

# Freezing the press: Freedom of expression and statutory limitations in Botswana

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## Summary

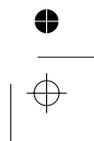
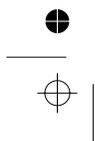
*Freedom of expression is guaranteed under section 12(1) of the Botswana Constitution. Limitations of this 'right' have to comply with the requirements in section 12(2), which allows for the limitation of freedom of expression under Botswana law. This article analyses a number of statutory provisions (the National Security Act, the Corruption and Economic Crime Act and Penal Code) and a government directive (to cease advertising in particular newspapers) that limit this right. The author investigates whether these limitations are in conformity with the Constitution. He concludes that there has been a significant erosion of freedom of expression, and laments the absence of judicial pronouncements on this issue.*

## 1 Introduction

The adoption of the Universal Declaration of Human Rights (Universal Declaration) by the United Nations General Assembly in 1948 ushered in an international consciousness for the recognition and respect for human rights. Subsequent thereto, a number of treaties and other instruments, such as the International Covenant on Civil and Political

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Rights (ICCPR) incorporated its provisions, in some cases wholesale. One common feature of almost all human rights treaties or instruments is the inclusion of the freedom of, or the right to expression.

The significance of this is that freedom of expression is regarded internationally as a human right that must prevail in any system that claims to uphold democratic values. It is an indispensable tool, and indeed one of the cornerstones of a democratic society. This freedom can meaningfully be enjoyed if there is in existence an accessible forum for the free exchange of ideas and information. This role is to a large extent played by the press, whether print or electronic, which does so by promoting debate on public issues, providing information to the public, thereby enabling the general populace to make informed decisions, and generally to influence political choices.<sup>1</sup> While the role of the media is acknowledged, it must be mentioned that the free flow of information and free speech generally, are not absolute. They are hedged in by limitations and restrictions that are usually brought to bear in the context of constitutional provisions and legislative enactments. A discussion on the limitations and restrictions on freedom of expression follow later on in this article.

The purpose of this contribution is to survey the law relating to freedom of expression in Botswana, the limitations that restrain the exercise of this freedom and determine whether some limitations set by parliament have constitutional validity. In Botswana, freedom of expression, its constitutional guarantees and statutory limitations have been a subject of debate in various fora.<sup>2</sup> In all these fora, the question that has invariably been asked is whether there is press freedom and freedom of expression in Botswana. I argue in this paper that although the Constitution of Botswana provides for freedom of expression, the enjoyment of that freedom is limited by laws that parliament has made and continues to make, and by regulations that the executive has made and continues to make. These laws, regulations and procedures have largely diluted the extent to which the freedom may be exercised. Although the judiciary has shown an inclination towards upholding the constitutional provisions, the incidence of litigation involving freedom of expression has been minimal.

<sup>1</sup> ST Sechele 'The role of the press in independent Botswana' in WA Edge & MH Lekorwe (eds) *Botswana: Politics and society* (1998) 415–416: He refers to a newspaper coverage that forced government to revise the lending policies of a national Bank after it exposed the indebtedness of the country's top politicians.

<sup>2</sup> See B Otlhogile 'The constitutional rights of the mass media in Botswana: An academic's view' in M Leepile (ed) *Botswana's media and democracy: Selected papers from the seminar on the media in a democracy* (1994); T Balule 'The media vis-à-vis the Constitution: Freedom of expression and the press in Botswana' paper presented at MISA Seminar in Gaborone, Botswana, 1996; K Dingake 'The media and the law in Botswana' paper presented at MISA Seminar in Gaborone, Botswana, 1996.

## 2 The constitutional framework of Botswana

Any discussion on freedom of expression in Botswana must necessarily start with the Constitution. At independence, Britain bequeathed to the newly born state of Botswana, as she did with the other former British colonies, a Westminster model of government.<sup>3</sup> These constitutions included provisions on the protection of the fundamental rights and freedom of the individual, in consonance with the Universal Declaration. The various colonies went beyond the Universal Declaration in that they made provision for the legal enforcement of those fundamental rights and freedoms.<sup>4</sup> These constitutions thus have binding legal force and have been made the supreme law of the land. The Botswana Constitution, unlike many written constitutions, has no provision making it the supreme law of the land.<sup>5</sup> Academic opinion leans in favour of the view that a written constitution must necessarily be supreme to other bodies established within the framework of such constitutions.<sup>6</sup> This view has received judicial support in the Court of Appeal of Botswana, which has declared that the Constitution is supreme, and that parliament may not enact laws that contravene or derogate from the provisions of the Constitution, unless such derogation is expressly sanctioned by the Constitution itself.<sup>7</sup>

The Constitution of Botswana protects fundamental rights and freedoms of the individual, providing as follows in section 12(1):

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 same Constitution, however, places certain limitations on the exercise of the freedom of expression. In line with the limitations placed on the freedom by the Constitution, parliament has enacted laws which 'tend' to whittle down the content and exercise of freedom of expression.<sup>8</sup> Such limitations, which will be considered more fully below,

<sup>3</sup> It has been argued in some quarters that this is only partly correct. See B Otlhogile in Edge & Lekorwe (eds) (n 1 above) 153–4, who argues that the Botswana Constitution only embraces some features of the Westminster model. For example, Britain does not have a written constitution whereas most of her former colonies do.

<sup>4</sup> See eg sec 18(1) of the Constitution of Botswana.

<sup>5</sup> See eg art 2 of the South African Constitution Act 108 of 1996 and art 1(6) of the Constitution of Namibia.

<sup>6</sup> BO Nwabueze *Constitutionalism in the emergent states* (1973).

<sup>7</sup> *Dow v Attorney-General* [1992] LRC (Const) 623.

<sup>8</sup> Eg Penal Code Cap 08:01, sec 59, National Security Act 23:01, secs 3–5, Corruption and Economic Crime Act 1994, sec 44, among others.

are usually couched in vague, elastic and absolute terms, thus creating room for abuse. The question that has occupied the minds of media personalities, journalists and lawyers is whether these statutory provisions conform to the limitations set out under the Constitution. I argue that the limitations, to the extent that they do not set out in clear terms what conduct is being proscribed, do not conform to the constitutional test of 'being reasonably justifiable in a democratic society'. Any limitation that parliament places on freedom of expression must necessarily find justification in the Constitution, otherwise it is of no force and effect. Before embarking on a discussion on the various limitations, it is necessary to outline the content of the freedom upon which the limitations are placed.

### 3 Content of 'freedom of expression'

Any meaningful conclusion as to the existence of freedom of expression can only be reached after a determination of the content and substance of limiting provisions, constitutional or statutory, that impact on the freedom. To this end, an analysis of section 12 is in order.

It has already been pointed out above that chapter II (under which section 12 falls) protects fundamental rights and freedoms of the individual. While some concerns over chapter II are expressed as rights, such as the right to life and personal liberty, section 12 provides for 'freedom of expression'. This distinction in terminology (apparently deliberate) would appear to have been intended to convey a difference in scope and consequence. Freedom is defined as 'the power of acting, in the character of a moral personality, according to the dictates of the will, without other check, hindrance or prohibition than such as may be imposed by just and necessary laws and the duties of social life'.<sup>9</sup> It is also described essentially as a liberty. It is therefore liberty regulated by law, immunity from restraints, but not the absence of reasonable rules.<sup>10</sup>

The substantive content of a 'right', on the other hand, is one that has attracted a lot of academic debate for a long time.<sup>11</sup> A discussion on the different theories and approaches is something beyond the scope of this paper, but for our purposes here we will prefer the definition of a right in the Hohfeldian sense of a 'claim right'. Hohfeld took the view that the concept of a right is a generic one having a wide variety of meanings.<sup>12</sup> It

<sup>9</sup> *Black's law dictionary* (1990) 664.

<sup>10</sup> See IJ Wani 'An evaluation of the Convention on the Law of the Sea from the perspective of the landlocked states' (1982) 22 *Virginia Journal of International Law* 627 641.

<sup>11</sup> See the different theories alluded to in Lord Lloyd & MDA Freeman *Lloyd's introduction to jurisprudence* (1985) 432.

<sup>12</sup> WW Cook (ed) *Fundamental legal conceptions as applied in judicial reasoning and other legal essays* (1923) ch 1.

depicts a number of different ideas which in everyday, including legal, discourse, are easily confused. According to him, the existence of a right in favour of one person implies a corresponding duty on the part of another person.<sup>13</sup> It exists when in consequence of given facts the law declares that one person is entitled to enforce a claim against another person or to resist enforcement of a claim urged by another.

Hohfeld's analysis has, however, not gone unchallenged,<sup>14</sup> and it is not necessary here to go into a detailed discussion on the counter-analysis mounted against Hohfeld. What seems to be paramount in the distinction between freedom and right is the notion of enforcement. The existence of a right is normally accompanied by some mechanism of enforcement. For example, in terms of section 8 of the Constitution of Botswana, a person is protected from deprivation of property unless certain conditions are satisfied; for example where compulsory acquisition is necessary in the public interest and upon payment of adequate compensation.<sup>15</sup>

Freedom, on the other hand, does not impose any positive duties on the part of another person. At best it only implies negative responsibilities; those against unreasonable or unjustifiable interference. The High Court of Botswana has held, in *Media Publishing (Pty) Ltd v Attorney-General of Botswana and Another*,<sup>16</sup> impliedly following the Canadian Supreme Court in *Graham Haig and Others v Chief Electoral Officer and Others*<sup>17</sup> (but distinguishing the case on the facts), that where freedom of expression is couched in the negative (as is the case in Botswana), there is no legal obligation upon the state to take a positive step in order to enable an individual or group of individuals to enjoy that freedom. Consequently, where the government had taken a positive step of discontinuing advertising in the Guardian Group of Newspapers with the sole intention of showing its disapproval of the group's line of reportage (a punitive measure), it was held to be an infringement of the Newspaper Group's freedom of expression.

<sup>13</sup> As above. This accords with the definition in G Wille *Principles of South African law* (1977) 44: 'An interest conferred by, and protected by, the law entitling one person to claim that another person or persons either give him something, or do an act for him, or refrain from doing an act'.

<sup>14</sup> See eg A Halpin 'Hohfeld's conceptions: From eight to two' (1985) 44 *Cambridge Law Journal* 435.

<sup>15</sup> The Acquisition of Property Act was enacted essentially as a vehicle for the enforcement of the constitutional guarantees of rights to property. Under the Act, a person whose property has been compulsorily acquired is entitled to challenge the legality of acquisition as well as the amount of compensation. See secs 9 & 10: see also *Attorney-General v Western Trust (Pty) Ltd*, High Court Botswana, Civil Cause No 37/1981 (unreported) and more recently *President of the Republic of Botswana and Others v Pieter Bruwer and Another* 1998 BLR 86.

<sup>16</sup> Misc No 229/2001 (unreported) 19, *per* Lesetedi J.

<sup>17</sup> 1993 (2) SCR 995.

The view has been expressed that the content of freedom of expression will vary according to the form in which it is incorporated in different constitutions. However, it is said that at the very minimum it entails three positions. Firstly, it may mean simply the right to express opinions without censorship, whether by prior authorisation or subsequent prosecution. Secondly, it may mean the right to receive and impart information. Thirdly, it may mean a guaranteed access to forms of publication and broadcasting.<sup>18</sup> These concerns are clearly covered by section 12(1) of the Botswana Constitution. The position is that the person against whom duties would have existed in the case of freedom of expression, the state authority, is constitutionally entitled to impose such limitations as are reasonably justifiable in a democratic society and may pass laws the effect of which is to curtail this freedom as long as certain conditions are satisfied.<sup>19</sup>

In other systems, freedom of the press and speech is expressed in terms suggesting it is a right.<sup>20</sup> The First Amendment to the Constitution of the United States of America, for example, provides that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press . . .' There is immunity from state interference, and a disability on congress to curtail freedom of speech and of the press.<sup>21</sup> It is not expressed as entailing a positive obligation on the state. What is interesting about the position in the United States is that even in the absence of express limitations to the right, Congress may nevertheless make, and some states have made, laws restricting freedom of speech in the protection of public order, decency and other peoples' rights<sup>22</sup> and the judiciary has upheld the limitations.<sup>23</sup>

What seems to emerge is that even if the freedom of expression were expressed as a right under the Constitution, parliament could still properly make law restricting the exercise thereof as long as it is done to protect one or other of the heads of public interest, for example national security, the rights of others, public order, etc. Indeed, under the Constitution of Botswana, such derogations are permitted under the same provisions that provide for the protection of fundamental rights. The Court of Appeal of Botswana in *Attorney General v Unity Dow* has held that section 3 of the Constitution, which entitles (together with

<sup>18</sup> A Boyle 'Freedom of expression as public interest' (1982) *Public Law* 574 577–579.

<sup>19</sup> See sec 2(2) Botswana Constitution.

<sup>20</sup> See art 5 of the German Basic Law (*Information Freiheit*) and art 10 of the European Convention on Human Rights and Fundamental Freedoms.

<sup>21</sup> See EM Barendt *Freedom of speech* (1987) 80.

<sup>22</sup> G Robertson & A Nicol *Media law* (1992) 3; see also C Gearty 'Citizenship and freedom of expression' in R Blackburn (ed) *Rights of citizenship* (1993) 275–6.

<sup>23</sup> *Debs v United States* 249 US 211 (1919); see more recently *Rust v Sullivan* 114 L ED 2d 233 (1991).

section 12) a person to freedom of expression, is a substantive provision creating substantive rights. Freedom of expression has still not secured parliamentary blessing in the form of an enabling Act. Instead, parliament continues to enact a plethora of laws having a stifling effect on the freedom.<sup>24</sup> Since these limitations are, in the words of one scholar,<sup>25</sup> inevitable, perhaps the inquiry should not be whether there should be limitations at all, but whether the limitations are reasonably justifiable in a democratic society. In Botswana this is an essential condition for the validity of any statutory limitation passed in terms of the permissible derogations, as will be shown below.

#### 4 Statutory limitations and derogations

The freedom to express oneself is not absolute. All the major legal systems of the world recognise the importance of other public values like the reputation of other people, public order, national security and the suppression of disorder. These systems have devised mechanisms, usually in terms of existing legal orders, to protect these values. The justification for these limitations is perhaps, at least in principle, obvious. The exercise by individuals of rights should not harm others. The law sanctions restrictions to freedom of expression and speech and the position is best explained by some famous media law commentators who observe that '[t]he expression of facts and ideas and opinions never can be absolutely free. Words can do damage, even if they are true — by betraying a military position or by prejudicing a trial, or by inciting racial hatred'<sup>26</sup> and that 'free speech is what is left of speech after the law has had its say'.<sup>27</sup>

These views have been cemented by a judicial pronouncement in the United Kingdom where the Judicial Committee of the Privy Council said that '[f]ree speech does not mean free speech: It means speech hedged in by all the laws against defamation, blasphemy, sedition and so forth. It means freedom governed by law'.<sup>28</sup> The preponderance of the various limitations to freedom of expression fortify the view held by many that under the law, the position of the media is not different from that of an ordinary individual.<sup>29</sup> The legal restraints attached to citizen rights of

<sup>24</sup> Eg Penal Code Cap 08:01 sec 59, National Act Cap 23:01 secs 3–5, Corruption and Economical Crime Act 1994 sec 44 Cinematographic Act Cap 60:02 sec 12(1), Botswana Housing Corporation (Amendment) Act No 5 of 1994, among others.

<sup>25</sup> C Gearty 'Citizenship and freedom of expression' in R Blackburn R (ed) *Rights of citizenship* (1993) 275.

<sup>26</sup> Robertson & Nicol (n 22 above) 2–3.

<sup>27</sup> As above.

<sup>28</sup> *James v Commonwealth of Australia* [1936] AC 578 627.

<sup>29</sup> T Gibbons *Regulating the media* (1991) 18.

free speech apply with equal force to the media in spite of the latter's role in disseminating information, scrutinising official behaviour and providing a forum for debate on important issues of national concern.

The European Convention on Human Rights<sup>30</sup> and even the Universal Declaration provides for such limitations for the purpose of securing due recognition and 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.<sup>31</sup>

Section 12(2) of the Constitution of Botswana provides as follows:

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 interest 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 interest 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.

Though the limitations under the various regimes are not identical, they cover essentially the same concerns. It is not enough for the legislature to pass the law that curtails freedom of expression in the interest of national security, public order and so forth: It must be 'reasonably justifiable in a democratic society'. This is a condition for the limitations that parliament may set. A proper determination of the reasonableness or otherwise of the limitations can only be done in regard to the particular circumstances and peculiar surroundings of each case. Where constitutional and legislative provisions do not carry with them particular definitions, it is only natural to derive guidance from the courts, and in most cases to regard the pronouncement of the courts as authoritative in terms of interpreting and defining particular concepts. It is also usual practice for the courts in one jurisdiction to derive guidance from pronouncements of courts elsewhere especially where the latter were concerned with similar provisions.

Accordingly, resort may be had to European human rights jurisprudence. This is one system that can be described as 'mature' both

<sup>30</sup> Art 10(2).

<sup>31</sup> Art 29(2).

in respect of organisation and the importance attached to the existence of the court by the member states. It must, however, be pointed out that the European Convention employs language different from that used in section 12. While section 12 provides that the limitations must be 'reasonably justifiable', under the European Convention such limitations must be 'necessary' in a democratic society. In European human rights jurisprudence, 'necessary, implies a pressing social need.<sup>32</sup> In the well-known *Spycatcher* case, the European Court said the following:<sup>33</sup>

The adjective 'necessary' . . . implies the existence of a 'pressing social need'. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision, embracing both the law and the decisions applying it, even those given by independent courts. The court is therefore empowered to give the final ruling on whether a 'restriction' is reconcilable with freedom of expression as protected by Article 10 . . . What the court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued', and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'.

Such limitations must, however, be proportional to the aim (which must be legitimate) pursued, and the reasons in favour of the limitations must be relevant and sufficient. It is submitted that 'necessary' implies a higher degree of justification (than 'reasonably justifiable') and necessarily involves giving a central place to proportionality of the means of achieving a pressing and legitimate public purpose.<sup>34</sup> There must be a compelling need for the restrictive measures, the absence of which will threaten the peace, order and stability of the nation.

The phrase 'reasonably justifiable' has not been judicially defined in Botswana. A parallel may be drawn from the Canadian experience. In Canada, the limitations must be 'demonstrably justified' in a free and democratic society.<sup>35</sup> This expression received judicial scrutiny in *R v Oakes*,<sup>36</sup> where it was held that two criteria must be met if the limit is to be found reasonable: Firstly, the objective which the legislation is designed to achieve must relate to concerns which are pressing and substantial. Secondly, the means chosen must be proportional to the objective sought to be achieved. The broad guidelines in *R v Oakes* are sufficiently clear and do not require any elaborate explanation. Difficulties may arise, however, in determining whether particular legislation and measures taken in terms of that legislation fall within the parameters of these guidelines.

<sup>32</sup> *Lingens v Austria* (1986) 8 EHRR 407.

<sup>33</sup> *The Sunday Times v United Kingdom (No 2)* (1992) 14 EHRR 229 para 50.

<sup>34</sup> *Coetzee v Government of the Republic of South Africa and Others* (1995) 4 LRC 220.

<sup>35</sup> Sec 1 of the Canadian Charter of Rights and Freedoms.

<sup>36</sup> [1986] 1 SCR 103.

It is submitted the criteria in *R v Oakes* should apply in the Botswana context as well. What the criteria demand is that since the various freedoms are guaranteed under the Constitution, interference with or denial of the freedoms in any situation should be justified by a need to advance a 'superior' or overriding public interest. 'Reasonably justifiable' therefore seems to require that the measures taken, viewed in light of all the circumstances, were such as to have been taken by any competent authority properly directing itself. The purpose to be achieved is one that produces maximum degree of order and tranquillity to society generally and minimising the risk of anarchy.<sup>37</sup> If this is accepted as the threshold, interference with the freedom is more likely to be adjudged lawful in an African sense than in the European sense.

In South Africa, the limitations must be 'reasonable and justifiable' in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including (a) the nature of the right, (b) the importance of the purpose of the limitation, (c) the nature and extent of the limitation, (d) the relation between the limitation and its purpose and (e) less restrictive means to achieve the purpose.<sup>38</sup> The factors to be taken into account in determining the reasonableness and justification of the limitations are laid down in part by the Constitution. It is clear that article 36 is inclusive rather than exhaustive. The terminology employed in the South African sense is much closer to that in the Botswana Constitution and it is submitted that the decisions in South African jurisprudence on article 36 would be very persuasive in Botswana.

Despite the distinction in terminology employed in the European Convention and the Botswana Constitution, the jurisprudence from both systems as well as other systems like the commonwealth have established common fundamental propositions in terms of interpreting the provisions on the protection of fundamental rights and freedoms and their limitations. Firstly, a constitution which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled, is to be given a generous and purposive construction.<sup>39</sup> The Botswana Court of Appeal explained this in the landmark case of *Unity Dow* in the following terms:<sup>40</sup>

Generous construction means in my own understanding that you must interpret the provisions of the Constitution in such a way as not to whittle

<sup>37</sup> This would seem to conform to utilitarian concepts: See Lloyd & Freeman (n 11 above) on utilitarianism generally.

<sup>38</sup> Art 36(1) Constitution of the Republic of South Africa Act 108 of 1996; see *Coetzee v Government of the Republic of South Africa and Others* (n 34 above).

<sup>39</sup> See *Ming Pao Newspapers Ltd v AG of Hong Kong (PC)* [1996] AC 907 917 per Lord Jancey. In Botswana, see *Attorney-General of Botswana v Moagi* 1981BLR 1, 32 per Kentridge JA; *Dow* case n 7 above 635 per Amissah JP.

<sup>40</sup> n 7 above 668 per Aguda JA.

down any of the rights and freedoms unless by very clear and unambiguous words such interpretation is compelling. The construction can only be purposive when it reflects the deeper inspiration and aspiration of the basic concepts which the Constitution must forever ensure, in our case the fundamental rights and freedoms entrenched in section 3.

Thus, in construing the provisions of the Constitution and the limitations set out thereunder, the construction to be preferred is one that advances the freedom rather than one which has a limiting effect. Secondly, any restriction on the guaranteed right of freedom of expression, which constitutes one of the essential foundations of a democratic society, must be narrowly interpreted.<sup>41</sup> This consideration should apply with equal force to other freedoms. In Botswana, this was held applicable to all fundamental rights and freedoms.<sup>42</sup> Thirdly, any restrictions on the guaranteed right of freedom of expression must be proportionate to the aims sought to be achieved thereby.<sup>43</sup> This defines the term 'necessary' as used in the European Convention.

In our case the construction to be attached to the phrase 'reasonably justifiable' as described above appears to import, as near as possible, the same requirements. The pronouncements in the Botswana Court of Appeal in the cases referred to herein are strong indicators that Botswana's human rights jurisprudence has fallen in step with international trends. What remains to be established is how these broad principles have been applied in the country. Emphasis here is on the freedom of expression. Despite the numerous legislative enactments in existence which impact on the freedom of expression, there is very little case law on the subject. The position is even worse on the subject of the freedom to print or publish written material, which is our crucial concern here. In order to determine whether any enactment conforms to the permissible derogations or limitations under the Constitution, it is usually easy to look at factual propositions, which require the invocation of legislation that brings into practice the permissible derogation. In the majority of cases, this would be a criminal charge.

In Botswana, statutes that impact on freedom of expression do so by way of criminalising certain publications. This constitutes a significant form of intimidation to the print media whose primary function is the publication of information. In spite of the absence of judicial authority, a few of the statutory limitations will be discussed briefly hereunder. I intend to look at three pieces of legislation, in terms of which charges have been brought against journalists. These are the National Security Act,<sup>44</sup> the Corruption and Economic Crime Act<sup>45</sup> and the Penal Code.<sup>46</sup>

<sup>41</sup> *The Observer and the Guardian v United Kingdom* (1992) 14 EHRR 153 191.

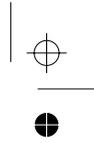
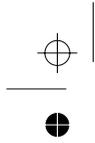
<sup>42</sup> See *Clover Petrus v The State* [1984] BLR 14 37 per Aguda JA.

<sup>43</sup> *James v United Kingdom* (1986) 8 EHRR 123.

<sup>44</sup> Cap 23:01.

<sup>45</sup> Act 13 of 1994.

<sup>46</sup> Cap 08:01.



## 5 The National Security Act

This Act was passed in response to the increase in terrorist activities in the country, which were perpetrated from outside, especially from South Africa. People were being killed and injured through bomb blasts and there was a series of events that normally resulted in extensive damage to property. It was therefore the government's concern to combat acts of terrorism and sabotage. The purpose of the Act is captured in the memorandum to the bill as presented to parliament. Clause 4 thereof was to the following effect:<sup>47</sup>

The main purpose of this Bill is therefore to pass a law for the purpose of safeguarding the life and property of the people of this country and to prevent acts likely to be prejudicial to the safety and interests of Botswana.

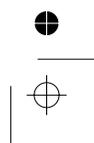
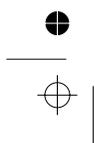
The provision that affects the right of journalists to publish is section 5(1). The section prohibits publication or communication of any classified matter without the authority of an authorised officer. Classified matter under the Act means any information or thing declared to be confidential or secret by an authorised officer. Subsection (2) thereof provides:

In a prosecution for a contravention of subsection (1) it shall be no defence for the accused person to prove that when he committed the matter he did not know that it was a classified matter.

While the objectives and purpose of the Act as a whole may have been noble, the means of achieving them are, in my submission, overboard. Information becomes classified because a government official has decided that it should be. The determination as to what information should be classified rests solely on the discretion of the authorised officer, whose determination will be difficult to judicially review. Apart from the laborious task of having to ascertain whether information is classified or not, to prosecute for publication of information does not advance the purposes of the Act. Openness on the part of government is the hallmark of a democracy. Allowing the free flow of information especially that concerning the government advances this goal. The government can effectively circumvent this through the classification of information as either confidential or secret and prosecuting for publication thereof. Worse still, under section 10, the onus that ordinarily rests on the state in a criminal case is effectively thrown on the accused person. It is a strong tenet of our criminal justice system that a person is presumed innocent until proved guilty.<sup>48</sup> This is embedded in our Constitution, which provides that '[e]very person who is charged with a criminal offence shall

<sup>47</sup> National Security Bill 4 of 1986, published on 14 March 1986.

<sup>48</sup> *Woolmington v DPP* [1935] AC 462.



be presumed innocent until he is proved or has pleaded guilty'.<sup>49</sup> The Constitution, however, provides for a derogation of this rule:<sup>50</sup>

Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (2)(a) of this section to the extent that the law in question imposes upon any person charged with a criminal offence the burden of proving particular facts.

This provision does not shift the legal burden, but only provides for shifting of what has ordinarily come to be called the evidentiary burden.<sup>51</sup> This occurs when the state establishes a *prima facie* case and the accused person has to raise matter to displace the *prima facie* case. In the Constitution, what is allowed is a law that only imposes a burden on the accused person to 'prove particular facts'. Under the National Security Act, the defence that seems to be available to the accused person is that of a denial of publication altogether, which is difficult to sustain in the case of the print media. This is more so where the Act provides that it is necessary to show that the accused person was guilty of any particular act tending to show a purpose prejudicial to the safety or interests of Botswana, but may be convicted on the basis of his antecedents.<sup>52</sup> The accused person is clearly denied his rights to the due process of the law. The provisions of the Act do not advance the purposes and objectives which informed its enactment. They are overboard and whittled down, to a large extent, the constitutional guarantees to an individual or media houses generally. They are not reasonably justifiable in a democratic society to the extent that the state can under legislation conduct business in total secrecy, and the situation would not be worse off in the absence of this otherwise draconian piece of legislation. It is submitted therefore that the provisions under the National Security Act, to the extent addressed herein, are unconstitutional.

## 6 The Corruption and Economic Crime Act

This Act was primarily passed to make provision for the prevention of corruption and 'white collar' crime. The provision that impacts on freedom of expression is cast in the following terms:<sup>53</sup>

Any person who, without authority or reasonable excuse, discloses to any person who is the subject of an investigation in respect of an offence alleged or suspected to have been committed by him under this Act the fact that he is subject to such an investigation or any details of such investigation, or

<sup>49</sup> Sec 10(2)(a) Botswana Constitution.

<sup>50</sup> Sec 10(12)(a) Botswana Constitution.

<sup>51</sup> See LH Hoffman & D Zeffertt *The South African law of evidence* (1990) 495–529 for explanation of burden of proof and the cases cited therein.

<sup>52</sup> See sec 10(4).

<sup>53</sup> Sec 44 Corruption and Economic Crime Act 13 of 1994.

publishes or discloses to any other person either the identity of any person who is the subject of such an investigation or any details of such an investigation, shall be guilty of an offence and shall be liable, on conviction, to imprisonment for a term not exceeding one year or to a fine not exceeding P2 000, or to both.

A similar provision was subject to judicial scrutiny in Hong Kong in terms of the Hong Kong Prevention of Bribery Ordinance.<sup>54</sup> It was argued before the Privy Council (Hong Kong's highest appellate court) that the provision was inconsistent with article 16 of the Hong Kong Bill of Rights which guaranteed freedom of expression. It was also argued that the restriction under the ordinance was disproportionate to the legitimate aims of the scheme of the ordinance in that it criminalised disclosures even when no prejudice was caused or likely to be caused to investigations and even when the accused believed there would be no prejudice. The Court took the view that since bribery cases were particularly difficult to detect, the maintenance of secrecy as to an investigation was even more important in order not to put the suspect on his guard.<sup>55</sup> The section achieved the purpose of protecting the integrity of the investigation. The Court observed that in many cases it will be impossible to know whether an investigation had prejudiced an investigation or not. The Court gave an example of a suspect who might destroy incriminating documents of which the investigator is not and never would be aware, but which he would have discovered had there been no prior disclosure.<sup>56</sup> While the protection of the integrity of the investigation is accepted as necessary,<sup>57</sup> on the question of prejudice, it seems that the court favours the state. While in some cases the restriction will serve the purpose of protecting the integrity of the investigation, it may result in injustices to the suspect in other cases. The Court in the *Ming Pao Newspapers* case held that the provision in the ordinance was not inconsistent with the Bill of Rights.

Section 44 has not been scrutinised by the Botswana Court. The opportunity was lost in *State v Professor Malema and Others*,<sup>58</sup> when the

<sup>54</sup> The provision under the Hong Kong legislation and our sec 44 are *in pari materia*. As a matter of fact, the Botswana legislation is almost a carbon copy of the Hong Kong legislation. When the Directorate on Corruption and Economic Crime was under the Act in 1994, its first director was recruited from Hong Kong where he has been Deputy Director of the Independent Commission Against Corruption (ICAC), the equivalent of the Botswana Directorate on Corruption and Economic Crime. Other officers now working in Botswana were also recruited from the ICAC. The reason behind this was apparently that the establishment of the directorate would effectively take root with experienced officers.

<sup>55</sup> *Ming Pao Newspapers v AG of Hong Kong* 1996 AC 907 920.

<sup>56</sup> As above, 921.

<sup>57</sup> In our criminal justice system, a court may deny an accused person bail pending trial if it is satisfied that the suspect will interfere with witnesses and thereby prejudice the trial.

<sup>58</sup> CRB 387/96 (unreported).

Chief Magistrate of Gaborone dismissed the charges as defective. It would have been referred to the High Court for a pronouncement on the constitutionality of section 44, but for the finding by the magistrate that the charge sheet was defective. It may be that the decision in the *Ming Pao Newspapers* case would be very persuasive to the Court. The Directorate of Economic Crime and Corruption explained reasons for the confidentiality of the investigation in a way that is very much in line with the reasoning in the *Ming Pao* case. They were (a) to avoid alerting the suspects lest they tamper with valuable evidence, and (b) that an investigation might actually exonerate a suspect; the suspect was not to have his reputation damaged if it was known that he or she was the subject of investigation.<sup>59</sup> Whether a court will enter a conviction or acquit will then depend on the nature of the charge laid against a suspect if the court holds the provision not to be inconsistent with the Constitution.

## 7 The 'false news' provisions and the *Okavango Observer* case

On 29 September 1995, the *Okavango Observer* (a newspaper circulating in the northwestern part of the country) carried an article under the title 'Terror Squad' Shocks Maun; in which it was reported that Maun residents were living in fear of a gang styled 'Ma Western' which terrorised and harassed villagers on various occasions. The gang was reported to have allegedly dug up a coffin at a graveyard, assaulted an elderly woman after refusing to give them beer, attacking a young man who was on his way home from a disco, stabbing another with a knife and several other bizarre incidents. The state then brought charges against Caitlin Davies and Letswetswe Phaladi, the editor and reporter respectively of the *Okavango Observer*. The two were accused of publishing a report contrary to section 59(1) of the Penal Code. The particulars of the charge disclosed that they had published a false report, which was likely to cause fear and alarm to the public.

Section 59 of the Penal Code provides as follows:

- (1) Any person who publishes any false statement, rumour or report which is likely to cause fear and alarm to the public or to disturb the public peace is guilty of an offence.
- (2) It shall be a defence to a charge under section 1 if the accused proves that prior to publication, he took such measures to verify the accuracy of such statement, rumour or report as to lead him reasonably to believe it was true.

In terms of the section, a statement, rumour or report must have been published. Secondly the statement, rumour or report should have

<sup>59</sup> Press Release of 8 November 1996.

been false. Thirdly, as was held in *State v Mbaiwa*,<sup>60</sup> there must be 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 doing so recklessly. Fourthly, it is not necessary that the report should *actually* have caused fear and alarm to the public or disturb the public peace. It is sufficient if it was only likely to do so. The determination as to the likelihood of disturbance of peace or fear and alarm being caused is left to the court. Under the Botswana criminal justice system, before charges may be laid against a suspect, the state agency responsible for prosecution must be satisfied that there is evidence available to bring the matter to court or that there is *prima facie* evidence which, if uncontroverted would lead to a conviction.<sup>61</sup> In this exercise, the personal idiosyncracies and predilections of the officer charged with the responsibility of drawing up the charges may play a part. A reporter may then be brought to court even where the elements of section 59(1) are not in place since the falsity of the report, the likelihood of fear having been caused, etc are matters to be resolved in court. The possibility of abuse of discretion by prosecutors cannot be ruled out, and section 59 may be used even though the report is not false. In the face of a risk of prosecution, the press will be deterred from publishing even true information and this has a chilling effect on freedom of speech and of the press.

There is another dimension of the charges in the *Okavango* case. The article carried interviews with people who allegedly fell victim to the activities of the 'Ma Western'. They number at least three. The Maun station commander is reported to have said it was possible the gang members acted under the influence of dagga, though none had been arrested for possession of drugs. This is an implicit acknowledgment of the possibility of terror having been caused by the gang. Besides, the existence of terror groups in Botswana generally is not something new. There had been occurrences of organised violence perpetrated by gangs in some major villages of the country.<sup>62</sup> For the record, it was always reported that members of the groups were mostly Form 2 dropouts, and a big village like Maun would reasonably be expected to have a number. The fear that was allegedly caused by the report would not, in view of the circumstances above, be such as to be made the subject of criminal

<sup>60</sup> [1988] BLR 314 322 *per Livesey Luke CJ*.

<sup>61</sup> *Ex parte Minister of Justice: In re R v Jacobson and Levy* 1931 AD 466 478; *S v Mtetwa* 1972 3 SA 766.

<sup>62</sup> Eg, there were the 'Makgaola 7' in Kanye in the late 1980s, the 'Ma Spoties' in Mogoditshane in the mid 1990s. All these activities received wide publicity in both the official and private media. While there might not have been fear caused to residents of Maun by the activities of the groups at the time, it was an activity that could reasonably be anticipated to be likely to occur at some future date, given the frequency of previous occurrences.

prosecution under section 59. If anything, it was something of a warning to society to be alert in their activities. In Maun, two men, allegedly leaders of the gang in question, were at the time of the report awaiting trial for offences involving violence allegedly connected to similar activities. This shows the extent to which Maun residents were familiar with the gang's illicit activities. From the standpoint of a journalist, section 59 is disturbing in several respects. Its uncertainty would require a reporter to conduct interviews to determine whether a story intended for publication would cause fear and alarm to the public. It might also be necessary to seek legal advice to determine if the intended publication falls foul of section 59. This retards communication of information. All this complexity in reporting in the face of a threat of prosecution has a chilling effect and stifles freedom of expression.

The Attorney-General entered a *nolle prosequi* in the *Okavango Observer* case.<sup>63</sup> While it may be said that dropping charges was appropriate, questions still linger in the minds of journalists and all those who cherish the ideas of a free press. Section 59 still remains and may be invoked anytime there is a publication which the state finds unpalatable. It is no panacea that nobody has ever been convicted under the provision. It is equally disturbing that charges may be left hanging on the heads of journalists as it happened in the *Okavango Observer* case.

It has been held in cases elsewhere that, whereas freedom of expression applies to free and unrestrained publication of information as long as it is done with due regard to other values and other people's rights, it is also applicable to information or ideas that offend, shock or disturb the state or any sector of the population.<sup>64</sup> One can do no better than adopt the views of Tendai Biti<sup>65</sup> on section 50(2) of the Law and Maintenance Orders Act of Zimbabwe, Cap 11:07.<sup>66</sup> Apart from the fact that the constitutional guarantees on freedom of expression in Zimbabwe<sup>67</sup> also exist under the Constitution of Botswana at section 12 as alluded to above, the 'false news' provision in Zimbabwe

<sup>63</sup> The charges were dropped after about two years. In the meantime the newspaper became defunct.

<sup>64</sup> *Open Door and Dublin Woman v Ireland* ECHR (29 October 1992) Ser A 246; see also *V Berger Case law of the European Court of Human Rights Vol II 1988-1990* (1992) 215.

<sup>65</sup> In a paper presented at the third Southern African Media Lawyers Conference at Kalahari Sands Hotel and Casino, Windhoek, Namibia, 26-28 August 1999 entitled 'National Security, Official Secrecy and Access to Information: A new approach for the next millenium'.

<sup>66</sup> It provides: 'Any person who makes, publishes or reproduces any false statement, rumour or report which (a) is likely to cause fear, alarm or despondency among the public or any section of the public; or (b) is likely to disturb the public peace; shall be guilty of an offence . . . unless he satisfies the court that before making, publishing or reproducing, as the case may be, the statement, rumour or report took reasonable measures to verify the accuracy thereof.'

<sup>67</sup> Sec 20 Zimbabwean Constitution.

(Section 50(2) of the Law and Maintenance Orders Act) is similar to section 59 of the Botswana Penal Code, although the former contains the term 'despondency' which does not exist in the latter. For purposes of this discussion, the two provisions will be treated as being similar. In the view of this writer, they were intended to criminalise the same kind of conduct and therefore serve the same purpose. The provisions are a colonial legacy that originated in the desire by the minority colonial governments to insulate themselves against dissent by the colonised. The absence of such provisions would, in the estimation of the colonial rulers, incite hatred and generate public uprisings which would lead to the demise of colonial rule and the advent of popular majority rule. As such the enactment of such provisions was a necessary political tool of survival.

In his paper, Tendai Biti argues that the provision does not criminalise false statements but rather those likely to cause despondency, alarm or public disorder. It is thus the potential to cause alarm, public disorder etc that is the gist of the offence. Since this potential cannot in all cases always be ascertainable before publishing the report or statement, the uncertainty translates into a chilling effect on those whose main pre-occupation is publishing. The offence created by the provisions is of a speculative nature in that it does not unambiguously advise the citizens as to the type of conduct proscribed. In the words of Biti, this is a breach of the concept of legality.<sup>68</sup> These provisions subject the maker of 'false news' to the subjective whims of the public which has different tastes and senses or levels of 'egg skull'.<sup>69</sup> These could not therefore be reasonably or demonstrably justifiable in a democratic society. Journalists cannot be expected to publish only that information which extols the virtues of those in power.

It is comforting to note that the false news provision has been struck down by the Zimbabwe Supreme Court in *Chavunduka and Another v Minister of Home Affairs and Another*<sup>70</sup> as being unconstitutional to the extent that it violates the constitutional guarantees of freedom of expression. The case concerned a newspaper article authored by the second applicant and published in the *Weekly Standard*, a weekly newspaper, entitled 'Senior army officers arrested', concerning an alleged coup attempt in which 23 members of the Zimbabwe National Army were alleged to have been arrested. It was alleged that the reason for the uprising was two-fold: mismanagement of the economy and Zimbabwe's participation in the war in the Democratic Republic of Congo. The article also noted general dissatisfaction within the army

<sup>68</sup> n 65 above 9.

<sup>69</sup> As above.

<sup>70</sup> [2000] 4 LRC 561 (*Chavunduka case*).

over the war, claiming that morale was low and that in defiance of orders some soldiers had refused to participate in the Congo conflict.

The editor of the newspaper, the first applicant and the author of the article were then charged under the false news provision in the Law and Order (Maintenance) Act, referred to above. They applied to court for an order declaring section 50(2)(a) of the Act to be in contravention of sections 20(1) and 18(2) which guarantee freedom of expression and the right to a fair trial. In upholding the applicants' claim, the Court observed that the offence in question was speculative and created out of a conjectural likelihood of fear, alarm or despondency which might arise out of the publication of any statement.<sup>71</sup> Since it was concerned with likelihood rather than reality, it was susceptible to too wide an interpretation. Accordingly, it exerted an unacceptable chilling effect on freedom of expression since people would tend to steer clear of the potential zone of application to avoid censure.<sup>72</sup> The Court went further and held that the phrase 'fear, alarm or despondency' was over-broad since almost anything that was newsworthy was likely to cause one or more of such emotional reaction which by its nature is subjective.<sup>73</sup> The provision was therefore insufficiently precise to demonstrate the particular conduct proscribed and it failed to provide guidance of conduct to persons of average intelligence. It therefore failed the requirement of being 'under the authority of any law'.

Although the Court accepted that section 50(2) of the Law and Order (Maintenance) Act was capable of serving one of the legitimate aims specified in section 20(2) of the Constitution, it nevertheless held that the limitation imposed thereby did not satisfy the requirement of being 'reasonably justifiable in a democratic society'.<sup>74</sup> In arriving at this conclusion, the Court, following its own<sup>75</sup> and Canadian jurisprudence,<sup>76</sup> had adopted a three-fold test in determining whether or not the limitation is permissible. Firstly, the Court asked whether the legislative objective which the limitation is designed to promote is sufficiently important to warrant overriding a fundamental right. In the particular circumstances of the case, the Court observed that since independence, a period of over 20 years, the need for recourse to section 50(2) had not been felt as there had not been any prosecution thereunder.<sup>77</sup> There was 'no longer a primary objective, directed to a 'substantial concern which justifies restricting the otherwise full

<sup>71</sup> As above, 572c.

<sup>72</sup> As above, 572d–e.

<sup>73</sup> As above, 572e.

<sup>74</sup> As above, 576b.

<sup>75</sup> See *Nyambirai v National Social Security Authority* [1996] 1 LRC 64 and *Retrofit (Pvt) Ltd v Posts and Telecommunications Corp* [1996] 4 LRC 489.

<sup>76</sup> *R v Zundel* (1992) 10 CRR (2d) 193.

<sup>77</sup> *Chavunduka* case (n 70 above) 575g–h.

exercise of the freedom of expression'. The retention of the provision could not be said to be required by any international obligation undertaken by the state. The first requirement was therefore not satisfied.

Secondly, the Court investigated whether the measures designed to meet the legislative objective are rationally connected to it and are not arbitrary, unfair or based on irrational considerations. In the particular circumstances of the case, the Court observed that the fact that the provision was never used since independence in 1980 strongly suggested that it was not rationally connected to, and essential for, the intended objective of avoiding public fear, alarm or despondency and to secure public safety or public order.<sup>78</sup> The anticipated danger was remote and conjectural. There was thus no proximate and direct nexus with the prohibited expression, and accordingly the second requirement was not satisfied.<sup>79</sup>

Thirdly, the question was whether the means used are no more than is necessary to accomplish the objective. This goes to proportionality. Here the Court observed that the expansive sweep of the provision covered just about anything the Attorney-General, in his deliberate judgment deemed to be likely to cause fear, alarm or despondency among the public or even a single member thereof. The provision imposed an acceptable chilling effect and was more far reaching than might be its intended objective. Accordingly, the third requirement was also not satisfied.<sup>80</sup>

In the event, the Court declared section 50(2) to be in contravention of section 20(1) of the Constitution.<sup>81</sup>

This somewhat elaborate discussion of the Zimbabwean case is undertaken as it provides an insight as to legality or otherwise of section 59 of the Botswana Penal Code. The two provisions are in *pari materia* as are the constitutional provisions. The High Court in Botswana, similarly circumstanced as the Zimbabwe Supreme Court, and the Canadian Court whose decisions were relied upon by the Zimbabwe Supreme Court, might well come to the same conclusion given the similarity in the bases for the conclusions. In the case of the *Okavango Observer*, charges were dropped after costs had been incurred in the form of legal fees. This is even more unfortunate in that costs are not generally awarded against the state should the charges be dropped or an acquittal entered. What is left is for the suspect to sue for malicious prosecution, a charge which is very difficult to establish. It is interesting to note, however, that the Court of Appeal of Botswana has adopted a

<sup>78</sup> As above, 576f–g.

<sup>79</sup> As above, 576g.

<sup>80</sup> As above, 578a.

<sup>81</sup> As above, 579d–e.

somewhat relaxed position to the rule regarding costs in criminal proceedings. In *Re Attorney General's Reference; State v Malan*,<sup>82</sup> the Court said that the High Court, and itself, have the inherent power of ordering a party to pay costs in criminal proceedings. This power, however, is to be exercised in very exceptional circumstances. It will be exercised by the court to mark its strong disapproval of high-handed conduct amounting to bad faith. This development is to be welcomed.

## 8 The 'Advertising Ban' case<sup>83</sup>

This case arose from a number of articles published in the *Botswana Guardian*, a weekly newspaper circulating in Botswana and owned by the applicant (which also owns the *Midweek Sun*, another weekly). The articles were critical of certain leaders of the country, among them the President and the Vice-President. The government (and it was accepted that it was the President's decision) then decided to stop advertising in the *Guardian* and *Sun* group of newspapers, and the decision was communicated by the permanent secretary in the Ministry of Mineral Resources, Energy and Water Affairs (curiously enough as this would ordinarily be done by the permanent secretary to the President!) to all government departments, parastatals and private companies in which the government is a shareholder as a directive. The directive was in the following terms:

ADVERTISING IN PRIVATE NEWSPAPERS: We would like to inform you that the government has decided that, with immediate effect, we should cease advertising in the *Guardian* and *Sun* Group of papers. This directive applies to all government Ministries/Departments, parastatals and Private Companies in which the government is a shareholder. You are of course, expected to use your discretion regarding any signed contracts. This is taken as an available option for all consumers.  
Thank you

It was not disputed that prior to the directive, the government, parastatals and companies in which government is a shareholder, used to put a lot of advertisements in the *Guardian* and *Midweek Sun* papers. The applicant challenged the directive on two bases: Firstly that the action in issuing the directive was unconstitutional as it violated the applicant's freedom of expression, and secondly that the directive needed to be reviewed and set aside. This constituted the main action, and in the interim, the applicant sought an order that the directive should not be implemented pending the outcome of the main action. The application for an interim order came before Lesetedi J.

<sup>82</sup> [1990] BLR 32.

<sup>83</sup> *Media Publishing (Pty) Ltd v The Attorney-General of Botswana and Another* Misc No 229/2001.

The judge then enumerated the requisites that the applicant had to satisfy in order to succeed: (a) Is there a right, whether clear or *prima facie*, that the interim order would protect? (b) If the right was only *prima facie*, was there a well-grounded apprehension of irreparable harm to the applicant if the interim relief was not granted and he ultimately succeeds in establishing his right? (c) Does the balance of convenience favour the granting of the interim relief? and (d) Does the applicant have any other satisfactory remedy? The determination as to whether the first requisite was fulfilled is what occupied most of the proceedings, and is what comes out more prominently in the judgment as it was based on an alleged infringement of a constitutionally entrenched freedom, the freedom of expression as provided for in section 12(1) of the Constitution.

The reason for the withdrawal of the benefit of advertising was, as stated by the permanent secretary to the President (hereinafter 'PSP'), 'to demonstrate government's displeasure at irresponsible reporting and the exceeding of editorial freedom'. It was submitted for the respondent, and accepted by the applicant, that the latter did not have a right to receive advertisements from the government for publication in its papers. It was, however, argued for the applicant that once the government had decided to confer a benefit of advertising (referred to in argument as 'patronage'), it could not withdraw that benefit or 'patronage' in order to punish or show disapproval of the applicant's conduct which was not acceptable to the government or top officials thereof. The respondent further argued that the advertising in the newspapers created a purely commercial relationship and that in as much as the government voluntarily decided to advertise in the applicant's newspapers, it was entitled, without assigning a reason, to withdraw from advertising in the applicant's papers. The PSP went on further to say that:

Newspapers are known to alter their editorial policy so that it conforms to the views of their advertisers, who are also known to demand adjustments in the editorial policy to conform to their expectations.

Although the court accepted that government is entitled to advertise in any medium it chooses, it observed that:<sup>84</sup>

There are many accepted parameters within which government may legitimately withdraw such patronage, for instance where the applicant's selling rates for publishing space is not competitive compared to that of other papers or where the applicant's publications do not reach the market targeted by the government for its advertisements.

The court observed that the list is not exhaustive. In deciding on the propriety or otherwise of the reason advanced by the government for the withdrawal of advertising from the two papers, the court drew inspiration from the United States of America Court of Appeal case of

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<sup>84</sup> At 20.

*Hyland v Wonder*,<sup>85</sup> in which the services of a volunteer with the San Francisco Juvenile Probations Commission were terminated after he had criticised the way the probate department was being run, which criticism reflected badly on the department. Mr Hyland applied to court to set aside his dismissal on the basis that it violated his constitutional right to freedom of expression as its sole purpose was to punish him for exercising his freedom of expression. In upholding his claim, the Court of Appeal (*per* Tang J) recalled its earlier position that a person who had no right to a governmental benefit could be denied the benefit for some reasons and not others. The government could not deny him a benefit<sup>86</sup>

on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalised and inhibited. This would allow the government to produce a result which it could not command directly. Such interference with constitutional rights is impermissible.

Lesetedi J found the *Hyland* case very persuasive, adopted its reasoning and went on to say:<sup>87</sup>

For that reason the government cannot act with a view to taking away an individual's benefits as an expression of its displeasure for the individual's exercise of a constitutional right as this would tend to inhibit the individual in the full exercise of that freedom for fear of incurring punishment. The message implicit in the directive is that an individual being a beneficiary to governmental patronage, who in the exercise of its freedom of expression goes beyond what the government is comfortable with, faces the possible unpleasant consequence of losing certain benefits which it would otherwise have received. This hinders the freedom to express oneself freely.

It therefore followed that the applicant had established at least a *prima facie* right stemming from the consequences of executive action. The other requisites were found to be in place and the application and the relief sought were granted.

The determination as to the existence of a right on the part of the applicant culminated in an affirmative finding based largely on the reasons assigned by government for the withdrawal of advertising from the papers. This would appear to be in step with the general principle in administrative law that discretionary power must be exercised for a proper purpose and for the proper objectives.<sup>88</sup> It was possible to make a determination in the particular case because reasons for the adverse governmental action were assigned.

What would have happened if government had not given reasons? Three positions are possible: Firstly, in the absence of reasons advanced

<sup>85</sup> 972 F 2d 1129.

<sup>86</sup> At 1136.

<sup>87</sup> n 83 above at 26.

<sup>88</sup> See *President of the Republic of Botswana and Others v Bruwer and Strumpher* Civ App No 13/97 (unreported); *Congreve v Home Office* 1976 QB 929; *University of Cape Town v Ministry of Education and Culture* 1988 3 SA 203.

by the government for its action, the court may have to infer. But this will be possible only if the circumstances place the court in a position in which it can make a reasonable inference. Secondly, the court may come to a finding based on the absence of an answering affidavit contradicting the averments made by the applicant in his or her founding affidavit,<sup>89</sup> but there must be proof of service. Thirdly, the conclusion can be reached that the government will be better off in not assigning reasons at all, or if executive action is punitive, different and more benign (but dishonest) reasons may be assigned by the government for its actions. This can, however, be dispelled by the applicant by laying down material before the court suggesting bad faith on the part of government in which case executive action stands to be reviewed.<sup>90</sup>

It can be said that the decision in the *Advertising Ban* case is a welcome one, as it went a step in protecting freedom of expression. However, one would be hamstrung in speculating as to the outcome of the final case on the merits. Such case is still pending before the court.

## 9 Conclusion

To the extent that the Constitution of Botswana provides for the protection of fundamental rights and freedoms of the individual, and establishes limitations, which exist even in other more democratic systems, it may be said our system embraces international standards. However, it is not sufficient that the Constitution should merely establish these fundamental ideas in terms of black letter law. The state authorities should be seen to be acting in a way that advances these freedoms. In terms of freedom of expression, we have seen the mushrooming of legislation whose effect is to muzzle the press, and the trend has been an increase rather than a decrease in legislation that drastically erodes the ability of the press to inform the public on important matters. Unfortunately, where charges had been brought and questions arose on the constitutionality of the provisions in terms of which the charges had been drawn, the opportunity for the constitutionality question to be decided had been lost either because charges had been withdrawn or dismissed at an early stage on a technicality. The idea of a Freedom of Information Act is being mooted in the country. If the Act comes to fruition, perhaps it will revolutionalise the system and uproot the higher authorities' belief in secrecy of information.

<sup>89</sup> See Order 20 Rule 4(3) of the High Court Act, Cap 04:02 and *Plascon Evans Paints v Van Riebeeck Paints* 1984 3 SA 623 (A).

<sup>90</sup> *Anisimic Ltd v Foreign Compensation Commission* [1969] 2 AC 147; *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another* 1988 3 SA 132 (A); *Legodimo Kgotlafela Leipego v Moapare and Others* 1993 BLR 229; *Chief Seepapitso Gaseitsiwe v Attorney-General* 1996 BLR 54.