *NSA* will be found to be in violation of this test on account of its ambiguity. But its application in a particular case may be found to be in conflict with the test. For example, the Act prohibits disclosure of all official information irrespective of whether harm to national security or interests of the nation is likely to arise from the disclosure, which is in conflict with the general rule that exemptions to fundamental freedoms must be construed narrowly so as not to defeat the essence of the rights protected. The *NSA* is used to deny citizens access to any information on the defence force,⁷² it is however inconceivable that an international human rights body would sanction its use to suppress information on gross human rights violations by the force.

7.3.2 *Safeguards and Remedies Against the Abuse of the NSA*

International law requires that restrictions on fundamental rights and freedoms on national security grounds must be shown to be genuinely aimed, both in theory and practice, at protecting national security. In addition, there must be adequate and legally binding safeguards against the abuse of the concept. Heads of government departments classify information under the *NSA*.⁷³ Information is classified into three categories: (i) open; (ii) confidential; and (iii) secret. Information falling under the latter two categories is known as 'classified information' and access to it must be authorised by the head of the relevant department. In deciding whether or not to allow access to classified information, heads of departments exercise administrative discretion. There are no guidelines for the exercise of the discretion.⁷⁴

The Court of Appeal has held that where the exercise of discretion affects rights of citizens, the exercise of such discretion should be subject to the supervision of the

⁷² See S. Grant & B. Egner, 'The Private Media and Democracy' in J. Holm & P. Molutsi (eds.) *Democracy in Botswana: The Proceeding of a Symposium Held in Gaborone 1 – 5 August 1998* (Macmillan Botswana Publishing (Pty) Ltd, 1989) 247 at 250.

⁷³ The Permanent Secretary in the Office of the President is the 'authorised officer' under section 2 tasked with the responsibility of administering the *NSA*. He in turn has appointed heads of government departments to exercise or perform duties conferred or imposed by the Act. (Interview with Ms S. Tsiane, then Acting Permanent Secretary in the Office of the President, Gaborone, 30th January 2003).

⁷⁴ Interview with Ms Kgabi, Director, National Archives and Records Services. (Gaborone, 31st January 2003).

courts.⁷⁵ The Court has also held that if power is conferred on a public authority to do an act in the public interest, the use of that power for a purpose other than in furtherance of the public interest would render that act a nullity. And where the use of a power has been exercised by a public authority for an improper purpose, that act is reviewable by the High Court.⁷⁶

Judicial review is available as a safeguard against the abuse by heads of departments' powers under the *NSA*. However, while judicial review may be legally binding, its adequacy is questionable because of its inherent limitations. Traditionally, review entails only an examination of the form and legality, but not the substance and merits of an administrative decision.⁷⁷ Further, a reading of the *NSA* suggests that where information is withheld from disclosure on national security grounds, the state is not required to give specific reasons for the refusal, instead, a general claim of harm to national security will suffice. But where an administrative authority is not required to give specific reasons for his/her decision, it is difficult for an aggrieved person to challenge the decision on review, especially where the person is alleging that the decision was taken for an improper purpose.

The position of a person aggrieved by the exercise of discretion under the *NSA* is further worsened by the application of a presumption that executive action is presumed right until rebutted by solid evidence.⁷⁸ Displacement of this presumption is a burden that the challenger of an administrative action is made to bear, and in the absence of detailed reasons for the decision, it will be difficult to displace. The Court of Appeal has observed that since this presumption puts a government in a position of great advantage, the requirements of democracy give a reciprocal expectation to the people that when the government acts, it should act correctly and should not take advantage of, or hide its own mistakes behind a shroud of silence when its actions are questioned.⁷⁹ Unfortunately, it seems heads of departments are not paying heed to this

⁷⁵ *Attorney-General and another v Kgalagadi Resources Development Company (Pty) Ltd* [1985] BLR 234 at 238.

⁷⁶ *The President of the Republic of Botswana and others v Bruwer and another* [1998] BLR 86 at 90.

⁷⁷ See generally, J. Jowell, 'Beyond the Rule of Law: Towards Constitutional Judicial Review' [2000] *Public Law* 671.

⁷⁸ *Peloewetse v Permanent Secretary to the President and others*, Civil Appeal No. 26/99, Court of Appeal (Unreported) p.13.

⁷⁹ *Ibid.*

caution. There remain strong allegations by the media that the *NSA* is being used to keep a wide range of official information secret under the pretext of protecting national security and that no satisfactory reasons are given to justify the claims.

The adequacy of judicial review as a safeguard against the abuse of the *NSA* is further compounded by a general attitude of courts around the world where national security matters are involved. It is extremely rare for courts to order disclosure of national security information over the objection of the government.⁸⁰ In Botswana, there are strong sentiments within the government that the security of the country cannot be determined in a court of law.⁸¹ The courts have not yet had opportunity to deal with cases involving disclosure of information relating to national security. It is therefore difficult to say with certainty what their attitude will be when the issue finally comes before them. However, it is unlikely that they will adopt a radically different approach from the practice already set by courts in other countries of giving deference to the state's assertions of national security.

International law also requires restrictions on fundamental rights and freedoms to be shown to be necessary in a democratic society.⁸² The mere protection of information relating to national security is therefore not sufficient to justify prevention of, and punishment for, disclosure of such information in all circumstances. The necessity of a restriction must be evaluated in the light of the fundamental values underpinning that society. The constitution of Botswana, consistent with international law, adopts the principle of proportionality with regard to limitations on the freedoms of expression and access to information. Restrictions may be imposed on the two freedoms in the interest of national security provided such limitations are shown to be reasonably justifiable in a democratic society.⁸³ This requires the state to: (i) give relevant and sufficient reasons to justify a restriction; (ii) prove that the disclosure corresponds to a pressing social need; and (iii) demonstrate that the restriction is

⁸⁰ See P. Birkinshaw, *Freedom of Information: The Law, the Practice and the Ideal* (Butterworths, 2001) chapter 9.

⁸¹ In response to concerns by the private press in the 1980's over deportations of foreign journalists for national security reasons, and that the deportations should be challenged in the courts, the then minister of Presidential Affairs and Public Administration, Mr P.H.K. Kedikilwe, responded by pointing out that the security of the country will not be determined by the courts, but by the executive. See 'Press Freedom Won't Be Above National Security' *Daily News*, 19th September 1985 No. 179.

⁸² Articles: 19(3) ICCPR and 10(2) ECHR.

⁸³ Section 12(2)(b), Constitution of Botswana. For a further discussion see chapter 4 at 4.5.1.

proportionate to the legitimate aim pursued.⁸⁴ The application of this principle involves a question of balance between competing interests.

The *NSA* does not impose a complete ban on the disclosure of information relating to the security of the state, such information can be disclosed with the consent of the state. However, where disclosure is not authorised, the Act creates strict liability offences for the disclosure. A person will thus not be able to escape liability by proving that a disclosure was in the public interest.⁸⁵ The Act also does not require the state to give sufficient and relevant reasons to justify the withholding of information. The regime provided for under the *NSA* is not consistent with the principle of proportionality because it does not provide for a balancing of the competing interests in a given situation. The Act's attempt to exclude, or its failure to incorporate the principle of proportionality therefore places its constitutionality in serious doubt. An appropriate approach is one that calls for a balancing of the different competing interests, i.e., harm to the security of the state and the public's right to know. Such an approach would enable a person charged under the Act to, *inter alia*, escape liability where a disclosure of information is proved to be in the public interest, oblige the state to give sufficient reasons to justify the withholding of information, and also ensure that a restriction is proportionate to the legitimate aim pursued.

The strict liability regime under the *NSA* is mitigated by the fact that the Attorney General (AG) must give consent to all prosecutions under the Act.⁸⁶ The AG enjoys a wide discretion in the exercise of this power. For example, even though an accused person may not raise a defence of public interest, the AG will normally not give consent to prosecute where the disclosure of information is in the public interest.⁸⁷ Furthermore, consent will not be granted where the disclosure of information does not harm the security of the state or is of a trivial nature. There are no guidelines on how the AG exercises his/her discretion. The discretion is exercised on a case-by-case basis in the light of the facts of the case at hand.⁸⁸

⁸⁴ Cf. *Sunday Times v UK* n 24 above, at 277 – 278 (para. 62).

⁸⁵ See discussion under 7.3.1. Compare with the speech of Lord Bingham of Cornhill in *R v Shayler* [2002] 2 All ER 477 at 492 para. 20, when dealing with the nature of offences under the UK *Official Secrets Act 1989*, which are similar to those created by the *NSA*.

⁸⁶ Section 15(1), *NSA*.

⁸⁷ Interview with Mr A.B. Tafa, then Acting Attorney General (Gaborone, 11th December 2002).

⁸⁸ *Ibid.*

The involvement of the AG does provide a safeguard against the abuse of the Act, but it is not sufficient. A refusal to give consent to prosecute will only protect a person from criminal prosecution. In the case of public servants, even though the refusal will save them from criminal prosecution, they will still be liable for disciplinary action for breach of the *General Orders*. There are no formal or informal structures in the public service for reporting wrongdoing or suspected wrongdoing within the service.⁸⁹ Further, there is no protection against work-related victimisation such as dismissal or demotion for those officers who blow the whistle on government wrongdoing.

The ambiguity of the *NSA*, its failure to embrace the principle of proportionality, together with the inadequacy of safeguards against its abuse, entrenches the culture of secrecy in government. This culture of secrecy impacts negatively on media freedom and the public's right of access to official information. Public servants, who are an important source of information for the media, are reluctant to disclose information out of fear of criminal and/or work-related sanctions, and the media self-censor themselves in order to avoid prosecution under the vague provisions of the *NSA*.

7.4 *Media Freedom and National Security in South Africa*

Media freedom and access to information were among the greatest casualties of the apartheid state.⁹⁰ A number of laws were enacted by successive apartheid governments restricting the two freedoms with the object of protecting state or national security.⁹¹ Perhaps the most repressive of these laws on the two freedoms were the *Internal Security Act*, *Protection of Information Act* and *Defence Act*. On the one hand, the *Internal Security Act*, among others, permitted the state to prohibit the printing, publication or dissemination of any material which expressed views or

⁸⁹ Corrupt practices may however be reported to the Directorate of Crime and Economic Corruption, an anti-corruption institution formed under the *Corruption and Economic Crime Act* No. 13 of 1994.

⁹⁰ See generally, G. Marcus, 'Freedom of Expression and National Security: The South African Experience' in Coliver *et al* (eds.) *Secrecy and Liberty*, n 20 above at 389.

⁹¹ These include: *Internal Security Act 74 of 1982*; *Defence Act 44 of 1957*; *Protection of Information Act 84 of 1982*; *National Key Points Act 102 of 1980*; *Armaments and Production Act 57 of 1968*; *National Supplies Procurement Act 89 of 1970* and *Petroleum Products Act 120 of 1977*. For a detailed discussion of the impact of these laws on the freedoms of expression and access to information, see Y. Burns, *Media Law* (Butterworths, 1990) Part II, Chapter 1.

conveyed information calculated to endanger the security of the state.⁹² The *Protection of Information Act* on the other hand prohibited the disclosure of official information unless the disclosure was authorised by the state.⁹³ In addition, the *Defence Act* created a presumption that any information relating to the defence of the Republic or military equipment was secret unless publication of such information was authorised.⁹⁴

The apartheid government used these national security laws to censor the media by denying them access to information and preventing them from commenting on matters of public interest. Many publications were banned for being critical of the apartheid policy and the public was generally kept in the dark regarding political matters.⁹⁵ The use of these laws was compounded by the fact that none of them provided a clear definition of the concept of state or national security. In determining state or national security interests, the apartheid state relied on the principle of *salus reipublicae suprema lex est*, i.e., the state has the right to protect its own safety and a corresponding duty to protect its subjects from disorder, revolution and violence.⁹⁶ National security laws were however used to maintain apartheid by serving the interests of the minority white population. Security organs established by the apartheid state to administer national security laws were granted sweeping powers.⁹⁷ These organs gave national security laws a very wide scope of application to cover not only what were legitimate national security interests, but also, to suppress criticisms of apartheid and revelations of human rights violations by the state and its agents.

The lack of a clear definition of the concept of national security under the apartheid state enabled the government to use national security laws for improper purposes. With the introduction of a new constitutional order, one of the challenges facing the new democratic government was the need to ensure that the actions it will undertake in self-preservation, will not fundamentally traduce the values which makes it worth

⁹² Section 5(1). This provision has now been repealed.

⁹³ Section 4, which is similar to section 2 of the UK *Official Secrets Act of 1911*.

⁹⁴ Section 118.

⁹⁵ Marcus, n 90 above at 395.

⁹⁶ See Burns, n 91 above p.71.

⁹⁷ C.A. Ford, 'Constitution-Making in South Africa: Symposium Article: Watching the Watchdog: Security Oversight Law in the New South Africa' (1997) 3 *Michigan Journal of Race & Law* 59 at 63.

preserving. The laws that the government inherited from the apartheid state made serious erosions on media freedom and access to information, two freedoms that are arguably among the most important in a democratic society. Immediately after assuming office, the government embarked on a wide-ranging legislative reform to ensure, *inter alia*, the compatibility of security laws with the new order. Many statutory provisions that made profound incursions into media freedom and access to information such as the *Internal Security Act* were repealed. However, some provisions that impact negatively on the two freedoms, especially access to information, have not yet been amended or repealed. The democratic government has invoked some of these laws to censor the media.⁹⁸ The chilling effect of these laws on media freedom is now alleviated by the application of the *Promotion of Access to Information Act (AIA)*,⁹⁹ which applies to the exclusion of any other legislation that prohibits or restricts the disclosure of official information.¹⁰⁰

7.4.1 *Definition of National Security in the AIA*

National security was invoked by the apartheid state to inhibit public debate on political and social problems. The tendency to misuse the concept is not only peculiar to the apartheid state, national security has been, and is still being used in some modern states to inhibit free political activity and to suppress embarrassing revelations about governments.¹⁰¹ Given the propensity to misuse the concept, and especially in the light of South Africa's authoritarian past, it was perhaps inevitable for the democratic government to attempt a definition of national security in order to safeguard the enjoyment of fundamental rights and freedoms. It is also not surprising that the concept is defined in an access to information legislation. Under the apartheid state, the media were often denied access to state-held information under the guise of

⁹⁸ For example, in November 1994, the then Minister of Defence invoked the *Defence Act* to try and force a Commission of Inquiry appointed by the State President to investigate illegal arms dealings to have its proceedings held in camera: see L. Johannessen, 'Arms and the Right to Know: The Cameron Commission of Inquiry' (1996) 1 *Southern Africa Media Law Briefing* 3; and in July 1997 the state arms manufacturer, Denel, tried to use the *Armaments and Production Act* to interdict the media from publishing the name of a client involved in a multi-billion rands arms deal. See J. Minnie & B. Mwape, *So this is Democracy? Report on State of the Media in Southern Africa 1997* (MISA, 1997) pp. 86–88 & 91.

⁹⁹ Act No.2 of 2000.

¹⁰⁰ Section 5, *AIA*. For a detailed discussion of this section, see chapter 6 at 6.4.2.

¹⁰¹ A typical example is the current situation in Zimbabwe where opposition politicians are constantly being harassed and detained under national security legislation for criticizing president Robert Mugabe and his ruling party.

the protection of national security, hindering them from facilitating the free flow of information and performing their watchdog role.

The *AIA* allows the state to refuse a request for access to official information if the disclosure could reasonably be expected to cause prejudice to the defence or security of the Republic.¹⁰² The terms ‘defence’ and ‘security’ are not specifically defined in the Act. However, section 41(2) specifies public records that fall within the ambit of subsection 1. The relevant parts of the subsection read:¹⁰³

- (2) A record contemplated in subsection (1), without limiting the generality of that subsection, includes a record containing information –*
- (a) relating to military tactics or strategy or military exercises or operations undertaken in preparation of hostilities or in connection with the detection, prevention, suppression of hostilities or curtailment of subversive or hostile activities;*
 - (b) relating to the quantity, characteristics, capabilities, vulnerabilities or deployment of –*
 - (i) weapons or any other equipment used for the detection, prevention, suppression, or curtailment of subversive or hostile activities; or*
 - (ii) anything being designed, developed, produced or considered for use as weapons or such other equipment;*
 - (c) relating to the characteristics, capabilities, vulnerabilities, performance, potential, deployment or functions of –*
 - (i) any military force, unit or personnel; or*
 - (ii) any body or person responsible for the detection, prevention, suppression or curtailment of subversive or hostile activities;*
 - (d) held for the purpose of intelligence relating to –*
 - (i) the defence of the Republic;*
 - (ii) the detection, prevention, suppression or curtailment of subversive or hostile activities; ...*
 - (e) on methods of, and scientific or technical equipment for, collecting, assessing or handling information referred to in paragraph (d);*
 - (f) on the identity of a confidential source and any other source of information referred to in paragraph (d); ...*

¹⁰² Section 41(1)(a)(i) & (ii).

¹⁰³ Section 41(2).

Even though the terms 'defence' and 'security' are not defined in the Act, an examination of the above subsection reveals that the two terms are used to refer to the concept of national security.¹⁰⁴ Section 41(2) provides a set of definitions to be used in determining legitimate national security interests. The provision seeks to exempt from disclosure information held by the state relating to the protection of its political or territorial integrity from the use, or threatened use of force. It does so by recognising that the state needs to have effective tools to combat the threat posed to its democratic institutions and citizens by violent and subversive forces. The provision thus protects military secrets such as the movement and deployment of troops, and details, such as capabilities, design and vulnerabilities of weapons used by the military in combating or preventing hostilities or subversive activities. In addition, the provision also protects intelligence work relating to the detection or prevention of subversive or hostile activities against the state. The Act defines subversive or hostile activities against the state as including: (i) sabotage or terrorism against the people of the Republic or a strategic asset, whether inside or outside the Republic; (ii) an activity aimed at changing the constitutional order of the Republic by the use of force or violence; and (iii) a foreign or hostile intelligence operation.¹⁰⁵

National security is given a narrow definition in the *AIA*, which is consistent with international law. It appears the South African legislature drew inspiration from both the *Siracusa* and *Johannesburg Principles* in defining the concept. While it may be too early to judge its success, it seems that in its relatively short existence, the Act has been successful in thwarting the threat of censorship from the state under the guise of protection of national security. Since its enactment in 2000, MISA, which has been monitoring media violations in the Southern African region since 1994, has yet to record an action alert on censorship of the media by the government on national security grounds. South Africa is thus currently looked at as the shining light of media freedom in the region and in Africa as a whole.¹⁰⁶

¹⁰⁴ Cf. *Council of Civil Service Unions v Minister of the Civil Service*, n 9 above at 410.

¹⁰⁵ Section 2, *AIA*.

¹⁰⁶ J. Minnie, 'A Game of Snakes and Ladders' *Freepress*, September 2002, p. 29. (*Freepress* is a MISA quarterly publication).

7.4.2 *Safeguards and Remedies Against the Abuse of National Security*

In most countries around the world, national security remains an excessively broad area of restriction on the exercise of fundamental rights and freedoms. Many states have hitherto failed to provide specific guidance on the key issue of: what information is it legitimate to withhold from the public on the grounds of national security? The uncertainty surrounding what the concept encompasses leaves governments around the world with very wide discretionary powers that enables them to withhold a wide range of information from the public under the pretext of protecting the security of the state. This uncertainty is also said to be the source of the courts' traditional deference to assertions by governments that something pertains to national security because courts do not have clear standards of what the concept entails against which executive action can be judged.¹⁰⁷

The *AIA* brings about some measure of certainty to the concept of national security by identifying types of information that the state may legitimately withhold from the public in the interest of the security of the state. Section 41(2) contains a comprehensive list of types of information that are *prima facie* protected from disclosure in the interest of national security. The list serves at least two useful purposes. First, it sets limitations upon the discretion of executive authorities seeking to withhold information from the public in the interest of national security. And secondly, it provides a benchmark upon which courts can judge whether executive authorities have exercised their discretionary powers properly in withholding information from the public. The demarcation of the area of risk by way of identifying types of information, the disclosure of which will cause prejudice to the security of the state, provides for some measure of certainty and thus serves as an important safeguard against the potential abuse of national security.

Information relating to the defence or security of the state does not constitute a mandatory ground of refusal to disclose information under the *AIA*.¹⁰⁸ It remains within the discretion of an information officer to disclose information even if it

¹⁰⁷ Atkey, n 2 above at 48.

¹⁰⁸ Contrast this approach with the position under the FoI laws of countries such as the UK, Australia and New Zealand where information relating to national security is automatically excluded from disclosure to the public.

concerns national security. To justify the withholding of information, the state is required to prove that the disclosure could reasonably be expected to cause prejudice to national security. The South African courts have not yet pronounced on the requirements of this standard. However, from comparative jurisprudence, it would appear that the state would be required to prove that there are real and substantial grounds for the expectation that the security of the state will be harmed.¹⁰⁹ This is a strict approach in establishing a connection between the disclosure of information and harm to national security, which minimises the scope for the state to invoke national security for improper purposes.

Further, even if the disclosure of information would harm national security, the Act provides for mandatory disclosure of information in the public interest.¹¹⁰ The public interest is determined through a two-step test. First, the disclosure of information should reveal evidence of either substantial contravention of the law or an imminent and serious public or environmental risk. Secondly, the public interest in the disclosure of information must clearly outweigh the harm to national security.¹¹¹ The provision incorporates the principle of proportionality in accordance with the constitution.¹¹²

The limitation of fundamental rights and freedoms for a purpose that is reasonable and justifiable in a democratic society involves the weighing up of competing values, and ultimately an assessment of proportionality.¹¹³ Where the state intends to withhold information from the public in the interest of national security, it must give

¹⁰⁹ Cf. *Canada Packers Inc v Canada (Minister of Agriculture)* 53 DLR (4th) 246 and *Searle Australia Pty Ltd v Public Interest Advocacy Centre & another* (1992) 108 ALR 163. See also discussion in chapter 6 at 6.4.2 (c).

¹¹⁰ Section 46, *AIA*.

¹¹¹ See J. de Waal, I. Currie & G. Erasmus, *The Bill of Rights Handbook* (Juta & Co Ltd, 2001) p. 550.

¹¹² Section 36(1) of the Constitution of 1996 provides:

'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'.*

¹¹³ For an excellent formulation of the principle of proportionality in South Africa, see the decision of the Constitutional Court in *S v Makwanyane* 1995 3 SA 391 at 436. See also discussion in chapter 4 at 4.5.2 on the application of the limitation clause in South Africa.

consideration to the public's constitutional right to know and the constitutional value of an open society. These should then be weighed against any harm to national security that may result from the disclosure of the information. In South Africa, this balancing exercise is best illustrated in the approach taken by the *Commission of Inquiry into Alleged Arms Transactions Between Armscor and One Eli Wazan and Other Related Matters*, otherwise known as the *Cameron Commission* after Justice Edwin Cameron who chaired it.¹¹⁴ The Commission was appointed to inquire into alleged illegal arms sales by the South African National Defence Force (SANDF). During the course of the Commission's work, reference was made to a document that contained a list of countries that the SANDF was allowed to sell arms to and those that it could not. The SANDF was anxious about the contents of the document being made public as they felt diplomacy in arms transactions required a measure of secrecy. They therefore applied to the Commission to have the document withheld from the public. The Commission ruled against SANDF holding that:

'Reasonableness as a standard of public conduct in South Africa now requires that decision-makers should have due regard to appropriate constitutional standards and principles. These include in the present case the value of openness and visibility in government and official processes. In other words, an assessment whether the reasonable justification test has been fulfilled may include in the weighing process giving consideration to the public's constitutional right to know and the constitutional value of an open society. To put the matter differently, the public's right to know should not be omitted from an assessment whether the reasonable justification standard has been fulfilled'.¹¹⁵

The Commission acknowledged that the decision to allow the disclosure of the contents of the document was not without a risk of harm to national security. However, it concluded that the risk in the case was not sufficient to entitle it to bar from the media and the public their important right to examine South Africa's past, including its past armaments dealings. The fact that the disclosure could cause embarrassment and even complexity to other governments or indeed the government of South Africa was not sufficient to justify the withholding of the information from the public. Lessons from the Commission demonstrate the importance of the

¹¹⁴ The Commission was appointed on 14th October 1994 pursuant to Government Notice R 1801, published in *Government Gazette* 16035. The report of the Commission is available at: [<http://www.polity.org.za/html/govdocs/commissions/cameron.html>].

¹¹⁵ Paragraph 1433, *Cameron Commission*.

proportionality principle as a procedural safeguard against the abuse of national security. The principle, when properly applied, strikes an equitable balance between media freedom and the public's right of access to official information on the one hand, and genuine national security interests on the other hand.

No matter how well an access to information law is designed, there will still be cases where disclosure of information will be refused on bogus national security grounds. It is only through a leak that such information may become public. Leaking information is however dangerous because it exposes the leaker to criminal sanctions and/or occupational detriment. Under the *Protection of Information Act 1982*, a person, who without authorisation, discloses information obtained or which he/she has had access by virtue of his/her employment with the government, commits an offence.¹¹⁶ And any person who receives information knowing or having reasonable grounds to believe that the information is being disclosed to him/her in contravention of the Act also commits an offence.¹¹⁷ The latter prohibits the media from publishing leaked information. In some instances, the unauthorised release of classified information serves as an important safety valve for ensuring the free flow of information to the public, especially where such disclosure exposes some wrongdoing in government. It is in this vein that the *Johannesburg Principles* provide that:

'No person may be subjected to any detriment on national security grounds for disclosing information that he or she learned by virtue of government service if the public interest in knowing the information outweighs the harm from disclosure'.¹¹⁸

The South African legislature has recognised the value to an accountable and transparent society played by those public servants who blow the whistle on unlawful or irregular conduct in government by enacting the *Protected Disclosures Act of 2000*.¹¹⁹ The Act provides protection against criminal and employment-related sanctions for disclosures that reveal various types of wrongdoing in government. Disclosures are protected if they are made to legal advisers, or through formal

¹¹⁶ Section 4(1)(iv). The stipulated penalty for the offence is a fine not exceeding R10 000 or an imprisonment term not exceeding 10 years.

¹¹⁷ Section 4(2). The penalties for the offence are the same as for unlawful disclosure.

¹¹⁸ Principle 16.

¹¹⁹ Act No. 26 of 2000, available at: [<http://www.gov.za/gazette/acts/2000/a26-00.pdf>].

employment complaints procedures or certain high-level officials such as ministers, the Public Protector or Auditor General.¹²⁰ Public servants are also protected if they make wider disclosures, for example to the police, members of parliament and the media.¹²¹ The latter protection applies where the whistle-blower honestly and reasonably believes that the information and any allegation contained in it are substantially true, and the disclosure is not made for personal gain. Further the disclosure must also be for a good cause and reasonable. The Act recognises four good causes, which are that: (i) a concern was raised internally or with a prescribed regulator, but was not properly addressed; or (ii) the concern was not raised internally or with a prescribed regulator because the whistle-blower reasonably believed he would be victimised; or (iii) the concern was not raised internally because the whistle-blower reasonably believed a cover-up was likely and there was no prescribed regulator; or (iv) the concern was exceptionally serious.¹²²

The withholding of information from the public under bogus national security grounds constitutes a serious breach of the constitutional principle of accountable and transparent government. Where this breach occurs, public servants would be able to leak it to, among others, the media, under the protection of the *Protected Disclosures Act*. The Act therefore provides another safeguard against the abuse of national security by the state. The fact that there remains a possibility of exposing their true intentions, if they invoke national security for improper purposes, should be able to keep information officers on the straight when exercising their discretion to withhold information under the *AIA*.

The main remedy of a person aggrieved by a decision to withhold information on national security grounds is judicial review.¹²³ However, it has been observed that the highly deferential stance adopted by courts where national security matters are involved places the adequacy of the remedy in serious doubt. The lack of clear standards on what pertains to national security is partly responsible for the courts' attitude. In the case of South Africa, this should not be the case as the *AIA* clearly identifies legitimate national security interests. There are currently no decided cases

¹²⁰ See sections 5 – 8.

¹²¹ Section 9.

¹²² Section 9(2).

¹²³ For a more detailed discussion of remedies offered by the *AIA*, see chapter 6 at 6.4.2 (d).

involving national security under the democratic era in South Africa, from which one can ascertain the attitude of their courts. The South African constitution requires its courts to apply the principle of proportionality in cases involving a limitation of fundamental rights and freedoms. The principle requires a court to engage in a balancing exercise of competing interests in a given case, therefore if the courts were to adopt an uncritical and deferential stance to the state's assertions of national security, this will amount to a failure of a proper application of the principle.

From the trend thus established by the courts in their protection of fundamental rights and freedoms in the country, there is hope that they will not adopt a highly differential attitude. In one of the leading decisions involving an attempt by the state to withhold information from the public, the High Court held that:

'The judiciary as guardian of the constitution must be astute in determining the full ambit of the rights enshrined in the constitution and be vigorous in its protection thereof'.¹²⁴

The *Cameron Commission* is, for now, the leading authority on the application of the principle of proportionality in cases involving national security in South Africa. Even though the Commission's findings are not binding on the courts, it should serve as a useful point of reference in the application of the principle. If courts were to adopt the same attitude as the *Cameron Commission* in dealing with matters of national security, then judicial review would be an adequate remedy in the context of South Africa, given that national security interests are clearly defined and courts are obliged to apply the principle of proportionality.

7.5 Conclusion

In a democratic society, the protection of national security is a genuine and legitimate interest, not just of the state or the government of the day, but of the public at large. The security of a state is essential for ensuring the well-being of its citizens. Democratic societies guarantee their citizens certain fundamental rights and freedoms,

¹²⁴ *Government of the Republic of South Africa v Sunday Times Newspaper and another* 1995 2 SA 221 at 225.

which are crucial for the maintenance of the values of that society. One such right is the freedom of expression. The proper protection of this right, and the related right of access to official information, leads to an open and accountable government. The overall public interest therefore requires a proper balance to be struck between measures undertaken by the state in the protection of national security and the exercise of the freedoms of expression and access to information by its citizens. Unfortunately, most states around the world fail to provide this balance. The failure stems mainly from the fact that national security in these states remains an excessively broad area of restriction, thus effectively precluding proper judicial scrutiny of executive action taken, purportedly, in the interest of national security. The ambiguity and breadth of national security in these states also encourages abuse of the concept.

Botswana is one of those countries that fail to provide a proper balance between the freedoms of expression and access to information, and national security interests. The *NSA* is skewed in favour of the protection of national security. The Act fails to provide a clear definition of legitimate national security interests, and it gives the state almost unlimited powers to keep a wide range of information secret under the pretext of protecting the security of the state. The failure to indicate the scope of the state's discretionary powers under the *NSA* leaves citizens vulnerable to arbitrary interferences with their fundamental freedoms, especially the freedoms of expression and access to information. Occasionally, the state invokes the Act to justify the withholding of embarrassing or inconvenient information that has nothing to do with national security.¹²⁵

South Africa is one of the few countries that have brought a measure of certainty to the concept of national security by identifying interests that justify the withholding of information in the interest of the security of the state. National security was abused by the apartheid state to deny the majority citizens access to information and from taking

¹²⁵ For example, in November 1991 a journalist and *Mmegi* newspaper were charged under the *NSA* for 'unlawfully receiving an official document marked secret' and publishing classified information. The charges related to *Mmegi's* publication of information contained in a document outlining government policy on workers' demands made during a general strike. The charges were however subsequently dismissed by the High Court in February 1995 because the state had failed to obtain the consent of the AG to prosecute. See A. Schoeman & D. Lush, *So this is Democracy? Report on Media Freedom in Southern Africa 1995* (MISA, 1996) pp. 10 – 11.

part in public discourse. The democratic government therefore found it important to limit the state's discretionary powers to withhold information from the public in the name of national security by defining the concept. The definition draws heavily from international instruments such as the *Siracusa* and *Johannesburg* principles. Botswana must also define legitimate national security interests that will justify the withholding of information in order to strike a balance between the exercise of the freedoms of expression and access to information, and protection of national security. A definition based on international law will limit the scope of the state's discretionary powers.

The task of striking a balance in situations where the freedoms of expression and access to information, and national security, appear to conflict should be a matter for independent judiciaries. The task cannot be left to those who exercise executive power because they may act in their own political interest rather than the broader public interest and abuse restrictions to conceal their wrongdoing. The courts' traditional deference to states' assertions of national security must therefore be discarded. Courts need to be more rigorous and intrusive than was once thought to be permissible in order to strike a balance between the preservation of free expression and the interests of national security.¹²⁶ At least two things are necessary to achieve this. First, states must adopt a narrow definition of national security that is consistent with international law so that courts can have a basis on which they can judge the legality of executive action. And secondly, courts should apply the principle of proportionality in the determination of the legality of restrictions to the freedoms of expression and access to information.

There is an overlap between the traditional grounds of review such as reasonableness and the approach of proportionality, but the intensity of review under the latter is greater.¹²⁷ The proportionality principle requires the reviewing court to assess the balance that the decision-maker struck, not merely whether it was within the range of rational or reasonable decisions. Further, the proportionality test also go further than

¹²⁶ Cf. *R v Shayler*, n 85 above, at 497 (para. 33)

¹²⁷ See Jowell, n 77 above, and R. Clayton, 'Regaining a Sense of Proportion: The Human Rights Act and the Proportionality Principle' (2001) 6 *EHRLR* 504.

the traditional grounds of review in as much as it requires attention to be directed to the relative weight accorded to interests and considerations in the case.¹²⁸

In terms of international law, striking a balance between freedom of expression and national security also means there should be no sweeping blanket bans on disclosure of information relating to national security. No one should be subjected to criminal penalty for disclosure of information unless the disclosure poses a real risk of substantial harm to the security of the state. Furthermore, even where disclosure causes harm, the requirements of necessity in a democracy require that the leaker should not be punished where the public interest in receiving the information outweighs the harm to national security. In the same vein, protection should be extended to those public officials who blow the whistle on government wrongdoing.

The above measures, together with the desirability of a narrow definition of national security, and the adoption of the proportionality principle in the determination of legality of limitations to fundamental rights and freedoms constitutes international law minimum standards, which states must adopt in order to balance the exercise of freedom of expression and the protection of national security. The regime offered in Botswana under the *NSA* falls far below these standards. South Africa on the other hand, has incorporated these standards into its municipal law. The latter therefore provides a suitable environment for the maintenance of a proper balance between media freedom and national security. There is an urgent need for Botswana to review the *NSA* to bring it into line with international law standards.

¹²⁸ See speech of Lord Hope of Graighead in *R v Shayler*, n 85 above, especially para. 75.

CHAPTER 8

IMPACT OF THE CIVIL LAW OF DEFAMATION ON MEDIA FREEDOM

8.1 Introduction

In democratic societies, reputation is an integral and important part of the dignity of the individual.¹ The legitimate purpose of the civil law of defamation is therefore to protect the reputation of individuals or legal persons against injury through publication of matter that tends to lower the esteem in which they are held within the community, or by exposing them to public ridicule or hatred, or by causing them to be shunned or avoided.² At the same time, in modern representative democracies, there is a profound commitment to the principle that debate on public issues should be uninhibited, robust and wide open. Conflict between these two important interests – protection of reputation and the promotion of freedom of expression, frequently arise when individuals or the media, exercising their right to speak freely, make false statements about others, injuring their reputation.

In jurisdictions based on the traditional English common law, in an action for defamation against the mass media, the plaintiff only needs to prove evidence of a statement that tends to harm his/her reputation by lowering him/her in the estimation of the community, or which deters third parties from associating or dealing with him/her, and prove that the defendant was responsible for uttering or publishing it to others. The plaintiff is not required to prove fault on the part of the defendant nor actual injury to reputation.³ This strict standard holds liable both the malicious and the innocent who merely repeat in good faith what they have heard from reliable sources.

¹ Per Lord Nicholls in *Reynolds v Times Newspapers Ltd* [1999] 4 ALL ER 609 at 619 – 622. See also Barendt, E. 'What is the Point of Libel Law?' [1999] 52 *Current Legal Problems* 110 and R.C. Post, 'The Social Foundations of Defamation Law: Reputation and the Constitution' (1986) 74 *California Law Review* 691.

² A. Nicol, G. Millar & A. Sharland, *Media Law and Human Rights* (Blackstone Press Limited, 2001) p. 65.

³ E. Barendt, *Freedom of Speech* (Clarendon Press, 1985) pp. 178 – 80.

The common law has over the years influenced other jurisdictions to adopt this strict liability regime with respect to the mass media.⁴

A defendant in a defamation suit can generally plead three defences to justify the publication of a defamatory statement: truth, fair comment and privilege.⁵ Where truth is pleaded, the defendant bears the burden of proving the truth of the statement. Similarly, the defence of fair comment demands that a defendant show the factual basis of the comment to be true. The difficulty in proving the truthfulness of an alleged defamatory remark is that, quite often the facts that would justify defamatory publication are known to be true, but admissible evidence capable of proving those facts is not available.⁶ The defence of qualified privilege is not dependent on proof of truth, but it requires what was said to serve 'the common convenience and welfare of society'.⁷ However what is requisite for the public benefit has been narrowly construed and has not been extended to cover political dialogue that was honest but erroneous.⁸

The fear that material intended for publication might contain falsehoods that may damage the reputation of others causes much of what we read, view or hear to be trimmed before it reaches us. Those exposed to damages awards and legal costs as publishers under the law of defamation often want to side-step the financial risks altogether by withholding material which may turn out to be defamatory. The climate thus created impacts negatively on investigative and polemic writing or broadcasting, which constitutes one of the most potent mechanisms for ensuring accountability in a representative democracy. This 'chilling effect' of the law of defamation on freedom of expression resulted in calls for the recognition of the important role of the media in informing the public on matters of public interest and in acting as a public watchdog, and that this requires that the media be accorded some privilege when commenting on

⁴ Under Roman-Dutch law, defamation is based on the *actio iniuriarum*, which requires, among other things, proof of an intention to injure. However, courts in Botswana (and at one point, South Africa) both Roman-Dutch jurisdictions, hold the media strictly liable for defamatory statements due to the English common law influence. See *Attorney General v Ghanzi Hotel* [1985] BLR 452 and *Pakendorf & others v De Flamingh* 1982 3 SA 147, respectively.

⁵ K. Williams, 'Defaming Politicians: The Not So Common Law' (2000) 63 *Modern Law Review* 748.

⁶ Cf. Lord Keith in *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534 at 538. (Such difficulties may arise in cases involving the confidentiality of journalists' sources.)

⁷ *Toogood v Spyring* (1834) 1 CM & R 181, 193.

⁸ Cf. *Blackshaw v Lord* [1984] 1 QB 1.

matters of political interest. The US Supreme Court obliged in the celebrated case of *New York Times Co v Sullivan*.⁹ Founding on the First Amendment, it laid down that when allegations which would ordinarily be defamatory were made of a public official in relation to his/her official conduct, an action by him/her would not succeed unless he/she prove that the defamatory statement was false, and prove with convincing clarity that it was made by the defendant with the knowledge of its falsity or reckless disregard as to whether it was false or not.

The *Sullivan* case, although a welcome development in freedom of expression circles, has been criticised for its failure to give sufficient weight to an individual's right of reputation. A person who goes into public life must expect robust and often unfair criticism. Although this may be part of the price of going into public life, it does not follow that it is necessary to deprive him of any right to reputation.¹⁰ The case also sets a difficult standard for the plaintiff to satisfy. A plaintiff must obtain detailed information about what the defendant actually knew or presumably did by way of investigation to prove that he/she published the statement knowing it to be false or with at least reckless disregard for the truth. This rigorous standard provides little protection for the reputation of the plaintiff because it imposes a difficult standard of proof upon the plaintiff and does not require the defendant to act reasonably to verify the truth of the statement before publication.¹¹

Many jurisdictions have declined to adopt the *Sullivan* case, opting instead for a fault-based regime.¹² In terms of this approach, publication of defamatory matter in the media is protected provided that it was reasonable in the circumstances, i.e., the defendant was not at fault. This approach provides a better environment for the search for an appropriate balance between freedom of expression and the protection of reputation. The reputation of individuals is not left unprotected, while at the same time, political debate and discussion can take place in relative freedom.

⁹ 376 US 254 (1964).

¹⁰ S. Kentridge, 'Freedom of Speech: Is It the Primary Right?' (1996) 45 *ICLQ* 261 at 267.

¹¹ J.E. Schaffner, 'Protection of Reputation Versus Freedom of Expression: Striking a Manageable Compromise in the Tort of Defamation' (1999) 63 *Southern California Law Review* 435 at 444.

¹² These include Australia, Canada and UK. See C. Forsyth, 'The Protection of Political Discourse: Pragmatism or Incoherence?' in J. Beatson and Y. Cripps (eds.) *Freedom of Expression and Freedom of Information: Essays in Honour of Sir David Williams* (Oxford University Press, 2000) 87.

The potential conflict between freedom of expression and the protection of reputation requires the law to strike an appropriate balance between the two rights. This chapter examines the civil laws of defamation of Botswana and South Africa to determine how they attempt to strike this balance. In particular, it seeks to determine the impact of the laws on media freedom. Before examining the laws of the two states, I briefly examine how international law attempts to strike a balance between the two rights. The municipal laws of the two states will then be discussed in the light of international law and how they compare with it.

8.2 Striking a Balance Between Media Freedom and Protection of Reputation Under International Law

The rights of freedom of speech (especially media freedom) and access to information are accorded an extremely high value in international law as cornerstones upon which the very existence of a democratic society rests.¹³ All major international human rights treaties therefore guarantee them.¹⁴ As we have seen, the ECtHR has in a number of cases consistently acknowledged the essential function the media fulfils in a democratic state. It has held that the media have not only a right but also a duty to impart information on all matters of political and public interest, which the public has a corresponding duty to receive.¹⁵ It has also held that the media plays a watchdog role.¹⁶ Because of these important roles, international law requires restrictions on freedom of speech to be construed strictly and the need for any restriction to be established convincingly.¹⁷

¹³ See generally, Lord Lester and N. Schiffrin, 'The European Convention on Human Rights and Media Law' (1999) 4 *The Yearbook of Copyright and Media Law* 353, and *Report on the Compatibility of "Desacato" Laws with the American Convention on Human Rights*, Annual Report of the Inter-American Commission on Human Rights 1994, OEA/Ser.L/V/II.88 Doc. 9 rev. (17 February 1995) at 202.

¹⁴ See chapter 4 at 4.2.

¹⁵ *Sunday Times v UK* (1979) 2 EHRR 245 at para. 65 and *Lingens v Austria* (1986) 8 EHRR 407 at para. 41.

¹⁶ *De Haes & Gijssels v Belgium* (1997) 25 EHRR 1 at para. 37.

¹⁷ *Tammer v Estonia* (App. No. 41205/98, 6th February 2001) at para. 59. See also M. Nowak, *UN Convention on Civil and Political Rights: CCPR Commentary* (Engel, 1993) p. 353 at para. 40.

Protection of the reputation of individuals is also one of the rights guaranteed under international law. It is expressly guaranteed in the *ICCPR*¹⁸ and *ACHR*¹⁹ as part of the right to privacy. The *EHCR* does not expressly guarantee the right, but Article 10(2) provides that the right to freedom of expression may be restricted in the interest of the protection of the reputation of others. The *ACHPR* on the other hand provides that the rights and freedoms of each individual shall be exercised with due regard to the rights of others.²⁰ It can thus be inferred from this provision that the right of freedom of expression must be exercised with due regard to the reputation of others.

Protection of reputation may undermine freedom of expression, particularly in the political arena, if every attack on reputation is penalised. Freedom of expression could be stripped of its fundamental importance in the process of formation of political opinion and as a watchdog over those entrusted with the management of public affairs if that was the case. Likewise, an absolutist approach to the protection of freedom of expression exposes individuals to unwarranted attacks on their reputation. The media may have a vital public interest role, but they are also profit dependent enterprises in an environment where the commercial marketplace in sensationalism often assumes greater importance than the intellectual marketplace in ideas.²¹

International law attempts to resolve the classic human rights conflict between the guarantee of freedom of expression and the protection of reputation by providing that the former right may be limited in the interest of the latter.²² However, because of the importance of freedom of expression in the maintenance of democracy, restrictions are to be construed narrowly in terms of the three-part test. A restriction sought on freedom of expression in the interest of the protection of reputation must: (i) be prescribed by law; (ii) be genuinely aimed at protecting reputation; and (iii) correspond to a pressing social need and proportionate to the legitimate aim pursued.²³

¹⁸ Article 17(1).

¹⁹ Article 11(2).

²⁰ Article 27(2).

²¹ S. Tierney, 'Press Freedom and Public Interest: The Developing Jurisprudence of the European Court of Human Rights' (1998) 3 *EHRLR* 419 at 420. See also, Forsyth, n 12 above, at 98.

²² Articles: 19(3)(a) - *ICCPR*; 13(2)(a) - *ACHR* and 10(2) - *ECHR*.

²³ Cf. *Thorgeirson v Iceland* (1992) 14 *EHRR* 245 at para. 62 and *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85, Series A, No. 5 (13th November 1985) at para. 79.

Proof of the first two elements of the three-part test is usually not problematic in cases involving restrictions based on the law of defamation. The word ‘law’ has been interpreted as covering not only statute, but also common law.²⁴ And reputation is one of the legitimate aims recognised under international law that justifies restrictions on freedom of expression. It is the requirement of necessity that plays a crucial role in the endeavour to strike an appropriate balance between freedom of expression and the protection of reputation. Unfortunately, this is not a simple or uniform concept. The application of the concept involves the weighing and balancing of different competing interests. The public interest ends served by restrictions on freedom of expression must be weighed against their detrimental effect on democracy.

The ECtHR is so far the only international human rights treaty enforcement organ that has generated some easily accessible case law from which guidance may be sought on how the principle of necessity should be applied in an attempt to strike a balance between the two rights. Other international human rights treaties enforcement organs have to a large extent endorsed the jurisprudence of the ECtHR.²⁵ The discussion of international law principles that follows therefore draws heavily from the jurisprudence of the ECtHR. The discussion proceeds on the assumption that the position proclaimed by the ECtHR, unless otherwise stated, reflects the status of international law.

In its attempt to strike a balance between freedom of expression and the protection of reputation, the ECtHR’s approach has centred around the role the media plays in reporting on matters of public interest. The requirements of protection of reputation have to be weighed in relation to the interest of the media in imparting information and ideas on matters of public concern.²⁶ The court has established a number of

²⁴ *Tolstoy Miloslavsky v UK* (1995) 20 EHRR 442 at para. 37.

²⁵ See: *Declaration of Principles on Freedom of Expression in Africa* (Adopted by the African Commission on Human and People’s Rights at its 32nd Ordinary Session, 17th–23rd October 2003); *Inter-American Declaration on Freedom of Expression* (Approved by the Inter-American Commission on Human Rights at its 108th Regular Session, 20th October 2000), and *Report of the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression and Opinion 1999*, UN Doc. E/CN.4/2000/63 (18 January 2000) at para. 52.

²⁶ *Tammer v Estonia*, n 17 above, at para. 65.

principles that national courts are to consider in their attempts at striking a balance between the two rights.²⁷

First, the ECtHR has held that the important role of the media in informing public opinion on matters of public interest and in acting as a public watchdog requires that the media be accorded particular latitude when commenting on matters of political or other public interest.²⁸ The court attaches the highest importance to the protection of speech in the context of political debate and very strong reasons are required to justify restrictions on political speech.²⁹ The concept of political speech is not clearly defined in the case law of the court, but it has been suggested that it relates to the electoral process and to day-to-day matters of public concern.³⁰ Even though the court emphasises the protection of political speech, in practice, it gives strong protection to expression of matters of public interest in general.³¹ The term public interest is interpreted in a fairly open-ended way and is not only restricted to political speech, but covers publication of material that can be shown to possess public interest content.³² Protection is thus given to the media when they seek to draw popular attention to matters of legitimate public concern. The court recognises that media freedom covers possible recourse to a degree of exaggeration, or even provocation, and has shown willingness to protect political commentators' use of insulting language where it is part of a reasoned critique.³³ While vigorous protection is given to the media when commenting on matters of public concern, the media must not overstep certain set bounds, *inter alia*, for the protection of the reputation of others.³⁴

Secondly, freedom of expression provides an important tool for exercising democratic control over those responsible for matters of public interest. International law therefore requires defamation laws to reflect the principle that persons in charge of the

²⁷ See S. Coliver, 'Defamation Jurisprudence of the European Court of Human Rights' (1992) 13 *Journal of Media Law and Practice* 250 and K. Starmer & I. Byrne, *Blackstone's Human Rights Digest* (Blackstone Press Ltd, 2001) at section 32.

²⁸ *Lingens v Austria*, n 15 above at para. 41.

²⁹ *Feldek v Slovakia* (App. No. 29032/95, 12th July 2001) at para. 83.

³⁰ D.J. Harris, M. O'Boyle & C. Warbrick, *Law of the European Convention on Human Rights* (Butterworths, 1995) p. 397.

³¹ See *Thorgeirson v Iceland*, n 23 above at para. 64, where the court refused to distinguish between protection given to political expression and to discussion of other matters of public concern.

³² Tierney, n 21 above at 421.

³³ *Oberschlick v Austria (No. 2)* (1997) 25 EHRR 357 at para. 38.

³⁴ *Lingens v Austria*, n 15 above at para. 41.

management of public affairs can claim less protection from criticism than the average private person not involved in public affairs. Those who are involved in the management of public affairs are expected to tolerate a greater degree of criticism than the private citizen.³⁵ The ECtHR gives differing levels of protection from defamation to the government *qua* corporate body, politicians, public servants and private citizens. The limits of permissible criticism are wider with regard to the government than in relation to a politician acting in his/her capacity as such.³⁶ Similarly, politicians are subject to wider limits of acceptable criticism than civil servants acting in an official capacity, and civil servants must in turn tolerate more criticism than a private citizen.³⁷ The UN endorses the general position that public officials must tolerate a greater degree of criticism than private citizens, but goes further to recommend that government bodies and public authorities should not be allowed to bring defamation suits to protect their governing reputations.³⁸ The rationale seems to be that allowing government bodies to bring defamation actions could undermine the vital importance of open criticism in a democracy.³⁹

Third, a distinction is drawn between expression in the form of statements of fact and the expression of value judgments or opinions. The existence of fact can be demonstrated, whereas the truth of value judgments is not susceptible of proof.⁴⁰ Where a defamatory statement is considered to be a fact, the media must be permitted to call relevant evidence to try to prove truth.⁴¹ The requirement to prove the truth of the allegations as a defence to a defamation action, which is an elementary feature of defamation proceedings in most legal systems, is not incompatible with the right to freedom of expression.⁴² The UN and Inter-American Commission on Human Rights (IACmHR) however consider this standard to be a hindrance to the free flow of ideas

³⁵ *Ibid.* Further, see *Report of the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression and Opinion 1999*, n 25 above, para. 52; *Declaration of Principles on Freedom of Expression in Africa*; n 25 above at Principle XII (1) and *Inter-American Declaration on Freedom of Expression*, n 25 above at Principle 11.

³⁶ *Castells v Spain* (1992) 14 EHRR 445 at paras. 42 – 46.

³⁷ *Thoma v Luxembourg* (App. No. 38432/97, 29th March 2001) at para. 47.

³⁸ *Report of the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression and Opinion 1999*, n 25 above at para. 52

³⁹ Cf. Lord Keith's speech in *Derbyshire County Council v Times Newspapers*, n 5 above at 547: "It is of the highest public importance that a democratically elected governmental body should be open to uninhibited public criticism".

⁴⁰ *Lingens v Austria*, n 15 above at para. 43.

⁴¹ *Castells v Spain*, n 36 above at para. 48.

⁴² *Feldek v Slovakia*, n 29 above at para. 57.

and opinions, particularly in the political arena, where it is argued that political criticism is often based on value judgments or opinions rather than purely fact-based statements. The two bodies recommend that the plaintiff should bear the burden of proving the falsity of any statements of imputations of fact alleged to be defamatory.⁴³

A defendant is not required to prove the truth of opinions or value judgments, but there must be some established or undisputed factual basis for the expression of the opinion, which must be made in good faith.⁴⁴ To satisfy this requirement, media defendants must prove that they acted in accordance with the ethics of journalism, especially the obligation to verify factual statements that are defamatory of private individuals.⁴⁵

Fourth, international law recognises that media defendants can raise a defence of 'reasonable publication'. Even where a statement of fact on a matter of public concern has been shown to be false, liability can be excluded if the defendant can establish that it was reasonable in all the circumstances for a person in his/her position to have disseminated the material in the manner and form that he/she did.⁴⁶ In determining whether a publication was reasonable, account is taken of the importance of freedom of expression with respect to matters of public concern and the right of the public to receive timely information relating to such matters.⁴⁷ The media's right to disseminate information on issues of general interest will be protected provided they act in good faith and on accurate factual basis and provide reliable and precise information in accordance with the ethics of journalism.⁴⁸ One of the fundamental ethical principles of journalism is that the defendant should have carried out an adequate and diligent previous search before publication of the offending statement.⁴⁹ This would ordinarily require defendants to prove proper steps to verify any allegations, an opportunity for

⁴³ *Report of the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression and Opinion 1999*, n 25 above at para. 52 and *Report on the Compatibility of "Desacato" Laws with the American Convention on Human Rights*, n 13 above at 208.

⁴⁴ *Lingens v Austria*, n 15 above at para. 46.

⁴⁵ *Bladet Tromso and Stensaas v Norway* (1999) 29 EHRR 125 at paras. 65 – 66.

⁴⁶ *Ibid.* The UN Special Rapporteur on Freedom of Expression endorsed the above case in his 1999 report, n 25 above, para. 52. See also *Declaration of Principles on Freedom of Expression in Africa*, n 25 above at Principle XII (1).

⁴⁷ The ECtHR has held that news is a perishable commodity and to delay its publication may deprive it of its value and interest. See *The Observer and The Guardian v UK* (1991) 14 EHRR 153 at para. 60.

⁴⁸ Cf. *Bladet Tromso and Stensaas v Norway*, n 45 above at paras. 65 – 66.

⁴⁹ Decision of the European Commission on Human Rights No. 18902/91, *H.N. v Italy*, decision of 27th October 1998, D.R. 94 at 21.

the person potentially defamed to respond, and an honest and reasonable belief in the truth of the story.⁵⁰ The ECtHR takes a relaxed attitude to this standard where the media are relying on official reports. It has held that where the media contributes to a public debate on questions of legitimate public interest, it must be able to rely on official reports without having to carry out independent research.⁵¹ The IACmHR, on the other hand, favours the approach that the media should incur liability only in cases where it is proved that they acted with actual malice. This means that the author of the statement in question must have acted with an intention to cause harm, or was aware that the statement was false or acted with gross negligence in efforts to determine the truth or falsity of the statement.⁵²

Fifth, sanctions for defamation should not be so large as to exert a chilling effect on freedom of expression and information.⁵³ The overriding goal of providing a remedy for defamatory statements should be to redress the harm done to the reputation of the plaintiff. An award of damages must therefore bear a reasonable relationship of proportionality to the injury to reputation suffered.⁵⁴ International law however does not provide guidance on the quantum of damages to be awarded. The difficulty stems from the fact that perceptions as to what would be an appropriate response by society to a defamatory statement will differ from one state to another. National authorities are thus better placed than international bodies to assess the matter. It is also important for municipal laws concerning the calculation of damages for injury to reputation to be flexible, to enable the assessment of damages tailored to the facts of a particular case. While flexibility is required in the assessment of quantum of damages, international law also emphasises that there must be adequate and effective safeguards against disproportionately large awards.⁵⁵

⁵⁰ See Williams, n 5 above at 749. It would appear that this is also the standard recommended by the UN in terms of General Assembly Resolution 59(1). One of the responsibilities attached to the exercise of the freedoms of expression and access to information is the '*moral obligation to seek facts without prejudice and to spread knowledge without malicious intent*'.

⁵¹ *Colombani and others v France* (App. No. 51279/99, 25th June 2002) at para. 65.

⁵² *Inter-American Declaration on Freedom of Expression*, n 25 above at Principle 10.

⁵³ *Declaration of Principles on Freedom of Expression in Africa*, n 25 above at Principle XII (1) and *Tolstoy Miloslavsky v UK*, n 24 above at para. 49.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*, at para. 50.

And finally, sixth, international law also recognises that prior restraints to publication in the media constitute an extreme restriction on freedom of expression. It has been observed that news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.⁵⁶ International human rights treaties, however, adopt different approaches to the question of the compatibility of prior restraints to publication in the media and the right to freedom of expression. The *ACHR* expressly prohibits any form of prior censorship of the media. Restrictions are only permitted by way of subsequent imposition of liability.⁵⁷ Under the *ECHR*, there cannot as yet be said to be a clear rule against prior restraint, however it seems that prior restraints are viewed as pernicious and that, to be upheld as justifiable, their use will have to be viewed as appropriate, proportionate and absolutely necessary.⁵⁸ The ECtHR has held that the *ECHR* does not prohibit the imposition of prior restraints on publication, but the dangers inherent in them are such that they call for the most careful scrutiny on the part of the court.⁵⁹ The court has found some interdicts to be a justifiable interference with freedom of expression for the protection of reputation.⁶⁰

The principles discussed above demonstrate that, in its attempt to strike a balance between the exercise of freedom of expression and the protection of reputation, international law tilts the scales in favour of freedom of expression. The approach is not surprising given international law's firm belief that the freedoms of expression and access to information are essential for the maintenance of democracy, and for guaranteeing respect of other basic rights.

⁵⁶ *The Observer and The Guardian v UK*, n 47 above at para. 60.

⁵⁷ Article 13(2) and *Inter-American Declaration on Freedom of Expression*, n 25 above at Principle 5.

⁵⁸ C.R. Munro, 'Prior Restraint of the Media and Human Rights Law' (2002) *Juridical Review* 1 at 23.

⁵⁹ *The Observer and The Guardian v UK*, n 48 above at para. 60.

⁶⁰ For example, *Wabl v Austria* (2000) 31 EHRR 51 at para. 45, where an interdict against repetition of an insulting comment levelled at a newspaper was held to be a justifiable interference for the protection of a newspaper's reputation.

8.3 *A Synopsis of the Civil of Defamation in Botswana and South Africa*

As observed in chapter 4, freedom of expression (including media freedom) is expressly guaranteed in the constitutions of Botswana and South Africa.⁶¹ The right to reputation is however not expressly guaranteed in either of the two constitutions. The constitution of Botswana adopts the *ECHR*'s approach to the protection of reputation in that the exercise of freedom of expression may be restricted for the purpose of protecting the reputation of others.⁶² The constitution does not provide detailed rules on how the exercise of freedom of expression and the protection of reputation should be reconciled. It simply provides that restrictions on the former right must be done under the authority of law, and shown to be reasonably justifiable in a democratic society.⁶³ It is then left to the law of defamation to strike an appropriate balance between the two rights.⁶⁴

In South Africa, the right to reputation is protected as part of the right to human dignity.⁶⁵ The Constitutional Court has held that in the new constitutional order, the value of human dignity is not only concerned with an individual's sense of self-worth, but also constitutes an affirmation of the worth of human beings in society. Human dignity, the court concluded, includes the intrinsic worth of human beings shared by all people as well as the individual reputation of each person built upon his/her own individual achievements.⁶⁶ The value of human dignity therefore values both the personal sense of self-worth as well as the public's estimation of the worth or value of an individual. The limitation of rights clause in the constitution thus provides that law of general application may limit entrenched rights to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.⁶⁷ Because reputation is an aspect of human dignity, the exercise of freedom of expression may be restricted in the interest of the protection of the

⁶¹ Sections 12(1) and 16(1), respectively.

⁶² Section 12(2)(b).

⁶³ *Ibid.*

⁶⁴ *Media Publishing (Pty) Ltd v Attorney General and another* Misa 229/2001, High Court (Unreported) at 22 – 23.

⁶⁵ Human dignity is guaranteed under section 10.

⁶⁶ *Khumalo and others v Holomisa* 2002 5 SA 401 at 418 - 419 para. 27.

⁶⁷ Section 36(1).

reputation of others. The task of striking a balance between the two rights is also left to the rules of the common law.⁶⁸

The common law of defamation thus plays a crucial role in the endeavour to strike an appropriate balance between freedom of expression and the protection of reputation in Botswana and South Africa. It may be noted that both states are Roman-Dutch common law jurisdictions. The civil laws of defamation of the two states should, in principle, be the same. South African jurisprudence has an immense influence on the law in Botswana. Case reporting in Botswana is poor, and there is generally a lack of scholarly literature on the law of defamation in the country. Judges, legal practitioners, academics and law students therefore tend to rely heavily on South African jurisprudence. Though not binding on courts in Botswana, South African jurisprudence is of a high persuasive value because the two countries share the same common law background.⁶⁹ Since South Africa embraced democratic rule, there have been some changes in its common law that have been influenced by its new democratic ethos. One of these changes relates to the liability of the mass media for defamatory statements. These changes are however not automatically applicable in Botswana unless expressly adopted by the courts.

In examining how the law of defamation attempts to strike a balance between media freedom and the protection of reputation, and also to appreciate the impact that the law has on media freedom, it is essential to briefly discuss liability, defences and remedies for defamation under the common law. The discussion proceeds on the assumption that the major principles of the law of defamation in Botswana and South Africa, unless stated otherwise, are the same.

⁶⁸ *Argus Printing and Publishing Co Ltd v Esselen's Estate* 1994 2 SA 1 at 25.

⁶⁹ The High of Botswana in *Attorney General v Ghanzi Hotel*, n 4 above at 457, held that authoritative decisions on the common law by South African courts should be followed unless good cause can be shown why they should not.

8.3.1 *Elements of the Iniuria of Defamation*

Under Roman-Dutch common law, every person has a natural right to the possession of an unimpaired reputation, i.e., *fama* or good name.⁷⁰ A person's *fama* is the respect and status he/she enjoys in society. Thus any action that has the effect of reducing a person's status in the community infringes his/her *fama* and constitutes an *iniuria*.⁷¹ Defamation is therefore defined as the intentional infringement of another person's right to good name.⁷² The Roman-Dutch common law of defamation is based on the *actio iniuriarum*, and affords a right to claim damages to a person whose right to *fama* has been impaired intentionally by the unlawful act of another.⁷³ The elements of the *iniuria* of defamation are: (i) publication of words or behaviour; (ii) injury to personality; (iii) wrongfulness; and, (iv) an intention to injure.

The good name that a person enjoys in society relates to the opinion of others concerning him. Defamation will only arise if a defamatory act has been published or disclosed to some person or persons other than the person defamed.⁷⁴ Once publication has been proved, the plaintiff must go on to establish that the defendant was responsible for the publication. As a general rule, publication is attributed to the defendant if he/she was aware or could reasonably have expected that an outsider would take cognisance of the defamation.⁷⁵ Every person who has contributed to the publication of a defamatory statement is liable. The editor, proprietor, printer and publisher of a newspaper or other publication circulated generally may be liable for defamatory statements appearing in the newspaper or publication.⁷⁶

The element of injury to personality relates to the defamatory effect of the words or behaviour in question. In general, defamatory conduct consists of the written or spoken word. It may also include conduct or any means of communication such as

⁷⁰ *Mulwa v Mosienyane* (Judgment on exception) CT 398/83, High Court of Botswana (Unreported). The judgment is reproduced in B. Otlhogile, *The Law of Defamation: Cases and Materials* (University of Botswana, 1992) 32 at 38 – 39.

⁷¹ *Karim v Weterings* [1974] 2 BLR 34.

⁷² J. Neethling, J.M. Potgieter & P.J. Visser, *The Law of Delict* (Butterworths, 1999) p. 339.

⁷³ *Ibid.*, at chapter 10 and W.A. Jourbert (ed.) *The Law of South Africa*, Vol. 7 (Butterworths, 1995) p. 266 para. 245.

⁷⁴ *Rivett-Carnac v Wiggins* 1997 3 SA 80 at 88.

⁷⁵ *Pretorius v Niehaus* 1960 3 SA 109 at 112 – 113.

⁷⁶ *Moodie v Fairbairn* 1837 3 Menz 14. See also Joubert, n 73 above p. 235 para. 254.

gestures or pictorial representations.⁷⁷ Not every statement or conduct that makes one's fellow men unwilling or less inclined to associate with one is defamatory. For example, it is not defamatory to impute to a person conduct that makes him/her unpopular, or which incurs the disapproval of a certain section of the public even if it causes him/her real prejudice.⁷⁸ Acts that are usually regarded as defamatory are those that injure the reputation of the person concerned in his/her character, trade, business, profession or office, or which expose him/her to ridicule or contempt.⁷⁹

Wrongfulness lies in the infringement of a person's right to his/her good name. The test for wrongfulness is an objective one. The relevant question is whether in the opinion of the reasonable man with normal intelligence and development, the reputation of the person concerned has been injured.⁸⁰ The test is based on considerations of fairness, morality, policy and the court's perception of the legal convictions of the community (*boni mores*).⁸¹ In each case, the court has to determine whether public and legal policy requires the particular publication to be regarded as lawful. The application of the test for wrongfulness involves a balancing of competing interests. The court, in the light of the specific circumstances and all other relevant factors, must weigh the interests of the perpetrator and the prejudiced person in order to determine if there has been a reasonable or unreasonable infringement of the interests of the prejudiced party.⁸²

Finally, a person who commits a delict is liable for damages only where the act and the damage can be attributed to him/her, i.e. he/she is at fault. Traditionally the form of fault required for the *actio iniuriarum* is intention or *animus iniuriandi*.⁸³ Intention has two elements: the will to cause a result (the violation of reputation) and

⁷⁷ *Golding v Torch Printing & Publishing Co (Pty) Ltd* 1948 3 SA 1067 at 1087.

⁷⁸ *Good v Smith* 1964 4 SA 374 at 376.

⁷⁹ *Marruchi v Harris* 1943 OPD 15 at 22. For example, see: *Mulwa v Mosienyane* (No. 2 – judgement on merits) [1984] BLR 138, where plaintiff, a medical doctor was accused of being a 'dangerous doctor' who impregnated young nurses and then carry out illegal abortions on them; *Mosieman v Maswabi* [1979] BLR 92, plaintiff, a government pharmacist, was accused of being a drug addict and a thief who stole government drugs to sell them in private; and *SA Associated Newspapers Ltd v Yutar* 1969 2 SA 442, a newspaper had accused the plaintiff, then Deputy Attorney General of South Africa, for having misled the court in a criminal trial.

⁸⁰ *SA Associated Newspapers Ltd v Yutar*, n 79 above at 451.

⁸¹ *National Media Limited and others v Bogoshi* 1998 4 SA 1196 at 1204.

⁸² Y. Burns, *Communications Law* (Butterworths, 2001) p. 170.

⁸³ *Marias v Groenewald and another* 2001 1 SA 634.

knowledge of wrongfulness (awareness of the unlawfulness of conduct). Intention may be in the form of *dolus directus* or *dolus eventualis*.⁸⁴

It is not an element of the delict of defamation in the Roman-Dutch common law that the alleged defamatory statement be false.⁸⁵ The publication of a defamatory statement that refers to the plaintiff gives rise to two separate and distinct presumptions, namely a presumption of wrongfulness and a presumption of a deliberate intention to injure the plaintiff's reputation.⁸⁶ In striving to achieve an equitable balance between the promotion of freedom of speech and the protection of reputation, the law has devised some defences, which if successfully invoked, renders lawful the publication of matter that is *prima facie* defamatory.⁸⁷

8.3.2 Defences Excluding Wrongfulness

A defendant can rebut the presumption of wrongfulness by providing a ground of justification for his/her conduct. The defendant carries a full burden of proof of circumstances justifying his/her conduct, and must rebut the presumption on a balance of probabilities.⁸⁸ Saddling the defendant with the overall onus of averring and proving justification for his/her otherwise unlawful conduct is based on considerations of policy, practice and fairness *inter partes*. Usually the circumstances justifying his/her wrongdoing are peculiarly within the defendant's knowledge, thus fairness dictates that the defendant should bear the onus of proving any justification of his/her conduct.⁸⁹ The most common grounds of justification in defamation proceedings are: (i) truth and public interest; (ii) fair comment; and, (iii) privilege.⁹⁰

⁸⁴ Ibid. (*Dolus directus* means that a person foresees the consequences of his/her act and desires that these consequences ensue. And *dolus eventualis* means that a person does not have the direct aim of impairing another's reputation, nor is he certain that the result will accompany the desired consequences, but foresees that his/her statement could have the effect of so impairing the plaintiff's reputation, and nevertheless persists in his/her action.)

⁸⁵ *Khumalo v Holomisa*, n 66 above at 414 para. 18.

⁸⁶ *National Media Limited and others v Bogoshi*, n 81 above at 1202.

⁸⁷ *Argus Printing and Publishing Co Ltd v Esselen's Estate*, n 68 above at 25.

⁸⁸ *Neethling v Du Preez; Neethling v The Weekly Mail* 1994 1 SA 708 at 770.

⁸⁹ *Mabaso v Felix* 1981 3 SA 865 at 857. See also *National Media Limited and others v Bogoshi*, n 81 above at 1215.

⁹⁰ The list of defences excluding unlawfulness is not closed; a defendant may further plead, *inter alia*, self-defence, consent, jest, etc. See Jourbet, n 73 above pp. 248 - 250 paras. 263 - 265.

The *prima facie* wrongfulness of a defamatory publication will be set aside if the defendant proves that the defamatory statement is true, and that the publication is for the benefit of the public.⁹¹ The defendant is not required to prove the literal truth of all statements of fact contained in the defamatory matter. What must be proved true is the sting of the charge or the gist of the defamation. The fact that there is some exaggeration in the language used does not deprive the defence of its effect.⁹²

The public interest involved in a defamatory statement will depend on the specific circumstances as well as the convictions of the community (*boni mores*). Thus factors such as the time, manner and occasion of the publication will play an important role.⁹³ The publication of true statements about public officials and figures is generally regarded to be in the public interest. However, past transgressions are not necessarily relevant to a person's present character and should not be raked up after a long lapse of time.⁹⁴ Public interest in itself without the defamatory statement also being true, may not justify a defamatory publication.⁹⁵

Wrongfulness will also be excluded upon proof by the defendant that a defamatory statement constitutes a fair comment upon facts that are true and matters of public interest. This ground of justification rests upon the right of every person to express his/her judgment or opinion honestly and fairly upon matters of public interest.⁹⁶ There are four requirements for this ground of justification. First, the allegation concerned must amount to comment and not to the assertion of an independent fact. The test for what constitutes fair comment is that of the reasonable man: the statement must be recognisable to the ordinary reasonable man as comment and not as a statement of fact.⁹⁷ The comment must be based upon facts expressly stated or referred to in the defamatory matter, or generally known to the relevant audience.⁹⁸ Second, the comment must be fair. What is fair is ascertained by reference to the

⁹¹ *Crawford v Albu* 1917 AD 102 at 117.

⁹² *Attorney General v Ghanzi Hotel (Pty) Ltd*, n 4 above at 458 and *Johnson v Rand Daily Mails* 1928 AD 190 at 205 – 207.

⁹³ *Patterson v Engelenburg and Wallach's Ltd* 1917 TPD 350 at 361.

⁹⁴ *Kemp v Republican Press (Pty) Ltd* 1994 4 SA 261 at 265 – 266.

⁹⁵ *Neethling v Du Preez; Neethling v The Weekly Mail*, n 88 above at 777.

⁹⁶ *Marais v Richard* 1981 1 SA 1157 at 1166 – 1167.

⁹⁷ *Crawford v Albu*, n 91 above at 114.

⁹⁸ *Moyse and others v Mujuru* 1999 3 SA 39 at 49.

convictions of the community (*boni mores*).⁹⁹ The comment must be relevant to the facts to which it relates and must be the honest and *bona fide* opinion of the commentator. Third, the facts on which the comment is based must be true and correctly stated.¹⁰⁰ And, four, the comment must refer to matters of public interest. Matters of public interest include not only the conduct of public officials and figures, but also matters submitted for public criticism such as speeches made in public, public performances, works of art and literary works.¹⁰¹ The defence of fair comment may be defeated if the plaintiff proves that the defamatory statement was published with an improper motive.¹⁰²

The presumption of wrongfulness will also be rebutted where the defendant proves that the defamatory matter was made on a privileged occasion. Privilege exists where a person has a right, duty or interest to make specific defamatory assertions and the person or persons to whom the assertions are published have a corresponding right, duty or interest to learn of such assertions. The common law makes a distinction between absolute and qualified privilege. Absolute privilege protects the defendant completely from any liability for defamation. The privilege is usually regulated by statute and is generally enjoyed by members of parliament so that they have full freedom of speech during debates in parliament.¹⁰³

In the case of qualified privilege, the defendant must prove that he/she had an interest in making the statement to someone who was interested in hearing it, and that the communication was relevant to the matter under discussion.¹⁰⁴ The common law recognises three main categories of occasions that attract qualified privilege. The first category relates to statements published in discharge of a duty, the exercise of a right, or the furtherance of a legitimate interest. The privilege arises where a person has a legal, moral or social duty or a legitimate interest in making defamatory assertions to another, who has a corresponding duty or interest to learn of the assertions.¹⁰⁵ The determination of a moral or social obligation or justifiable interest is based on the test

⁹⁹ *Marais v Richard*, n 96 above at 1167 – 1168.

¹⁰⁰ *Moyse and others v Mujuru*, n 98 above at 47.

¹⁰¹ *Le Roux v Cape Times Ltd* 1931 CPD 316 at 327.

¹⁰² *Marais v Richard*, n 96 above at 1170.

¹⁰³ Cf. section 58(1) of the Constitution of South Africa.

¹⁰⁴ *Baird v Pretorius* 1996 2 SA 825.

¹⁰⁵ *Ehmke v Grunewald* 1921 AD 575 at 581 and *Borgin v De Villiers* 1980 3 SA 556 at 577.

of the reasonable man. The relevant question is whether the circumstances created a duty or interest, in the eyes of the reasonable man, which entitled the defendant to have made the defamatory statement.¹⁰⁶ Once it has been proved that both parties had a corresponding duty or interest (i.e., a privileged occasion existed), the defendant must further prove that he/she acted within the scope or limits of the privilege. In order to do this, the defendant must prove that the defamatory assertions were relevant to, or reasonably connected with the discharge of the duty or the furtherance of the interest.¹⁰⁷

The second category of occasion that enjoys qualified privilege relates to statements made during the course of, or in connection with, judicial or quasi-judicial proceedings, and applies to all participants therein.¹⁰⁸ In this case, the defendant is required to prove that the defamatory statements were relevant to the matter at issue.¹⁰⁹ And the third category relates to privileged reports. Reports of the proceedings of courts, parliament and certain public bodies are protected, provided they are fair and reasonable or substantially accurate or correct.¹¹⁰ Where a report is summarised, it must be substantially correct and a reasonable reproduction of the events for it to enjoy qualified privilege.¹¹¹ The justification of wrongfulness based on qualified privilege will be defeated where the plaintiff proves that the defendant published the offending statements with an improper motive.¹¹²

8.3.3 Defences Excluding Intention

As observed above, *animus iniuriandi* has two elements: direction of the will and consciousness (or knowledge) of wrongfulness. If any of these two elements is absent, there is no liability for defamation. However, since publication of defamatory matter gives rise to a presumption that the defamation was committed intentionally, the defendant bears the burden of rebutting the presumption. The defendant can adduce

¹⁰⁶ *De Waal v Ziervogel* 1938 AD 112 at 123.

¹⁰⁷ *Ibid.*, at 122.

¹⁰⁸ The privilege applies to litigants, witnesses, legal representatives and judicial officers.

¹⁰⁹ *Jourbert v Venter* 1985 1 SA 654.

¹¹⁰ *Van Leggelo v Argus Printing & Publishing Co Ltd* 1935 TPD 230 at 337 and 241 and *Argus Printing & Publishing Co Ltd v Anastassiades* 1954 1 SA 72.

¹¹¹ *Van Leggelo v Argus Printing & Publishing Co Ltd*, n 110 above at 241.

¹¹² *McPhee v Hazellurst* 1989 4 SA 551 at 555 and *May v Udwin* 1981 1 SA 1.

evidence that demonstrates that either direction of the will or consciousness of wrongfulness or both, are lacking on his/her part.¹¹³ There are two common grounds that a defendant may plead to exclude fault, namely mistake and jest.

Where a person is unaware of the wrongfulness of his/her defamatory conduct because, for whatever reason, he/she *bona fide* thinks or believes that his/her conduct is lawful, consciousness of wrongfulness and intent are absent as a result of such mistake.¹¹⁴ The kind of mistake that will enable a defendant to satisfy the court that he/she published defamatory matter without *animus iniuriandi* has not yet been clearly defined in the common law.¹¹⁵ However, it seems that a mistake that was made recklessly will not be able to rebut the presumption of fault.¹¹⁶

If a defendant proves that the defamatory matter was published in jest, this will also exclude fault. For the plea to be successful, the court requires the defendant to prove that the reasonable man would regard the defamatory matter as nothing else than a joke.¹¹⁷ If the defendant fails to satisfy the court that the reasonable man will regard the matter as a mere joke, the defendant is held liable irrespective of the actual absence of *animus iniuriandi*.

8.3.4 Remedies for Defamation

The common law provides two types of remedies for defamation: the interdict and damages. An interdict is used to avert an impending wrongful act or to prevent the continuation of a wrongful act that has already commenced.¹¹⁸ The interdict is usually resorted to as an interim remedy pending final determination of the main action. In defamation cases, a person may apply for an interdict to restrain the publication or continued publication of matter allegedly defamatory of him/her pending a determination by a court whether or not the matter is indeed defamatory. The common

¹¹³ *SAUK v O'Mally* 1977 3 SA 394 at 403.

¹¹⁴ See *Maisel v Van Naeren* 1960 4 SA 836, where it was held that the defendant's mistaken belief that an occasion was privileged effectively rebutted the presumption of *animus iniuriandi*.

¹¹⁵ See generally, Neethling, Potgieter & Visser, n 72 above at p. 125 and Jourbert, n 73 above p. 250 para. 266.

¹¹⁶ *Kennel Union of Southern Africa v Park* 1981 1 SA 714 at 728.

¹¹⁷ *Masch v Leask* 1916 TPD 114 at 117.

¹¹⁸ Neethling, Potgieter & Visser, n 72 above pp. 260 – 261.

law requires an applicant for an interim interdict to satisfy four requisites on a balance of probabilities before it can grant the remedy.¹¹⁹ The applicant must show: (a) that the right which is the subject matter of the main action and which he/she seeks to protect by means of interim relief is clear or, if not clear, is *prima facie* established, though open to some doubt; (b) that if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he/she ultimately succeeds in establishing his/her right; (c) that the balance of convenience favours the granting of interim relief; and (d) that the applicant has no other satisfactory relief.

An applicant for an interdict restraining publication of a defamatory statement must generally prove that the respondent is about to publish or continue the publication and distribution of a statement defamatory of him/her;¹²⁰ that respondent has no valid defence to defamation proceedings;¹²¹ and that he/she will suffer irreparable harm if an interdict is not granted. If the full extent of the publication has already taken place, an interdict will serve no useful purpose and the applicant's remedy would be an action for damages.¹²²

A person who has been defamed is presumed to have suffered general damages.¹²³ An award of general damages under the *actio iniuriarum* for defamation is intended to provide satisfaction (in financial terms) to assuage a person for wounded feelings arising from an unlawful impairment of his/her reputation.¹²⁴ In addition to general damages, a person may also recover any patrimonial loss (special damages) suffered as a result of the defamation. Special damages, unlike general damages must be proved.¹²⁵ A trial court has a wide discretion in determining an award of damages.¹²⁶

¹¹⁹ *LF Boshoff Investments (Pty) Ltd v Cape Town Municipality* 1969 2 SA 256 at 267; *Hix Networking Technologies v System Publishing (Pty) Ltd* 1997 1 SA 391 at 398 and *Media Publishing (Pty) Ltd v Attorney General and another*, n 64 above at 7 – 8.

¹²⁰ *Buthelezi v Poorter* 1974 1 SA 831.

¹²¹ *Ibid.* The respondent is required to state sufficient particulars of his/her defence to enable the court to evaluate it.

¹²² *Cleghorn and Harris Ltd v National Union of Distributive Workers* 1940 CPD 409.

¹²³ *Mulwa v Mosienyane (No. 2)*, n 79 above at 146 and *Die Spoorbond and another v South African Railways; Van Heerden and others v South African Railways* 1946 AD 999 at 1005.

¹²⁴ *Van Der Berg v Coopers & Lybrand Trust (Pty) Ltd and others* 2001 2 SA 242 at 260 para. 48.

¹²⁵ *Walton v Cohn* 1947 2 SA 225 at 229.

¹²⁶ *Kritzinger v Perskorporasie van SA (Edms) Bkp* 1981 2 SA 373 at 389.

There is no fixed formula in terms of which awards are made. The South African Supreme Court best sums up the position, observing:

*“The award in each case must depend upon the facts of the particular case seen against the background of prevailing attitudes in the community. Ultimately a court must, as best as it can, make a realistic assessment of what it considers just and fair in all the circumstances. The result represents little more than enlightened guess.”*¹²⁷

In assessing the quantum of damages, a court will have to take into account a number of factors. Some of these factors are aggravating and attract a higher award. These include: an improper motive on the part of the defendant; the exceptionally serious or insulting nature of the defamation; reckless or irresponsible conduct on the part of the defendant; extensive distribution of the defamatory publication and the position and status of the plaintiff in the community.¹²⁸ On the other hand, there are mitigating factors, which will lower the amount of the award. These include: the bad reputation, character or conduct of the plaintiff; the truth of the defamatory allegations; provocation on the part of the plaintiff; the restricted extent of publication and an apology by the defendant.¹²⁹

8.4 Striking a Balance Between Media Freedom and the Protection of Reputation: Common Law Principles

The common law acknowledges that freedom of expression and media freedom are potent and indispensable instruments for the creation and maintenance of a democratic society.¹³⁰ At the same time, the law also recognises that the right of free expression enjoyed by all persons, including the media, must yield to the individual's right, which is just as important, not to be unlawfully defamed.¹³¹ In striving to strike an appropriate balance between the two rights, we saw that international law gives

¹²⁷ Per Smalberger JA in *Van Der Berg v Coopers & Lybrand Trust (Pty) Ltd and others*, n 124 above at 260 para. 48.

¹²⁸ Jourbert, n 73 above p. 252 para. 269. For a recent restatement of these factors, see *Dibotelo v Sechele & others*, Civil Case 1511/2000, High Court of Botswana, at 9 – 10 (Unreported). A summary of the case appears in: (2002) 3 *Commonwealth Human Rights Law Digest* 265.

¹²⁹ See generally, Neethling, Potgieter & Visser, n 72 above p. 257.

¹³⁰ See *Media Publishing (Pty) Ltd v Attorney General and Another*, n 64 above at 21 and *National Media Limited and others v Bogoshi*, n 81 above at 1209.

¹³¹ *Argus Printing and Publishing Co Ltd v Esselen's Estate*, n 58 at 25.

prominence to freedom of expression. The common law on the other hand does not regard either of these rival interests as more important than the other.¹³² It does not recognise a general privilege for the media when reporting on matters of the public interest. The law regards the freedom of the journalist as part of the freedom of the subject, and to whatever lengths the subject in general may go, so also may the journalist.¹³³

The Supreme Court of South Africa set out the status of the media in *Neethling v Du Preez; Neethling v The Weekly Mail*.¹³⁴ The court held:

- (a) At common law there is no general media privilege, and there is no defence of fair information on a matter of public interest. A journalist who obtains information reflecting on a public figure has no greater right than any other private citizen to publish his/her assertions to the world;
- (b) The law does not recognise a duty-interest relationship between the media and its audience sufficient to support a general qualified privilege. Publication in the media is publication to the world, and not everyone can be regarded as having a sufficient interest in the subject matter;
- (c) Although privilege is based on the publication in question being in the public interest, there is a palpable difference between that which is interesting to the public and what is in the public interest to be known;
- (d) Publication in the media is not subject of qualified privilege merely because it gives the public information concerning a matter in which the public is interested. Qualified privilege requires publication pursuant to a duty, whether legal, moral or social, and the existence on the part of its audience of a corresponding interest to receive the defamatory communication;
- (e) The existence of a duty to publish is an objective one, based on the standards of the community concerned; and

¹³² *National Media Limited and others v Bogoshi*, n 81 above at 1207.

¹³³ *Neethling v Du Preez; Neethling v The Weekly Mail*, n 88 above at 777.

¹³⁴ *Ibid.*, at 780.

- (f) In deciding whether a defamatory publication attracts qualified privilege, the status of the matter communicated (i.e., its source and intrinsic quality) is of critical importance.¹³⁵

Thus where media defendants plead the defence of qualified privilege, they must prove that the publication was in furtherance of a right, duty or interest, and that the audience had a corresponding right, duty or interest to learn of the alleged defamatory matter. Privilege will not be inferred from the media's recognised role in democratic societies.

Even though the common law of defamation does not recognise a general media privilege, it does provide a wide scope for expression of matters that are in the public interest, particularly political expression.¹³⁶ In the application of the test for wrongfulness, courts allow greater latitude in the criticism of acts of public officials and figures for the manner in which they conduct public affairs.¹³⁷ It has been held that the character of a public official or figure is not only a possession to himself/herself, but also a public asset. Therefore, if any person knows of anything about the character of a public official or figure that makes him/her unfit for the position he/she occupies, such a person is not only justified, but bound, to inform the public of the facts, and to substantiate them for the public benefit if necessary.¹³⁸ However attacks upon the private character of public officials and figures are not to be lightly made, and if they are made, they must be justified.¹³⁹

While the common law expects public officials and figures to tolerate a greater degree of criticism than private citizens, politicians in particular are expected not to be overhasty to complain about being defamed unless it is really serious. A distinction is

¹³⁵ The examples given by the court in the examination of the status of the matter communicated includes: does the matter emanate from an official and identified source or does it spring from a source that is informal and anonymous? Does the matter involve a formal finding based on reasoned conclusions, after the weighing and sifting of evidence, or is it no more than *ex parte* statement or mere hearsay?

¹³⁶ *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* 1992 3 SA 579 at 591.

¹³⁷ "Those that govern usually stand more scrutiny in the carrying out of their responsibilities than the ordinary member of society. For that reason and because of the position they hold, those who hold power should be more tolerant of such criticism ..." Per Lesetedi J in *Media Publishing (Pty) Ltd v Attorney General and another*, n 64 above at 23.

¹³⁸ *Botha v Pretoria Printing Works Ltd* 1906 TS 710 at 715 and *Dibotelo v Sechele & others*, n 128 above.

¹³⁹ *Ibid.*

drawn between an attack against the dignity and reputation of a politician, on one hand, and an attack upon his/her political views, policies and conduct, on the other hand. When it comes to the latter, courts are slower to come to the assistance of a politician. But if a defendant oversteps the bounds permissible, he/she will be liable.¹⁴⁰ If there is an unwarranted defamation which lowers a politician in the esteem of his/her community, which is not at all necessary in commenting upon his/her policy or conduct, a court will be more readily inclined to protect his/her dignity and reputation.¹⁴¹

The common law denies the state a right to sue for defamation. It is not that the state has no reputation; the principle is based on policy considerations. It is argued that the normal means by which the state protects itself against attacks on its management is political action and not litigation, and that citizens should be free to express opinions upon the management of their country's affairs without fear of legal consequences.¹⁴² The concern is that if the state were to be allowed an action in defamation, this will seriously interfere with freedom of expression. The term state does not only refer to organs of central government, it includes all organs that are part of the governance of a country such as local authorities and other organs and institutions exercising governmental powers.¹⁴³

The fact that the common law regards media freedom as part of the freedom of the individual arguably means there should be no fundamental differences in determining their liability for defamation. For example, all the four elements of defamation, including intention, should be established whether the defendant is an individual or the media. South African case law prior to the decision in *Pakendorf & others v De Flamingh* (supra) demonstrates that intention in the form of *animus iniuriandi* was a requirement for defamation.¹⁴⁴ In the *Pakendorf* case, the Supreme Court took a major deviation from the common law principle that in a case of defamation involving the mass media fault in the form of intention is required. The court held that the owner, publisher, printer and editor of a newspaper were liable without fault (i.e., strictly

¹⁴⁰ *Mangope v Asmal and another* 1997 4 SA 277 at 287.

¹⁴¹ *Ibid.*

¹⁴² *Die Spoorbond and Another v South African Railways; Van Heerden and others v South African Railways*, n 123 above at 1013.

¹⁴³ *Posts and Telecommunications Corporation v Modus Publications (PVT) LTD* 1998 3 SA 1114.

¹⁴⁴ *Cf. Hassen v Post Newspapers (Pty) Ltd* 1965 3 SA 562.

liable) for defamatory statements published in their newspaper. The result was that in cases involving the media, a plaintiff was not required to allege or prove fault, and only a rebuttable presumption of unlawfulness arose from the publication of defamatory matter. Media defendants could therefore not raise defences rebutting the fault element of defamation.

Strict liability of the mass media for publication of defamatory matter seems to have been influenced by the English common law.¹⁴⁵ In importing the principle into the common law of South Africa, the court held that it was inequitable to allow the mass media to plead absence of *animus iniuriandi*. Two policy reasons were advanced for this position: the difficulty of proving intent on the part of persons involved in the publication of the defamatory material, and the protection of the defenceless individual who finds himself/herself in a vulnerable position *vis-à-vis* the all powerful mass media.¹⁴⁶ Strict liability was also imported into the common law of Botswana by the High Court in *Attorney General v Ghanzi Hotel* (supra). The court observed that the weight of judicial authority then in South Africa was firmly on the side of holding the mass media strictly liable for the publication of defamatory matter, and concluded:

*“No argument has been addressed to me why O’Mally’s case and De Flamingh’s case, both authoritative decisions of the Appellate Division of the Supreme Court of South Africa, should not be followed by the courts of Botswana and I respectfully accept them as correctly stating the law on the point in question.”*¹⁴⁷

Imposing liability for defamation on the media without fault has a chilling effect on media freedom because the media tends to shy away from getting involved in controversial matters in order to avoid liability, which ultimately undermines the media’s informative and watchdog roles.¹⁴⁸

After South Africa adopted a democratic constitution, strict liability was seriously questioned in light of the constitutional provision guaranteeing both freedom of expression and media freedom. For this reason, it was perhaps not surprising when the

¹⁴⁵ See *Wilson v Halle* 1903 TH 178 at 201.

¹⁴⁶ *Pakendorf & others v De Flamingh*, n 4 above.

¹⁴⁷ *Attorney General v Ghanzi Hotel*, n 4 above at 457.

¹⁴⁸ Cf. *National Media Limited and others v Bogoshi*, n 81 above at 1210. It was held: “... nothing can be more chilling than the prospect of being mulcted in damages for the slightest error.”

Supreme Court made an about turn on the principle in *National Media Limited and others v Bogoshi* (supra). This case overruled *Pakendorf & others v De Flamingh* (supra), and held that strict liability was in conflict with the democratic imperative that the public interest is best served by the free flow of information and the role of the media in that process.¹⁴⁹ The court also observed that the law of defamation requires a balance to be struck between the right to reputation, on one hand, and freedom of expression, on the other. In *Pakendorf & others v De Flamingh* (supra), there was no indication that a weighing of interests and in particular, freedom of expression, received any attention.¹⁵⁰

In overruling strict liability, the court did not revert back to the common law position of liability based on intention, which allowed media defendants to rely on absence of consciousness of wrongfulness to escape liability. Instead, the court made yet another deviation from age-old principles of the common law by basing liability of the media for defamation on negligence.¹⁵¹ In the process, the court adopted a new defence for rebutting unlawfulness that allows media defendants to establish that publication of defamatory matter, albeit false, was nevertheless reasonable in all the circumstances.¹⁵² In determining the reasonableness of a publication, account must be taken of the nature, extent and tone of the allegations. In this regard, factors to be taken into account would include: that protection was afforded only to material in which the public had an interest, as opposed to material which was interesting to the public; that greater latitude is usually allowed in respect of political discussion; and the tone in which a newspaper article is written, or the way in which it is presented. What will also feature prominently is the nature of the information on which the allegations were based and the reliability of their source, as well as the steps taken to verify the information.¹⁵³ The court emphasised that there can be no justification for

¹⁴⁹ Ibid., at 1210.

¹⁵⁰ Ibid., at 1207.

¹⁵¹ See J. Burchell, 'Media Freedom of Expression Scores as Strict Liability Receives the Red Card: *National Media Ltd v Bogoshi*' (1999) 116 *South African Law Journal* 1. For a criticism of the court's approach, see J.R. Midgley, 'Recent Cases: Media Liability for Defamation' (1999) 116 *South African Law Journal* 211. And for a recent affirmation that negligence is now the basis for liability for defamation by the media, see *Marias v Groenewald and another*, n 83 above.

¹⁵² "... the publication in the press of false defamatory allegations of fact will not be regarded as unlawful if upon a consideration of all the circumstances of the case, it is found to have been reasonable to publish the particular facts in the particular way and at the particular time." Per Hefer JA in *National Media Limited and others v Bogoshi*, n 81 above at 1212.

¹⁵³ Ibid.

the publication of untruths, and members of the media should not be left with the impression that they have a licence to lower the standards of care, which must be observed before defamatory matter is published.

The Supreme Court then went on to consider whether media defendants should be permitted to rebut the presumption of intentional harm by establishing a lack of knowledge of wrongfulness, even where that lack of knowledge was as a result of the negligence of the defendant. The court concluded that a defence of absence of *animus iniuriandi* would be incompatible with the newly introduced defence of reasonable publication.¹⁵⁴ In most cases the defence of lack of *animus iniuriandi* is concerned with the defendant's ignorance or mistake regarding one or other element of defamation. A subjective test is applied in determining whether the defendant made a mistake.¹⁵⁵ Such an approach is obviously not consistent with the defence of reasonable publication, which requires that a mistake should have been a reasonable one. The court found that there were compelling reasons for not treating the media on the same footing as ordinary members of the public by permitting them to rely on the absence of intent.¹⁵⁶ Media defendants therefore cannot escape liability merely by establishing an absence of knowledge of wrongfulness, they must in addition, establish that they were not negligent in publishing defamatory matter.

As observed above, the right to protect one's reputation weighs no less than the freedom of expression under the common law. But in the endeavour to strike an appropriate balance between the two rights, the law takes special notice of the important role the freedom of expression plays in the maintenance of democracy. While a person whose dignity has been unlawfully impugned deserves an appropriate remedy, courts carefully try to ensure that such remedies do not unduly inhibit freedom of expression, especially media freedom.

Where the remedy sought is an interdict, the case is approached with caution and courts are generally anxious to steer a course as close to the preservation of liberty as

¹⁵⁴ *Ibid.*, at 1214.

¹⁵⁵ *Nydoo and others v Vengtas* 1965 1 SA 1.

¹⁵⁶ *National Media Limited and others v Bogoshi*, n 81 above at 1214.

possible.¹⁵⁷ The Supreme Court of South Africa has held that freedom of speech is a right not to be overridden lightly. When determining the issue of whether the balance of convenience favours the granting or refusal of an interdict, consideration should be given to the fact that the person defamed would, if the interdict were refused, nonetheless have a cause of action which would result in an award of damages. This should be weighed against the possibility, on the other hand, that a denial of a right to publish is likely to be the end of the matter as far as the media are concerned.¹⁵⁸ In the determination of the question of balance of convenience, factors to be taken into account include: the strength of the applicant's case; the seriousness of the defamation; the difficulty a respondent has in proving, in the limited time afforded to it in cases of urgency, the defence which it wishes to raise; and the fact that the order may, in substance though not in form, amount to a permanent interdict.¹⁵⁹

The common law clearly tilts the scales in favour of a refusal to grant an interdict for defamation. Courts have however warned that this should not be seen as a licence to the media to publish and distribute any statement regardless of harm to others. In appropriate circumstances, courts will not hesitate to protect the dignity of those who rightfully seek their protection.¹⁶⁰

The common law also requires damages for defamation to reflect the delicate balance between the promotion of freedom of expression and the protection of reputation. In particular, care must be taken not to award large sums of damages too readily lest doing so inhibits freedom of expression or encourages intolerance to it and thereby opening floodgates to litigation.¹⁶¹ In South Africa, it has been observed that:

*“An action for defamation has been seen as the method whereby a plaintiff vindicates his reputation, and not as a road to riches. This is a further factor which reduces the inhibiting effect of defamation on freedom of expression.”*¹⁶²

¹⁵⁷ *Publications Control Board v William Heinemann Ltd and others* 1965 4 SA 137 at 160.

¹⁵⁸ *Hix Networking Technologies v System Publishing (Pty) Ltd*, n 119 above at 402.

¹⁵⁹ *Ibid.*

¹⁶⁰ *Van Zyl v Jonathan Ball Publishers (Pty) Ltd* 1999 4 SA 571 at 595.

¹⁶¹ Cf. *Van Der Berg v Coopers & Lybrand Trust (Pty) Ltd and others*, n 124 above at 260 para. 48.

¹⁶² Per Grosskopf JA in *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party*, n 134 above at 590.

The amount of damages to be awarded for defamation is entirely in the discretion of the trial court and an appeal court will not lightly interfere with the award. However, a duty to interfere does arise where the trial court has failed to take into account relevant factors in the quantification of damages.¹⁶³ This should allow an appeal court to interfere with an award, which is excessively high for failure to strike an appropriate balance between freedom of expression and the protection of reputation. Courts in Southern Africa (which includes Botswana and South Africa) have generally not been generous in their awards of damages for defamation, which have been termed comparatively low and sometimes almost insignificant.¹⁶⁴

A question that as often been posed is whether the Roman-Dutch common law of defamation achieves a proper balance between the right to protect one's reputation and freedom of expression. The major concern appears to be whether the law gives adequate protection to freedom of expression, especially media freedom. In the opinion of the Supreme Court of South Africa, the common law does strike a proper balance between the two rights.¹⁶⁵ In overruling strict liability of the media for defamation, the court emphasised that it was not revising the common law to conform with constitutional values, but was merely correcting a common law principle wrongly stated in *Pakendorf & others v De Flamingh* (supra).¹⁶⁶ International law is regarded as providing minimum standards that any law aimed at giving meaningful effect to the enjoyment of rights should be premised. International law principles on the law of defamation should therefore be seen as providing minimum standards that strike a proper balance between the promotion of freedom of expression and the protection of reputation.

A comparison of the common law and international law principles on defamation leaves one with no option but to concur with the Supreme Court's observation.¹⁶⁷ The discussion of principles relating to the liability, defences and remedies under the

¹⁶³ *SA Associated Newspapers Ltd and others v Samuels* 1980 1 SA 25.

¹⁶⁴ See: *Ramakulukusha v Commander, Venda National Force* 1989 2 SA 813 at 847 and *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party*, n 134 above at 590. (The recent award by the High Court of Botswana in *Dibotelo v Sechele and others*, n 128 above, is however a bit generous and therefore not consistent with the past general trend in the region.)

¹⁶⁵ *National Media Limited and others v Bogoshi*, n 81 above at 1217.

¹⁶⁶ *Ibid.*, at 1213.

¹⁶⁷ This argument is based on the view that strict liability was improperly incorporated into the common law of Botswana. See below at 8.3.6.

common law demonstrate that these compare favourably with international law. The common law accords the media wide latitude when commenting on matters of public interest. Further, the role of the media as a tool for exercising control over those responsible for matters of public interest is recognised because public officials and figures are expected to tolerate a greater degree of criticism than private citizens. The defences available under the common law match those offered by international law. The common law's adoption of the defence of reasonable publication is a welcome move as the defence plays a crucial role in the endeavour to strike an appropriate balance between media freedom and the protection of reputation. Finally, the common law, in consonance with international law, requires that remedies for defamation should not be so severe as to constitute a hindrance to media freedom. Courts are therefore generally reluctant to grant interdicts against publication in the media and also avoid awarding large sums in damages. In appropriate circumstances, the courts will however act to protect the individual's right to reputation.

8.4.1 *Impact of the Law of Defamation on Media Freedom in Botswana*

At the time of writing, the courts in Botswana have decided only two defamation cases involving the media. First was *Attorney General v Ghanzi Hotel* (supra), which established strict liability for the media. The second is *Dibotelo v Sechele and others* (supra), where the court was concerned only with the issue of quantum of damages. Thus since the *Ghanzi Hotel* case, courts in Botswana have not yet had the opportunity to review principles relating to the liability of the media. The fact that there have been few cases reaching the courts involving defamation by the media does not mean the law of defamation does not pose a serious threat to media freedom. On the contrary, the law of defamation is one of the major obstacles to the media's democratic role in Botswana. As observed in chapter 3, the private media are constantly harassed by threats to sue from public officials and figures.¹⁶⁸ It appears most claims against the media are settled out of court, a trend obviously influenced by the fact that due to the principle of strict liability, the media stands little chance of thwarting defamation claims.

¹⁶⁸ See chapter 3 at 3.2.3.

Strict liability, a principle that was incorporated into Botswana from South Africa, today constitutes a serious hindrance to media freedom. With the introduction of democracy in South Africa, we saw that the principle was found wanting and was overruled.¹⁶⁹ But Botswana remains saddled with the principle. In overruling strict liability in South Africa, the court held *inter alia* that *Pakendorf & others v De Flamingh* (supra), which established the regime, failed to weigh competing interests in order to strike a proper balance between freedom of expression and the protection of reputation, and that strict liability was also not compatible with the media's democratic role.¹⁷⁰

It is perhaps important to note that South Africa had adopted strict liability during the dark days of apartheid when the fundamental role of the media in informing society in a democracy was seldom acknowledged, and the ideals of openness and accountability were replaced by measures of censorship and suppression.¹⁷¹ Botswana, on the other hand, was then regarded as the shining example of democracy in the Southern African region, with a constitution that *inter alia* expressly guaranteed both freedom of expression and media freedom. It was therefore wrong for the High Court to import strict liability from South Africa (a state then with a repressive human rights culture) without attempting to reconcile the principle with the constitution. The Bill of Rights provisions in the constitution were greatly influenced by the *ECHR*.¹⁷² It would therefore have been appropriate for the court to examine the jurisprudence of the ECtHR on the point before settling for a principle. The failure by the court to exercise caution in importing apartheid era jurisprudence in the area of human rights casts a serious doubt on the correctness of the decision.

The principle of strict liability has no place in modern democratic societies. There is a dire need to scrap it in order to enhance the media's democratic role in Botswana. The principle must be replaced with a system that will allow media defendants to avoid liability upon proof that publication of a statement of fact on a matter of public concern, even though proved false, was nevertheless reasonable in the circumstances.

¹⁶⁹ *National Media Limited and others v Bogoshi*, n 81 above.

¹⁷⁰ *Ibid.*, at 1210.

¹⁷¹ Cf. Burchell, n 151 above at 1.

¹⁷² *Dow v Attorney General* [1992] LRC (Const.) 623 at 654 – 655. See further discussion in chapter 4 at 4.5.1.

This will not only be consistent with international law, but also with the new South African common law approach.

Given that the common law principles, with the exception of strict liability, discussed above provide a favourable environment for the protection of media freedom, the abolition of strict liability should enhance media freedom in the country. The media have hitherto been timorous to challenge strict liability in the courts. It will probably take a bold one to take the matter up in the light of the consequences that may follow a failure to persuade the courts to scrap the principle. It is submitted that this is a case that calls for intervention by the legislature. Botswana should legislate for a defence of reasonable publication for the media instead of waiting for the courts to rectify the error since it may take a long time before the courts get an opportunity to fully review the law and bring it to conformity with international law.

8.4.2 Impact of the Law of Defamation on Media Freedom in South Africa

Before the Supreme Court's decision in *National Media Limited and others v Bogoshi* (supra), two common law principles were singled out as imposing unjustified restrictions on media freedom.¹⁷³ First, the principle of strict liability imposed a chilling effect on the dissemination of information by the media because liability was imposed even for the slightest error. Secondly, the principle that falsity of a defamatory statement is not an element of defamation, leaving the defendant with the burden of proving the truth of an alleged defamatory statement. The difficulty of proving the truth of defamatory statements, especially in the absence of a defence of reasonable publication, does cause a chilling effect on the publication of information. A publisher will have to think twice before publishing a defamatory statement where it may be difficult to prove the truth of that statement and where no other defence to defamation would be available.¹⁷⁴

The principle of strict liability has now been abolished and has been replaced by liability based on negligence. But the rule that falsity of a defamatory statement is not

¹⁷³ See generally, J.W.G. van der Walt, 'Freedom of Expression and Defamation: A Reflection on Recent Developments' (1998) *Journal of South African Law* 198.

¹⁷⁴ Cf. *Khumalo v Holomisa*, n 66 above at 422 para. 39.

an element of defamation remains in force. In one of the early post-democratic era decisions of the High Court, it was held that the structure of the constitution required a plaintiff who sought to inhibit speech in the area of free and fair political activity to bear the onus of proving that a defendant has forfeited entitlement to constitutional protection.¹⁷⁵ The decision was based on the court's view that the constitution gives primacy to freedom of expression over the protection of reputation. The court had found the common law relating to the liability of the media for defamation inconsistent with the constitutional protection of media freedom, arguing that the law unjustifiably gave primacy to the protection of reputation.¹⁷⁶ In requiring a plaintiff to prove the falsity of an alleged defamatory statement, the court held, it was performing its duty to develop the common law to conform to constitutional values.

Holomisa v Argus Newspapers Limited (supra) came under heavy criticism from the Supreme Court in *National Media Limited and others v Bogoshi* (supra). As discussed above, the latter held that the constitution has not altered the common law of defamation, nor does the law regard either of the rival interests as more important than the other, and therefore that the common law was adequate in striking an appropriate balance between the promotion of media freedom and the protection of reputation. The Supreme Court also rejected the High Court's argument that a plaintiff must prove the falsity of a defamatory statement, holding that justice demands that the defendant be saddled with the burden of proof.¹⁷⁷

Any lingering doubts about the correctness of Supreme Court's decision on the latter point have now been put to rest by the recent decision of the Constitutional Court in *Khumalo v Holomisa* (supra). An argument was made to the court that, to the extent that the common law of defamation does not require a plaintiff to allege the falsity of a defamatory statement, it is inconsistent with the constitution. In considering the constitutionality of the rule, the court first observed that it is often difficult, and sometimes impossible to determine the truth or falsity of a particular statement. In not requiring a plaintiff to establish falsity, but in leaving the allegation and proof of truth to a defendant, the common law chooses to let the risk lie on defendants because, after

¹⁷⁵ *Holomisa v Argus Newspapers Limited* 1996 2 SA 588.

¹⁷⁶ *Ibid.*, at 611.

¹⁷⁷ *National Media Limited and others v Bogoshi*, n 81 above at 1215.

all, it is the defendant who published the statement and thereby causing harm to the plaintiff.¹⁷⁸ The court however acknowledges that the rule does cause a chilling effect on media freedom.¹⁷⁹

At the heart of the constitutional dispute, was the difficulty of establishing the truth or falsehood of defamatory statements. The court held that individuals could assert no strong constitutional interest in protecting their reputations against publication of truthful but damaging statements. Similarly, the media have no strong constitutional speech interest in the publication of false material. Burdening either plaintiffs or defendants with the onus of proving a statement to be true or false, in the circumstances where proof one way or the other is impossible, results in a zero-sum game. Either the plaintiff will benefit from the difficulties of proof or the defendant will win. In the court's view, such a zero-sum result, regardless of who benefits, fits uneasily with the need to establish an appropriate constitutional balance between freedom of expression and the protection of reputation.¹⁸⁰

The court held that the defence of reasonable publication avoids a zero-sum result by avoiding a winner-takes-all situation thereby striking a proper balance between freedom of expression and the protection of reputation. Consequently, it reduces the chilling effect of the common law rule on media freedom.¹⁸¹ The court went on to set out some factors to be taken into account in the determination of the reasonableness of a publication, which include:

- a) The individual's interest in protecting his/her reputation in the context of the constitutional commitment to human dignity;
- b) The individual's interest in privacy. In this regard, persons in public office have a diminished right to privacy, though of course their right to dignity persists; and,
- c) The crucial role played by the media in fostering a transparent and open democracy.¹⁸²

¹⁷⁸ *Khumalo v Holomisa*, n 66 above at 421 – 422 para. 38.

¹⁷⁹ *Ibid.*, at 422 para. 39.

¹⁸⁰ *Ibid.*, at 423 – 424 para. 42.

¹⁸¹ *Ibid.*, at 424 para. 43.

¹⁸² *Ibid.*

The court did not find the common law rule inconsistent with the constitution because of the availability of the defence of reasonable publication. The defence encourages editors and journalists to act with due care and respect for the individual's right to reputation prior to publishing defamatory material, without precluding them from publishing such material when it is reasonable to do so.

The abolition of strict liability and the adoption of the defence of reasonable publication have enhanced media freedom in South Africa. Although, one common law rule that imposes a chilling effect on the freedom remains in force, it cannot be said to constitute an unjustifiable fetter on the media freedom. The rule is based on sound policy considerations, and its chilling effect on media freedom is significantly mitigated by the availability of the defence of reasonable publication.

8.5 Conclusion

Striking an appropriate balance between the promotion of freedom of expression and the protection of reputation in democratic societies is a delicate exercise. Legitimacy of government in a representative democracy requires the electorate to exercise informed consent when casting their votes or when evaluating the adequacy of their representatives' behaviour.¹⁸³ From this requirement, it is indisputable that there is a need to promote freedom of expression and the free flow of information on matters that will enable citizens to effectively exercise their right to vote and scrutinise their representatives' behaviour. It is for this reason that debate on political and other issues of public interest are accorded special protection under international law.¹⁸⁴ The media in particular enjoy an elevated status under international law because of their role as disseminators of information and watchdog over those responsible for the management of public affairs.

¹⁸³ I. Loveland, 'Reforming Libel Law: The Public Law Dimension' (1997) 46 *ICLQ* 561 at 572.

¹⁸⁴ *Lingens v Austria*, n 15 above at para. 41.

While the media may have these important duties, it should be noted that the media are also profit dependant enterprises. As observed by Tierney,¹⁸⁵ sensationalism in the media aimed at capturing large audiences often eclipses their democratic role, jeopardising, among others, the protection of the reputations of others. Thus at the heart of the debate on how to strike an appropriate balance between the promotion of media freedom and the protection of reputation, is the question: to what extent should the media be protected when exercising their democratic role? At one extreme is the US's absolutist approach where liability of the media for defamation only arises upon proof of actual malice. At the other is the principle of strict liability that holds the media liable for any defamatory matter they publish. The former approach does not afford adequate protection to the right of reputation, while the latter does not give due credit to the media's democratic role. An approach that will strike a proper balance between these two rights is to be found somewhere between the two extremes.

International law has settled for a position that can arguably be said to meet this requirement. The media will be protected when commenting on matters of political and other public interest if publication of the matter is found to be reasonable in all the circumstances. This approach strikes a delicate balance between the promotion of media freedom and the protection of reputation as it gives due weight to both rights. South Africa has rejected the two extreme approaches in favour of the position adopted by international law. Botswana should do the same.

Even though it has been observed that the Roman-Dutch common law does not recognise a general media privilege, courts in Botswana and South Africa acknowledge the special role of the media in the maintenance of democracy. Flowing from this, it should not be difficult for media defendants to raise and prove the defence of qualified privilege where the alleged defamatory matter is a contribution to public debate on political and/or issues of public interest. The defence requires one to have been acting under a moral or social duty. It is submitted that the media have a moral and social duty to inform the public on matters that are in the public interest,

¹⁸⁵ Tierney, n 21 above at 420.

and that the public also has a corresponding duty to receive such information.¹⁸⁶ Similarly, the common law defence of fair comment plays an important role in enhancing media freedom. The defence recognises that the media not only disseminate information, but also play the role of an interpreter of, or commentator on such information. Thus comment by the media relating to matters of political and public interest are protected provided the comment is made in good faith and is based on facts that are substantially true. The latter condition is important for ensuring that adequate protection is given to the reputation of others.

The discussion of the common law of defamation demonstrates that it is consistent with international law. South African courts generally apply the common law in a manner that promotes media freedom and freedom of expression. In Botswana, there has not been much litigation in the area of defamation involving the media. However, to the extent that the rules of the common law enunciated by the South African courts in principle reflect the common law of Botswana, because both are Roman-Dutch jurisdictions, the legal framework supports the promotion of media freedom. The main obstacle to media freedom in Botswana remains the principle of strict liability. If the principle can be replaced with a system that recognises a defence by the media of reasonable publication, this should improve the situation of the media.

It is worth noting that while it has been observed that courts in Botswana and South Africa have in the past been careful not to award large sums of money in damages, the award by the High Court of Botswana in *Dibotelo v Sechele and another* (supra) is anomalous. The amount of BWP 250 000 awarded by the court is quite generous when compared to awards in similar cases in South Africa. One can only hope that the case does not establish a precedent for awarding excessively high damages in the country. Perhaps the award can be justified by the peculiar facts of the case. The defendants were found to have been grossly negligent and had refused to tender an apology until after the close of pleadings.

¹⁸⁶ For example, in *Zillie v Johnson and another* 1984 2 SA 186, the High Court of South Africa found that a newspaper had a duty to inform the public, who also had a corresponding duty to receive information relating to policies of a candidate in an imminent general election because it concerned matters of public concern.

CHAPTER 9

GENERAL CONCLUSION

The central objective of this study has been to examine the legal environment in which the traditional news media (i.e., the press, radio and television broadcasting) operate in Botswana and South Africa. The main focus has been to determine the extent to which the laws and official policies of the two states support the exercise of media freedom and the media's performance of their informative and watchdog role in democratic societies. It will be recalled that the study takes a comparative approach in assessing the legal environment in the two states. The municipal laws of Botswana and South Africa relating to the guarantee of media freedom and support for the media's democratic role are compared with international law and standards. The latter arguably constitute minimum requirements for ensuring an effective guarantee of media freedom and the creation of an environment in which the media can perform their democratic mandate:

The study approaches the inquiry by considering:

- i) The nature of media freedom by examining the theoretical underpinnings of the concept and its relationship to the right of freedom of expression;
- ii) The protection of media freedom in international human rights instruments, the relevance and impact of these instruments in the municipal laws of Botswana and South Africa;
- iii) The guarantee of media freedom and freedom of information in the municipal laws of the two states;
- iv) The extent to which the regulation of the media in the two states enhances diversity of media outlets and the dissemination of diverse viewpoints; and
- v) The impact of the laws relating to the protection of national security and the reputation of others on media freedom.

A number of observations and conclusions on the above issues have already been made in the preceding chapters. This chapter is not intended to be a repetition of them, but seeks to note the salient points and highlight lessons that both states may learn from international law, and from each other, regarding the protection of media freedom and the enhancement of the media's democratic role.

The importance of the right of freedom of expression in modern representative democratic societies is widely acknowledged in both international law and the national laws of many states. Freedom of expression is integral to a democratic society for many reasons. The right ensures *inter alia* that citizens are able to make responsible political decisions and participate effectively in public life. A free flow of information and ideas is therefore necessary in democratic societies to enable citizens to make informed decisions. The media are key agents in ensuring that citizens have access to diverse information and ideas. The role that the media is expected to play in democratic societies has influenced the manner in which media freedom is perceived and its relationship to freedom of expression. Media freedom is considered to be an aspect of the general right of freedom of expression, and is expected to foster the latter right by providing fora for vigorous and uninhibited public debate. Botswana and South African courts seem to have generally endorsed the view that media freedom is an instrumental freedom, and must serve the general interests of freedom of expression.¹

The effectiveness of the performance of the media's democratic role is intricately linked to the right to freedom of information. If the media are to properly discharge their obligation to provide citizens both with information and a platform for the exchange of ideas, they must be guaranteed access to information, particularly information held by government bodies. The watchdog role also depends on the extent to which the media have access to pertinent information. Media freedom and freedom of information are therefore important aspects of the general right of freedom of expression. A guarantee of media freedom not coupled with a guarantee of access to information will thus be meaningless.

¹ See *Media Publishing (Pty) Ltd v Attorney General of Botswana and others* MISC 229/2001, High Court (Unreported) at 21 and *Khumalo and others v Holomisa* 2002 5 SA 401 at 416 – 417 para. 22.

As we have seen, the study is premised on the assumption that international law constitutes the minimum standards for guaranteeing media freedom and ensuring the performance of the media's democratic role. However, none of the international human rights treaties protecting freedom of expression and media freedom has direct application in Botswana and South Africa. International treaties in the two states are directly applicable in the municipal courts only where they have been ratified and incorporated into the domestic law. But even though international treaties that have not been incorporated into the municipal laws of Botswana and South Africa do not have direct application, they do play a role in the interpretation of the municipal law. In Botswana, the *Interpretation Act* authorises courts to construe national law on the basis of treaties, while in South Africa, the constitution requires courts to consider international law when interpreting the Bill of Rights, and to interpret domestic legislation in a manner that is compatible with international law.

Courts in South Africa have generally demonstrated an enthusiasm for drawing from international and comparative law jurisprudence to enrich the national jurisprudence when interpreting issues that affect rights entrenched in the Bill of Rights.² For example, in *Khumalo and others v Holomisa* (supra), which concerned an application to declare the common law rule that requires a defendant in a defamation suit to prove the truth of an alleged defamatory statement, the Constitutional Court considered the position in a number of foreign jurisdictions before rejecting the application.³ By contrast, even though the courts in Botswana have not had many opportunities to adjudicate on matters relating to freedom of expression and media freedom, they have conspicuously restrained themselves from actively invoking international law to enhance domestic human rights protection when dealing with other rights issues such as the constitutionality of corporal punishment and the death penalty.⁴ The attitude of the courts in Botswana is disappointing especially in the light of the express provision in the *Interpretation Act* that encourages them to use international law to interpret

² See generally, R.C. Blake, 'The World's Law in One Country: The South African Constitutional Court's Use of Public International Law' (1998) 115 *South African Law Journal* 668.

³ *Khumalo and others v Holomisa*, n 1 above at 423 para. 40.

⁴ O. Tshosa, *National Law and International Human Rights Law: Cases of Botswana, Namibia and Zimbabwe* (Ashgate Dartmouth, 2001) p. 202.

domestic law. Perhaps the court's attitude as noted earlier, is attributable to the uncertainty regarding the status of international law in the municipal law.

There is already in existence rich international law jurisprudence on the protection of media freedom and the enhancement of the media's democratic mandate. The jurisprudence is, however, not binding on Botswana and South Africa because the treaties under which it has been developed have not been incorporated into their domestic laws. A notable example is the ICCPR, which has been ratified by both states but not incorporated into their municipal laws. If the jurisprudence on freedom of expression and media freedom developed under the ICCPR were binding on the two states, it would considerably enhance media freedom. Notice is taken of the fact that South African courts are required, and have generally tried, to incorporate international law standards into the domestic law when interpreting the Bill of Rights, but it is submitted that the position of the media would be greatly improved if Botswana and South Africa were to incorporate the ICCPR and ACHPR into their municipal laws.

While the incorporation of the treaties in South Africa is not likely to have much practical impact as the courts there have already been importing international law standards into the domestic law, at least it would demonstrate the state's willingness to adhere to its international law obligations. Incorporation of the treaties in Botswana should, however, make a significant difference. It would make the status of international law in the domestic law clearer and hopefully this should give courts of law the confidence to invoke international law when dealing with rights issues. An alternative to the incorporation of the treaties in Botswana would be to enact a constitutional provision or act that would oblige courts to consider international law when interpreting the Bill of Rights. A provision to this effect should inspire the courts to seek guidance from international law, as we have seen in the case of the South African courts.

The constitutions of Botswana and South Africa both guarantee media freedom in terms that are consistent with international law standards. The former guarantees the freedom implicitly as part of the general right of freedom of expression, while the latter gives an express guarantee. The constitution of South Africa also guarantees an

active right to information held by the state, which plays an important complimentary role to the media's democratic mandate. Further to the constitutional provision, South Africa has also enacted an access to information law, the *AIA*, which, as observed in chapter 6, is one of the most liberal and comprehensive access to information laws in the world. The *AIA inter alia* supports the principle of maximum disclosure of official information and establishes a presumption that all information held by the state is subject to disclosure unless specifically exempted under the Act. The Act further gives an exhaustive list of legitimate grounds that would justify a refusal to disclose information. The grounds of refusal are consistent with international law and the Act adopts the three-part test to ensure that exemptions are narrowly interpreted. The constitution and *AIA* seek to ensure transparent, participatory and accountable governance in South Africa, and the climate that the law creates is favourable to the exercise of the media's democratic mandate.

The South African scene in respect of access to official information contrasts sharply with the position in Botswana. The constitution of Botswana only guarantees a passive right to information. The exercise of the right of freedom of information is further hampered by a culture of secrecy in the conduct of government affairs. This culture of secrecy is further entrenched by a requirement that all public servants must sign a declaration of secrecy under the *National Security Act 1986* and the fact that there is no protection for whistleblowers. The prevailing situation makes it very difficult for the media to perform their democratic mandate because it is difficult to access official information. The government's promise in 2000 to enact an access to information legislation has so far not been fulfilled. There is no doubt that it is now long overdue for Botswana to enact an access to information law because it is not only necessary to ensure the media's performance of their democratic mandate, but is also essential for the maintenance of a democracy by ensuring transparency and accountability in government.

Perhaps the situation regarding access to information in Botswana would not be that bad, even without an access to information legislation, if the ICCPR and ACHPR were directly applicable in the municipal law. We saw in chapter 4 that the ICCPR protects an active right to information, which obliges states to actively disseminate information of importance. Similarly, the Declaration of Principles on Freedom of

Expression in Africa (African Declaration), which is intended to inform and guide the application of Article 9 of the ACHPR, provides that public bodies hold information not for themselves but as custodians of the public good.⁵ The Declaration further recognises that everyone has a right of access to information held by public bodies subject to the exceptions recognised by international law. If Botswana had incorporated both the ICCPR and ACHPR into her domestic law, the jurisprudence developed under the ICCPR on the point and the African Declaration would enable its courts to construe the constitutional provision as enshrining an active right to official information in order to enhance the media's informative and watchdog roles. This point emphasises the importance of incorporating international human rights treaties into municipal law for bolstering the protection of rights in the domestic law.

We saw that the idea that the media sector should be diverse is underpinned by a belief that, in a democratic society, it is important for its members to have access to a broad range of views and opinions so that people can make informed choices on a variety of public matters. The ideal legal environment, supportive to the media's democratic mandate would therefore be one that permits and encourages entry into the market of a diverse range of media outlets. The assumption is that a diverse range of media outlets will maximise the dissemination of a wide range of views and opinions. This seems to be the idea underlying the enabling legal framework for the print media in Botswana and South Africa. The laws of the two states do not impose any restrictions on entry into the market. Despite the liberal legal regimes in both countries, this has not produced the desired diversity and pluralism in the print media. The main obstacles are not legal, but economic. These include: commercialisation, which influences the content of newspapers; and concentration of ownership of media outlets, which restricts entry into the market by new players.

Media companies are in essence economic entities and are not likely to be driven by purely altruistic considerations in their reportage. First, the print media in Botswana and South Africa rely heavily on advertisers for survival. Consequently, the content of newspapers in both countries is often designed to deliver affluent audiences to advertisers. The content and distribution of newspapers in the two states therefore

⁵ Article IV.

targets the middle and upper income urban audiences. The poor and mostly rural audiences are thereby marginalized. Secondly, allegedly due to globalisation, the print media like other sectors in most countries around the world today, is characterised by an increasing concentration of ownership aimed at the creation of larger companies that can compete on the global market. There is a tension between these economic factors and democratic ideals because the former seriously jeopardizes both external and internal pluralism in the sector. Concentration of ownership of media outlets leads to monopolies or oligopolies and hence fewer players in the market, and stark economic realities also suggest that the media, as commercial entities, will not always pursue their democratic mandate in all circumstances. For example, where there is a conflict between economic considerations and the performance of the democratic mandate, such as a threat by a major advertiser to withdraw from a newspaper as a result of unfavourable coverage, it is likely that the democratic mandate will be subordinated to the interests of the newspaper as a commercial entity.

In South Africa, as is the case elsewhere in the world, competition law as failed to deliver external pluralism in the print media, and, as observed in chapters 3 and 5, its government has recently introduced a policy geared towards encouraging more players into the market. While the policy will enable some new players to enter the market, the major concern is whether the new players will be able to survive for long in a market dominated by giant media houses in this age of globalisation. Botswana can draw some useful lessons from South Africa in her attempt at ensuring external pluralism in the print media. Competition law alone has proved inadequate and a policy aiming at encouraging new alternative media outlets to enter the market can be quite costly. Perhaps a viable option for both countries to ensure external pluralism in the print media would be to limit control over titles in circulation along similar lines to the French and Italian models.

A plurality of players in the market does not necessarily guarantee internal pluralism. Commercial considerations often force newspapers to deliver content that is tailored to attract audiences to advertisers rather than disseminate a wide range of views and opinions to a diverse audience, thereby enabling citizens to participate in the democratic process. In chapter 2, we saw that media freedom is an instrumental good and that it is valued in so far as it promotes the goal of freedom of expression.

Regulation of the media is thus justified if it aims to ensure that the media serve the goals of freedom of expression. Content regulation of the broadcast media in many countries around the world has furthered the provision of a plural and diverse range of programmes.⁶ Arguably, the imposition of particular content obligations on the print media could promote internal pluralism in the newspaper sector, as has been the case in the broadcast sector.

Content regulation in relation to the print media is however generally considered an anathema in democratic societies. But, as we saw in chapter 2, there are no convincing arguments for the double standard in the regulation of the print and broadcast media. If we accept that media freedom is an instrumental good, then, in principle, there is nothing objectionable in regulating the content of newspapers if such regulation would enhance the media's democratic role by ensuring that the press disseminates a wide range of ideas and opinions to diverse audiences. The issue of content regulation in the print media therefore needs further consideration, particularly in the light of globalisation, which pushes states to encourage larger media companies that can compete on the global stage, resulting in fewer players in the market; and the fact that the media as economic entities do not act solely, or at all, for altruistic purposes. Content regulation could ensure that newspapers strike a proper balance between the pursuit of economic objectives and the performance of their democratic mandate.

The study shows that the legal framework for the regulation of the print media in Botswana and South Africa is mainly concerned with ensuring external pluralism. The position contrasts sharply with the regulation of the broadcast media. Airwaves are regarded a scarce resource in both countries, and the regulation of the broadcast media is thus premised on the principle that the use of the airwaves is a privilege and that the public interest requires that spectrum should be allocated so as to cater for the diverse needs of all citizens. Regulation of the broadcast sector therefore emphasises both the presence of a number of actors in the market and internal pluralism, which is concerned with the diversity and quality of programming. The broadcast sector in South Africa is more developed than that in Botswana, and we have seen that the

⁶ Cf. D. Ward, 'The Democratic Deficit and European Union Communication Policy: An Evaluation of the Commission's Approach to Broadcasting' (2001) 8(1) *Javnost* 75 at 80.

former has developed arguably one of the most detailed, comprehensive and democratic legal frameworks for enhancing both external and internal pluralism in the sector. Botswana is still in the process of developing a comprehensive legal framework for the regulation of broadcasting. In May 2003 the NBB published a draft national broadcasting policy for public consultation. If approved, the document will form the basis for a regulatory framework for the broadcast sector. The draft policy, among other things: identifies regulatory goals and how to attain those goals; sets out the mandates of public, commercial and community broadcasters; recommends limits over control of broadcasting licensees and cross-ownership between the print and broadcast media; and makes recommendations for ensuring universal access to broadcasting services to citizens.

Given the present state of affairs in Botswana, the country can learn some valuable lessons from the South African experience. Here I highlight some of the important principles embodied in the South African legal framework that are crucial for enhancing diversity and pluralism in the broadcast sector. Any state that is seriously committed to the democratisation of the broadcast media should consider incorporating similar principles into its regulatory framework.

With regard to ensuring external pluralism, it is crucial that there should be: an availability of different categories of broadcasting services; a guarantee of the independence of public service broadcasters both in law and practice from interference by the government; requirements to ensure that commercial broadcasters are controlled by persons from a diverse range of communities; a limit on the number of licences that any one entity may control; and limits to cross-media control between the print and broadcast media, and between the broadcast media and content production companies. It is encouraging to note that Botswana's draft broadcasting policy embraces all but two of these principles. The draft policy does not expressly recommend that commercial broadcasters should be controlled by persons from a diverse range of backgrounds, and the recommendation on limits on cross media control does not extend to content production companies.

In so far as the provision of quality programming in the broadcast media is concerned, public service broadcasters, as public assets, are expected to establish a benchmark for

quality. In order to do this, public service broadcasters must be independent from both political and commercial influences, have sufficient resources to provide quality programming and be accountable to the public for the manner in which they perform their public mandate. Independence of public service broadcasters is now a concept embraced by most democratic societies, as evidenced by the Council of Europe's requirement that all its member states should guarantee the independence of such broadcasters. The African Declaration also requires states to transform all state and government controlled broadcasters into public service broadcasters, which should be guaranteed editorial independence.⁷ In South Africa, the independence of the public service broadcaster, the SABC, is guaranteed in law and practice. The SABC's editorial independence is expressly guaranteed in law and the corporation also enjoys both administrative and financial independence. The governing board of the SABC is elected in a democratic manner and is accountable to parliament for the performance of the corporation's public mandate.

In Botswana the draft broadcasting policy recommends the transformation of the state owned broadcasters into PSBs in accordance with international law standards. The approval of this recommendation by the government is, however, in doubt in the light of a statement made by a senior cabinet member, when officiating at one of the of the broadcasting policy formulation seminars. The official was quoted as saying that the government was not yet ready to give up control of the state owned broadcasters, as the government needs a medium that it can control.⁸ Should the state fail to transform the state owned broadcasters into fully fledged PSBs and guarantee them editorial independence, this will not only be in violation of international law standards, but also the spirit of the government's own policy documents, such as the *National Development Plan 8* and *Vision 2016*.⁹

While the ideals of democratic communication require people from diverse backgrounds to control broadcasting licences, people from disadvantaged backgrounds are usually not able to enter the industry due to the costs involved. Thus, the government of Botswana will have to put in place a policy to assist people from

⁷ Article VI.

⁸ See 'RB Will Remain Under Government Control, Says Kwelagobe' *Daily News*, 28th June 2002.

⁹ *Long Term Vision for Botswana: Towards Prosperity for All* (Government Printer, 1997) p. 35.

disadvantaged backgrounds to invest in the industry, otherwise only the affluent sections of society will dominate the sector. South Africa has set up the MDDA to assist the historically disadvantaged to play a part in the broadcasting sector. Botswana should consider a similar policy and could learn some valuable lessons from South Africa in this respect.

A significant number of the citizens of Botswana and South Africa are illiterate and based in rural areas, and we saw that the distribution of the print media in both countries is concentrated in the urban areas. These factors render the press inaccessible to a large number of citizens, which makes the broadcast media all the more important because of its capacity to reach a wide audience and its ability to overcome barriers of illiteracy. Since a large number of the citizens of both countries rely only on the broadcast media for their information needs, it is crucial that the broadcast media provide high quality programming, addressing the diverse needs of the population. The South African regulatory framework, in recognition of the importance of the broadcast media in this regard, imposes extensive obligations on each of the three categories of broadcasters to ensure internal pluralism in their programming. In addition, broadcasters are required to include in their programming, programmes produced by the independent production sector. These requirements go a long way in providing for internal pluralism in the programmes provided by broadcasters. Botswana's draft broadcasting policy should thus be applauded for recommending the imposition of similar obligations on all broadcasters recognised under its law.

The ideals of democratic communication demand that citizens should have access to a diverse range of views and opinions in order to play an effective part in the democratic process. The situation in both Botswana and South Africa is such that the broadcast media is the most accessible media to the majority of the citizens. It is submitted that this fact imposes an obligation on the governments of the two states to endeavour to ensure the availability of broadcasting services to all their citizens. In an attempt at providing broadcasting services to all its citizens, South Africa has restructured its signal distribution sector. More importantly, the public service broadcaster's signal distribution network has been converted into a common carrier, and is obliged, subject to its technological capacity to provide broadcasting signal

distribution to licensees on an equitable and reasonable basis. The move has enabled more community and small commercial broadcasters, who would otherwise not have been able to afford the costs of signal distribution equipment, to enter the market thus offering choice to the citizens. Further to ensuring universal access to broadcasting services, the South African regulatory framework requires broadcasters to provide programming in all official languages in order to remove language barriers to access.

In Botswana, the signal distribution network of the state owned broadcasters is not open to use by other categories of broadcasters. However, in the light of the costs of acquiring signal distribution equipment, the draft broadcasting policy recommends that the national signal distribution network should be opened up to other categories of broadcasters at a reasonable cost. The national signal distribution network is a public resource and must therefore be used in the public interest, i.e., furthering the democratic ideal, by ensuring that citizens have access to a number of broadcast services, which will hopefully provide them with a diversity of views and opinions. It is also crucial for the government to extend the network to cover all parts of the country. At the moment all broadcasters in the country broadcast in two languages, English, the official language and Setswana, the national language. All citizens cannot comprehend these languages, and there is a need to encourage the use of other minority languages in order to make broadcast services more accessible to the minority groups in the country. The draft broadcasting policy addresses this problem by recommending the use of other languages by all broadcasters in the country.

The effectiveness of the regulation of a sector depends to a certain extent on the qualities of the regulator. We saw that in South Africa, ICASA is expressly guaranteed both administrative and financial independence in the performance of its mandate. The successes in the regulation of the broadcast media there can in part be attributed to the effectiveness and independence of the regulator. By contrast, the regulator in Botswana is not expressly protected from interference by the government and does not have financial independence. The law should be amended in order to expressly provide for the administrative and financial independence of the regulator. Such guarantees will not only enhance the status of the regulator, but the latter guarantee in particular will also enable it to carry out its mandate more effectively.

The publication of the draft national broadcasting policy in Botswana was a very important event in the history of broadcasting in the country. The approval of the document in its present form by the government, and its subsequent implementation would certainly lead to major transformations in the broadcast sector, resulting in the enhancement of the sector's democratic mandate. It is however submitted that the draft policy needs to be amended in order to fill the gaps identified in chapter 5. Apart from these gaps, the publication of the draft policy is a positive step in that it addresses a number of crucial issues. It seems the South African regulatory framework generally inspired the draft, although it does not cover all issues addressed in South Africa. The manner in which the draft policy proposes to tackle most regulatory issues arguably draws from the South African experience, and reflects the approach currently in place there. South Africa would therefore be a crucial point of reference for Botswana's implementation of her broadcasting policy.

The study demonstrates the importance that international law accords to the freedoms of expression (including media freedom) and information as pillars of a democratic society. Despite their importance, we saw that the freedoms are not absolute, as their enjoyment must be reconciled with the protection of other equally important social interests, such as the protection of national security and the reputation of others. International law, however, requires a delicate balance to be struck between the exercise of the freedoms of expression and information and any restrictions thereon. In particular, the law requires restrictions on the two freedoms to be construed strictly and the need of any restriction to be established convincingly.¹⁰ The question of striking an appropriate balance between freedom of expression, media freedom and access to information, and the protection of national security and the reputation of others, has proved to be one of the most contentious issues around the world.

With regard to restrictions based on national security, the major problem is that national security remains, both in international law and the municipal laws of most states, a vague concept. International human rights treaties and the organs entrusted with the enforcement of these instruments have hitherto failed to provide a precise definition of what constitutes genuine national security interests. The resulting

¹⁰ Cf. *Tammer v Estonia* (App. No. 41205/98, 6th February 2001) para. 59.

vacuum means states have a wide discretion in determining what amounts to threats to their security. The unfettered discretion that states generally enjoy in determining national security interests has resulted in the concept becoming excessively broad, resulting in occasional abuses. The uncertainty surrounding national security has an impact on the ability of courts of law to perform their duty and provide adequate safeguards against the abuse of the concept. Courts play an important role in safeguarding civil liberties by scrutinising executive action in order to ensure its lawfulness. In the absence of clear guidelines as to what constitutes genuine national security interests, courts are reluctant to interfere with executive action taken, purportedly, in the interests of national security. It is therefore critical for international law to provide specific guidance on the key issue of what constitutes genuine national security interests, and what information it would be legitimate to withhold for its protection. The *Johannesburg* and *Siracusa Principles* have made significant contributions towards the identification of genuine national security interests, and international tribunals should thus be encouraged to endorse, incorporate and refine these principles in their decisions. Such a step would help develop authoritative international law jurisprudence on national security that would guide governments and national courts in the interpretation of the concept.

South Africa has taken important steps towards striking an appropriate balance between freedom of expression and the protection of national security. The *AIA* provides a comprehensive list of types of information that the state may legitimately withhold in the interests of national security. The list draws from both the *Johannesburg* and *Siracusa Principles*. By listing the types of information that can be withheld for the protection of genuine national security interests, the Act thereby limits the discretion of the state in the determination of national security interests and further provides the courts with a clear and solid basis upon which they can judge the lawfulness of government action. The *AIA* further incorporates the three-part test in the determination of the legitimacy of restrictions based on national security.

By contrast, Botswana is one of the many countries around the world where national security remains a broad and vague concept. The ambiguity and breadth of the concept in the country is detrimental to the performance of the media's democratic mandate, as we saw in chapter 7, in that national security is occasionally invoked by the

government to deny the media access to a wide range of information. If Botswana is truly committed to enhancing democracy, it should amend its laws relating to national security, particularly the *NSA*, to ensure their compliance with international law principles. It is recommended that Botswana adopt a definition of national security that is consistent with both the *Johannesburg* and *Siracusa Principles*, and further incorporate the three-part test for the determination of the legitimacy of restrictions on the freedoms of expression and information based on national security.

The Constitutional Court of South Africa has opined that the media, as primary agents of the dissemination of information and ideas, are powerful institutions in a democracy and thus have a duty to act with vigour, courage, integrity and responsibility.¹¹ One of the prominent issues in the debate on striking an appropriate balance between media freedom and the protection of the reputation of others relates to the question of how to ensure that the media do indeed act in this way in the performance of their democratic mandate. If the media were to be held strictly liable for any errors, this would impact negatively on their duty to act with vigour and courage, as they may be forced to adopt a cautious approach in their reportage in order to avoid liability. Similarly, if the media were to be held liable only upon proof that they acted with malice or reckless disregard for truth, this may lower ethical standards and thus fail to ensure that the media perform their democratic mandate with integrity and responsibility.

International law resolves the tension between the above extreme approaches by giving vigorous protection to the media when commenting on political and other matters of public interest, but only where publication of defamatory matter is proved to have been reasonable in the circumstances of a given case. These principles ensure that the media perform their democratic mandate with vigour and courage, while at the same time the requirement of reasonableness ensures that they act responsibly. In the light of international law standards, a favourable legal environment to the striking of the appropriate balance between media freedom and the protection of reputation would be one that allows the media room for reasonable error, but simultaneously requires maintenance of high ethical standards in the reporting of news.

¹¹ *Khumalo and others v Holomisa*, n 1 above at 417 para. 24.

The South African legal environment meets both of the above requirements. The liability of the media for publication of defamatory matter is based on negligence, which allows media defendants to escape liability if they prove that they acted with due diligence in the publication of the matter. In addition, the law imposes on the media a duty to act with care before publication of matter that is potentially defamatory.¹² Codes of conduct have been introduced in both the print and broadcast media to establish and maintain high ethical standards in order to ensure the observance of this duty of care. The print media have established a voluntary regulatory regime by adopting a Press Code, which all newspapers in circulation have elected to abide by. The code *inter alia* requires newspapers to report news truthfully, accurately and fairly. In the broadcast media, the *IBA Act 1993* obliges all broadcasters to comply with a Code of Conduct drawn up by the regulator. The code that has been drawn up by *ICASA* imposes similar obligations on broadcasters as those imposed on the print media in the reporting of news. A proper enforcement of these codes should not only ensure the observance of high ethical journalistic standards in the media, but also provide a quick and inexpensive way of settling disputes between the media and members of the public aggrieved by reports in the media.

In Botswana the media are strictly held liable for publication of defamatory matter. This position is not only in conflict with international law standards, but also with the recommendation of *Vision 2016* that media freedom be guaranteed in law and practice. As I argue in chapter 8, strict liability for the media was wrongly incorporated into the law of Botswana and therefore should be replaced by the principle of liability based on negligence. *Vision 2016*, in conformity with international law, further requires that media freedom be balanced by sound media ethics. *Vision 2016* specifically provides that ethical standards must be spelt out in a code of conduct that is enforced by the media sector itself.¹³ At the time of writing, there were no codes for either the broadcast or print media in force in Botswana. With regard to the broadcast media, the regulator will draw up a code once the process of formulating a national policy for broadcasting has been finalised.

¹² *National Media Ltd and others v Bogoshi* 1998 4 SA 1196 at 1212-13.

¹³ *Long Term Vision for Botswana: Towards Prosperity for All*, n 9 above at 35.

The print media, which is normally associated with voluntary regulatory mechanisms, has hitherto failed to establish any credible means of enforcing ethical standards in Botswana. It will be recalled that the *Mass Communications Bill 2001*, which is yet to come before parliament, proposed the setting up of a statutory press council whose members would be appointed by the minister of communications. In response to the government's efforts to legislate for a press council, the print media registered a voluntary press council with the assistance of MISA-Botswana in October 2002. However, the council has not yet adopted a code of conduct. It is indisputable that a reputable mechanism in the print media in Botswana that can maintain high ethical standards and ensure that newspapers perform their democratic mandate in a responsible manner is now long overdue. It is therefore imperative for both the government and the print media to work together in order to establish an institution that can ensure the maintenance of high ethical standards in the sector.

This study clearly demonstrates that, despite affirmations by the state of Botswana on the importance of the media in sustaining democracy, and the constitutional guarantee of media freedom, the state has generally failed to take positive measures to ensure the enjoyment of the right. However, notwithstanding this failure, Botswana is still generally regarded as one of the countries in Africa where there is a relatively high degree of media freedom.¹⁴ South Africa is regarded as offering the media the highest degree of freedom in the performance of their democratic mandate in the whole of the African continent. The position in South Africa is attributable to the fact that, the state, in addition to its affirmations of the importance of media freedom in democratic societies, has also taken crucial measures to ensure its realisation. It is submitted that if Botswana were to borrow from the South African experience in this regard, it would significantly enhance media freedom in the country.

¹⁴ P.N. Takirambudde, 'Media Freedom and the Transition to Democracy in Africa' (1995) 7 *African Journal of International and Comparative Law* 18 at 46.

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