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B-1049 Brussels  
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ISBN 99916-62-06-5

Cover: Gail Irwin

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United Nations Educational, Scientific and Cultural Organisation  
The European Union

Printing: *Stups Printing, Johannesburg, South Africa*

# **Undue Restriction**

## **Laws impacting on media freedom in the SADC**

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Southern Africa Report

**Laws with restrictive impact on the media in nine member states of the  
Southern Africa Development Community**

**Commissioned by the United Nations Educational, Scientific and Cultural  
Organisation, the European Union and the Media Institute of Southern Africa**

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# An Overview of International Protection of Media Freedom

In 1774 Edmund Burke gestured to reporters in the House of Commons in England and said, “*There are three Estates in Parliament; but, in the Reporters’ Gallery yonder, there sits a Fourth Estate more important far than they all*”. He was acknowledging the importance of the contribution the press made in that society, even though it was not as free as it is today. Now the role of the press and the other media that have emerged since has come to be recognised worldwide as vital in modern democratic societies.

Testimony to the recognition by governments of the power of that Fourth Estate role has come from the plethora of laws and regulations they have enacted in attempts to curb the media in its stimulation of ideas and values of freedom and in the publication of information about their conduct. Equally impressive in quality rather than quantity has been the growth in the last century of spirited declarations by people acknowledging the essential need for freedom of expression and freedom for the media to operate.

As part of that process this handbook is published to provide a catalogue of laws in nine of the member states of the Southern Africa Development Community that militate against freedom for the media.

In the southern Africa context the important declaration of principles that has been accepted, if not adopted, by SADC member states is **The Windhoek Declaration on Promoting an Independent and Pluralistic Media**. This affirms that the establishment, maintenance and fostering of an independent, pluralistic and free media is essential to the development and maintenance of democracy in a nation. The Declaration urges African states to take positive measures to guarantee the establishment of media freedom.

The South African Constitutional Court has held that the media bears an obligation to provide citizens with a platform for the exchange of ideas, which is crucial to the development of a democratic culture<sup>1</sup>. In addition, the media performs the role of a watchdog over government on behalf of the governed.

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<sup>1</sup>*Khumalo and others v Holomisa* 2002 5 SA 401 at 417.

As such, it should ferret out corruption, dishonesty and graft wherever and whenever it may occur and to expose the perpetrators<sup>2</sup>.

Media freedom, coupled with freedom of expression, is guaranteed in all major international human rights instruments, which emphasises the importance that the media is accorded in democratic societies. The freedom is guaranteed in a number of UN human rights instruments such as the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR), and regional human rights instruments 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).

In brief, these instruments guarantee media freedom in the following terms:

## Universal Declaration of Human Rights (UDHR)

At its inception, 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 of a legal nature. It was taken to indicate goals rather than impose precise obligations upon states<sup>3</sup>. 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 either speaking or writing whether ordinarily (that is, in a private context) or in the print or electronic media<sup>4</sup>. It also protects musical and artistic expression.

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<sup>2</sup> *Government of the Republic of South Africa v Sunday Times newspaper* 1995 2 SA 221 at 227.

<sup>3</sup> W Kleinwachter, “The Birth of Article 19 – A Twin Concept of the United Nations” (1989) 10 (3) Media Law and Practice 93 at 99.

<sup>4</sup> P Nnaemeka-Agu, “Freedom of Expression and of the Press and the African Charter” (1993) 19 (4) Commonwealth Legal Bulletin 1761.

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.

At face value, this Article appears to guarantee an absolute right to media freedom. The formulation of the provision has thus been criticised for its failure to balance the twin concepts of freedom and responsibility as laid down in the UN Resolution 59 (1) of 1946. Under this Resolution, the exercise of freedom of expression, which includes media freedom, is subject to the following responsibilities:

- a) Willingness and capacity to exercise the freedom without abuse; and,
- b) The moral obligation to seek facts without prejudice and to spread knowledge without malicious intent<sup>5</sup>.

Article 19 must however be read in conjunction with Article 29, which provides for a limitation on freedom imposed by certain responsibilities. This Article permits restrictions on the freedom of expression 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 United Nations<sup>6</sup>.

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 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<sup>7</sup>.

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<sup>5</sup> Yearbook of the UN 1946 - 1947 (United Nations, 1948) p 176.

<sup>6</sup> Article 29 (2) & (3) of the UDHR.

<sup>7</sup> S Coliver, *The Article 19 Freedom of Expression Manual: International and Comparative Law, Standards and Procedures* (Article 19, 1993) p 9.

## 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. Media freedom is 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 also “other media” and this is important for both radio and television<sup>8</sup>.

Media freedom is therefore expressly protected under this Article.

The exercise of media freedom carries with it duties and responsibilities. Under Article 19 (3), freedom 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 freedom, these must not be put in jeopardy the right itself. Such restrictions must satisfy the conditions laid down 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*
- (iii) must be justified as necessary for that state party for one of those purposes<sup>9</sup>.*

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<sup>8</sup>M Nowak, *UN Convention on Civil and Political Rights: A Commentary* (N.P. Engel, 1993) p 342.

<sup>9</sup>Report of the Human Rights Commission to the General Assembly, 38th Session, Supp. No 40, 1983 (A/38/40) Annexe VI, General Comment 10.

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

The Charter’s protection of freedom of expression is set forth in Article 9 (2) which provides:

*“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<sup>10</sup>.

The uncertainty surrounding Article 9 has now been cleared. The African Commission on Human and Peoples’ Rights, which is the organ responsible for the enforcement of the Charter has now developed principles to inform the application, and guide the development, of Article 9. These principles, the Declaration of Principles on Freedom of Expression in Africa, were adopted in October 2002 and are drawn from a comprehensive range of international standards and jurisprudence.

Article 1 (1) of the Declaration of Principles makes it clear that media freedom is guaranteed under Article 9 of the Charter.

Another peculiar feature of the Charter is that Article 9 does not include any express restrictions on media freedom. 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*”<sup>11</sup>.

The Declaration of Principles provides that any restrictions on media freedom must be provided by law, serve a legitimate interest and be necessary in a democratic society<sup>12</sup>.

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<sup>10</sup> Nnaemeka-Agu, n 4 above at 1763.

<sup>11</sup> Article 27 (2) of the ACHPR.

<sup>12</sup> Article 2 (2)

## American Convention on Human Rights (ACHR)

Article 13 (1) sets forth the positive protection of media freedom 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 media freedom is protected under the ICCPR are equally applicable here.

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 governments<sup>13</sup>.

Restrictions on media freedom 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<sup>14</sup>.*

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<sup>15</sup>.

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

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<sup>13</sup>Article 13 (2) & (3).

<sup>14</sup>Article 13 (2) of the ACHR.

<sup>15</sup>Article 13 (4) of the ACHR.

## 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*”, is the oldest of the human rights treaties discussed here and its implementation procedures are the most developed. Article 10 (1) guarantees media freedom 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 content or the mode of communication<sup>16</sup>.

This, therefore, means that media freedom, even though not expressly mentioned, is covered. Further, the ECHR 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<sup>17</sup>.

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<sup>18</sup>.

In confirming this double standard, the Court in *Informationsverein Lentia and others v Austria* stated:

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<sup>16</sup>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.

<sup>17</sup>*Sunday Times (No 1) v United Kingdom* (1979) 2 EHRR 245.

<sup>18</sup>F Jacobs & R White, *The European Convention on Human Rights* (Clarendon Press, 1996) chapter 12.

*“...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”<sup>19</sup>.*

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<sup>20</sup>. In regulating broadcasting, a state is also not allowed to infringe the right of a person to receive information<sup>21</sup>.

Media freedom 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 media freedom 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 ECHR has held that the law need not be written, but must be expressed with sufficient clarity to enable the citizen to know with reasonable certainty what consequences a given action would entail<sup>22</sup>.

<sup>19</sup>(1993) 17 EHRR 93.

<sup>20</sup>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, DR 49, p 126.

<sup>21</sup>*Autronic AG v Switzerland* (1990) 12 EHRR 485.

<sup>22</sup>*Sunday Times (No 1) v United Kingdom* (1979) 2 EHRR 245.

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 – features of a democratic society<sup>23</sup>.

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 widely 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 ensuring and maintaining a free media<sup>24</sup>.

Despite the importance of media freedom in a democratic society, the protection that freedom is accorded in international law is not absolute. The exercise of the freedom must be reconciled with the protection of other equally important social interests. However, international law requires a delicate balance to be struck between the exercise of media freedom and any restrictions that are imposed.

In trying to strike this balance, the international human rights instruments discussed above set forth essentially the same three-part test for determining the legitimacy of restrictions:

- First, any restriction must be prescribed by law;*
- Secondly, it must serve one of the legitimate purposes expressly enumerated in their text; and*
- Thirdly, it must be necessary.*

There is some variation among the UDHR, ICCPR, ACHR and ECHR concerning the legitimate purposes for which media freedom may be restricted. Article 29 of the UDHR permits restrictions to the freedom 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, protection of information received in confidence and the authority or impartiality of the judiciary.

<sup>23</sup>*Handyside v United Kingdom* (1979-80) 1 EHRR 737.

<sup>24</sup>*Worm v Austria* (1997) 25 EHRR 454 at para.47.

International law provides minimum standards of human rights below which no member of the international community should fall. Ideally, all states should guarantee media freedom in accordance with international law standards and restrictions on the freedom should comply with the three-part test.

A law will be regarded as unduly restrictive on media freedom if it does not comply with the three-part test.

The structure that this handbook adopts for each member state is as follows:

- i) Examination of the constitutional protection of media freedom to determine its compatibility with international law;
- ii) Determine the status of the international human rights instruments discussed above; and
- iii) Catalogue the laws that unduly restrict media freedom.

## Botswana

Though Botswana's Constitution does not explicitly guarantee media freedom as such, its references to freedom of expression and the communication of ideas and information without interference are accepted as implying protection for media freedom. However, despite this there are a number of laws in this former British Protectorate which arguably offend against the country's constitutional principles relating to media freedom.

Much of the legislation is framed in broad and vague terms which call into question their validity as legal instruments and thus their constitutionality. In addition, discretionary powers are given to the president and other authorities which, if invoked, could have devastating effects on media freedom.

However, in practice, Botswana has tended to avoid using its harsh legislation against the media and when it has done so and where it has been challenged, it has either withdrawn charges or deflected the issues by using other devices to avoid being confronted by a court challenge. This has resulted in the constitutionality of much of Botswana's laws which have an effect on the media remaining constitutionally untested, creating a situation where no definitive rulings have been made that may have resulted in the amendment or repeal of legislation.

The consequence is that while the media is allowed to operate in a semblance of freedom, the presence of these laws has, in fact, a chilling effect. This has induced self-censorship in the media which is always unsure whether the legislation may at some stage be invoked thus unduly restricting the media from publishing information and denying the public access to the information.

In addition to actual legislation, the Botswana government has adopted unusual administrative action to try to punish newspapers for what it regarded as "hostile" reporting and this could have had a negative effect on the viability of media

In early May, 2001, the Botswana government ordered all ministries, departments, parastatal organisations and private companies in which the government is a stakeholder to stop advertising in the *Botswana Gazette* and the *Midweek Sun*, both of which have run highly critical reports on government

policies and conduct. It followed this a fortnight later with a ban on the supply of police and crime information to the two newspapers. The directive giving the order on advertising stated that the cabinet decision followed “persistent negative and often hostile reportage on government and its institutions by the two newspapers”.

This reduced the income of the papers and began to undermine their viability. The papers challenged the bans in the Botswana High Court which struck them down, ruling that the government’s actions were unconstitutional because they violated the papers’ right to “freedom of expression”. Mr Justice I B K Lesetedi declared that the government was telling the papers that if they wished to continue to enjoy the benefits of receiving government advertising they should “conform” to a reportage which “falls within what it (the government) considers to be the parameters of editorial freedom”. He added that the views of the media might not always be palatable to those who govern; and that the relationship between the media and government could sometimes be described as akin to the “opposing poles of a magnet”<sup>1</sup>.

## Protection of Media Freedom under the Constitution

Section 12 (1) of the Independence Constitution of 1966 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 thus does not expressly guarantee media freedom. Rather it refers to freedom to communicate ideas and information without interference. However, the High Court has in obiter dictum (an expression of opinion which, however, is not regarded as binding) held that media freedom is an aspect of freedom of expression<sup>2</sup>.

<sup>1</sup>*So This is Democracy? State of the media in Southern Africa 2001* (MISA, 2002) p 30, 38

<sup>2</sup>*Media Publishing (Pty) Ltd v Attorney General and others MICSA 229/2001 (unreported)* at 21

Though no authorities were cited to support this conclusion, lawyers believe 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 – of which Botswana is a member – the Privy Council declared that a constitution is sui generis (unique and not classifiable with others), calling for principles of interpretation of its own, suitable to its character<sup>3</sup>.

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”<sup>4</sup>.

The case was cited with approval by the Court of Appeal of Botswana in *Dow v Attorney General of Botswana*<sup>5</sup>, 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”<sup>6</sup>. The court further held that the Bill of Rights in the constitution of Botswana was greatly influenced by the ECHR, which the United Kingdom had ratified and applied to its dependent territories and that the UDHR, in turn, influenced the ECHR itself. 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. The ECHR has held that the principles of freedom of expression are of particular importance as far as the press and other media are concerned<sup>7</sup>.

The guarantee of media freedom under the constitution is not absolute. The exercise of the freedom is subject to section 12 (2), which reads:

<sup>3</sup>*Minister of Home Affairs & another v Fisher & another* [1980] AC 319.

<sup>4</sup>*Ibid*

<sup>5</sup>[1992] LRC (Const) 623

<sup>6</sup>*Ibid*, at 654 – 5

<sup>7</sup>*Sunday Times (No 1) v United Kingdom* (1979) 2 EHRR 245

*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.*

This provision incorporates a three-part test similar to that found in international legal instruments on human rights in the determination of the legitimacy of restrictions on media freedom.

First, a restriction must protect one or more of the interests enumerated in subsection 2, paragraphs (a) to (c). The list of permissible restrictions under the constitution is, however, much broader than the permissible restrictions under international legal instruments.

Second, any restriction must be done “*under the authority of law*”. The phrase “*under the authority of any law*”, although worded differently from such equivalent phrases such as “*provided by law*”; “*prescribed by law*” or “*in terms of the law*”, used in other constitutional and international human rights instruments, carries substantially the same meaning<sup>8</sup>. In order to satisfy

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<sup>8</sup>Decision of the Zimbabwean Supreme Court in *Chavunduka & another v Minister of Home Affairs* 2000 4 SA 1

the test, “*done under the authority of law*”, the law must be adequately accessible and formulated with sufficient precision to enable a person to regulate his/her conduct<sup>9</sup>.

And third, any restriction must also be shown to be reasonably justifiable in a democratic society. The determination of a restriction and whether it is reasonably justifiable in a democratic society, involves a balancing exercise. The decision revolves around the issue 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 ECHR has held that to satisfy the test whether the restriction is “reasonably justifiable in a democratic society”, it must be proved that there is a pressing social need for the restriction<sup>10</sup>.

## **Status of International Human Rights Instruments**

Of the international human rights instruments protecting media freedom, Botswana has ratified the ICCPR and ACHPR. Botswana has also adopted the Windhoek Declaration. However, international human rights instruments in principle have no automatic application in the country’s domestic law unless incorporated by legislation<sup>11</sup>. Neither of these international human rights instruments has been incorporated into the domestic law and thus they are not directly enforceable in the country. Judicial activism has, however, gone some way towards altering this position. Courts in the country 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 Botswana is, or is not, a party to. Thus the international human rights instruments that Botswana has either ratified or adopted, which protect media freedom, even though not incorporated into the domestic law, may be used as an aid to interpretation.

Even though the ACHR and the ECHR are not binding on Botswana, there is evidence that courts at times draw inspiration and seek guidance from the jurisprudence developed under these instruments. In particular, the ECHR is important given its influence on the Bill of Rights.

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<sup>9</sup>*Ibid.* & *Sunday Times (No 1) v United Kingdom*, n 7 above

<sup>10</sup>*Handyside v United Kingdom* (1976) 1 EHRR 737

<sup>11</sup>*Dow v Attorney General of Botswana*, n 5 above at 654

# Laws That Unduly Restrict Media Freedom

## 1.1 Printed Publications Act [Cap 20:01]

*The main object of this Act is to make provision for the registration of newspapers printed or published in the country. Under section 5, no newspaper shall be printed or published until a return containing certain information has been lodged and registered with the Registrar of Newspapers. The information required for registration includes the title of the newspaper, its business address, details of the publisher and editor and subsequent changes to this information. Failure to comply with the registration requirements constitutes a criminal offence.*

Registration is an unnecessary restriction on the freedom to publish. Instead of registration, an alternative would be to require every publication to publish the information set out in section 5.

## 1.2 Anthropological Research Act [Cap 59:02]

*This Act regulates anthropological research. In terms of section 3, no person may conduct anthropological research without the permission of the minister. The minister has wide powers to refuse applications for permission, the grounds for refusal including: (i) that the applicant is not fit and proper to conduct the research; (ii) that the applicant does not have qualifications to enable him/her to conduct the research adequately; (iii) that the research may disrupt the life of the community or any inhabitants who are the subject of research; (iv) that the applicant is ill-equipped to conduct the research; and (v) on the ground of safety of the applicant.*

The Act gives the minister very wide discretionary powers, which may be exercised unlawfully resulting in the hindrance of research and the dissemination of information in society. Further, the grounds upon which permission may be refused are questionably paternalistic in that a determination of those conditions is the sole prerogative of the minister.

### **1.3 Cinematograph Act [Cap 60:02]**

*The Act regulates the making and exhibition of cinematograph films and for the licensing of cinemas, etc. It requires that a filming permit has to be obtained from the minister and that the film must be made in accordance with the terms and conditions of the permit, failing which the producer, proprietor, promoter, photographer or any other person engaged in the making of the film could face criminal charges.*

*Under the Act, the minister appoints a board of censors which issues certificates of approval before films may be shown publicly and the minister may prohibit both public and private exhibitions. Under section 15, the board has a range of powers to make subjective impressions about a film and then prohibit its showing.*

The Cinematograph Act interferes with and hinders the development of an independent, indigenous, professional and creative film industry. First, the Act, through the minister, pre-empts the editorial and creative roles and responsibilities of the film producer and director. Second, anyone participating in any way with a film production that contravenes the Act is liable to prosecution. This means every member of the production team, technical or creative, writer, photographer, sound recorder or actor, graphic artist or musician, is at risk of a fine or imprisonment.

And, third, in many ways the Act is destructive to media development by imposing bureaucratic mechanisms that are antithetical to film production and to modern mass media organisations in general.

These mechanisms sabotage two of cinema production's strongest assets: its productive efficiency and its creative energy. Within this context, independent film production is not economically viable.

### **1.4 National Assembly (Powers and Privileges) Act [Cap 02:03]**

*Section 19(h) of this Act makes it an offence for any person to utter or publish any false or scandalous slander or libel on the Assembly or upon any member. The rationale behind the provision is the protection of the dignity of the National Assembly.*

What is objectionable is the law's use of vague terms such as "false" and "scandalous". These are subjective terms and invoking them may be used to stifle legitimate criticism of the National Assembly and its members.

Further, the provision does not provide for a defence of publication of false but honest matter. It is sufficient that publication is declared "false" or "scandalous". The provision also exposes the publisher to double jeopardy, as a member of the Assembly may also sue for defamation under the common law.

### **1.3.5 House of Chiefs (Powers and Privileges) Act [Cap 0205]**

Section 10 (e) of this Act is identical to section 19 (h) of the National Assembly (Powers and Privileges) Act and the views expressed above on that law apply with equal force to this Act.

### **1.6 Botswana Housing Corporation (Amendment) Act No. 5 of 1994**

*In terms of section 10 of this Act, it is obligatory for every member of the board and officers, employees and auditors of the corporation to take an oath or declaration of secrecy not to reveal any matter or thing that has come to their knowledge in performance of their duties.*

There is no proviso for the disclosure of information that is in the public interest. The Botswana Housing Corporation performs a public function. It is necessary for the public to be informed of its operations and to know if certain improprieties exist within the corporation. Officers and employees of the corporation should be able to give interviews or respond to questions from the press where there are allegations of impropriety or maladministration. Section 10 effectively erodes this.

### **1.7 Public Service Act [Cap 26:01]**

*Section 34 (1) prohibits public servants from disclosing the contents of any document, communication or information that has come to their notice in the course of their duties unless authorised by the minister in writing.*

There is no proviso for disclosure of information in the public interest. Public servants are the best placed people who can expose corruption and other maladministration in the public service. However, the provision does not allow public servants to blow the whistle on any government wrongdoing. Media practitioners therefore find it very difficult to obtain information from public servants as a result of this provision.

*Further, section 38 (2) prohibits any person who knows of any information that has been disclosed in contravention of subsection (1) to publish it.*

This subsection targets the secondary disclosure of information leaked by public servants, particularly by the media.

This means that no information about the conduct of the administration may be disclosed without the minister's authority, a ban which conflicts with accepted standards of public disclosure of information by civil servants in a democracy.

## **1.8 Electoral Act [Cap 02:07]**

*Section 69 of this Act gives a returning officer in any election discretion to determine who may be present at the counting of votes.*

Free and fair elections are one of the hallmarks of a true democracy. To ensure free and fair elections, transparency of the electoral process is crucial, as it tends to build public confidence in the system. The provision gives a returning officer very wide discretionary power, which may be used to exclude the media or a political party's representatives from witnessing the counting of votes. Citizens generally trust that with the media keeping a close watch, things will be done in a proper manner. Thus exclusion of the media from the counting of votes may be seen as a way of facilitating fraud and corruption.

## **1.9 Prisons Act [Cap 21:03] and Prisons Regulations**

*In terms of section 128 (1) of the Act, no person may take a photograph or make a sketch of a prisoner or prison without the consent of the Commissioner of Prisons.*

This provision may be used to stifle the dissemination of information on prison conditions and/or prisoners, which may be in the public interest to be made public.

*Regulation 38 (1) of the Prisons Regulations regulates communications that prisoners may have with the outside world. It governs visits to prisoners and letters that prisoners may write and receive while serving their terms. For the media to have access to prisons or prisoners, journalists must seek the consent of the Commissioner. In exercising his/her discretion on whether to allow or refuse access, the Commissioner is required to take into account security considerations and the interests of the prisoners.*

This regulation may be used to restrict media practitioners' access to prisons and prisoners. While there may be justification for the restrictions, what is objectionable is the very wide discretionary powers enjoyed by the Commissioner, which are often exercised to the detriment of the media.

## **1.10 Penal Code [Cap 08:01]**

The Penal Code is the basic criminal code of the country. It creates a variety of offences on a wide range of subjects.

### **1.10.1 Insults relating to Botswana – section 91**

*The offence in relation to the media lies in publishing anything with the intent to insult or bring into contempt or ridicule national symbols, the flag, national anthem and the standard of the president of Botswana.*

The threat to media freedom lies in the determination of the existence of an intention to insult which rests with the prosecutors.

The term "to insult" is notorious for its vagueness and can be easily used to silence legitimate criticism. This, therefore, presents an area of uncertainty for the media.

### **1.10.2 Treason – section 37 (c)**

*A person commits the offence of treason if he/she forms an intention to threaten the security of Botswana and manifests such intention by publication.*

While the provision is a legitimate restriction on media freedom, the danger is that the concept of national security is vague. Governments often confuse threats to the security of the nation with threats to the security, or the tenure of office, of their political parties. The provision may therefore be easily abused in order to silence criticism against a political party in power.

### **1.10.3 Prohibited Publications – section 47**

*The president of Botswana is empowered to ban any publication published in the country, where, in his/her opinion, such publication is contrary to the public interest.*

There are no clear guidelines as to when a publication will be deemed to be contrary to the public interest. The danger in the provision is therefore that it may enable a president to ban a publication simply because he/she may not like it.

### **1.10.4 Seditious – section 50**

*In terms of this provision, a seditious intention is the intention to bring into hatred or contempt or to excite disaffection against the person of the president or government of Botswana.*

The offence is committed when there has been publication of seditious material. Similar to the case of treason, while the prohibition of publication of seditious material may be legitimate, the problem is one of clearly defining what will amount to genuine sedition.

The uncertainty thus created means sedition may be used unscrupulously to stifle criticism against both the president and the government of Botswana.

### **1.10.5 Alarming Publications – section 59**

*The provision prohibits the publication of a statement, rumour or report that is false. The requisite for the offence is an intention to publish a false statement, rumour or report knowing or having reasonable cause to believe that it is likely to cause fear and alarm to the public or to disturb the public peace or to do so recklessly.*

The danger in this provision is that the statement, rumour or report does not need to have actually caused fear and alarm to the public or in any way disturbed the public peace. It is sufficient if it is likely to do so. The likelihood that fear and alarm will be caused to the public is primarily a subjective determination to be exercised according to the whims and idiosyncrasies of a particular prosecuting authority. This is because the notion of falsity is unclear and subjective and can be used to suppress expression that is critical of a government. Further, the notions of fear, alarm or disturbance of the public peace are inherently subjective and do not give the media sufficient notice of what is prohibited.

### **1.10.6 Obscene and Indecent Publications – section 178**

*In order to protect public morals, this provision prohibits the publication of material that has a tendency to corrupt morals, or material that is an unnecessary affront to people's sense of propriety*

While this may be a legitimate restriction, the problem is that issues of morality are notoriously controversial and contentious. There is no uniform conception of morals even in international law. Morals vary from time to time and from place to place. This is therefore an uncertain area for the media.

### **1.10.7 Criminal Defamation – section 192**

*The provision prohibits the publication of any matter that is likely to injure the reputation of any person by exposing him/her to hatred, contempt or ridicule, or likely to damage any person in his profession or trade.*

Defamation is essentially a delictual wrong (a delict is a breach of a general duty imposed by law which will ground an action for damages at the suit of any person to whom the duty was owed and who has suffered harm in consequence

of the breach). It is ordinarily taken care of in civil proceedings where there is recovery of damages for injuries to reputation. The subjective perception of a person's reputation is a factor to be taken into account.

It cannot be accepted as right for the state to feel the need to punish criminally a person for defaming another person. The criminalisation of conduct falling in the realm of civil law also arguably amounts to double jeopardy since the provision does not exclude a civil suit that is also available to the person claiming to have been defamed.

Criminal defamation is unnecessary as the matter is adequately addressed under civil law. Moreover, the application of the provision in practice is discriminatory, as it is mainly used in favour of senior public servants.

#### **1.10.8 Defamation of Foreign Princes – section 60**

*Similar to criminal defamation, this section prohibits the publication of defamatory matter regarding foreign princes, ambassadors and foreign dignitaries.*

The views expressed on criminal defamation are therefore also relevant here. The state should ideally leave the matter of defamation to the civil law.

#### **1.11 National Security Act [Cap 23:01]**

*This Act was enacted in response to destabilising violence directed at the country by the South African apartheid regime in the 1980s. Section 4 of the Act in general terms 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. This is a strict liability offence, and it penalises the disclosure of official information however trivial the information and irrespective of the harm likely to arise from the disclosure. Further, a public servant charged under the section cannot raise a plea that the disclosure of the information was in the public interest.*

*Section 4 (3) of the Act makes receipt and retention of information obtained in contravention of the Act an offence punishable by*

*imprisonment of up to 30 years. This provision is concerned with secondary disclosures of official information.*

*The General Orders Governing the Conditions of Service of the Public Service 1987 requires all public officers to sign a declaration acknowledging their obligations under the National Security Act<sup>12</sup>. Even if an officer has not signed such a declaration, he/she is still bound by the Act.*

The Act is a serious impediment to media freedom. Public officers who are unwilling to answer questions from the media occasionally invoke it as an excuse for not responding to questions. The effect of the Act and the General Orders is to entrench a culture of secrecy in the public service making it difficult for the media to get any information on the administration of government. The provision further makes it impossible for public officers to blow the whistle on government or civil servants' wrongdoing thus indirectly impeding the media's watchdog role.

*A further impediment to media freedom is posed by section 4 (3). The media is specifically targeted by the provision that makes receiving and retaining information obtained in contravention of the Act and its secondary disclosure an offence.*

In addition to its broad provisions, the concept of national security is also not clearly defined in the Act. The ambiguity surrounding this concept therefore allows the government to use the Act to suppress the dissemination of embarrassing or inconvenient information to the public.

For example, in 1992 *Mmegi* newspaper was charged under the Act for publishing information contained in a confidential report outlining government policy on workers' demands made during a general strike<sup>13</sup>. The charges were subsequently dismissed by the High Court in 1996, as the consent of the Attorney-General to prosecute had not been sought in accordance with the Act. And again, in 1996, a journalist who had sourced a transcript in which a parent confessed to having participated in the murder of his daughter was threatened with charges under the National Security Act<sup>14</sup>.

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<sup>12</sup>General Order 206

<sup>13</sup>*So This is Democracy? State of the media in Southern Africa* 1996 (MISA, 1997) p 5

<sup>14</sup>*ibid*

## 1.12 Corruption and Economic Crime Act of 1994

*Section 44 of this Act makes it an offence for anyone to disclose information relating to an on-going investigation or to the identity of a person being investigated for corruption or the commission of an economic crime.*

The provision impedes the performance of the media's watchdog role. Media practitioners in the country feel that the prohibition on publication of issues under investigation makes it difficult and often impossible for the media to report and expose corrupt practices in the country<sup>15</sup>.

## 1.13 Criminal Procedure and Evidence Act [Cap 08:02]

*In terms of sections 70 (5) and 179 (1) the proceedings of a preparatory examination or a trial on a charge relating to indecent assault or extortion, cannot be published without the consent of the presiding judicial officer.*

Generally, the court sits in public except in exceptional cases where it is necessary to hold a hearing in camera to protect the rights of the parties involved, such as in cases relating to indecent assault or rape of girls under the age of 16 years and boys under the age of 14 years<sup>16</sup>. Unless the proceedings of a court are held in camera, there is no point in restricting publication of proceedings conducted in open court. Any member of the public can attend such proceedings and to prohibit the media from covering open proceedings is an unwarranted restriction on the dissemination of information.

## 1.14 Education Act [Cap 58:01]

*Section 23 of the Act empowers the minister of education to declare any publication unsuitable for use in schools. The section is intended to protect school children from what the minister may consider not to be in the best interests of the children.*

While the intention of the provision may be laudable, the danger is that it gives the minister wide discretionary power that may be easily abused. For example, the minister may consider any publication that adopts a critical stance against the government as unsuitable for school children.

## 1.15 Botswana Defence Force Act [Cap 21:05]

*In terms of section 9 (1) of the Act, the command of the force is vested in the commander, who at the same time is given discretionary powers to enable him to carry out his functions efficiently. The commander has power under the provision to determine what is good and what is not good for the conduct of his command and for the army.*

Such wide discretionary powers can be easily abused to the detriment of the media. For example, in 1997, the then commander invoked this provision to stop sales of a private newspaper in the army barracks<sup>17</sup>. This was after the newspaper had published a story questioning the manner in which he was managing the army.

Some media practitioners also say this provision is often invoked to deny them access to army barracks hindering them in the performance of their duties.

## Conclusion

Even though media freedom is not expressly guaranteed in the constitution of Botswana, the implicit guarantee of the freedom compares favourably with international law standards. More importantly, the constitution incorporates the three-part test in the determination of the legitimacy of restrictions on the freedom.

However, despite the constitutional guarantee of media freedom, there are many laws currently in force in the country whose constitutionality is in serious doubt. Most of the restrictions on the media discussed above are either couched in vague language or give the government very wide discretionary

<sup>15</sup>Panelists Slam DCEC Act" *Mmegi*, 1 December 2003, Vol 20 No 72

<sup>16</sup>Section 2, Criminal Procedure and Evidence (Amendment) Act of 1997

<sup>17</sup>*So This is Democracy? State of the Media in Southern Africa 1997* (MISA, 1998) p 22

powers thereby creating uncertainty on the extent of the limitations on media freedom. It is submitted that most of these laws do not satisfy the “*prescribed by law*” limb of the three-part test due to their ambiguity.

Some of the restrictions on media freedom create strict liability offences. It must be recalled that the last limb of the three-part test requires a balance to be struck between competing interests. Strict liability offences do not allow for the balancing of competing interests, which places the constitutionality of such restrictions in doubt.

There have been occasions when Botswana has departed from its peculiar practice of generally seeking to avoid invoking legislation against the media – which has resulted in the constitutionality of these laws never being decided in court.

As has been observed where the constitutionality of these laws has been challenged, the state either withdrew the charges against the media or the courts found a way of settling the dispute without addressing the constitutionality issue. An example occurred in 1997 when a journalist was charged with an offence under section 44 of the Corruption and Economic Crime Act and he challenged the constitutionality of the provision. The journalist, however, was acquitted by the magistrate on other grounds, thereby denying the High Court the opportunity to decide on the issue of the constitutionality of the provision<sup>18</sup>.

And in January 1996, another journalist was charged with an offence under section 59 of the Penal Code for publishing an alarming article. The Attorney-General withdrew the charges against the journalist in May 1998, once again depriving the High Court of a chance to scrutinise the constitutionality of the provision.

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<sup>18</sup>*State v Malema and others* CRB 387/97

## Lesotho

In common with other Southern African Development Community countries, Lesotho has ratified both the ICCPR and the ACHPR but, as with the other countries, there has been no follow through by incorporating the treaties into the country’s domestic law. Though this has resulted in their impact on the Lesotho justice system being substantially lessened, they still have an influence when the Lesotho courts feel impelled to refer to them and to decisions by international law tribunals in interpreting domestic law with similar provisions.

Also, in common with most SADC countries, Lesotho’s constitution provides for freedom of expression and not freedom of the media in specific terms. Media freedom is, therefore, implied. Though freedom of expression is given wide expression in the constitution, it also has extensive limitations which can intrude severely on media freedom.

Among the provisions limiting media freedom, are clauses providing for the protection of the reputations of people and the private lives of persons concerned in legal proceedings and for restrictions on the freedom of expression of public officials. There are also provisions for the extensive classification as secret of government documents and for the exclusion of the media from parliament and females from courts of law.

Lesotho’s legislation applying to the media is composed in broad terms and is wide ranging, vague and, in certain instances, provides for sweeping powers of secrecy to be exercised. Also, the right of reply can be imposed by law.

### Protection of Media Freedom under the Constitution

Lesotho’s constitution of 1993 is similar to the constitutions of most SADC member states by not expressly guaranteeing media freedom. Freedom of the media is, however, implicitly guaranteed under the general freedom of expression clause – Section 14 (1) – in the following terms:

*Every person shall be entitled to, and (except with his own consent) shall not be hindered in his enjoyment of freedom of expression, including 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 exercise of the right to freedom of expression as guaranteed under the constitution is not absolute. The constitution allows for derogations from the exercise of that right in certain circumstances. Derogations from the exercise of that right are provided for in section 14 subsections (2) to (4). These provide that:

*(2) 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) in the interests of defence, public safety, public order, public morality or public health; or*

*(b) 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, or regulating the technical administration, or the technical operation, of telephony, telegraphy, posts, wireless broadcasting or televisions; or*

*(c) for the purposes of imposing restrictions upon public officers.*

*(3) A person shall not be permitted to rely in any judicial proceedings upon a provision of law such as subsection (2) except to the extent to which he/she satisfies the court that that provision or the thing done under its authority does not abridge the freedom guaranteed by subsection (1) to a greater extent than is necessary in a practical sense in a democratic society in the interests of any matters specified in subsection (2) (a) or for any of the purposes specified in subsection (2) (b) or (c).*

*(4) Any person who feels aggrieved by statements or ideas disseminated to the public in general by a medium of communication has the right to reply or to require a correction to be made using the same medium, under such conditions as the law may establish.*

The derogation clause requires that for a restriction on freedom of expression to be valid: first, it must be done under the authority of law; second, it must be for the protection of those interests listed in sub-paragraphs 2 (a) to (c); and third, the restriction must be reasonable in a democratic society.

With regard to the third restriction – that it must be reasonable in a democratic society – the Lesotho constitution goes further than most constitutions in the region with similar provisions by stating that a court must apply the principle of proportionality in the determination of whether or not such a restriction is reasonably justifiable in a democratic society.

The derogation clause is modelled along the three-part test found in international human rights instruments. However, the permitted restrictions under the derogation clause are broader than those provided for in human rights instruments. For example, it allows for restrictions to be imposed on public officers, thus placing responsibility for certain forms of censorship directly on public servants.

## **Status of International Human Rights Instruments**

Lesotho has ratified both the ICCPR and the ACHPR. The Constitution, however, makes no reference to the status of ratified international law instruments in the domestic law of the country. The status of ratified international law treaties is thus governed by the common law.

In terms of Lesotho's common law, international law instruments cannot be directly invoked in domestic courts unless they have been incorporated into domestic law by legislation. This, however, does not mean that unincorporated international treaties do not have an impact on domestic law.

Quite often, the Lesotho courts draw inspiration from international law standards established in ICCPR, the ACHPR and other international human rights treaties. Furthermore, the courts also seek guidance from decisions of international law tribunals when interpreting similar provisions in domestic law.

## Laws That Unduly Restrict Media Freedom

### 1.1 Printing and Publications Act, 1967

*Section 10 makes it an offence to publish, distribute or redistribute any printed matter or extract, which proves to be a “clear and present danger to public safety, public order, public morality or fundamental human rights and freedoms”.*

This is the main Act regulating the print media in the country. The provision has been criticised on the ground that it sets an overbroad and vague criteria for restricting media freedom. The “clear and present danger” test is difficult to define with precision, is subjective and therefore open to abuse. This test has been found wanting thus leading to its rejection in some jurisdictions, notably the USA<sup>1</sup>.

### 1.2 Official Secrets Act, 1967

*The general aim of this Act is to provide means for preventing espionage and the unauthorised obtaining or disclosure of official information. Section 3 of the Act prohibits the unauthorised obtaining, retention, disclosure or publication of official information. Contravention of this provision carries a severe punishment of up to 14 years’ imprisonment. The Act effectively gives the government an absolute discretion to decide what information should be disclosed to the public.*

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<sup>1</sup>Brandenburg v Ohio 395 US 444 (1969)

The provisions of this Act have been blamed for inducing a culture of secrecy in the civil service as it “classifies” every official document as secret until the government decides otherwise. This makes it very difficult for the media to access official information and disseminate it to the public and also to play its important role as a watchdog on the government.

### 1.3 Internal Security (General) Act, 1984

*In terms of section 7, it is an offence for any person to utter or write any words with a subversive intention. Further, section 9 provides that it is unlawful for a person not to disclose information that he/she knows or believes to be of material assistance in preventing any subversive activity or for securing the apprehension, prosecution or conviction of a person for an offence involving the commission, preparation or instigation of subversive activity. In addition to these two offences, under section 34, it is an offence for any person to publish words that might reasonably incite the commission of public violence by members of the public.*

While the rationale behind the provisions of this Act may be praiseworthy, the concern of media practitioners is that the term subversive is highly subjective and can be easily abused by government to stamp out legitimate criticism against it.

Section 9 of the Act is a highly damaging provision because it sets out to turn people into informers for the authorities even on the basis of their suspicions about the conduct of others. As journalists are a class of people who in their normal news gathering activities may come across such information they could readily become vulnerable to this law and thus be under pressure to become informants of the police. If they were to supply information under this clause they could compromise their independence and freedom to gather news and raise suspicions among the public about their true role in the community.

Also of great concern is the manner in which Section 9 can be used to unjustifiably interfere with media practitioners’ internationally recognised right to protect the confidentiality of their sources.

In practice, this Act is rarely used against the media, but it remains a serious threat especially in the light of the heavy penalties prescribed for contravening it.

The threat posed by this Act is said to be contributing to self-censorship of the media.

#### **1.4 Sedition Proclamation No 44 of 1938**

*Section 4 of this Act creates the offence of sedition. An act, speech or publication is seditious if it is intended to bring the King, his heirs, successors or government into hatred or contempt. In terms of section 2, publication includes all written or printed matter and everything, whether of a nature similar to written or printed matter or not, containing any visible representation or by its form, shape, matter or in any manner capable of suggesting words or ideas. Further, section 3 defines seditious conduct as any acts, speeches or publications that are intended to bring into hatred or contempt or excite dissatisfaction against the administration of justice or promote feelings of ill-will and hostility between different classes of people in the country.*

The main objection to the offence of sedition is that it is subjective and is often easily abused to stifle legitimate criticism of the authorities. This offence has been struck down by courts in other Commonwealth jurisdictions on the ground that it is incompatible with the notion of a free and democratic society<sup>2</sup>.

A constitutional challenge was raised against the Act in Lesotho in the 1990s but, unfortunately, the High Court upheld its constitutionality on the ground that the Act was necessary for the preservation of public order<sup>3</sup>.

#### **1.5 The Obscene Publications Proclamation No. 9 of 1912**

*The Proclamation is aimed at preventing the sale or exhibition of indecent or obscene publications. Section 2 of the Proclamation makes it an offence for any person to make, manufacture or produce any indecent or obscene publication. Further, under section 3, it is an offence for any person to sell or distribute indecent or obscene material.*

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<sup>2</sup>Hector v Attorney General of Antigua and Barbuda [1990] 2 AC 312

<sup>3</sup>R v Sekhonyana 1991 – 1996 (2) LLR 1354

The argument against this Proclamation is that it is outdated and fails to make exceptions for material of an artistic, literary or scientific nature. The use of the terms “indecent” and “obscene” is also objectionable because of their ambiguity and broadness and is thus susceptible to abuse by law enforcement officials to ban publications they merely disapprove of.

#### **1.6 The Parliamentary Powers and Privileges Act, 1994**

*In terms of section 6 of this Act, no stranger is entitled to enter parliament. A stranger is defined in the Act as a person other than a Senator or member or an officer of either House of Parliament. Section 22 of the Act further prohibits anyone from printing or causing to be printed proceedings of the Senate, the National Assembly or one of their committees without the authority of the President or Speaker, respectively.*

Parliament is a forum where representatives of the people debate issues of public interest, which the public is entitled to be informed about. The media is best placed to access and disseminate this information to the public. The vast powers conferred by the Act on both the President of the Senate and the Speaker of the National Assembly could be readily invoked by them and therefore deprive the public of access to important information on the conduct of government and the work and performance of their public representatives. For example, in 1997, at the height of a feud between the then ruling Basutoland Congress Party and the breakaway Lesotho Congress for Democracy, the Speaker of the National Assembly banned the public and journalists from attending parliamentary sessions and covering its proceedings<sup>4</sup>. Democratic jurisdictions would regard the use of such powers as a gross abuse of freedom of the media and freedom of expression.

#### **1.7 Criminal Procedure and Evidence Act, 1981**

*In terms of sections 85 and 173 (4), magistrates are granted the power to hold both preparatory examinations and trials in camera or to*

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<sup>4</sup>So this is Democracy? State of the Media in Southern Africa 1997 (MISA, 1998) p 31

*exclude females, minors, and the public generally if it appears to be in the interests of good order, public morals or the administration of justice. Magistrates are also allowed to prohibit the unauthorised publication by radio or by printing of any information relating to a preparatory examination held in connection with a charge of or the commission, or attempted commission, of an indecent act or extortion. The presiding officer may give his/her consent to publication in certain circumstances.*

Judicial discretion to hold certain cases in camera may be justified and necessary in some instances, for example, in cases of sexual violence against women and children where the aim is the protection of the identity and dignity of the victim. However, the exclusion of women in the interests of good order or morality is discriminatory in this age when society is striving for gender equality and can be prejudicial to female journalists who could be excluded from court proceedings merely by virtue of being female. There have also been allegations of some journalists being excluded from court proceedings on frivolous grounds<sup>5</sup>.

### **1.8 High Court Act, 1978**

*Provision is made in section 13 that all proceedings shall be in open court except that a judge may, if he thinks fit, order the court to be cleared or that any person leave the court.*

While this provision may be justifiable, the fears expressed in relation to the application of the Criminal Procedure and Evidence Act above, apply with equal force here.

### **1.9 Lesotho Telecommunications Act No. 5, 2000**

*The main objectives of this Act are to provide for the restructuring and development of telecommunications, establish an autonomous and independent regulatory authority and license providers of*

*telecommunications services. Section 4 of the Act establishes the Lesotho Telecommunications Authority, which is said to be an autonomous and independent body.*

However, because of the government's dominant position in appointing members of the Authority, doubts have been raised about its independence. In accordance with section 5, the Authority's board comprises five members appointed by the minister of communications on the advice of an Appointments Recommendation Committee. This committee consists of nominees of the ministries of Communications, Finance, Trade and the Office of the Attorney General. The concern is that the involvement of a government minister and departmental nominees in the appointment of members of the Authority's board may seriously compromise its independence.

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<sup>5</sup>Media Law and Practice in Southern Africa: Lesotho No 14 (Article 19 and MISA, 2000) p 19

# Malawi

Media freedom is expressly guaranteed in Malawi and the limitation clause derogating from it is subject to the standards contained in international human rights instruments. But Malawi, paradoxically, has not taken the required steps to ratify the ICCPR or ACHPR in its domestic law. However, judicial officers do take cognisance of them and thus they play a role in the evaluation of domestic law.

Despite this ostensible attempt to create a favourable climate for the adjudication of issues involving fundamental rights and freedoms, Malawi has on its statute book a number of laws that not only unduly restrict media freedom, but in some instances confer arbitrary powers on the authorities to ban or take other action against the media.

The restrictions are mostly described in wide, vague and frequently subjective terms that are likely to seriously inhibit the practise of journalism. They also range over a wide variety of communications activity.

They start with a requirement to register publications in advance with a fine being imposed for failing to do so; censorship of films and other entertainment; strict restrictions on the disclosure of official secrets which results in government officials being unwilling to supply information to the media; ministerial powers to ban publications “not in the public interest”; prohibitions on the publication of seditious and obscene material or matter that is prejudicial to public security or which undermines confidence in government; and false news likely to alarm the public. Defamatory matter about foreign diplomats or dignitaries is also prohibited.

Journalists can be ejected from parliament if they are deemed to be “strangers”, the courts can be closed and the police are compelled not to discuss their investigations with reporters.

Broadcasting is regulated by a government appointed board consisting of at least two important civil servants and publications can be declared unsuitable for use in schools.

## Protection of Media Freedom under the Constitution

Malawi is one of the countries in the SADC region that expressly guarantees media freedom in its constitution. Section 36 provides:

*The press shall have the right to report and publish freely, within Malawi and abroad, and to be accorded the fullest possible facilities for access to public information.*

It is submitted that while the provision makes reference to the press, the term is used in a wider sense to cover all sectors of the media. The guarantee of media freedom is subject to section 44, which is the general limitation clause on all rights and freedoms guaranteed under the Bill of Rights. The relevant portions of the general limitation clause read:

*(2) Without prejudice to subsection (1), no restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this Constitution other than those prescribed by law, which are reasonable, recognized by international human rights standards and necessary in an open and democratic society.*

*(3) Laws prescribing restrictions or limitations shall not negate the essential content of the right or freedom in question, shall be of general application.*

The constitution of Malawi fully embraces the international law three-part test with regard to derogations from fundamental rights and freedoms. The constitution requires that restrictions must be prescribed by law and should be reasonable and necessary in a democratic society. In the determination of the latter issue, the constitution expressly stipulates that the courts must apply the principle of proportionality.

The constitution does not spell out the interests that may justify limitations to media freedom. However, the limitation clause provides that limitations on the rights and freedoms guaranteed must be in accordance with international human rights standards. It is therefore submitted that restrictions on media freedom in Malawi will only be legitimate if they protect those interests spelt out in international legal instruments such as the ICCPR.

## Status of International Human Rights Instruments

The status of international human rights treaties in the domestic law of Malawi is regulated by section 211 of the constitution, which reads:

*(1) Any international agreement ratified by an Act of Parliament shall form part of the law of the Republic if so provided for in the Act of Parliament ratifying the agreement.*

*(2) International agreements entered into before the commencement of this Constitution and binding on the Republic shall form part of the law of the Republic, unless Parliament subsequently provides otherwise or the agreement lapses*

In terms of subparagraph (1), it appears that for an international treaty to have direct force in the domestic law of Malawi, an Act of Parliament must ratify it. The constitution thus adopts a dualist approach. While Malawi has acceded to the ICCPR and ratified the ACHPR, none of these international treaties have yet been ratified by an Act of Parliament. It, therefore, means that these instruments cannot be directly invoked in the domestic courts. This does not mean that the instruments have no relevance in the country. Malawian courts occasionally seek guidance and inspiration from these instruments when interpreting the domestic law.

## Laws that Unduly Restrict Media Freedom

### 1.1 Printed Publications Act, 1947

*One of the objects of this Act is to provide for the registration of newspapers. In terms of section 5, no person may print or publish a newspaper until there has been registered at the office of the Government Archivist the title of the newspaper and the particulars of its proprietor, editor, printer or publisher. Contravention of this provision constitutes an offence and a person convicted under the section is liable to a fine not exceeding £100 (R1 170).*

It would appear that the registration of newspapers is only an administrative exercise, as the Government Archivist is not given discretionary powers to refuse registration once all the relevant information has been supplied.

However, some media practitioners criticise the registration requirement as amounting to a prior restraint on the freedom to publish.

## **1.2 Censorship and Control of Entertainments Act, 1968**

*The main purpose of this Act is to regulate the pre-approval of content that is intended for distribution to the public, such as cinematograph pictures and print media publications. It also applies to theatrical productions and other forms of public entertainment. It establishes a board of censors that is appointed by a cabinet minister, which performs a pre-classification function under the Act. The board of censors has power to declare any content intended for distribution to the public undesirable. Content will be deemed undesirable if in the opinion of the board it is, among others, indecent, offensive, harmful to public morals or contrary to the interest of public safety or public order. The minister has powers under section 31 to override the decisions of the board of censors.*

*Under section 23, it is an offence punishable by a fine or imprisonment for any person to distribute or publish content that has been declared by the board of censors or the minister to be undesirable.*

The limitations to which the media is subjected to under this Act are subjective and vague. Issues relating to morality are notoriously contentious. In addition, the concept of the public interest is often abused by those who manage public affairs to censor anything not palatable to them. A further objection to the Act is the power granted to the minister to override decisions of the board of censors. The power may be easily abused for political reasons.

## **1.3 Official Secrets Act, 1913**

*The Official Secrets Act regulates the disclosure of official state information. Section 4 of this Act is based on the controversial section 2 of the UK Official Secrets Act 1911. The provision generally prohibits a person from disclosing any official information to which he/she has had access owing to his/her holding, or having held, office*

*under the government. The provision basically prohibits public servants or former public servants from disclosing official information without prior permission. Contravention of this provision constitutes a misdemeanour and upon conviction, one will be liable to a fine of up to £50 (R585) or imprisonment for a term not exceeding two years or both.*

The provisions of the National Security Act enforce a culture of secrecy in the public service making it very difficult for media practitioners to obtain information from public servants. This seriously erodes the media's ability to play its watchdog function and hinders the dissemination of important information to the public.

## **1.4 Penal Code (Cap. 7:01)**

The Penal Code, the basic criminal code of the country creates a number of offences that are incompatible with the enjoyment of media freedom. These offences include:

### **1.4.1 Section 46 – publication contrary to the public interest**

*In terms of this provision, the minister of justice is empowered to ban the publication or importation of any publication that in his/her discretion is contrary to the public interest.*

The expression, the public interest, is not defined. The danger with the provision is that it gives the minister very wide discretionary powers that may be easily abused to ban publications that are critical of the government.

### **1.4.2 Section 51 sedition**

*The provision prohibits the publication of seditious matter. Sedition is defined in section 50 (1) and includes any matter that: would bring into hatred or contempt or incite disaffection against the person of the president, or government; incite the subjects of the president to*

*procure the alteration, otherwise than by lawful means, of any other matter in the Republic of Malawi; bring into hatred or contempt or to incite disaffection against the administration of justice; raise discontent or disaffection against the subjects of the president; and promote feelings of ill-will and hostility between different classes of the population.*

It is legitimate for a government to enact a law that prohibits the publication of matter that would undermine the constitutional order of the country. The offence of sedition is intended to perform this function. However, the definition of sedition in section 51 is very wide and subjective and can be easily used to silence legitimate criticisms against the president and his/her government.

#### **1.4.3 Section 60 – publication of false news**

*In terms of this provision, it is a misdemeanour to publish any false statement, rumour or report that is likely to cause fear or alarm among the public or disturb the public peace.*

The main objection to this provision is that it is subjective and vague. The determination of whether a publication is likely to cause fear and alarm depends on the discretion of the prosecuting authorities. The matter is further compounded by the fact that the concepts of fear, alarm or the disturbance of the public peace are inherently subjective and can be abused by a government to harass publications that it does not like.

#### **1.4.4 Section 60 – defamation of a foreign prince or visiting dignitary**

*It is a criminal misdemeanour under this section to publish any matter tending to degrade, revile or expose to hatred or contempt any foreign prince, ambassador or other foreign dignitary with the intent to disturb the peace and friendship between Malawi and the country to which such prince, ambassador or foreign dignitary belongs.*

The provision seriously impairs the ability of the media to publish critical matter on the conduct of foreign dignitaries. Further criticisms are that a foreign

dignitary is not defined and thus a newspaper will always be unsure whether a foreigner it is writing about is a dignitary and that it is inappropriate to criminalise defamation, as there are adequate remedies under the civil law.

#### **1.4.5 Section 179 – Obscene publications**

*This provision makes it an offence to produce any obscene material or anything that can corrupt public morals. Any person who contravenes this section is liable to a fine not exceeding K1,000 (R60) or imprisonment for a term not exceeding two years.*

The subjective nature of obscenity is very controversial and contentious. The argument against the provision is that the limiting of the freedom to publish by reference to the concept of obscenity is not desirable, as it does not give the media sufficient notice of what is prohibited.

#### **1.5 National Assembly Powers and Privileges Act (Cap 2:04)**

*Section 8 of this Act allows the Speaker of the National Assembly to order any person regarded as a stranger, that is, a person who is not a member of parliament, to leave the precincts of the Assembly.*

The provision can be an obstacle to information gathering by media practitioners if the Speaker were to use these powers to exclude the press from the National Assembly.

#### **1.6 Education Act (Cap 30:01)**

*Under section 47, the minister of education is empowered to declare any publication or periodical publication to be unsuitable for use in schools.*

The rationale behind the provision is the protection of students attending school and while this may be laudable, the objection is that it gives the minister very wide discretionary powers that may be easily abused. For example, the minister

may use this power to declare a publication that is critical of the government to be unsuitable for use in schools.

### **1.7 Courts Act (Cap 3:02)**

*Section 60 provides that the proceedings of every court of law shall be carried on in an open court to which the public have access. However, proceedings may be held in camera if, in the opinion of the presiding officer, it is expedient in the interests of justice or property or for other sufficient reason to do so.*

While the provision may be addressing a legitimate concern, it has been criticised for its failure to provide clear guidelines when a presiding officer may exclude the public from court proceedings. Media practitioners are concerned that in the absence of clear guidelines and checks on the powers of presiding officers, the provision can be easily abused to exclude the media from court hearings, thereby undermining their duty to gather and disseminate information and play a watchdog role over the administration of justice.

### **1.8 Police Act (Cap 13:02)**

*Section 39 (26) prohibits police officers from disclosing or conveying any information concerning an investigation or other police or departmental matter to an unauthorised person. Contravention of this provision is deemed to be an offence against discipline and any person convicted under the section is liable to punishment according to the degree and nature of the offence.*

A blanket prohibition on the disclosure of information regarding an investigation by the police is an unjustified interference with media freedom and the citizens' right of access to information. Only disclosures that may jeopardise on-going police investigations may be prohibited.

### **1.9 Taxation Act (Cap 41:01)**

*In terms of section 94, the register of tax assessments is not open to the public for inspection.*

It has been argued that the prohibition hinders investigative journalism in tax evasion cases.

### **1.10 Preservation of Public Security Act (Cap 14:02)**

*Regulation 5 made pursuant to section 3 of this Act prohibits the publication of any matter likely to: be prejudicial to public security; undermine the authority of, or the public confidence in, the government; promote feelings of ill-will or hostility between any sections of classes or races of the inhabitants of Malawi; or promote industrial unrest in the country.*

The concepts to which media freedom is subjected to under the provisions of this Act are vague. There is a propensity by most government to use these concepts for ulterior motives. Any conventional criticism of government policy or administration can fall under the provisions of this Act.

### **1.11 Communications Act, 1998**

*The Act consolidates previous Acts regulating the broadcast and telecommunications industries and establishes the Malawi Communications Regulatory Authority (MACRA), which regulates the two sectors. Section 4 (3) provides that MACRA shall be independent in the performance of its functions. In terms of section 6, MACRA shall consist of a chairperson and six members together with two ex-officio members being the secretary to the president and the cabinet and the secretary for information. The president, who also appoints the chairperson, appoints members of MACRA.*

The independence of the regulating authority is undermined by the manner of appointment of its members. The involvement of the president in the appointment of members, together with the presence of two senior civil servants, seriously compromises its independence.

# Namibia

Though Namibia has gone to great lengths to provide in its constitution for media freedom and for the incorporation of international human rights instruments in its domestic law so that its courts are bound by them, media freedom is subject to many undue limitations some of which are a legacy of South Africa's seven decades' occupation of that former mandated territory.

It will be recalled that from the end of World War I to March 1990, when Namibia (then South-West Africa) gained its independence, it was administered by apartheid South Africa under a League of Nations mandate which was later the subject of protracted United Nations and international court skirmishing. During this period, South Africa applied several of its statutes to Namibia.

Some of these laws were repealed in 1989 following the passage of UN Security Council Resolution 435, which provided for the repeal of discriminatory and repressive laws before the holding of the first democratic elections.

The laws that were not repealed by the UN Resolution remain in force and these need to be specifically repealed by the Namibian Parliament or declared unconstitutional by a competent court of law.

Among these laws is South Africa's notorious Section 205 of the *Criminal Procedure Act* which has been used for questioning journalists about their confidential sources of information and other material.

Another legacy is the law protecting official secrets, subsequently renamed the *Protection of Information Act*, which imposes stringent secrecy requirements on civil servants and thus inhibits the free flow of information.

But it is in state broadcasting, government media outlets and regulatory bodies where government interference and lack of media independence and freedom are pronounced and cause serious interference with the independence and integrity of news services. The government has appointed controlling bodies for these operations which have no claims to independence and exert influence on content which verges on propaganda.

The Namibian government has also adopted unusual administrative acts to “punish” media for being highly critical of its policies and conduct and which can affect the viability of media

The Namibian cabinet in December 2001 took a decision to ban all state advertising from *The Namibian* daily newspaper as a protest against certain reports carried in the newspaper. Later, in May 2002, the cabinet again took further punitive action against the newspaper by banning all state departments and employees using state monies to buy copies of the paper.

Both these acts were done administratively and singled out *The Namibian* for this special selective punishment. They reduced the income of the paper. If the paper had been heavily reliant on these sources of income its viability could have been placed at risk. In the event, *The Namibian*, the country’s most popular paper, had sufficient other advertisers to enable it to overcome the losses of state revenue.

## Protection of Media Freedom under the constitution

Article 21 (1) (a) of the Namibian constitution expressly enshrines media freedom in the following terms:

*(1) All persons shall have the right to:*

*(a) freedom of speech and expression, which shall include freedom of the press and other media.*

The guarantee of media freedom under Article 21 (1) (a) is subject to Article 21 (2), which provides specific permissible restrictions on these freedoms. In addition, the guarantee is also subject to Article 22, the general limitation clause for all rights and freedoms entrenched in the Bill of Rights.

Article 21 (2) provides:

*The fundamental freedoms referred to in Sub-Article (1) hereof shall be exercised subject to the law of Namibia in so far as such law imposes reasonable restrictions on the exercise of the rights and freedoms conferred by the said Sub-Article, which are necessary in a democratic society and are required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or*

*morality, or in relation to contempt of court, defamation or incitement to an offence.*

The general limitation clause reads:

*Whenever or wherever in terms of this Constitution the limitation of any fundamental rights or freedoms contemplated by this Chapter is authorised, any law providing for such limitation shall:*

- (a) be of general application, shall not negate the essential content thereof, and shall not be aimed at a particular individual;*
- (b) specify the ascertainable extent of such limitation and identify the Article or Articles hereof on which authority to enact such limitation is claimed to rest.*

From the above two provisions dealing with restrictions on media freedom, it is clear that for any restriction on media freedom to be legitimate, it must comply with the following criteria:

- (i) The restriction must be authorised by a law of general application;*
- (ii) The restriction must be for the purpose of protecting those interests specified in Article 21 (2); and*
- (iii) The restriction must be reasonable and justifiable in a democratic society. In the determination of this issue, the constitution expressly requires the application of the principle of proportionality, that is, a restriction should not negate the essential content of the right.*

Although the Namibian Constitution provides that restrictions on media freedom must be authorised by a law of general application, the interpretation of this expression is similar to that given to “*prescribed by law*” or “*done under the authority of any law*” used in international human rights instruments and constitutions of other countries.

The constitution, therefore, embraces the three-part test found in international human rights instruments in the determination of the legitimacy of restrictions on media freedom.

## Status of International Human Rights Instruments

The relationship between international law and the domestic law of Namibia is governed by section 144 of the constitution. It provides:

*Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.*

In terms of this provision, all international treaties that are binding upon Namibia have automatic application in the domestic law. This means that courts and other forums can directly apply and enforce international treaties that are binding on Namibia if they establish subjective rights and duties for the individual without having been translated into the domestic law by legislative or other mechanisms. Namibia thus adopts a monist (single entity) approach to the position of international law in its domestic law. International treaties become binding on Namibia once they have been ratified or acceded to by the Namibian Parliament.

Namibia has ratified both the ACHPR and ICCPR. This, therefore, means that the two instruments have direct application in the domestic law of the country. In the case of *Kauesa v Minister of Home Affairs & others*<sup>1</sup>, the Namibian Supreme Court noted that the provisions of the ACHPR were binding on Namibia and therefore formed part of the domestic law in accordance with section 144 of the constitution.

## Laws That Unduly Restrict Media Freedom

### 1.1 Elections Act No 24 of 1992 (As amended by Act No 23 of 1994)

*Section 78 of this Act regulates access to polling stations. In terms of the provision, only specified officials who include designated election agents of political parties are permitted in polling stations. The media are excluded.*

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<sup>1</sup>1995 1 SA 51 (Nm SC). See also, *Government of the Republic of Namibia v Culture 2000 & another* (1994)

<sup>1</sup>SA 407 (Nm SC).

The provision is objectionable because it hinders the media in the performance of one of its important democratic mandates – to play a watchdog role over the electoral process.

### 1.2 Criminal Procedure Act No. 51 of 1977

*In terms of section 205 of this Act, a magistrate is authorised, at the request of a public prosecutor, to require any person likely to give material or relevant information concerning an offence to attend before him or her for examination by a prosecutor.*

*Furthermore, section 189 of the Act empowers a magistrate to inquire into any refusal by a person to answer any question put to him or her and to sentence that person to imprisonment if there is no just cause for refusing to answer the questions.*

These provisions have been invoked against journalists in Namibia. There is currently no precedent in the country for the interpretation of “just cause” to include a refusal by a journalist to disclose confidential information in the public interest<sup>2</sup>. The provisions could be easily abused by the authorities to compel media practitioners to disclose their sources of information, contrary to the well-recognised journalistic practice of maintaining the confidentiality of sources.

### 1.3 Protection of Information Act of South Africa No. 84 of 1982

*Section 4 of the Protection of Information Act, another remnant of the period when Namibia was administered by South Africa, forbids a person from disclosing any information obtained by virtue of his/her employment with the government.*

While the rationale behind this Act is the protection of national security and state secrets, it has been criticised for providing excessively wide-ranging limits on access to official information thereby hindering the media’s performance of its informative and watchdog roles.

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<sup>2</sup>Media Law and Practice in Southern Africa – Namibia, No. 9 (Article 19 & MISA, 1999) p. 9

#### 1.4 Namibian Broadcasting Act No. 9 of 1991

*This Act establishes a government-controlled national broadcaster, the Namibian Broadcasting Corporation (NBC). In terms of section 5 of the Act, the NBC is managed and controlled by a board appointed by the minister responsible for broadcasting and information. Furthermore, section 4 (2) empowers the minister to prescribe terms and conditions on which the NBC may provide broadcasting services, including content.*

The main concern regarding this Act is that it fails to guarantee the national broadcaster editorial independence thus making it vulnerable to manipulation and abuse by the government for political ends. The involvement of a government minister in the appointment of the governing board of the national broadcaster and the minister's influence on programme content, seriously compromises the independence of the broadcaster.

These concerns gained prominence when in August 2002 President Nujoma took over the portfolio of information and broadcasting. At a press briefing announcing the take-over, the president issued threats to NBC journalists calling them agents of some of the country's enemies<sup>3</sup>. Immediately after the takeover, the president used his influence to force changes to the national broadcaster's programmes, including the content of news broadcasts, thereby raising concerns over its independence.

#### 1.5 Namibian Communications Commission Act No. 4 of 1992

*This Act establishes a Communications Commission whose mandate is, among others, the issuing of broadcasting licences and to exercise control over and supervise broadcasting activities. In exercising these powers, the Commission is required to allocate spectrum resources in such a manner as to ensure the widest possible diversity of programming and optimum utilisation of broadcasting resources. A government minister in terms of section 3 appoints members of the Commission.*

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<sup>3</sup>So this is Democracy? State of the Media in Southern Africa 2002 (MISA, 2003) p. 87.

The involvement of the minister is objectionable because it undermines the independence of the Commission from government.

Other concerns have been raised with regard to sections 20 and 26.

*Section 20 requires licensees to broadcast a counter-version whenever they have broadcast "false" allegations against any person or entity. However, this obligation does not apply where the person making the counter-version has no direct interest in the transmission of the counter-version or if the counter-version is substantially longer than the broadcast that made the false assertion of fact. Further, the obligation to broadcast a counter-version does not extend to broadcasts of public meetings of the National Assembly.*

It would appear that complaints about broadcasts would be directed to the Commission which would then rule on whether they are false or not.

*Section 26, on the other hand, empowers the minister to order any licensee to broadcast any announcement that the minister deems to be in the interest of national security or the public interest at any time and in any specified manner.*

The exercise of this power may unduly interfere with the editorial independence of a licensee.

#### 1.6 New Era Publications Act No 1 of 1992

*In 1992, the government enacted the New Era Publications Corporation Act whose main purpose is the establishment of a newspaper in indigenous Namibian languages. The main objectives of the newspaper are to provide "objective and factual information" and to lay special emphasis on community related issues, particularly those of importance to the rural areas, which are in the national interest and government related matters which may concern the community. The newspaper is funded by parliamentary appropriations and through sales and advertising revenue.*

*The affairs of the publication are managed and controlled by a board of directors appointed by the minister of information and broadcasting.*

Concerns have been raised regarding the minister's influence over the appointment of the board in that this may compromise the independence of the newspaper.

The Act also fails to expressly guarantee the editorial freedom of the New Era newspaper.

*In terms of section 8, the chairperson of the board of directors has discretion to decide when board meetings should be held. The minister is however empowered to request that special meetings be convened.*

This is perceived by some commentators as an inroad into the ability of the *New Era* newspaper to function without interference from the government.

### **1.7 Namibia Press Agency Act No. 3 of 1992**

*The Act establishes the Namibian Press Agency. The objects of the agency are to carry on a news agency service for the collection of news and information and the distribution of such news and information to subscribers of the services of the agency and other persons, bodies and organisations. The agency is funded by parliamentary appropriations and the revenues it receives. In terms of sections 5 and 6, the agency is managed and controlled by a board of directors appointed by the minister of information and broadcasting.*

The concerns raised with regard to this Act are similar to those under the *New Era Publications Act*, that is, the involvement of a government minister in the appointment of the governing board of the agency may seriously compromise its independence from the state.

### **1.8 Defence Act, 2004**

Section 46 (1) creates an offence of contempt of court in relation to proceedings before a military court.

*In terms of this provision, any person who wilfully causes any disturbance or interruption at any military court or wilfully commits any other act calculated or likely to bring such a court into contempt,*

*ridicule or disrepute, commits the offence of contempt of court. The offence created by this section is punishable by a fine not exceeding N\$2,000 (R2 000) or to imprisonment for a period not exceeding 6 months, or both.*

The objection to this provision is the use of the terms 'likely', 'ridicule' and 'disrepute'. The argument is that the wording of this section goes beyond the confines of the express exception embodied in Article 21 (2) of the constitution. Section 46 (1) includes within its broad sweep expression that is protected by the constitution as well as expression that is not.

Criticism of a military court is likely to bring the court into disrepute or even to become a subject of ridicule if a decision were taken by that court or evidence admitted or a ruling made that is completely unsustainable. However, such criticism may not be directly intended by the writer to ridicule the court – as opposed to criticism calculated to have that effect. The provision does not differentiate these two scenarios. Thus, a journalist, reporter or even a letter writer to a newspaper or any person making a legitimate comment about military court proceedings, may be found guilty of contempt.

*In addition, section 54 (1) of the Defence Act prohibits any person from publishing or broadcasting any information calculated or likely to endanger national security or the safety of members of the Defence Force. Furthermore, subparagraph (3) of this provision makes it an offence for any person to disclose any secret or confidential information relating to the defence of Namibia which came to that person's knowledge:*

- (i) by reason of such person's membership of the Defence Force; or*
- (ii) by reason of such person's employment in the Public Service or in any other office, post, appointment or capacity in the service of the State; or*
- (iii) by reason of any contract relating to the defence of Namibia or any employment by a contractor under such a contract; or*
- (iv) which was given to such person in confidence by any person who was authorized or whose duty it was to give such person such information.*

The information covered by subparagraph (3) can however be disclosed when authorised by the minister or under the minister's authority or by order of a competent court or where it was the duty of that person in the interests of the State to disclose the information to another person.

The words “*likely to*” in section 54 (1), may give rise to an interpretation that an intention to endanger national security is not required – as opposed to the term “*calculated*” which has been properly used in that section. The term “*likely to*” thus essentially seeks to create an offence where the publication of information is not necessarily intended to endanger national security but where, in the opinion of a presiding judicial officer, the disclosure is likely to endanger national security even though there is no proof that the disclosure does indeed endanger national security.

Furthermore, the term “*or the safety of members of the Defence Force*” is also far too wide. While a clearly legitimate interest is sought to be protected by the legislature in relation to safety of Defence Force members, the publication of information must, in order to meet the standards provided for in the constitution, be restricted to performance of their duties as Defence Force members. The reason for this closer delineation of the offence is self-evident. For instance, the publication of information about the arrest on a charge of rape of a Defence Force member (say, in respect of a particularly young victim) is clearly reporting a matter in the public interest. However, the report may well lead to the safety of that member of the Defence Force being endangered by relatives of the victim or others threatening revenge. An instance such as this illustrates why this provision must be restricted to NDF activities.

The prohibition contemplated in section 54 (3) on disclosure of information considered by the NDF to fall into the category of “*secret*” or “*confidential*” constitutes an impermissible restriction upon freedom of expression and the media. While clearly it is legitimate for the Defence Force to protect secret and confidential information relating to the defence of Namibia for reasons of national security, the exceptions under which information of that nature may be disclosed are far too narrow and do not meet the requirements of “*reasonable and necessary*” in a democratic society. They are limited to authorisation by the Minister, by order of a competent court, or in the interest of the State. Disclosure should also be permitted in the public interest as well as where necessity requires it.

*Section 57 (c) of the Defence Act also makes it an offence for any person to use any language or do any act or thing with intent to recommend to, encourage, aid, incite, instigate, suggest to or otherwise cause any other person or any category of persons or persons in general to refuse or fail to render any service to which such other person or a person of such category or persons in general is or are liable or may become liable in terms of the Act. Contravention of this provision attracts upon conviction a fine not exceeding N\$24,000 (R24 000) or to imprisonment for a period not exceeding six years or to both a fine and imprisonment.*

This section is modelled on section 121 of the *South African Defence Act*. The section seeks to prohibit persons from doing certain acts in connection with the liability to render a service under the Act. The background to the equivalent of subparagraph (c) of the *Defence Act* in the *South African Defence Act* was an attempt to use it as a response to the then growing opposition to compulsory military service by way of conscription under apartheid. The provision was intended to stifle legitimate debate on the types of service and activities engaged in by SADF members.

Subparagraph (c) with its extremely wide terms is in conflict with the freedom of expression and the media clause embodied in Article 21 of the constitution. The breathtaking sweep of this offensive provision is demonstrated by this example: A newspaper report or article, or even a letter published in the columns of a newspaper, which is critical of the engagement or deployment of NDF troops or of NDF activities of any nature, may recommend or suggest that certain services should not be rendered – for example, the deployment of troops to assist foreign leaders to suppress uprisings resulting from unfair elections or refusal to accept election results. The criticism of such activities may well be with the intention to recommend or suggest that such services should not be rendered and should be discontinued. These are plainly matters of legitimate public debate and cannot, by resort to or recourse to “*national security*” in Article 21 (2), justify this over broad invasion of the right to freedom of expression and the media.

## South Africa

South Africa has a fine constitution that expressly guarantees freedom of expression and freedom of the media and a limitation clause that narrows the degree to which limitations can be applied. However, it has a legacy of apartheid laws that can be used to impose serious restrictions on the media.

Fortunately, since 1994 when the country's first democratically-elected government led by the African National Congress took power, these laws have only been invoked on rare occasions. Indeed, the South African national government has tended to take a lenient view of media activity and has avoided taking strict action against the media and journalists. But media practitioners are deeply concerned that these laws remain on the statute book and can be invoked at any time.

The government has also transformed the former propagandist state broadcaster into a public broadcaster which falls under an independent regulator, the Independent Communications Authority of SA, and an independent ombudsman-type ethics control body, the Broadcasting Complaints Commission. The operations of the BCCSA is similar to that of the Press Ombudsman and Appeals Committee to whom the public can complain about ethical lapses by the press. There has also been a proliferation of private commercial and community broadcasters.

Most of the offensive laws are a legacy of apartheid media controls, but it should be noted that the government, despite its frequent protestations that it upholds the maintenance of press freedom and freedom of expression, has not been averse to introducing its own legislation which can restrict media freedom. An example is the Promotion of Equality and Prevention of Unfair Discrimination Act which was promulgated in 2000 and which has clauses which could impact on media freedom to report on racial incidents. There is also anti-terrorism legislation that the government withdrew at the last minute as it was about to pass through the final processes of parliamentary approval in February 2004 because the labour federation, Cosatu (Congress of SA Trade Unions), threatened a national strike on the eve of the April 14 general elections.

For some years the Freedom of Expression Institute and the SA National Editors' Forum have been negotiating with the government over laws which

impact on media freedom in an effort to have the laws scrapped, amended or reformulated, but little progress has been made.

A feature of SA society is the large number of non-governmental civil society organisations which keep a close watch on their freedoms and government conduct which may intrude on those freedoms. In the media field, there are at least five such watchdog organisations – the SA Chapter of the Media Institute of Southern Africa, SA National Editors Forum, Freedom of Expression Institute, Media Workers Association of SA and Article 19.

There is also a strong Constitutional Court to which a steady stream of appeals on issues ranging from criminal to civil actions has been directed, some involving the government and its administration, against which the court has ruled on occasion.

## Protection of Media Freedom under the Constitution

Media freedom is expressly guaranteed by the constitution under the freedom of expression clause. Section 16 provides:

- (1) *Everyone has the right to freedom of expression, which includes –*
  - (a) *freedom of the press and other media;*
  - (b) *freedom to receive or impart information or ideas;*
  - (c) *academic freedom and freedom of scientific research.*
- (2) *The right in subsection (1) does not extend to –*
  - (a) *propaganda for war;*
  - (b) *incitement to imminent violence; or*
  - (c) *advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.*

The South African Constitutional Court has pronounced on the importance of the rights guaranteed by section 16 (1) holding that the constitution recognises that individuals in society need to be able to hear, form and express opinions and views freely on a wide range of matters<sup>1</sup>. The constitution does not limit its guarantee to the freedom of the press, but specifically extends the

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<sup>1</sup>*South African National Defence Union v Minister of Defence & another* 1999 4 SA 469 at 477.

guarantee to other means of communication. The High Court has held that the guarantee extends to, among others, radio and television<sup>2</sup>.

The guarantee of media freedom for the broadcast media must be read together with section 192 of the constitution.

*This 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 constitution does not guarantee an absolute right to media freedom. As is evident from subsection 2, the exercise of the freedom does not extend to propaganda for war, incitement to imminent violence, or advocacy of hatred that is based on race, ethnicity, gender or religion. In addition to these restrictions, the exercise of media freedom is also subject to section 36 (1) of the constitution, which is the general limitation clause on the exercise of all rights guaranteed under the Bill of Rights. The general 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.*

An examination of the general limitation clause reveals that the South African constitution does not follow the traditional three-part test found in international human rights instruments. The clause adopts a two-part test:

*First, a limitation must be in terms of law of general application and Second, a limitation must be shown to be reasonable and justifiable in an open and democratic society.*

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<sup>2</sup>*Dotcom Trading 121 (Pty) Ltd v/a Live Africa Network News v King & others* 2000 4 SA 973.

It is submitted that the determination of the first limb of this test is similar to the “prescribed by law” test found in international law instruments. The second limb of the test is based on an assessment of proportionality, which calls for the balancing of different competing interests. The proportionality of a limitation must be assessed in the context of its legislative and social setting. The courts have, therefore, said that there is 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<sup>3</sup>. The South African two-part test is attractive in that it puts emphasis on the right; any limitation on rights guaranteed under the Bill of Rights is only an exception, which must be justified in the light of the existing facts.

## Status of International Human Rights Instruments

The status of international human rights treaties in the domestic law of South Africa is governed by the constitution. Section 231 (4) provides that any international agreement becomes law in the country when it is enacted into law by national legislation, but a self-executing provision of an agreement that has been approved by parliament is directly enforceable in the domestic law unless it is inconsistent with the constitution or an Act of Parliament.

The concept of self-executing provisions of a treaty 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.*

South Africa has ratified both the ICCPR and ACHPR, but none has as yet been incorporated into the domestic law. There is however a view that the civil and political rights clauses of the main human rights treaties, such as the ICCPR, are self-executing. Thus if the South African courts recognise this principle, the ICCPR may be directly enforceable in the domestic law of South Africa.

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<sup>3</sup>*S v Monamela* 2000 3 SA at 20

Even though unincorporated treaties that are not self-executing are not directly enforceable in the domestic law, they still play an important role in the interpretation of South African law. Section 39 (1) of the constitution requires courts, tribunals and other forums to consider international law when interpreting the Bill of Rights. And, furthermore, section 233 requires that when a court is interpreting legislation, it must prefer any reasonable interpretation that is consistent with international law to any alternative interpretation that is inconsistent with international law.

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<sup>4</sup>.

## Laws that Unduly Restrict Media Freedom

### 1.1 Promotion of Equality and Prevention of Unfair Discrimination Act, No. 4 of 2000

One of the aims of this Act is to prevent hate speech.

*Section 10 prohibits the publication, communication, propagating or advocating words that could reasonably be construed to demonstrate a clear intention to be hurtful, be harmful or incite harm or promote or propagate hatred.*

The line between what amounts to hate speech and permitted speech is difficult to draw. Courts around the world adopt varying approaches in the determination of this issue. For example in the United States, hate speech is generally forbidden if it is directed to inciting or producing imminent lawless action and likely to incite or produce such action<sup>5</sup>. And in Canada, hate speech has been defined as speech that wilfully promotes hatred against an identifiable group<sup>6</sup>.

The South African provision prohibits language that could reasonably be

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<sup>4</sup>*S v Makwanyane* 1995 3 SA 391 at 413 - 14.

<sup>5</sup>*Brandenburg v Ohio* 395 US 444 (1968) at 447.

<sup>6</sup>*R v Keegstra* 3 CRR (2d) 193 at 205.

construed to demonstrate a clear intention to be hurtful, harmful or to incite harm or to promote or propagate hatred. A publisher or speaker can contravene this law even when he/she has no subjective intention to be hurtful, harmful or to propagate hatred

The objection to this provision is that in our modern and complex society, language or images have a range of meanings. Some material clearly promotes or propagates hatred, but in less stark situations, it is often difficult to predict whether a member of a targeted group will find a particular report hurtful or harmful. A particular statement might offend one member of the group, another might not care about it and a third might find it amusing.

Section 10 is, therefore, disturbingly wide as it effectively strives to protect citizens from speech that may offend them. The danger for journalists is in reporting speeches or statements by people which contain references which are construed as offending against this law. Failure to report these statements would be preventing the public from knowing what is happening in society.

Likewise, editors who commit themselves to obeying this provision will have to engage in self-censorship, which may result in keeping information from the public thereby eroding the public's right to know.

*Section 12 of the Act prohibits the publication of information, advertisements or notices that could be understood to demonstrate a clear intention to unfairly discriminate against any person.*

Like section 10, this provision is also very wide as it prohibits speech or statements in instances where the communicator or the journalist reporting them has no subjective intention to discriminate.

## **1.2 Criminal Procedure Act 51 of 1977**

*Section 153 empowers a presiding judicial officer in criminal proceedings to hold such proceedings behind closed doors if it appears that it is in the interests of the security of the state or of good order or of public morals or of the administration of justice.*

The fairness of a trial consists of a collaboration of factors, publicity being one of them. However, if publicity detracts from the fairness of the trial, it may be limited. This provision, therefore, addresses those instances where publicity in criminal proceedings will not be in the public interest or result in a fair trial.

The objection to this provision is that it gives presiding officers overly broad powers to ban the public and media from attending court proceedings. Such powers can be easily abused especially in the light of the lack of certainty and consistency as to when access to the courts will be limited.

The notorious Section 205 “*Reveal your confidential sources*” law was used during the apartheid regime to intimidate and harass journalists. It was also used to try to force journalists to censor themselves by not publishing stories given to them in confidence for fear of being forced to reveal their sources or failing to do so and being imprisoned. Another witch-hunting objective was to obtain the identity of a source who would be regarded as a traitor to the then ruling National Party<sup>7</sup>.

Section 205 (1) states:

*A magistrate may, upon the request of a public prosecutor, require the attendance before him or any other magistrate, for examination by the public prosecutor, of any person who is likely to give material or relevant information as to any alleged offence, whether or not it is known by whom the offence was committed”.*

The hearing could be in public or in secret and the offence alleged, especially in relation to the subpoenaing of journalists to appear before a magistrate, did not have to constitute a prima facie case (a case that commends itself), but merely a broad allegation that an offence had been committed. Some journalists were imprisoned for failing to reveal sources and some were able to escape by disclosing the identity of the source after obtaining permission to do so, invariably after the source had left the country.

The only legal escape route for a journalist is to quote Section 189 (1) of the Act and provide a “*just excuse*” for failing to give evidence. In the apartheid era judicial officers ruled, in effect, that there was no conceivable “*just excuse*” for a journalist. If a journalist failed in that defence and refused to give the information he/she could be sentenced to jail for up to two years and, where the alleged offence related to the *Internal Security Act*, for up to five years.

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<sup>7</sup>Kelsey Stuart's *Newspaperman's Guide to the Law* (Butterworths 1990) p 259/264

Since the end of apartheid and South Africa becoming a democracy with a constitution upholding freedom of the media, the SA National Editors' Forum has negotiated a *Record of Understanding* with the Minister of Justice and other authorities under which certain negotiation and evaluation procedures will be undertaken before a subpoena under the Act is issued. This has a braking effect on the use of the Act against journalists who claim that the constitution gives them a "just excuse" to refuse to name their confidential sources. Talks on this matter are continuing<sup>8</sup>.

### 1.3 Magistrates Court Act 32 of 1944

*In terms of section 5 (2) and (3), a magistrate has power to exclude the public from attending civil proceedings if in his/her opinion the exclusion is in the interests of good order or public morals or securing peace in the court.*

While the provision addresses legitimate concerns, the problem is that the powers given to magistrates are very wide. Thus, the concerns raised in regard to section 153 of the *Criminal Procedure Act*, are equally relevant here.

### 1.4 Inquests Act 58 of 1959

*Section 10 of this Act provides that oral evidence in an inquest shall be held in public. The presiding officer may however order the inquest to be held in camera or direct that any particular category of the public be excluded from the hearing if it appears to him/her that such a step would be in the interests of the safety of any witness or of good order or of the administration of justice.*

The wide discretionary powers given to presiding officers here raises similar concerns addressed under section 153 of the *Criminal Procedure Act*.

### 1.5 Defence Act 44 of 1957

During the apartheid era, the SA media was placed in a subordinate position

in the reporting of military matters, as it was forced to seek the permission of a senior military officer or even the defence minister before it could publish information gained independently of the SA Defence Force. In other respects, the media was largely dependent on official statements for its source of news. The Defence Act thus contains a number of provisions that restrict media freedom.

*Section 89 gives wide discretionary powers to the minister of defence and SADF commanding officers to restrict or prohibit access by the media to military areas.*

*Any person who enters a military area in contravention of this provision faces a severe penalty of a fine up to R10 000, or to imprisonment for a period up to 15 years or to both.*

This provision impacts on media freedom in that the freedom to comment on military matters may be restricted since the cooperation of the military is required in order to obtain access to military premises, property or information. A denial of access to any military premises means that journalists do not obtain news at first hand. Because of the requirement for official permission to publish, publication of the information they may have obtained can be prohibited. Indicating that an area contains military equipment or is a military base – even if its situation is openly known to the public and perhaps signposted as such – can be an offence if permission to publish has not been obtained.

*In terms of section 101, during operations in defence of the Republic or for their prevention or suppression of terrorism or if there is internal disorder, the state president is granted wide powers to censor certain information.*

The justification for censorship under this section is not stringent and may be easily abused. For example, since it allows for censorship for the prevention or suppression of internal disorder, it has been argued that this provision could be used to quell legitimate dissent.

*Section 118 deals with disclosure of information. It prohibits a person from publishing any information relating to the composition, movements or dispositions of the military without permission of a competent military authority. Further, the provision prohibits the publication of any matter relating to a member of the army calculated*

<sup>8</sup> Record of Understanding between Ministers of Justice and Safety and Security, National Director of Public Prosecutions and SANEF, Cape Town, Feb 19 1999.

*to prejudice or embarrass the government in its foreign relations or to alarm or depress members of the public, except with the authorisation of the minister. It is also an offence under the section for a person to disclose secret or confidential information that came to his/her knowledge by reason of his/her membership of the army or employment in the public service.*

The ambit of these provisions are very wide and it places a heavy burden on the media as it creates a presumption that all information relating to the army is secret or confidential unless the contrary is proved.

### **1.6 Protection of Information Act 84 of 1982**

This Act repealed the Official Secrets Act 16 of 1956 and aims at protecting state secrets.

*In terms of section 4 (1) (b) (iv), a person is forbidden from disclosing any information obtained by virtue of his/her employment with the government.*

The offender must have known or reasonably should have known that such information was for the protection of the security of the state or the state's other interests. The Act does not specify those "other state interests" that will justify the withholding of official information.

The ambiguity surrounding this provision makes it susceptible to abuse. For example, in February 1996, the ministry of health invoked this Act in order to force its employees to sign declarations of secrecy barring them from leaking sensitive information. The move was prompted by a scandal in the ministry involving a government tender for an AIDS awareness film<sup>9</sup>.

*Section 4 (2) makes receipt of information obtained in contravention of the Act an offence.*

This provision targets media practitioners as it prohibits them from receiving leaked official information.

### **1.7 Armaments Development and Petroleum Act 57 of 1968**

*Section 11A of the Act prohibits the unauthorised disclosure of information relating to the acquisition, supply, marketing, import or export of armaments.*

A person charged under this provision cannot raise the defence that the disclosure was in the public interest.

This provision seriously erodes the media's watchdog role. It is the duty of the media to expose any irregularities regarding the purchase and sale of armaments and, therefore, imposing a blanket ban on the media's freedom to comment on armaments issues is incompatible with media freedom.

### **1.8 National Supplies Procurement Act 89 of 1970**

*This Act gives wide powers to the minister of economic affairs, which he may exercise for the security of the state with a view to ensuring that goods and services are available. In particular, the Act makes arrangements for the acquisition of strategic supplies.*

*Section 8A prohibits the disclosure of information in relation to any goods or services referred to in an arrangement or order made in terms of the Act, or any statement, comment or rumour calculated, directly or indirectly, to convey such information or anything purporting to be such information.*

*Further, section 8 prohibits the unauthorised disclosure of information relating to any person or business, acquired in the performance of duties or the exercise of powers under the Act.*

It is acknowledged that certain government activities such as the acquisition and protection of strategic commodities need secrecy; the objection is to the wide discretionary powers given to the minister and the absence of safeguards against the abuse of the powers.

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<sup>9</sup>So this is Democracy? State of the Media in Southern Africa 1996 (MISA, 1997) p 33

## 1.9 Petroleum Products Act 120 of 1977

*In terms of section 4A, the minister of mineral and energy affairs is given powers to regulate or prohibit publication of information regarding:*

*(a) the source, manufacture, transportation, destination, storage, consumption, quantity or stock level of any petroleum product acquired or manufactured or being acquired or manufactured for or in the Republic;*

*(b) the taking place and particulars of negotiations in respect of the acquisition of petroleum products for the state and the transportation or consumption thereof, or of any other business transaction in connection with any such petroleum product.*

This provision may be used to hinder the dissemination of important information to the public. For example, in 1983 in the “Salem Affair” where SA was defrauded of millions of rands in a contract for the purchase of oil, the public only learnt of the incident when it was raised in parliament and reported in *Hansard*.

The government stated that it was not in the public interest to disclose the information, but at the time in question, the fraud was common knowledge in the outside world<sup>10</sup>.

## 1.10 Control of Access to Public Premises and Vehicles, Act 53 of 1985

*Section 2 of this Act grants the owner of any public premises authority to control access to the premises. The “owner” is defined as the head of a department of state, division, office or other body that occupies or uses those premises or vehicle or is in charge thereof, as the case may be.*

The exercise of this power may affect media practitioners’ news gathering abilities if they are not allowed to enter certain premises for the purposes of reporting.

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<sup>10</sup>Y Burns, *Communications Law* (Butterworths, 2001) p. 277.

The threat that this Act poses to media freedom is further compounded by the fact that under section 2 (1) (b), the power to control access to public premises is not qualified by a safety need; it is unrestricted in its application.

## 1.11 Investigation of Serious Economic Offences Act 117 of 1991

This Act makes provision for the swift and proper investigation of certain serious economic offences and establishes an Office for Serious Economic Offences.

*In terms of the Act, a person who has reasonable grounds for suspecting that a serious economic offence has been committed, or that an attempt has been, or is being, made to commit such an offence, may lay the matter before the director of the Office of Serious Economic Offences by means of an affidavit or affirmed declaration.*

*Media freedom concerns with regard to this Act are raised by section 7 (1), which prohibits a person from disclosing any information without the permission of the director.*

The concern is that this provision makes it difficult for the media to obtain information on the operations of the Office for Serious Economic Offences thereby inhibiting the gathering and dissemination of information to the public and also the ability of the media to play its watchdog role on the office.

## 1.12 National Key Points Act 102 of 1980

*Under this Act, the minister of defence may declare any place or area to be a “national key point” or “key point” and two or more national key points may be declared a “national key points complex” or “key points complex”<sup>11</sup>.*

*These powers may be exercised if it appears to the minister that this area or place is so important that its loss, damage, disruption or immobilisation may prejudice the Republic, or where he considers it*

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<sup>11</sup>Kelsey Stuart’s *Newspaperman’s Guide to the Law* (Butterworths 1990) p 155/6.

*to be necessary or expedient for the safety of the Republic or in the public interest.*

The Act does not state how, when or where the minister is to make the declaration and how members of the public are expected to know whether a key point has been declared.

*An interpretation placed on Section 10 of the Act combined with Section 2 of the Protection of Information Act appears to be that any person who approaches, inspects, is in the neighbourhood of, passes over (by plane) or enters a key point for any purpose prejudicial to the security or interests of the Republic is guilty of an offence and liable on conviction to imprisonment of up to 20 years.*

*Section 10 (2) of the Act states that it is an offence for a person to disclose any unauthorised information about the security measures at a key point or about any incident that occurred there and, if convicted, a fine of up to R10 000 or imprisonment for up to three years, or both, may be imposed.*

The media could readily fall foul of this open-ended law by reporting on what occurs at a key point. The danger is all the greater because the government has never identified the national key points and journalists only discover they are in peril when they report an activity at a key point and the authorities invoke the Act.

This was done when Independent Democrats' leader Patricia de Lille (then a member of the Pan Africanist Congress) was summonsed to give evidence to the elite police Scorpions unit and photographers tried to picture her entering police headquarters. The journalists were warned that the building was a national key point and barred from taking pictures. However, as a result of the outcry that followed, the police withdrew the allegations.

## Swaziland

More than 30 years ago, Swaziland, one of the last absolute monarchies in the world, repealed the sections in its constitution that gave some protection to freedom of expression. As a result, newspapers and other media there now operate *de facto* by whim of the King. He and his government have an extensive range of legislative instruments that enable them to control the media, but in addition, the King has absolute power to ban papers by Royal decree, a power also enjoyed by the minister of information in relation to press conduct regarded as prejudicial to the interests of defence, public safety, public morality or public health.

The King is in the process of introducing a new constitution which has been seven years in the drafting by his law advisers but though it contains a reference to freedom of expression, the practical value of this freedom is of little consequence as political parties remain banned and the King retains absolute power to decide what freedoms he will allow, including the power to ban publications and broadcasters.

The various laws that enable him to restrict media coverage range from “*insult laws*” that protect him and his government from press criticism to laws providing for protection of “*public interest and safety*”, under which practically any media activity can be prohibited. The country is under a state of emergency which gives additional powers to the authorities to impose restrictions on the media.

There are also restrictions on civil servants providing information to the media, provisions for secret hearings by statutory bodies on public interest matters and wide restrictions on photography. In addition, a costly bond has to be deposited with the government before a newspaper may be published.

### Protection of Media Freedom under the Constitution

The Swaziland constitution of 1968, which came into effect at independence was authored and styled in the Westminster fashion. It did not make specific reference to media freedom, but it was generally accepted that the freedom was protected under the general ambit of freedom of expression. Parts of this

constitution were repealed by the 1973 King's Proclamation issued by the then King Sobhuza II.

The Proclamation criticised the constitution for failing to provide the legislative structures for good governance and for the maintenance of peace and order and that it permitted the importation into the country of highly undesirable political practices. The Proclamation thus repealed the whole of the second chapter of the constitution on the protection of fundamental rights and freedoms, including those on freedom of expression. These provisions have not been replaced. Media freedom, including the greater right to freedom of expression, is, therefore, not entrenched in the constitution.

In September, last year, the International Bar Association (IBA) – to which the King had sent the new draft constitution for comment – announced that it had sent its highly critical comments to King Mswati III, who, however, had not responded. The draft makes a cursory provision for freedom of expression but its value is questionable as political parties remain banned and the King is given absolute power and is the final arbiter of all disputes.

No time has been set for the adoption of the constitution in a country where the rule of law has all but collapsed – the IBA described it as having “fallen into crisis” – and where the entire Appeal Court and the Chief Justice have resigned.

## Status of International Human Rights Instruments

The constitution of Swaziland does not address the status of international law in the domestic law of the country. The position is therefore governed by the common law. Swaziland, together with the other two former British Protectorates in southern Africa, Botswana and Lesotho, adopts a dualist approach with regard to the status of international treaties in their domestic laws. This means that international treaties do not have an automatic application in the domestic law unless specifically incorporated by legislation.

Swaziland has only ratified the ACHPC. However, the treaty has not been incorporated into the domestic law and therefore does not have direct application.

## Laws That Unduly Restrict Media Freedom

### 1.1 King's Proclamation to the Nation, 1973

*This Proclamation categorically restricts the freedom of assembly and expression by prohibiting the gathering of persons for purposes of expressing political opinions. It further prohibits the formation and operation of political parties and similar organisations.*

The Proclamation infringes on media freedom in that it restricts the media's coverage of political matters. Some observers have said this law muzzles the media from publishing material whose content is of a political nature or which appears to be furthering the cause of banned political parties.

### 1.2 Proclamation No. 1 of 1981

*The King, side-stepping the parliamentary route of law making, made this Proclamation which declared a state of emergency that was to remain in force until revoked by the King. It has not been revoked to date hence the conclusion that the country is run under a perpetual state of emergency. The law aims to protect “public interest and safety”.*

This terminology is notoriously vague and is often invoked to silence critics of the government. The danger is even more serious in countries where political organisations are prohibited such as in Swaziland. Any criticism of the King or government may be perceived to be a threat to the public interest and safety.

The Proclamation thus creates a restrictive and intimidating atmosphere for the operation of the media, especially because contravention of this law may result in detention without trial.

### 1.3 National Security Act, 1968

*Under section 4 of this Act, all public servants are prohibited, unless authorised, from disclosing any document or information they possess or have acquired by virtue of their employment with the government.*

*Contravention of this provision attracts a fine or a prison sentence of up to five years, or both. The object of the Act is to protect official secrets in the interests of national security.*

However, section 4 has a wider application and prohibits the disclosure of all official information held by the state regardless of whether or not such information has an impact on national security. The provision thus makes it extremely difficult for the media to obtain information from public servants. The situation is further aggravated by the fact that there is no legislation in the country giving the public a right of access to official information held by the state.

#### **1.4 Sedition and Subversive Activities Act, 1938**

*In accordance with section 1 of the Act, a publication is seditious if it is intended to bring the King, his heirs, successors, or government into contempt or encourage hatred of them.*

Media practitioners in the country argue that this Act in practice is used to restrict or stifle the media from criticising the King and his government. For example, in November 2000, the president of the banned People's United Democratic Front was charged under the Act for allegedly uttering the words: "Down with King Mswati's reign" and for making a statement intended to persuade churches, schools, colleges, universities, teachers everywhere and every house to join in overthrowing the "Tinkhundla" system of government. The accused was however acquitted by the High Court on the ground that on the evidence, the accused was attacking those that wrongly advise or mislead the King and not the King himself<sup>1</sup>.

The provisions of this Act undermine the principle that in a free and democratic society, those that hold office in government and those responsible for public administration must be open to criticism.

#### **1.5 Proscribed Publications Act, 1968**

*This Act empowers the minister of information to declare any*

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*Rex v Mario Masuku*, Criminal Case No. 84/01.

*publication or series of publications prejudicial, or potentially prejudicial, to the interests of defence, public safety, public morality or public health.*

The main objection to the provisions of this Act is that the decision to proscribe a publication may be taken by an individual member of the Executive and therefore can be easily abused. In fact, use of the Act has resulted in the closure of three media houses.

The danger that this law poses to the media is demonstrated by two cases. First, in *Swaziland Independent Publishers (Pty) Ltd trading as The Nation Magazine v Minister of Public Service and Information*<sup>2</sup> the minister had declared the Nation Magazine a proscribed publication but failed to give the basis on which the decision was based. The minister's decision was subsequently overturned by the High Court. Second, in *The Guardian Group (Pty) Ltd v Attorney General & others*<sup>3</sup> the Guardian newspaper fell foul of the minister for Public Service and Information, which resulted in the minister banning the paper. The paper was once again saved by the High Court, which overturned the minister's decision holding that the ministerial powers of proscription must be lawfully exercised. The minister was unable to satisfy the court that he had acted lawfully in banning the newspaper.

#### **1.6 Obscene Publications Act, 1927**

*This Act prohibits the importation, making, manufacture, production, sale or distribution of indecent or obscene material.*

The objection to the provisions of this Act is the use of the terms "indecent" and "obscene". These terms are vague and have been rejected in some democracies as incompatible with the concept of freedom of expression. The law has also been criticised for employing an unjustifiable double standard, as it does not apply to the Internet.

#### **1.7 Cinematography Act, 1968**

*The Act regulates the making of films portraying gatherings of*

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<sup>2</sup>Civil Case No. 1155/01

<sup>3</sup>Civil Case no. 1111/01

*Africans or African life. It provides that the permission of the Prime Minister must first be sought before a film of this nature can be made. It further provides that permission must also be sought before a film is taken at any of the following celebrations: Incwala Day; the Reed Dance; the King's Birthday; Umhlanga; and Independence Day.*

The Act unduly interferes with the editorial creativity of filmmakers in that they can only make films approved by the Prime Minister. Given the government's sensitivity to criticism, it is highly unlikely that the Prime Minister will grant permission for the making of a film that is critical of the government or the King or of one of these events.

*The Act also empowers the Prime Minister to ban films that in his/her opinion include:*

- i. Scenes holding up to ridicule or contempt any member of the military forces;*
- ii. Scenes tending to disparage public characters;*
- iii. Scenes suggestive of immorality or indecency;*
- iv. Executions, murders and revolting scenes;*
- v. Scenes of debauchery, drunkenness, or any habit of life that is not in accordance with good morals;*
- vi. Successfully committed crimes or violence; and*
- vii. Scenes prejudicial to peace and order.*

The powers that the Act grants to the Prime Minister are subjective and very wide and can therefore be easily abused by preventing the making of critical films.

### **1.8 Public Accounts Committee Order, 1974**

*In terms of this law, the Public Accounts Committee is empowered to conduct an inquiry into matters relating to public accounts. Upon the request from any witness, the committee shall hear the witness's evidence in camera.*

Media practitioners object to the provisions of this Act on the ground that the hearing in camera of evidence relating to public funds is a violation of the public's right to information.

### **1.9 High Court Act, 1954**

*The Act generally provides that all defended actions, whether criminal or civil, should be heard in open court. However, the court may in any case in the interest of "good order or public morals", direct that a trial be heard in camera.*

The expression "good order or public morals" is not defined and therefore will be determined at the discretion of the presiding judge.

While the rationale behind this provision may be noble, the fear of media practitioners is that in a country such as Swaziland, where there have been suggestions and reports of incidents of judicial interference by the executive, the media may be unjustifiably excluded from court hearings under this provision.

### **1.10 Magistrates Court Act, 1938**

*This Act grants magistrates the power to hold trials in camera or exclude females, minors and the public in general (including the media) from the courtroom in the interests of public morals.*

Media practitioners fear that this provision may be used unscrupulously to bar the media from attending certain trials, thereby depriving them of the ability to exercise their watchdog role on the judiciary and the conduct of the courts and also deny the public access to information.

### **1.11 Judicial Services Commission Act**

*The Act addresses the procedure for the appointment of judicial officers. The Act, however, prohibits the publication or disclosure of information on the work of the commission by the media without the written permission of the commission.*

This is an unjustifiable fetter on media freedom especially in view of the importance of the judiciary and therefore the need to ensure transparency in the appointment process.

### **1.12 Books and Newspapers Act, 1963**

*In terms of this Act, the pre-requisite for the operation of a print media house is the payment of a deposit of a bond of Emalangeni 15,000 (R15 000) with the Registrar of Books and Newspapers.*

Aspiring media owners find this amount prohibitive. Initially, the bond amount was Emalangeni 1,000 (R1 000), but was subsequently increased. Media practitioners saw the increase as an effort by the government to frustrate them from venturing into business. The need for a cash bond is also unjustified in view of the fact that insurance policies for professional indemnity are available to cater for any alleged mischief.

*The Act also requires that the first and last printed pages of every newspaper whose text is in the vernacular are printed in the English language.*

The publishers of vernacular publications see this requirement as a restrictive directive as to the language in which the author or publisher chooses to express himself/herself.

### **1.13 Parliamentary Privileges Act**

*This Act provides for the punishment of any person who utters or publishes false or scandalous slander about parliament or any of its members. It also provides for punitive sanctions against any person who publishes any evidence taken by, or the contents of a document presented to, parliament where the evidence has been taken behind closed doors, or where publication has been expressly prohibited by parliament.*

The media consider these provisions to be excessive restraints because of the fear of reprisal for making comment on parliamentary debate in a manner parliament or its members may consider to be scandalous.

### **1.14 Identification Order, 1998**

*The Order provides for the compilation and maintenance of a population register and issuance of identity documents. Persons appointed or employed to carry out the provisions of the Order are prohibited from communicating to any person, except in the performance of their duties, any information they have acquired by virtue of their employment. The Order further prohibits a person who came into possession of information, which to his/her knowledge has been communicated to him/her in contravention of the Order, to communicate or disclose the information.*

This latter prohibition specifically targets the media. The provisions of the Order effectively prohibit the media from commenting on irregularities in the registration system and in the issuing of identity documents.

### **1.15 The Emergency Powers Act, 1960**

*This Act authorises certain measures to be taken to deal with a state of emergency that may be declared by the King in terms of his Constitutional powers. Where a state of emergency has been declared, the Prime Minister has powers to make such regulations as he may deem fit for securing public safety and the maintenance of public order. It further provides that the Prime Minister may restrict the movement of residents within the country.*

Invoking this Act may impinge on media freedom because it gives the authorities the power to restrict the movement of media practitioners while they are reporting on, or photographing, the events or occurrences to which the emergency legislation is applied and the conduct of the authorities in implementing the emergency measures.

### **1.16 Prevention of Corruption Order, 1993**

*The Order establishes an Anti-corruption Commission. Any information acquired by the Commission may not be published or disclosed before the permission of the minister had been sought and granted. The minister has a discretionary power whether or not to release the information.*

The provisions of this Order have been objected to on the ground that they adversely affect the media's right of access to information, thereby weakening its watchdog role.

### **1.17 Posts and Telecommunications Act, 1962**

*This Act is meant to provide for the control of broadcasting activities in the country and sets out the legal mechanism for the granting of broadcasting licences to aspiring applicants. However, the Act does not elaborate on licensing procedures.*

It has been observed that applications for broadcasting licences are often left to be handled by officials at the state radio station who deal with them casually and never finalise them. The failure to provide clear guidelines for licence applications has led to a state monopoly in broadcasting.

*The Act further grants the licensing authority (the minister) power to revoke or suspend any licence where it appears that such revocation or suspension is expedient and in the public interest.*

There is no procedure set out in the Act for an aggrieved party to appeal against such decisions. The provisions of this Act impinge on media freedom in that they fail to establish a framework that will promote diversity in the broadcast media.

## **Tanzania**

The laws of Tanzania that impact on the media are among the most repressive in the SADC region; indeed, it is surprising that the print and broadcast media there are able to operate without constantly falling foul of the extreme censorship or of the various laws with punitive punishments. The media is in a most precarious position and balances on a knife edge.

So it is with considerable relief to learn that the Tanzanian government is reported to be backing efforts for the legislation that impacts on the media to be reviewed with the aim of scrapping the worst, amending that which can be amended or writing new legislation. This process has developed substantially in the last few years and appears to be reaching conclusions which will be welcomed by journalists and international observers.

Meanwhile, however, the laws currently on the statute book are the ones that are discussed in this handbook.

The constitution does not expressly guarantee media freedom but does uphold freedom of expression and this has been interpreted as covering the media as well. But the limitations clauses are couched in such wide, vague and subjective terms and place such a sharp focus on publication or broadcasts that should not “jeopardise the laws of the country” that the few freedoms remaining have been whittled away.

There are pointed references to the rights and freedoms in the constitution not being able to “illegalise” established or future laws or detract from the security and safety of society, the peace of the community, community health and even development plans for cities and villages, the production and use of minerals or the development of any other resources or other interests for the wellbeing of the public.

In common with most of the laws impacting on the media this is “catch-all” legislation that enables officials to impose censorship almost at will. The restrictions extend to the conveyance of secret information, respect for the courts and parliament to the extent of prohibiting certain classes of information and prohibitions on trade unions and private organisations. Punitive laws prohibit publication of newspapers without registration and registration is at the

whim of a government appointed official who may refuse registration if he is of the opinion that a publication may in future be in conflict with good governance and the maintenance of peace and order. The concept of punishing the possibility of future misconduct is taken further by giving a minister powers to ban a newspaper if he thinks that it may be guilty of misconduct in the future. He can also demand that a bond of an unlimited sum be deposited by a newspaper to offset penalties and damages that it may incur.

There is also strict control of broadcasting including the contents of programmes; a ban on film-making including “home movies” without permission and on making unauthorised contact with “outside bodies” such as news agencies; a crime of criminal defamation; protection of public figures and government officials; and, in many instances, the onus placed on the accused or the defendant to prove innocence.

“Classified” information – which can be applied to any government document – also has its set of penalties ranging from those imposed on civil servants for giving “classified” material to others such as the media and to the media for publishing it.

Court decisions always lean in favour of the complainant against a newspaper and the rulings have suggested that it is illegal to criticise the government.

## **Protection of Media Freedom under the Constitution**

Section 18 of the Tanzanian constitution provides:

*(1) Without jeopardising the laws of the country, everyone is free to express any opinion, to offer his views, and to search for, to receive and to give information and any ideas through any medium without consideration to country boundaries and is also free to engage in personal communication without interference.*

*(2) Every citizen has the right to be informed at all times about different events taking place within the country and around the world, events that are important to his life and to the livelihood of the people and also about important social issues.*

The constitution of Tanzania does not expressly guarantee media freedom. The provision that guarantees the right to freedom of expression refers to the freedom to express oneself through any medium, which includes the media. It is, therefore, generally accepted that media freedom is subsumed under the general freedom of expression clause cited above.

The constitution provides for certain limitations to the enjoyment and exercise of media freedom. There are two types of limitations. First, the section that guarantees the freedom has a proviso that limits the freedom. Thus, section 18 (1) requires that the exercise of media freedom should not “*jeopardise the laws of the country*”. Secondly, the constitution has a general limitations clause on all rights and freedoms guaranteed under the Bill of Rights. Section 30 (1), the general limitations clause, reads:

*(1) Human rights and freedom whose foundation has been outlined in this Constitution will not be used by one person in a way that will result in interference or curtailment of rights and freedom of others or interests of the public.*

*(2) Let it be understood that conditions contained in this Section of the Constitution, interpreting the rights, freedom and human responsibilities do not illegalise in any way the established law or prevent any law from being enacted or any legal action being taken in accordance with that law, so as –*

*(a) to ensure that justice and freedom of others or interests of the public are not violated by misuse of freedom and individual rights;*

*(b) to ensure that security, safety of the society, peace of the community, community health, development programs in cities and villages, production and utilisation of minerals, or development and promotion of resources or any other interests aimed at developing the well-being of the public;*

*(c) to ensure the implementation of judicial decisions or court orders reached on any matter of a civil or criminal nature;*

*(d) to maintain the reputation, justice and freedom of the majority of the people or individual life of people involved in court decisions; to prevent the conveyance of secret information; to maintain respect, authority and freedom of the court;*

*(e) to impose restrictions, administer and guard against the establishment, operation and matters of unions and private organisations in the country; or*

*(f) to allow any other activity to take place that will help develop and preserve the interests of the nation.*

The approach that the Tanzanian constitution adopts with regard to derogations from media freedom is different from international law. The constitution does not adopt the three-part test; rather, it only spells out those interests that would justify derogations from the freedom. There are no requirements that laws that limit freedom must be clear or that they must be reasonable or justifiable in a democratic society. The permissible grounds for limiting freedom are couched in very wide, vague and subjective terms.

Another major concern raised against the limitation of freedom is the proviso in section 18 (1) that the exercise of media freedom must not jeopardise the laws of the country. In the absence of a requirement that the laws of the country must conform to international law standards, there is a danger that the government may pass repressive laws that seriously hinder the enjoyment of media freedom. And in the light of the proviso, it will be difficult to challenge such laws. The derogation provisions in the Tanzanian constitution place media freedom in a very precarious position.

## **Status of International Human Rights Instruments**

The constitution does not address the status of international law in the domestic law of Tanzania. The status of international human rights instruments is, therefore, governed by the common law.

Like other former British colonies, Tanzania also adopts a dualist approach to the position of ratified treaties in its domestic law. Thus ratified international treaties do not have automatic operation in the domestic law unless they have been specifically incorporated into the domestic law.

While Tanzania has ratified both the ICCPR and ACHPR, these have not been specifically incorporated into the domestic law. These treaties, therefore, do not operate as a direct source of individuals' rights, nor can they be invoked in the Tanzania courts.

## **Laws that Unduly Restrict Media Freedom**

### **1.1 The Newspapers Act, 1976**

*The Newspapers Act, 1976 regulates the operation of newspapers in the country.*

The Act has a number of cumbersome and restrictive provisions that seriously impinge upon media freedom. In fact the Act retains most of the oppressive aspects of the Newspapers Ordinance legislated during the colonial days to subjugate the colonised people.

*The Act imposes a fine and a jail sentence of up to four years on any person who prints or publishes a newspaper without registering it with the Registrar of Newspapers or furnishes the Registrar with false information regarding the paper's particulars. The Registrar, an appointee of the Minister responsible for matters relating to newspapers, enjoys full discretionary powers with regard to the registration process.*

*The Registrar can refuse to register a publication if it appears to him/her that the paper in question may be used for any purpose prejudicial to, or incompatible with, the maintenance of peace, order and good government.*

The requirement of registration under the conditions imposed is an unjustifiable fetter on media freedom. The matter is further compounded by the fact that the Registrar is given arbitrary wide discretionary powers in the registration process, which may be easily abused.

*In addition to the registration requirements, the Act further gives the minister wide discretionary powers to ban or close down newspapers. The minister may prohibit publication of any newspaper "in the public interest" or "in the interest of peace and good order". If an order to cease publication is disobeyed, the offending person can face a fine or a maximum prison sentence of four years, or both. Registration of any newspaper can be cancelled if the minister is satisfied that the paper is being used, or is likely to be used, for any purpose "prejudicial to, or incompatible with, the maintenance of peace, order and good government".*

*The Act empowers the minister to require a publisher of a newspaper to deposit a bond of an unrestricted sum against any possible monetary penalties or damages, which the newspaper may incur. Where the minister requires such a bond, non-payment can result in a fine or term of imprisonment of up to two years, or both.*

*The Newspapers Act provides for the offence of criminal defamation in the Tanzania mainland. The Act defines defamation as a written, printed or other act, except for the spoken word, which concerns “another person, with intent to defame that other person”. Defamatory matter is defined as something likely to injure the reputation of a person by exposing him or her to hatred, contempt or ridicule.*

While the Act sets out situations where publication of defamatory matter is protected from prosecution (“*absolute privilege*”), these do not include the conduct of public figures and government officials. Despite this fact, public figures and government officials are accustomed to behaving as if their work is not a matter of legitimate public interest. The Act also places the onus on the defendant to prove his or her innocence rather than of the plaintiff to prove guilt “a clear reversal of a fundamental tenet of justice”.

*Anybody found guilty of defamation under the Act might be subject to a fine or a maximum prison sentence of two years, or both.*

Courts of law in mainland Tanzania have generally been friendly to complainants under the defamation provisions. This has constrained the development of a tradition of investigative journalism, notwithstanding the growth of the private media in recent years.

*The Newspapers Act also provides for the offence of sedition. The Act defines an act, speech or publication as seditious if it aims to bring lawful authority into hatred or contempt, or excites disaffection against the same, or promotes feelings of ill-will and hostility between different categories of the population. Anyone printing or publishing a newspaper, which contravenes these provisions, is liable to a fine or a prison sentence of a maximum of three years, or both.*

Since the advent of multi-party politics in the country, the offence of sedition has often been employed against politicians noted for their outspoken criticism of the government. It would appear that the basic premise of sedition laws in Tanzania is that it is wrong to criticise the government.

This is fundamentally incompatible with a democratic form of government, in which the ability to criticise leaders is necessary to achieve accountability of those in office and for citizens to make informed choice about their political representatives.

Today, in many democratic states, sedition is either formally or effectively a dead letter. Criminal sanctions for criticism of government should never be imposed unless the state can prove beyond reasonable doubt that there is a real intention to incite violence or lawless conduct and that there is a real risk that such violence will imminently ensue.

## **1.2 National Security Act, 1970**

*The National Security Act makes it a punishable offence for a person to obtain, possess, comment on, pass on, or publish any document or information, which the government considers to be classified. Any government official who discloses classified information without authorisation is liable to prosecution and anyone who receives or communicates any classified matter is guilty of an offence.*

The National Security Act prohibits public servants from disclosing a wide range of information, even that which has no bearing on the security of the state.

This is a draconian piece of legislation that gives the government absolute scope to define what should be disclosed to, or withheld from, the public. The communication of classified information by a person other than a government official targets secondary disclosures by the media. It is no defence under the Act that an accused person could not reasonably have known that the matter was classified.

The penalty for the above offences is imprisonment for up to twenty years. The breadth of the Act, together with the harsh penalty for its violation, makes it difficult for the media to source official information.

Some observers have also voiced concerns that the National Security Act further threatens media freedom by criminalising contact with outside bodies, which could include international news agencies.

*Section 12 (1) of the Act states that “communication with, or attempts to communicate with, a foreign agent in the United Republic or elsewhere” will be presumed to be “for a purpose prejudicial to the safety or interest of the United Republic” and directly or indirectly useful to a foreign power, unless an accused can prove the contrary to be the case.*

This provision also reverses the burden of proof, placing it on the defendant.

*Refusal by a person to provide information under the Act or for a person to supply false information is punishable by a term of imprisonment not exceeding five years.*

In the light of the ambiguity surrounding the concept of national security and the propensity of most governments to abuse the concept, there is a danger to media freedom in the abuse by the authorities extending to demands on journalists to disclose information which may or may not fall under the Act.

Attempts may be made to force media practitioners to disclose their sources on matters that have no connection with national security under the pretext of protecting national security. Journalists should enjoy the right to professional secrecy relating to the source of the information published or broadcast, unless disclosure is sought as a matter of last resort, all other avenues of inquiry have been exhausted and disclosure will serve a genuine public interest.

### **1.3 Broadcasting Services Act, 1993**

*The Broadcasting Services Act regulates broadcasting in Tanzania mainland. Section 4 of the Act provides for the establishment of the Tanzania Broadcasting Commission (TBC). Its main responsibilities are to issue licences to private broadcasters and generally to supervise them in terms of programme content and the discharge of licensing conditions.*

*The TBC consists of a chairperson appointed by the Tanzanian Union president and not less than six or more than eight members appointed by the Union minister in charge of information.*

The Act does not guarantee the independence of the TBC's governing body nor freedom from government interference in editorial policy or decision-making. The appointment process and the lack of legal safeguards for the independence of the TBC seriously compromise its ability to carry out its functions effectively, thereby impairing its credibility.

*In awarding licences, section 11 (3) (d) allows the TBC to specify the geographical coverage of a broadcasting licensee.*

The TBC has hitherto used this power to allow only government-owned radio and television stations to broadcast throughout the country. Geographic restrictions on the coverage of private broadcasting services deny citizens access to diverse sources of information.

*Section 25 of the Act relates to national security and obliges any licence holder to broadcast any announcement “which the minister deems to be in the public interest”. Additionally, if the minister believes that broadcasting of any particular material would be contrary to national security or public interest, he/she may, by written notice, “prohibit the license holder from broadcasting such matter – and the licence holder shall comply with any such notice so delivered”.*

Nowhere is “national security” or “public interest” defined. These provisions provide wide scope for political abuse. They also violate the fundamental principles of editorial independence.

### **1.4 Films and Stage Plays Act, 1976**

*The law regulates the film, video and theatre industries. Section 3 (1) prohibits any person from taking part or assisting in making a film unless the minister has granted him/her permission. Further, section 3 (2) restricts the making of films by a person for his/her own entertainment or private exhibition to his/her family or friends.*

These provisions provide unduly restrictive powers of censorship by the minister over the film industry, interfere with its independence and creativity and sets up severe prohibitions against news photographers taking videos of news events. It also effectively prohibits the making of “home movies” by individuals.

*Under section 30, the minister has power to revoke a permit, license or certificate of approval issued to the holder. The circumstances in which the minister can do so are predicated to the notion of “public interest”.*

In the absence of a clear definition of the concept of “public interest” in the Act, the power to revoke a permit may easily be abused by restricting the making of films critical of the government.

## **1.5 Penal Code, 1945**

There are several provisions in the Penal Code that unduly restrict media freedom. These include:

### **1.5.1 Journalists revealing sources of information – section 114 (1)**

*This section states that non-disclosure by the media of a source in court may lead to contempt proceedings. The punishment, if found guilty, is a fine or imprisonment for up to six months’.*

### **1.5.2 Subversive Statements – section 55 (1)**

*In terms of this section, it is a criminal offence to make statements likely to incite disaffection against the president or the government.*

The objection to this offence is that quite often, it is used to inhibit legitimate criticism of both the president and members of the government.

### **1.5.3 Abusive and insulting language likely to cause a breach of the peace – section 89 (1)**

The terms “abusive” and “insulting” are highly subjective and do not provide clarity. Due to the ambiguity of these terms, the prosecuting authorities often deem robust criticism of the government or its leading figures as insulting or abusive. The criminalisation of abusive or insulting conduct does not have a place in a democratic society, especially in view of the fact that an aggrieved person has a remedy in seeking damages under the civil law.

### **1.5.4 Contempt of Parliament and Court**

*The Penal Code makes it is a criminal offence for a person to make defamatory statements reflecting on proceedings or the character of parliament or one of its committees or concerning a member in respect of his conduct in parliament. Further, it is also an offence to disclose details of a parliamentary committee's investigations before the committee has reported to parliament.*

*Section 114 (d) deals with court proceedings and provides that any person who, “while a judicial proceeding is pending, publishes, prints or makes use of any speech or writing misrepresenting such proceeding, or capable of prejudicing any person in favour of, or against, any parties to such proceeding, or calculated to lower the authority of any person against whom such proceeding is being held or taken” will be guilty of contempt of court.*

The rationale behind the offence of contempt is to protect the integrity of the two institutions. However, the provisions are so widely drafted that they could seriously restrict legitimate reporting of matters before parliament or the courts.

In addition, it could render legitimate criticism of these institutions as amounting to contempt thereby eroding the media's watchdog role over the two institutions.

The *Penal Code* has other anachronistic offences such as those relating to the publication of “false news” and “indecent” matter. Most states in the SADC region have retained these legacies of colonial rule, but the offences are vague

and fail to satisfy the international law standard that derogations from fundamental rights should provide for clarity and narrow definitions.

### **1.6 Civil Service Act, 1989**

*Under the Civil Service Act, all civil servants are required to take an oath of secrecy. In addition, the Code of Ethics and Conduct for Public Servants in Tanzania prohibits public servants from communicating with the media on issues related to their work or official policy without due permission.*

The combined effect of these provisions is to create a culture of secrecy in the public service. When public servants are secretive, it is very difficult for media practitioners to access official information, thereby negatively impacting on the media's role of gathering and disseminating information and playing a watchdog role over the government and its administration.

### **1.7 Regions and Regional Commissioners Act, 1962, and Area Commissioners Act, 1962**

*Since independence, regional and district commissioners have been given powers to arrest and detain a person for 48 hours if they have reason to believe that such a person is likely to commit a breach of the peace or disturb public tranquility.*

These wide powers have been extensively used and abused by regional and district commissioners. They use these powers to detain persons, who in their opinion are “troublemakers” in their area of jurisdiction and, in particular, it has been used against journalists who expose malpractice and maladministration in public offices.

The matter is aggravated by the fact that a victim of these Acts has no recourse to a court of law to challenge the legality of the commissioners’ order for detention.

### **1.8 Prisons Act, 1967**

*The Prisons Act restricts people from entering prison premises. Section 83 creates a penalty, for loitering in the vicinity of a prison or any other place where prisoners may be in the course of their imprisonment. The section further disallows communication with any prisoner, the making of sketches or taking a photograph of a prisoner within or outside the prison. It is also an offence under the section for a person to cause any sketch or photograph of any prisoner or portion of a prison to be published in any manner.*

*In addition, section 85 makes it an offence for a person to be found in possession of what are called “prohibited articles” or to take such articles from prison. Furthermore, section 86 prohibits a person from being in possession of articles that have been supplied to a prison officer for use on duty.*

These provisions impact negatively on the media's ability to investigate and comment on prison conditions, which are matters in the public interest.

### **1.9 Public Leadership Code of Ethics Act, 1995**

*The Code of Ethics for Public Leaders requires every public leader to submit to the Ethics Commissioner, a declaration in a prescribed form, of assets and liabilities of the public leader himself/herself and those of his/her spouse and unmarried children. The public leader must submit the declaration within thirty days after taking office and then at the end of each year and at the end of his/her term of office.*

*Declarable assets include cash and deposits in the bank or financial institutions, treasury bills, interest on money deposited or business assets, dividends and stocks, farms under commercial operation and real property which is not a non-declarable asset.*

*In terms of section 21 (1), the Ethics Secretariat must maintain a register of public leaders' assets and liabilities. Regulations have been made under section 32 which stipulate conditions for allowing a person to inspect the public leaders’ register of assets and liabilities. First, a person wishing to inspect the register must have lodged a complaint with the Commissioner against a public leader. Secondly,*

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*the Commissioner must be satisfied that the complaint is genuine, relevant and was made in good faith. Thirdly, an inspection fee of one thousand shillings (R6) must be paid.*

*The law, however, does not allow anyone who has met these conditions to make the information public through the media. A person who peruses a property declaration of a public leader and then publishes or broadcasts or communicates it to the public commits an offence, which upon conviction, will be liable to a fine of 10,000 shillings (R60) or to imprisonment for a term not exceeding two years or both.*

As the law stands now, there is no way details of the property of public leaders could be made available to the public through the media. This constitutes a serious impediment to the media's ability to gather and disseminate information to the public or to play a watchdog role over those responsible for the management of public affairs.

## **1.10 Tanzania Revenue Authority Act, 1995**

*In terms of this law, revenue officials are prohibited from disclosing information on tax returns filed with the revenue authorities. An official who contravenes the provisions of this Act faces summary dismissal followed by prosecution.*

Journalists investigating stories on tax evasion have always found it very hard to access information on individuals or companies implicated in tax evasion. In the interest of good governance and where it can be proved to be in the public interest that such information be disclosed, the media should be allowed access to this information so that they can effectively play their role in a democratic society.

Though the Zambian constitution expressly guarantees freedom of the media and in much stronger terms than several other SADC member states, the limitations clauses in the constitution coupled with other legislation render much of this freedom meaningless. Indeed, the extraordinarily wide compass of the limitations and the restrictive laws place Zambia in the middle ages in regard to the freedoms that its citizens and the media are allowed.

The constitutional limitations, as in other SADC member states, range over protections for the defence, public safety, public order, public morality and public health of the country; stray into protecting the privacy of individuals; limit publication of material relating to the regulation of education, communications and broadcasting; and place restrictions on public officials.

Other limitations on media freedom extend from the president having absolute unchallengeable powers to ban publications to controls on the reporting of parliament and further controls on the reporting of “*sedition*” and other material which is defined so loosely and broadly as to cover perfectly normal everyday activities in a democratic state. Publication of “*false news*”, a highly subjective offence, is also a crime.

“*Insult laws*”, those that prevent the media from being critical of government officials from the president downwards and foreign diplomats, are also a feature and are heavily punished.

## **Protection of Media Freedom under the Constitution**

Article 20 of the Zambian constitution provides:

*(1) Except with his consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to impart and communicate ideas and information without interference, whether the*

*communication be to the public generally or to any person or class of persons, and freedom from interference with his correspondence.*  
(2) *Subject to the provisions of this Constitution no law shall make any provision that derogates from the freedom of the press.*

Article 20 (2) expressly guarantees freedom of the press. It is submitted that the expression “freedom of the press” here is used in a wider sense in a similar manner to the interpretation that the same expression has been accorded to the United State's First Amendment. In the US, press freedom does not only relate to the printed press, but also extends to other forms of the media. The Zambian constitution therefore expressly guarantees media freedom.

The freedom is, however, not absolute. Its exercise is subject to Article 20 (3) of the constitution, which provides:

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

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

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

*(c) that imposes restrictions upon public officers; except so far as that provision or, the thing done under the authority thereof, as the case may be, is shown not to be reasonably justified in a democratic society.*

In terms of the above derogation clause, any restriction on media freedom must satisfy the following criteria:

- i. It must be provided for by law;
- ii. The restriction must be for the purpose of protecting the interests enumerated in clauses (a) to (c);
- iii. And must be reasonably justifiable in a democratic society.

The above criteria are based on the international law three-part test for determining legitimacy to restrictions on media freedom. The principles developed under international law regarding the three-part test are therefore relevant to the Zambian derogation clause. It has, however, been argued that the Zambian standard is less stringent than the international law standard in that Zambian restrictions need only be “reasonably required” to protect the listed interests as opposed to being necessary as required under the international standard<sup>1</sup>.

## **Status of International Human Rights Instruments**

The Zambian constitution does not address the status of international human rights treaties in the domestic law of the country. The status of international treaties in the domestic law is therefore governed by the common law. Zambia's common law is based on English common law, a colonial legacy. Under English common law, international treaties are not directly enforceable in the domestic law unless they have been specifically incorporated by legislation passed by the legislature.

Zambia has ratified both the ICCPR and ACHPR but none of these instruments has been incorporated into domestic law. Thus, in accordance with the strict dualist approach, none of these instruments has direct application in Zambia. There is, however, evidence that courts in the country do not rigidly apply this concept. Courts have in a number of cases referred to, and drawn inspiration from, international standards set out in the ICCPR and ACHPR.

Furthermore, courts in the country have sought guidance from other regional international human rights instruments that Zambia is not a party to. For example, courts have on a number of occasions drawn inspiration from the ECHR and decisions of the ECHR because many provisions in the Bill of Rights of the Zambian constitution are modelled on the ECHR.

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<sup>1</sup>A.W. Chanda and M. Liswaniso, Handbook of Media Laws in Zambia (ZIMA, 1999) p. 7.

# Laws That Unduly Restrict Media Freedom

## 1.1 Printed Publications Act, Cap. 161

*The Act provides for the registration of newspapers printed or published in the country. In terms of section 5, it is illegal and an offence punishable by a fine to publish a newspaper or periodical without first registering it with the Director of the National Archives.*

The mandatory registration of newspapers has been queried by many media practitioners on the basis that it is an unnecessary fetter on the freedom to publish.

## 1.2 National Archives Act, Cap. 175

*This statute deals with the preservation, custody, control and disposal of public archives, including public records. Under section 18, with the exception of judicial records, no person may publish or reproduce the whole or any part of the contents of any public archives or records which have been transferred to the National Archives without the written permission of the Director or the person from whom such archives were acquired. A breach of this provision constitutes an offence, which on conviction attracts a fine or imprisonment for a period not exceeding twelve months or both.*

The above provision can be used unscrupulously to unduly censor the dissemination of information from the National Archives to the public.

## 1.3 Zambian National Broadcasting Act, Cap. 154

*The Act provides for the control and regulation of broadcasting and diffusion services. Section 3 of the Act establishes the national*

*broadcaster, the Zambia National Broadcasting Corporation (ZNBC). The ZNBC is run by a board of directors appointed by the minister of information in his/her discretion. In terms of section 7(2), the minister is empowered to give to the board such general or specific directions with respect to the carrying out of its functions as he/she may consider necessary, and the latter is obliged to comply with such directions.*

*Section 25 of the Act stipulates that no person other than the ZNBC shall operate a broadcasting service in Zambia otherwise than in accordance with the terms and conditions of a licence issued by the minister. The Zambia National Broadcasting (Licensing) Regulations 1993, restrict broadcasting licences to nine types of stations and/or services: commercial television stations; commercial AM/FM stations; FM transmitters; television transmitters; lower power television; FM and television booster stations; auxiliary services; international broadcasting stations; and cable television services.*

*Regulation 8(1) provides that the Long Wave (LW), Medium Wave (MW) and Frequency Modulation (FM) radio transmissions shall be available to the private media, while the Short Wave (SW) is reserved for government media. Further, only government television services can use VHF transmission.*

*Under section 27, if in the opinion of the minister, a particular programme is defamatory, blasphemous, obscene or seditious, he/she may prohibit the ZNBC from making such a broadcast*

The Act gives the minister of information very wide powers to censor programmes provided by the ZNBC.

The provisions of the Act are objectionable on a number of grounds. First, the law makes it difficult for individuals or companies to establish private radio and television stations. This effectively creates a state monopoly in broadcasting, which is unacceptable in a democratic dispensation. Second, the absence of an independent broadcasting regulatory authority to consider applications for licences exposes the broadcasting spectrum to political manipulation. This is aggravated by the fact that there are no safeguards provided in the Act to protect applicants who are unfairly treated. And third, the ZNBC does not enjoy any institutional independence.

Consequently, the corporation has limited the public's access to the state media as opposition political parties are rarely given coverage.

#### **1.4 Theatres and Cinematography Exhibition Act, Cap. 158**

*This Act provides for the regulation and control of theatres and cinematograph exhibitions. It defines a cinematograph exhibition as any exhibition of pictures or other optical effects presented by means of a cinematograph or other similar apparatus.*

*Section 7 of the Act establishes a Film Censorship Board. The mandate of this board, among others, is to approve every cinematograph picture submitted to it before it can be exhibited to the public. The board is obliged not to approve a film or part thereof, which:*

- i. Is made in South Africa or in association with any company formed in South Africa;*
- ii. Depicts any matter that is contrary to public order or decency;*
- iii. And is undesirable in the public interest.*

Media practitioners feel that the Censorship Board's role is of little significance. They argue for self-censorship by the filmmakers themselves. Furthermore, the ban on films made in South Africa is no longer justified.

#### **1.5 Penal Code, Cap. 87**

##### **1.5.1 Prohibited publications – section 53(1)**

*This provision confers on the president absolute discretion to prohibit any publication or series of publications published within or outside Zambia that he/she considers are contrary to the public interest.*

What is in the public interest is within the sole discretion of the president and it would appear that the courts are reluctant to review an exercise of this presidential prerogative. For example, in the 1981 case of *Shamwana v Attorney General*, two political detainees had sent a petition to the National Assembly

requesting it to review the state of emergency which had been in existence since independence. The then president banned the petition, whereupon the detainees brought an action before the High Court seeking an order declaring the banning of the petition to be unlawful, wrongful and unconstitutional. The court, however, held that an exercise of powers conferred on the president under section 53 was not open to question and therefore cannot be impugned.

Media practitioners contend that section 53 is incompatible with democracy, as it creates a situation where the existence of a free press is entirely dependent on the goodwill of the president. The power that the section confers on the president can be easily abused, especially in the absence of checks and balances on the exercise of the power.

##### **1.5.2 Seditious Libel – section 57 (1)**

*This law prohibits the publication of seditious words. Section 60 defines a seditious intention as including bringing the government into hatred or contempt or to excite disaffection against the government.*

This provision seriously inhibits media freedom. The definition of sedition applies to normal conduct in a democracy. For example, it is incumbent on opposition parties to criticise the government and to create dissatisfaction over its conduct by exposing its blunders and shortcomings so that an opposition party would be elected at the next elections to sweep the government from power. And it is the duty of the media to report on and publish such activities by the opposition.

What makes the provisions on sedition highly objectionable is not only the prohibition of peaceful opposition to the government, but the fact that truth is not a defence to a charge for sedition.

##### **1.5.3 Publication of False News – section 67 (1)**

*In terms of this provision, any person who publishes any statement, rumour or report, which is likely to disturb the public peace, knowing or having reason to believe that such statement, rumour or report is false, is guilty of an offence and is liable to imprisonment for up to three years.*

*It is no defence for the person publishing such information to plead that he/she did not know or did not have reason to believe that the information was false, unless he/she proves that prior to publication he/she took reasonable measures to verify the accuracy of such statement, rumour or report.*

This provision has a chilling effect on media freedom especially in the light of concepts of false news and disturbance of the public peace being highly controversial. Furthermore, media practitioners contend that the provision is especially unfair and unreasonable in a country where those in power have no obligation to answer inquiries from the media or public and where there is no legislation enabling people to have access to government information.

#### **1.5.4 Defamation of the President – section 69**

*Section 69 seeks to protect the reputation and dignity of the state president and his/her office. It provides that any person who, with intent to bring the president into hatred, ridicule or contempt, publishes any defamatory or insulting matter, is guilty of an offence and is liable to imprisonment for up to three years.*

This section has the effect of stifling media freedom, as it does not lay down any guidelines for determining what constitutes “insulting matter”. The police have the discretion to decide what publication is defamatory or insulting and what is not. This provision has been used to harass journalists from the independent media and others who criticise the president.

The constitutionality of the provision has been challenged in both the High Court and the Court of Appeal in the cases of *The People v Bright Mwape & Fred M'membe*<sup>2</sup>; *Fred M'membe & Bright Mwape v The People*<sup>3</sup>; and *Fred M'membe, Masausu Phiri & Goliath Munkonge v The People*<sup>4</sup>. Both courts upheld the constitutionality of the provision on the ground that it was reasonably required to forestall a breakdown of public order. The Supreme Court held that no one could dispute that side by side with freedom of speech

<sup>2</sup>HPR/36/94.

<sup>3</sup>(1995-97) ZR 118; SCZ Appeals Nos. 87 and 107 of 1995.

<sup>4</sup>*The People v Fred M'membe, Musautso Phiri & Bright Mwape* HP/38/1996 (unreported).

was the equally very important issue of public interest in the maintenance of the public character of public men for the proper conduct of public affairs, which requires that they be protected from destructive attacks upon their honour and character. The court went on to say that when the public person was the head of state, the public interest was even more self-evident. The president is thus elevated above everyone else.

These decisions have been criticised by media practitioners who argue that they miss the point that the president is a servant of the people and not their master. The question whether or not the president has a good reputation should depend on the incumbent's conduct while in office. The Supreme Court's judgment that the public character of public men must be protected could easily be misinterpreted to mean that any criticism of people in government can be punished under this law.

#### **1.5.5 Criminal Defamation – section 191**

*This section provides that any person who by print, writing, painting, effigy or by any means otherwise than solely by gestures, spoken words or other sounds unlawfully publishes any defamatory matter concerning another person with intent to defame that other person, is guilty of the offence of libel. This offence carries a custodial penalty. A criminal prosecution for libel can be launched in respect of the same libel that is the subject of a civil suit.*

The objection to this provision is that it exposes the media to double jeopardy and that it is unnecessary as the civil law provides an adequate remedy for libel and the civil law remedy has become the accepted means of redressing libel in democratic countries.

#### **1.5.6 Obscenity – section 177 (1)**

*The law on obscenity is meant for the protection of society's morals. Thus section 177 (1) makes it an offence for any person to make, produce or possess any obscene matter that has the tendency to corrupt morals.*

While the rationale behind the provision may be noble, the problem is that it does not sufficiently define obscenity.

Some observers have pointed out that the vagueness of the concept of obscenity has led to several anomalies and injustices such as arbitrary police action and blanket confiscation of material that the police regard as obscene.

## **1.6 The State Security Act, Cap. 111**

*This statute was enacted in 1969 and replaced the Official Secrets Act of 1967. The State Security Act is based on the United Kingdom Official Secrets Acts of 1911, 1920 and 1939. The objects of the Act are, among others, to make better provision relating to state security, espionage, sabotage and other activities prejudicial to the interests of the state.*

*Section 4 of the Act is a very broad provision. Among other things, the provision makes it an offence punishable by up to between 15 and 25 years imprisonment for public servants to communicate official information without prior authorisation or where the communication is not in the interests of the state.*

The section is a “catch-all” provision that prohibits the disclosure of all official information regardless of whether such information has a bearing on national security or not. It has been observed that the Act has a considerable deterrent effect on junior and middle-grade civil servants and therefore makes the work of media practitioners difficult as civil servants are reluctant to provide them with information about government operations for fear of being prosecuted.

*Section 4 further makes it an offence for any person to receive information knowing or having reasonable cause to believe that it was given in contravention of the Act.*

This targets the media and effectively forbids them from publishing leaked official information. The ultimate losers are thus the members of the public who rely on the media for information.

*Further to section 4, section 5 of the State Security Act also prohibits the communication of any classified matter to an unauthorised person.*

It is no defence for a person charged under this provision to prove that when he/she communicated the matter, he/she did not know, or could not reasonably have known, that it was classified matter. Section 5 does not provide any criteria upon which documents are to be classified. In the absence of guidelines, any document could presumably be classified “*confidential*” or “*secret*” even if it does not have the remotest connection with state security.

The provisions of the *State Security Act* makes it very difficult to access publicly held information, resulting in the public being ignorant of the operations of government and there being little informed debate on matters of public interest. The little publicly held information that is published emanates from leaks to the media mostly by brave disaffected government officials. The lack of guidelines in the Act has also given rise to its abuse.

For example, in its edition number 401 of February 1996, *The Post* newspaper carried an article in which it revealed the government's proposed constitutional reforms. The editors of the newspaper were charged under the *State Security Act* with receiving documents, articles or information knowing, or having reasonable grounds to believe, at the time that the same documents, articles or information was communicated or received in contravention of section 4.

The charges were dismissed by the High Court, holding that the state had failed to prove that the contents of the documents were matters of state security.

It is doubtful if sections 4 and 5 of the *State Security Act* are compatible with Article 20 of the Zambian Constitution, which requires restrictions on media freedom to be prescribed by law and to be reasonably required in a democratic society. These sections are vague, over-broad and do not provide safeguards against abuse.

## **1.7 National Assembly (Powers and Privileges) Act, Cap. 17**

*In terms of section 7 of this Act, no stranger, and this term includes a journalist, is entitled as a matter of right to enter or remain within the precincts of the National Assembly. The Speaker of the Assembly may at any time order a stranger to leave the Assembly. It is an offence for*

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*any person to publish or report on any proceedings of the Assembly or any of its committees when such proceedings have not been held in public, unless the permission of the Assembly has been given.*

Critics of this provision point out that in a country where public officers believe that what they do is secret, it is difficult to conceive of a situation in which such leave would be granted by the National Assembly.

*It is also an offence for any person to publish any false or scandalous libel on the Assembly or any of its committees.*

The objection to this part of the provision is that the terms “false” and “scandalous” are highly subjective terms and may be easily abused to stifle legitimate criticism of the National Assembly.

*The provision also prohibits the publication of any paper, report or other document prepared for submission to the National Assembly.*

The prohibition renders democratic governance difficult, since it prevents the public from being informed in advance about government plans or contemplated legislation.

Media freedom is implicitly guaranteed in the Zimbabwean constitution but as with other SADC member states, the constitution provides for limitations which are “*reasonably justifiable*” in a democracy in the interests of defence, public safety, public order, the state’s economic interest, public morality or public health. There are also protections for the reputations of others and limitations that may be imposed on public officers and the technical regulation of the communications industry, including broadcasting, or the creation and regulation of any monopoly in the communications fields.

Serious inroads into media freedom were made recently by the promulgation of the Access to Information and the Protection of Privacy Act. The law requires newspapers to be registered by a government appointed Media and Information Commission and for journalists to obtain accreditation from the commission before they are allowed to work.

There are also other wide-ranging limitations on access to information imposed by the Act. Furthermore, foreign press representation in Zimbabwe has been almost eliminated and the largest independent daily newspaper closed due to the application of the provisions of the Act.

It is also an offence to publish “*false*” information prejudicial to the state and this covers a wide range of activity. Other provisions deal with false information adversely affecting the economic interests of Zimbabwe or which undermines public confidence in a law enforcement agency, the prison services or the defence forces of the country.

“*Undesirable publications*” falling under various broad headings can also be banned while the minister of justice or judges may rule that certain information cannot be published. Official secrets legislation imposes heavy penalties on civil servants providing unauthorised information thus preventing whistle-blowing. Unauthorised information about the administration of prisons is banned and there is a law of criminal defamation.

The media should bear in mind that attempts to challenge the repressive media legislation in Zimbabwe in the courts can be hazardous as media owners and journalists have discovered.

In the year 2000, the Zimbabwean government openly declared that it had embarked on a judicial reform process which was aimed at ensuring that judges in office were persons whose ideologies converged with those of the ruling regime. Long serving judges of the Supreme Court were forcibly removed from office, among them Chief Justice Anthony R Gubbay and other judges who have ruled against the government in court actions.

They were replaced with persons who were viewed as sympathetic to the Zimbabwe regime. Since then there has been a serious erosion of the rule of law and Zimbabwe has seen a patently partial application of justice in the courts. When faced with human rights questions, the courts, loaded with judges sympathetic to the establishment, have chosen to abdicate their responsibility to uphold constitutional protections. Instead, they have subordinated the role of the court to the legislative power of the executive. As a result, in most freedom of expression cases that have come before the courts in recent years, the Supreme Court of Zimbabwe has upheld repressive government measures.

In this regard, the recent finding of the Supreme Court in the case of the Association of Independent Journalists of Zimbabwe and others against the Minister of Information and Publicity Jonathan Moyo is pertinent. The finding was that though the constitution of Zimbabwe protects freedom of expression it does not protect the “means” of exercising this right. This is highly significant as it seriously reduces constitutional protection of freedom of expression<sup>1</sup>.

These developments call into question the legal principles that are, or will be, applied to challenges of the law on the ground of their constitutionality. For example, a challenge by the *Daily News* in Harare of the constitutionality of the Access to Information and Protection of Privacy Act in 2003 received such judicially questionable treatment that the South African Bar Council protested. In April, 2004, barristers and advocates of the International Bar Association meeting in Cape Town were told of the “complete collapse” of the rule of law in Zimbabwe. This situation suggests that journalists may find little protection from the courts should they be charged with contravening laws relating to the media.

It should also be noted that many of the judgments referred to in this chapter on Zimbabwe were made before these changes in the Zimbabwe Bench occurred.

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<sup>1</sup>*Association of Independent Journalists and Ors v the Minister of State for Information and Publicity in the President's Office and Ors* SC 136/02 at p 7-8, 2

## Protection of Media Freedom under the Constitution

The Constitution of Zimbabwe does not have an explicit guarantee of media freedom. The freedom is implicitly guaranteed under section 20, the general freedom of expression clause. The relevant parts of this section provide:

*(1) Except with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence.*

The guarantee of freedom of expression and media freedom is subject to a series of limitations specified in subsection 2 of section 21. It reads:

*(2) Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) to the extent that the law in question makes provision –*

*(a) in the interests of defence, public safety, public order, the economic interest of the state, public morality or public health;*

*(b) for the purpose of –*

*(i) protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings;*

*(ii) preventing the disclosure of information received in confidence;*

*(iii) maintaining the authority and independence of the courts or tribunals or Parliament;*

*(iv) regulating the technical administration, technical operation or general efficiency of telephony, telegraphy, posts, wireless broadcasting or television or creating or regulating any monopoly in these fields;*

*(v) in the case of correspondence, preventing the unlawful dispatch therewith of other matter;*

*(c) that imposes restrictions on public officers;*

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

The derogation clause is modelled on the international law three-part test, and the Zimbabwean Supreme Court has sought guidance and has drawn inspiration from international law in the interpretation of the clause.

For a restriction on freedom of expression to be valid, the derogation clause requires that it must first, be done under the authority of any law; second, be for the protection of the interests specified in subsection 2; and third, it must be reasonably justifiable in a democratic society.

The Supreme Court has held that to satisfy the first requirement, the law restricting the freedom must be adequately accessible and formulated with sufficient precision to enable a person to regulate his/her conduct<sup>2</sup>. The court has also had occasion to make pronouncements on the third requirement. In *Re Munhumeso & other*<sup>3</sup>, the court opined that in the determination of whether a restriction is justifiable in a democratic society, derogations from rights and freedoms must be given a strict and narrow construction. In addition, a restriction must not be arbitrary and excessive.

The court has established some guidelines for the assessment of the third requirement, which are:

- (i) the legislative objective which the limitation had been designed to promote must be sufficiently important to warrant overriding a fundamental right;
- (ii) the measures designed to meet the legislative objective must be rationally connected to it and not arbitrary or based on irrational considerations; and
- (iii) the means used to impair the right must be no more than is necessary to accomplish the objective<sup>4</sup>.

The Supreme Court has reiterated that restrictions on freedom of expression and media freedom must be strict and narrow because not only the rights of those who might wish to communicate and impart ideas and information would be in jeopardy, but also the rights of those who might wish to receive such information and ideas<sup>5</sup>.

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<sup>2</sup>*Chavunduka & another v Minister of Home Affairs* 2000 4 SA 1 (ZS).

<sup>3</sup>1995 1 SA 551 at 559 (ZS).

<sup>4</sup>*Chavunduka & another v Minister of Home Affairs* (supra) at 15 - 16.

<sup>5</sup>*Ibid.* at 12.

While the first and third requirements of the derogation clause in the Zimbabwean Constitution compare favourably with international law, the second requirement has raised concerns. The limitations on freedom of expression permitted under the constitution are very widely drawn and broader than those permitted under international law instruments.

## Status of International human Rights Instruments

Zimbabwe adopts a dualist approach with regard to the status of international law treaties in its domestic law. International treaties are only directly enforceable in the domestic law when specifically incorporated by an Act of the legislature. Zimbabwe has ratified both the ICCPR and ACHPR but has not incorporated them into domestic law.

Therefore, technically, both these treaties are not directly enforceable in Zimbabwe. However, courts of law have slowly drifted away from a strict dualist approach in the way they treat international law in domestic law. It has been observed that in interpreting the various human rights norms in the Bill of Rights, Zimbabwean courts have actively referred to and relied upon similar provisions in international human rights instruments<sup>6</sup>.

The courts have drawn inspiration from instruments such as the UDHR, ICCPR, ECHR and ACHPR and have even invoked and relied actively on these instruments to invalidate practices that adversely affect the domestic enforcement of human rights.

For example, in the cases on the protection of freedom of expression cited above, the Supreme Court relied extensively on the jurisprudence of the ECHR. Thus, in common with most states in the region, while unincorporated international law treaties have no direct application in domestic law, they do, however, play an important role in the interpretation of fundamental rights entrenched in the Zimbabwean Bill of Rights.

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<sup>6</sup>Tshosa, O B National Law and International Human Rights Law: Cases of Botswana, Namibia and Zimbabwe (Ashgate Publishing Limited, 2001) p. 254

## Laws That Unduly Restrict Media Freedom

### 1.1 Access to Information and Protection of Privacy Act [Chapter 10:27] (as amended by Act No. 5 of 2003)

*The Access to Information and Protection of Privacy Act (AIPPA) was promulgated in 2002. The objects of the Act are, among others, to provide members of the public with a right of access to records and information held by public bodies and to regulate the mass media.*

The Act contains several provisions that are inimical to the enjoyment of media freedom. While section 5 of the Act grants a right of access to information to media companies registered in Zimbabwe, the right is subject to exemptions spelt out in sections 14 to 25.

*The permissible grounds for withholding information include the protection of cabinet documents; advice relating to government policy; national security; economic interests of the state; inter-governmental relations or negotiations; research information; and privacy.*

The problem with the exemptions is that they are broadly cast and vague and therefore impede the ability of the media to gather information from the state. The Act does not embrace the concept of mandatory disclosure of information falling within the specified categories where the disclosure would be in the public interest. This impacts negatively on the media's ability to perform its watchdog role over the manner in which the state is administered. For example, it would appear that the media would not be able to disclose any irregularities in the purchase of military equipment on the ground that the disclosure may prejudice the defence and national security of Zimbabwe.

*Section 66 requires all media services to register with the Media and Information Commission (MIC) before they can operate in Zimbabwe.*

The MIC may not refuse to register a mass media service unless the applicant has failed to comply with the provisions of the Act or has provided misleading or false information or where the applicant seeks to be registered in the name of an existing service. A reading of the latter provision conveys the view that the MIC has no discretion to refuse registration of a mass media service where there is compliance with the Act. However, the refusal to register the *Daily News*

suggest otherwise. It would appear that the MIC might simply refuse to register anyone they do not like even if there is compliance with the requirements of the Act as was demonstrated in the *Daily News* case<sup>7</sup>.

What has emerged so far is that media services critical of the government may find it difficult to get registration. The situation is compounded by the MIC's lack of independence from the government.

*In terms of section 40, the minister of information appoints members of the MIC after consultation with the president and in accordance with any directions that the president may give.*

The improper application of these provisions constitutes an unjustifiable prior restraint on media freedom.

*Further to the registration of media services, section 79 provides that all journalists must be accredited by the MIC before they can practice their trade in Zimbabwe.*

Accreditation is incompatible with media freedom, as the Inter-American Court of Human Rights has ruled, because it denies a person access to the full use of the news media as a means of expressing him/herself or imparting information<sup>8</sup>. In April 2004, an application by the Independent Journalists' Association of Zimbabwe challenging the provisions requiring registration of media services and accreditation of journalists was pending before the Supreme Court.

*Further provisions that have the potential of eroding media freedom are sections 86 to 89, which deal with the correction of untruthful information published in the media and the right of reply.*

*These sections provide that if information is published that is not true; the media is obliged to correct the information and allow the prejudiced person a right of reply. In the case of a correction, the Act requires that it must be published in the same manner as the refuted report and in the next issue after the date of receipt of the demand for a correction. While in the case of a reply, it must be given the same prominence as the offending information and must be published in the earliest possible issue of the publication.*

<sup>7</sup>*Associated Newspapers of Zimbabwe (Pvt) Ltd v Minister of State for Information and Publicity in the President's Office & others* (2SC, SC 20/03, 11th September 2003) and subsequent litigation.

<sup>8</sup>Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Advisory Opinion OC-5/85 of 13th November 1985, Series A No. 5, 7 HRLJ 74 (1986).

The objection raised with regard to these provisions is that they may unduly constrain the editorial freedom of the media.

## 1.2 Public Order and Security Act No. 1 of 2002

*This Act came into effect in January 2002 and its main object is to make provision for the maintenance of public order and security in Zimbabwe.*

The Act repealed the notorious Law and Order (Maintenance) Act [Chapter 11:07] of the Ian Smith regime but lawyers question whether it is less offensive than its predecessor.

*Section 15 of the Act prohibits the publication or communication of false statements prejudicial to the state. In terms of the provision, it is an offence for a person, whether inside or outside Zimbabwe to publish or communicate a statement that is wholly or materially false with the intention or realising that there is a risk or possibility of:*

- i) inciting or promoting public disorder or public violence or endangering public safety;*
- ii) adversely affecting the defence or economic interests of Zimbabwe;*
- iii) undermining public confidence in a law enforcement agency, the prison services or defence forces of the country; or*
- iv) interferes with, disrupts or interrupts any essential service.*

The main objection to criminalising the publication of false news is that the notion of falsity is unclear and subjective. It has mainly been used by public officials around the world to suppress expressions that are critical of them or their governments. False news provisions therefore constitute an unnecessary inhibition on the ability of the media to report on matters of public interest. In the case of *Chavunduka & another v Minister of Home Affairs*<sup>9</sup>, the Zimbabwean Supreme Court held that the constitutional guarantee of freedom of expression extends to statements, opinions and beliefs regarded by the majority as being wrong or false. The constitutionality of section 15 is thus in doubt.

<sup>9</sup>2000 4 SA 1 (ZS).

*Another provision that poses a serious threat to media freedom is section 16. The provision prohibits the publication of statements undermining the authority of the president or that are abusive, indecent or false about or concerning the president.*

The words abusive, indecent and false are notoriously vague and subjective, and these can easily be used to prohibit legitimate criticism of the president.

## 1.3 Broadcasting Services Act, 2001

The Broadcasting Act of 1973 created a state monopoly in the provision of broadcasting services. In September 2000, the Supreme Court declared the provision that created a state monopoly in broadcasting inconsistent with the Constitutional guarantee of freedom of expression<sup>10</sup>.

*This decision prompted the government to promulgate the Broadcasting Services Act, 2001, a law intended to liberalise the broadcasting industry. The aim of this statute is to regulate the broadcasting industry by establishing a sector-specific regulator for the industry.*

Some provisions of the Act are inconsistent with the guarantee and enjoyment of media freedom.

*Under section 4, the minister of information appoints members of the regulatory authority, the Broadcasting Authority of Zimbabwe, after consultation with the president. In terms of section 6, the authority does not have power to license broadcasting service providers, it only makes recommendations to the minister who is not bound to follow the authority's recommendations.*

These provisions compromise the ability of the authority to act independently from the government. The process of appointing members of the authority is not transparent and democratic and hence does not protect the authority from political manipulation. The granting of the power to issue licences to the minister is questionable for it can be easily abused by ensuring that licences are only granted to those who sympathise with the government and are approved of by it.

<sup>10</sup>*Capital Radio (Pvt) Ltd v Minister of Information* 2000 (2) ZLR 243 (S).

The regulatory authority is empowered under the Act to develop codes of conduct to govern the broadcasting industry.

*However, the minister of information has powers under section 25 to direct the authority to determine programming standards if he/she believes that an existing code of conduct is inadequate because it does not provide adequate community safeguards. The minister may also direct the authority to vary or revoke any standard in relation to any matter.*

This provision allows for censorship of the broadcast media by the minister, which seriously undermines the authority's power to effectively regulate the industry.

#### **1.4 Censorship and Control of Entertainments Act [Chapter 10:04]**

*The purpose of this Act is to regulate the content of material intended for distribution to the public. It is an offence under section 11 to publish any undesirable publication. The term undesirable is defined as any matter that is indecent or obscene or is offensive or harmful to public morals or any obscene medical, surgical or physiological details the disclosure of which is likely to be offensive or harmful to public morals.*

The question of public morals is controversial and surrounded by ambiguity. Restrictions based on the protection of public morals are thus criticised on the basis that they do not provide for certainty as required by the Constitution and international law.

#### **1.5 Official Secrets Act [Chapter 11:09]**

*The main provision repugnant to media freedom in this Act is section 4. This section is modelled on the now repealed section 2 of the United Kingdom Official Secrets Act of 1911. The thrust of the provision is to criminalise the unauthorised disclosure by a state employee or government contractor of any information that he/she has learned in the course of employment or while carrying out a contract.*

This is catch-all provision that punishes the disclosure of information even though the disclosure does not harm the public interest. The Act has an inhibiting effect on media freedom in that public servants are reluctant to provide the media with official information in the absence of express authorisation for fear of falling foul of this section.

While there are no reported convictions, media practitioners have from time to time been threatened with prosecution under the Act, although the charges have later not been pursued<sup>11</sup>.

The chilling effect that the Act has on media freedom has not been alleviated by the promulgation of the Access to Information and Protection of Privacy Act, 2000. Under section 92, only heads of public bodies acting in terms of the Act, are exempted from the application of the Official Secrets Act.

#### **1.6 Prisons Act [Chapter 7:11]**

*In terms of section 83 of this Act, it is an offence to publish a letter written in prison and smuggled out of the prison without the letter going through the authorised procedures laid down for clearance of mail from prison. Further, under regulation 188 of the Prison (General) Regulations SI 1/1996, it is an offence for a prison officer or a person authorised to visit a prison to divulge, without the authority of the director of the prison any information concerning the administration of prisons and the conditions and treatment and affairs of prisoners.*

The restrictions imposed by these provisions are overbroad and constitute an unnecessary fetter on the right of the media to disseminate information in the public interest.

#### **1.7 Courts and Adjudicating Authorities (Publicity Restrictions) Act [Chapter 7:04]**

*Courts of law and the minister of justice are empowered under this Act to order that for the protection of privacy of persons involved in court proceedings, certain information must not be published. The Act may be invoked in cases where a witness may be subject to reprisals if his/her identity is publicly revealed.*

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<sup>11</sup>Media Law and Practice in Southern Africa: Zimbabwe, No 6 (Article 19, FXI & MISA, 1997) p.9

While the rationale behind the Act is legitimate, concerns have been raised that there are no clear set guidelines when the restrictions must be imposed thereby rendering the Act susceptible to abuse.

### **1.8 Children's Protection and Adoption Act [Chapter 5:06]**

*Section 5 (6) of the Act prohibits the media from attending proceedings of juvenile courts.*

While it is a legitimate concern to protect child offenders, what is questionable is whether it is proper to completely exclude the media from observing the proceedings or whether there should be restrictions on what the media can publish such as the identity of the offenders.

### **1.9 Privileges, Immunities and Powers of Parliament Act [Chapter 2:08]**

*Section 22 of this Act creates the offence of contempt of Parliament. Members of the media will be in contempt of Parliament if they:*

- a) Wilfully fail or refuse to obey an order of Parliament;*
- b) Refuse to be examined or to answer any lawful and relevant question put by Parliament or a committee of Parliament;*
- c) Publish the proceedings of a committee of Parliament or evidence given before such a committee before the proceedings of the committee have been reported to Parliament;*
- d) Wilfully publish a false or perverted report of any debate or proceedings of Parliament or wilfully misrepresent any speech made by a member;*
- e) Publish a defamatory statement reflecting on the proceedings or character of Parliament or committee of Parliament; and*
- f) Publish a defamatory statement concerning a member in respect of his conduct in Parliament.*

The definition of contempt of parliament is very wide and significantly inhibits the ability of the media to report critically on the proceedings. It may also undermine journalistic privilege. For example, if there has been an information leak from a parliamentary committee to the media, parliament can order the

journalist who wrote the story to reveal his/her source. The provision was used in 1992 against the editor of the *Financial Gazette*, Trevor Ncube, in an attempt to compel him to reveal the source of a story alleging corruption by senior government officials. The story quoted an unnamed member of a Parliamentary select committee as its source<sup>12</sup>.

### **1.10 Common Law of Criminal Defamation**

*Zimbabwean law provides for the common law offence of criminal defamation. The offence consists of the unlawful and intentional publication of matter that tends to injure another person's reputation. The defamation must be serious to constitute an offence. The degree of seriousness is determined with reference to the extravagance of the allegation, the extent of the publication and whether the words are likely to detrimentally affect the interests of both the state and the community<sup>13</sup>.*

The main criticism of this offence is that it is ill defined and, because of its ambiguity, it discourages the media from criticising government ministers and policies, or the expression of political dissent. It is also argued that the civil law provides adequate redress in cases of defamation.

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<sup>12</sup>Ibid. p. 20.

<sup>13</sup>S v Modus Publications (Pvt) Ltd & another 1996 (2) ZLR 553 (S).

## Universal Declaration of Human Rights

**Article 19:** *“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”.*

## Declaration of Windhoek

*“Consistent with Article 19 of the Universal Declaration of Human Rights, the establishment, maintenance and fostering of an independent, pluralistic and free press is essential to the development and maintenance of democracy in a nation and for economic development.*

*“By an independent press, we mean a press independent from governmental, political or economic control or from control of materials and infrastructure essential for the production and dissemination of newspapers, magazines and periodicals”.*

## International Covenant on Civil and Political Rights

*“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”.*

## African Charter on Human and Peoples’ Rights

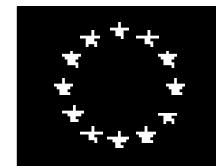
*“Every individual shall have the right to express and disseminate his opinions within the law”.*

## American Convention on Human Rights (ACHR)

*“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”.*

## European Convention on Human Rights (ECHR)

*“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”.*



**MISA**