

4

Botswana



1 INTRODUCTION

The Republic of Botswana is a large country with a small population – approximately 1.8 million people. The country was a British protectorate from 1885–1966, when it gained full independence from the United Kingdom. Botswana has maintained a multiparty democracy since independence and is generally considered a model of peace and democracy in Southern Africa.

Despite its strong democratic credentials when it comes to political stability, there is little doubt that the media environment in Botswana is not in accordance with international standards for democratic media regulation. An old-style state broadcaster operates out of the President’s Office, and it is yet to be transformed into a public broadcaster. Recent legislation has introduced a system of registration for all media practitioners and has set up a media complaints committee, which comprises only ministerial appointees. The broadcasting regulator, the National Broadcasting Board (NBB), is not a particularly independent body. Nevertheless, there is a level of media diversity in both the broadcasting and print media.

This chapter introduces working journalists and other media practitioners to the legal environment governing media operations in Botswana. The chapter is divided into five sections:

- Media and the constitution
- Media-related legislation

- Broadcasting-related regulations
- Media self-regulation
- Media-related common law based on decided cases

The aim of this chapter is to equip the reader with an understanding of the main laws governing the media in Botswana. Key weaknesses and deficiencies in these laws will also be identified. The hope is to encourage media law reform in Botswana, to better enable the media to fulfil its role of providing the public with relevant news and information, and to serve as a vehicle for government–citizen debate and discussion.

2 THE MEDIA AND THE CONSTITUTION

In this section you will learn:

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

2.1 Definition of a constitution

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

The Constitution of Botswana is notable because it has been in place since Botswana’s independence in 1966. The constitutions of some other Southern African countries were enacted much more recently as these countries embarked on democratic constitutional reforms only in the 1990s. The Botswana Constitution sets out the foundational rules of Botswana. These are the rules upon which the entire country operates.

2.2 Definition of constitutional supremacy

Constitutional supremacy means that the constitution takes precedence over all other law in a particular country, for example, legislation or case law. It is important to ensure that a constitution has legal supremacy: if a government passed a law that violated the constitution – was not in accordance with or conflicted with a constitutional provision – such law could be challenged in a court of law and could be overturned on the ground that it is ‘unconstitutional’.

The Constitution of Botswana does not make specific provision for constitutional supremacy; however, constitutional supremacy is implied in two important ways:

- The provisions of Chapter II, ‘Protection of fundamental rights and freedoms of the individual’, section 3 of the Constitution of Botswana, specifically provide that ‘the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms [listed in Chapter II] subject to such limitation of that protection as *are contained in those provisions*’ (emphasis added). The effect of this is that fundamental rights can only be limited to the extent that is allowed by the Constitution itself. This indicates that the Constitution is the supreme law and that, with regard to fundamental rights and freedoms, no other law can limit rights beyond the limitations set out in the constitutional rights themselves.
- The Constitution of Botswana contains specific provisions regarding altering the Constitution, which requires voting majorities and various other procedures (including a national plebiscite in respect of certain types of amendments) that are far more onerous than is required for the passage of mere legislation. Again, this points to the supremacy of the Constitution.

2.3 Definition of a limitations clause

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

The Constitution of Botswana makes provision for legal limitations on the exercise

and protection of rights that are contained in Chapter II of the Constitution of Botswana, ‘Protection of fundamental human rights and freedoms of the individual’. Section 3(1) specifically provides that the various rights provided for in Chapter II are subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely:

- (a) life, liberty, security of the person and the protection of the law;
- (b) freedom of conscience, of expression and of assembly and association; and
- (c) protection for the privacy of his or her home and other property and from deprivation of property without compensation,

the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

This is an interesting provision that requires some explanation.

- It is clear that limitations of rights can be done on two main bases, namely:
 - To protect the rights and freedoms of other individuals
 - To protect the public interest
- While limitations to protect the rights and freedoms of others are worded broadly, the following are key justifications for limiting rights: life, liberty, security of the person; freedom of conscience, expression, assembly and association; and protection of privacy and property, including not being deprived of property without compensation.
- While limitations to protect the public interest are worded broadly, the following are, again, key justifications for limiting rights upon the basis of public interest: life, liberty, security of the person and protection of the law; freedom of conscience, expression, assembly and association; and protection of privacy and property, including not being deprived of property without compensation.
- While section 3 of the Constitution of Botswana contains the general criteria for constitutional limitations, it is not in itself a generally applicable limitations provision because it states that rights are ‘subject to such limitations of that protection as are contained in those provisions’. Thus, the actual limitations of rights and fundamental freedoms are set out in the provisions of the relevant right or fundamental freedom itself.

Consequently, it is clear that the rights contained in Chapter II of the Constitution of Botswana are subject to the limitations that are contained within the provisions of the right itself. The limitations in respect of each right are dealt with below.

2.4 Constitutional provisions that protect the media

The Constitution of Botswana contains a number of important provisions in Chapter II, ‘Protection of fundamental human rights and freedoms of the individual’, which directly protect the media, including publishers, broadcasters, journalists, editors and producers.

2.4.1 Freedom of expression

The most important provision that protects the media is section 12(1), ‘Protection of freedom of expression’, which states:

Except with his or her consent, no person shall be hindered in the enjoyment of his or her 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 or her correspondence.

This provision needs some explanation.

- The freedom applies to all persons and not just to certain people, for example, citizens. Hence everybody (including both natural persons and juristic persons, such as companies) enjoys this fundamental right.
- The freedom is not limited to speech (oral or written) but extends to non-verbal or non-written expression. There are many examples of this, including physical expression (such as mime or dance), photography or art.
- Section 12(1) specifies that the right to freedom of expression includes the ‘freedom to hold opinions without interference’, thereby protecting the media’s right to write opinion pieces and commentary on important issues of the day.
- Section 12(1) specifies that the right to freedom of expression includes the ‘freedom to receive ideas and information without interference’. This freedom of everyone’s to receive information is a fundamental aspect of freedom of

expression, and this subsection effectively enshrines the right to the free flow of information. Thus, the information rights of audiences, for example, as well as the expression rights of the media are protected. This right is important because it also protects organisations that foster media development. These organisations facilitate public access to different sources and types of information, particularly in rural areas which traditionally have little access to the media.

- Section 12(1) specifies that the right to freedom of expression includes the ‘freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons)’. This is a central provision because it protects the right to communicate information and ideas *to the public* – a critically important role of the press, and the media more generally. Therefore, although the Constitution of Botswana does not specifically mention the press or the media, the freedom to perform that role – namely, to communicate information to the public – is protected.
- Section 12(1) specifies that the right to freedom of expression includes the ‘freedom from interference with his or her correspondence’. This protection of correspondence (which would presumably include letters, emails and telefaxes) is an important right for working journalists.

As discussed, constitutional rights are never absolute. Section 12(2) sets out the basis upon which the right to freedom of expression detailed in section 12(1) may be limited.

Although the wording is particularly complicated and legalistic, the essence of these provisions is that a law which limits the right to freedom of expression will not violate section 12(1) of the Constitution, provided that it:

- Is reasonably required in the interests of defence, public safety, public order, public morality or public health
- Is reasonably required for:
 - The purposes of protecting the:
 - Reputations, rights and freedoms of other persons
 - Private lives of persons concerned in legal proceedings
 - Protecting information received in confidence
 - Maintaining the authority and independence of the courts
 - Regulating educational institutions in the interests of persons receiving instruction therein
 - Regulating the technical administration or operation of telephony, telegraphy, posts, wireless, broadcasting or television

- Imposes restrictions upon public officers, employees of local government bodies or teachers
- Is reasonably justifiable in a democratic society

Although the limitations provisions in section 12(2) are lengthy (indeed, the provision is much longer than the right itself), it is generally (see exceptions immediately below) in accordance with internationally accepted standards. In this regard, it is important to note that the requirement that the limitation be ‘reasonably justifiable in a democratic society’ qualifies each of the separate grounds for limiting a right. Thus, any law that intends to limit a right on one of the stipulated grounds must also be reasonably justifiable in a democratic society. This is an objective test that a court can apply and is not dependent upon a governmental official’s view on whether or not the limitation is justifiable.

Notwithstanding this, there are at least two provisions in the limitations set out in section 12(2) that stand out as not being internationally acceptable grounds for limiting speech, namely:

- *The restriction imposed upon public officers:* Clearly, many public officials do have secrecy obligations, particularly in defence, intelligence and policing posts. Nevertheless, the general ability of whistleblowers in the public service to bring illegal conduct, including corruption, to the attention of the media in the public interest is a critical part of a functioning democracy. Consequently, such limitations provisions could well have a chilling effect on public servants, unduly preventing the disclosure of official misconduct.
- *The restrictions upon educational institutions:* The rationale behind this limitation is unclear. Indeed, academic freedom is often specifically mentioned as a subset of the right to freedom of expression precisely due to the essential role that freedom of expression plays in the search for truth – one of the key rationales for protecting freedom of expression.

2.4.2 Privacy of home and other property

A second right that protects the media is contained in section 9(1) of the Constitution of Botswana. This right provides that ‘[e]xcept with his or her own consent, no person shall be subjected to the search of his or her person or his or her property or the entry by others on his or her premises’. Being free from searches of notebooks, computer flash disks, rolls or disks of film and other tools of a journalist’s trade, as well as the offices of media houses, is an important right – but it can be limited.

As discussed, constitutional rights are never absolute. Section 9(2) sets out the basis upon which the right to protection for privacy of home and other property set out in section 9(1) may be limited.

Although the wording is particularly complicated and legalistic, the essence of these provisions is that a law which limits the protection of privacy will not violate section 9(1) of the Constitution, provided that it:

- Is reasonably required in the interests of defence, public safety, public order, public morality, public health, town and country planning, the development and utilisation of mineral resources, for the purposes of any census or in order to secure the development or utilisation of any property for a purpose beneficial to the community
- Is reasonably required for the purpose of protecting the rights or freedoms of others
- Authorises a government (or parastatal company) officer to access property and inspect premises or anything on the property for tax purposes, or to carry out work connected with any governmental (or parastatal) property on the premises
- Authorises compliance with a court order
- Is reasonably justifiable in a democratic society

2.4.3 Deprivation of property

This right is linked to the right to protection of property and deals with property seizures. It is wordy and very legalistic, but section 8(1) of the Constitution of Botswana provides in its relevant part that:

[n]o property of any description shall be compulsorily acquired, except where:

(a) the taking of possession is necessary or expedient –

(i) in the interests of defence, public safety, public order, public morality, public health, town and country planning or land settlement; and

....

(b) provision is made in the law –

(i) for the prompt payment of adequate compensation; and

(ii) securing to any person having an interest in ... the property a right of access to the High Court ... for ... a determination of ... the legality of the taking of possession ... of the property ...

It is clear from the provisions of section 8 that it is generally intended to allow for expropriation of land for purposes such as the exploitation of mineral rights, conservation, development and the like. However, strictly speaking, section 8(1) could be used by a journalist or media house to prevent the confiscation of media-related property, such as computers, cameras and notebooks.

Note that subsections 8(4)–(6) contain a range of limitations on the right. These are not particularly relevant to the media and are therefore not included here.

2.4.4 Freedom of conscience

Section 11(1) of the Constitution of Botswana provides in its relevant part that '[e]xcept with his or her own consent, no person shall be hindered in the enjoyment of his or her freedom of conscience, and for the purposes of this section the said freedom includes freedom of thought'. Freedom of thought is important for the media as it provides additional protection for commentary on issues of public importance.

As discussed previously, constitutional rights are never absolute. Section 11(2) sets out the basis upon which the right to freedom of conscience detailed in section 11(1) may be limited. Although the wording is complicated and legalistic, the essence of these provisions is that a law which limits freedom of conscience will not violate section 11(1) of the Constitution, provided that it:

- Is in the interests of defence, public safety, public order, public morality or public health
- Protects the rights of others
- Is reasonably justifiable in a democratic society

2.4.5 Freedom of assembly and association

A fifth protection is provided for in section 13(1) of the Constitution of Botswana, which provides that:

[e]xcept with his or her own consent, no person shall be hindered in the enjoyment of his or her freedom of assembly and association, that is to say, his or her right to assemble freely and associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his or her interests.

This right not only guarantees the rights of journalists to join trade unions, but also the rights of the press to form press associations and of entrepreneurs to form media houses and conduct media operations.

As discussed previously, constitutional rights are never absolute. Section 13(2) sets out the basis upon which the right to freedom of association contained in section 13(1) may be limited. Although the wording is particularly complicated and legalistic, the essence of these provisions is that a law which limits freedom of conscience will not violate section 13(1) of the Constitution, provided that it:

- Is in the interests of defence, public safety, public order, public morality or public health
- Protects the rights of others
- Imposes restrictions on public officers
- Makes provision for the registration of trade unions (including various conditions relating to issues such as membership and representivity)
- Is reasonably justifiable in a democratic society

2.4.6 Protection of law

A sixth protection is provided in section 10(10) of the Constitution of Botswana, which provides that:

[e]xcept with the agreement of all the parties thereto, all proceedings of every court and proceedings for the determination of the existence or extent of any civil right or obligation before any other adjudicating authority, including the announcement of the decision of the court or other authority, shall be held in public.

The formulation of this right to ‘open justice’ in the Constitution of Botswana is interesting because it effectively allows the parties to a case to agree to the proceedings not being public. This is an unusual formulation and detracts from the openness of the proceedings because the right to a public trial is not just important for the protection of litigants but also to secure public faith in the judiciary. In other words, the public (and, as part of that, the media) generally ought to have a right to attend judicial proceedings.

As discussed previously, constitutional rights are never absolute. Besides the

limitation already contained in section 10(10) allowing the exclusion of the public by the parties involved in the litigation, section 10(11) provides that the above general right to open court hearings shall not prevent a court (or similar body) from limiting public access:

- To the extent that the court considers this necessary or expedient in circumstances where publicity would prejudice the interests of justice
- Where this is empowered by the law in the interests of defence, public safety, public order, public morality, the welfare of persons under the age of 18 years, or the protection of the private lives of persons involved in the proceedings

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

Just as there are certain rights or freedoms that protect the media, other rights or freedoms can protect individuals and institutions *from* the media. It is important for journalists to understand which provisions in the Constitution can be used against the media. The Constitution of Botswana does not in fact contain many provisions that ordinarily are used against the media, such as a right to dignity or privacy. However, there are provisions that allow for the derogation from fundamental rights and freedoms, as well as declarations relating to emergencies, which may affect the media.

It is important to note the provisions of sections 16 and 17 of Chapter II in the Constitution of Botswana, which deal respectively with derogations from fundamental rights and freedoms, and declarations relating to emergencies. In terms of section 17, the president may by proclamation published in the Gazette declare that a ‘state of public emergency exists’, which declaration shall cease to have effect after:

- Seven days (if Parliament is sitting or has been summoned to meet within seven days) or
- 21 days in all other circumstances

If the National Assembly approves the declaration, it will remain in force for six months (although this can be extended for up to six months at a time).

It is important to note that the Constitution of Botswana’s emergency provisions are not in accordance with international best practice standards. This is because there are no objective preconditions to such a declaration. In other words, there is nothing in

the Constitution which requires that a real threat to the public must exist before a declaration of public emergency can be made by the president.

Importantly, section 16 of the Botswana Constitution specifically allows laws passed when Botswana is at war or under a state of emergency to derogate from the rights to personal liberty and equality. Note, however, that the right to freedom of expression cannot be derogated from, although the limitations already contained in the right itself would allow for wide discretion to regulate the media in the interests of, for example, defence and public order.

2.6 Key institutions relevant to the media established under the Constitution of Botswana

As the Constitution of Botswana came into effect in the mid-1960s, it does not contain a number of institutions that are sometimes found in the constitutions of other Southern African countries, such as an ombudsman, a human rights commission or an independent broadcasting authority.

Nevertheless, there are two important institutions in relation to the media that are established under the Constitution, namely, the judiciary and the Judicial Service Commission (JSC).

2.6.1 The judiciary

Chapter VI of the Constitution of Botswana, ‘The judicature’, establishes two superior courts: the High Court and the Court of Appeal. In terms of section 95(1) of the Constitution, the Botswana High Court shall have ‘unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law’. Effectively, this ambit allows the High Court to enquire into any matter of law in Botswana.

- Section 105(1) of the Constitution provides that where a substantial question of law involving constitutional interpretation arises in any subordinate court (such as a magistrate’s court), the question must be referred to the High Court.
- Section 95(5) specifies that the High Court has jurisdiction to supervise any civil or criminal proceedings before any subordinate court or any court martial, and make such orders as it considers appropriate for the purpose of ensuring that justice is administered by such court.
- Section 95(6) authorises the chief justice to make the practice and procedure rules of the High Court.

The Court of Appeal has a narrower jurisdiction – namely, powers conferred by the Constitution itself or any other law.

Note that in terms of section 106 of the Constitution of Botswana, there is a right of appeal (other than in respect of frivolous or vexatious cases) to the Court of Appeal from any decision of the High Court involving constitutional interpretation, except with regard to section 69(1) of the Constitution, which gives the High Court the right to determine whether any person has been validly elected as a member or speaker of the National Assembly.

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

In terms of sections 96, 99 and 100 of the Constitution of Botswana, the key judicial appointment procedures are as follows:

- The High Court is made up of the chief justice and judges of the High Court.
- The Court of Appeal is made up of the president of the Court of Appeal, such number of justices of appeal as may be prescribed by Parliament, as well as the chief justice and the other judges of the High Court. Furthermore, Parliament can make provision for the Office of the President of the Court of Appeal to be held by the chief justice of the High Court on an ex officio basis.
- The chief justice of the High Court and the president of the Court of Appeal (unless that office is held by the chief justice) are appointed by the president acting alone.
- The other judges of the High Court and the justices of appeal, if any, are appointed by the president acting in accordance with the advice of the JSC.

In terms of sections 97(2) and 101(2) of the Constitution of Botswana, a judge of the High Court and Court of Appeal, respectively, can be removed from office only for inability to perform the functions of his or her office or for misbehaviour. The removal of any of these judges by the president requires a prior finding by a presidentially appointed tribunal recommending removal.

2.6.2 The Judicial Service Commission

The JSC is a constitutional body that is established to:

- Participate in the appointment of judges to the High Court and justices to the Appeal Court
- Be responsible for exercising disciplinary control (together with the president) over the registrars of the two superior courts, magistrates and members of courts, as prescribed by Parliament in terms of section 104(2).

The JSC is relevant to the media because of its critical role in the judiciary, the proper functioning and independence of which are essential for democracy. In terms of section 103(1), the JSC is made up of the chief justice (the chairman), the president of the Court of Appeal or the most senior justice of the Court of Appeal (if the chief justice is the ex officio president of the Court of Appeal), the attorney-general, the chairman of the Public Service Commission, a member of the Law Society nominated by the Law Society, and a person ‘of integrity and experience not being a legal practitioner’ appointed by the president.

Importantly, section 103(4) specifically protects the independence of the JSC by stating that it ‘shall not be subject to the direction or control of any other person or authority in the exercise of its functions under this Constitution’.

2.7 Enforcing rights under the Constitution

A right is only as effective as its enforcement. All too often rights are enshrined in documents such as a constitution or a bill of rights, and yet remain empty of substance because they cannot be enforced.

Section 18 of the Constitution of Botswana, ‘Enforcement of protective provisions’, deals specifically with contraventions of the rights contained in sections 3–16 of Chapter II of the Constitution. It allows a person to apply to the High Court when a provision of those sections of Chapter II ‘has been, is being, or is likely to be’ contravened.

Perhaps one of the most effective ways in which rights are protected under the Constitution is through the provisions of the Constitution that entrench the rights contained in Chapter II, ‘Protection of fundamental rights and freedoms of the individual’. Section 89(3)(a) of the Constitution requires that a constitutional amendment of Chapter II needs to be passed by a two-thirds majority of all members

of the National Assembly. Furthermore, any amendment to the entrenchment provision (that is, of section 89 itself) requires the support of a majority vote of the entire electorate, in addition to it having been passed by Parliament, before it can be sent to the president for his assent, in terms of section 89(3)(b). Effectively, this requires a national referendum on any such constitutional amendment.

2.8 The three branches of government and separation of powers

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

2.8.1 Branches of government

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

THE EXECUTIVE

Section 47(1) of the Constitution of Botswana provides that the executive power of Botswana shall vest in the president and shall be exercised by him or her directly or through officers subordinate to him or her.

Section 30 of the Constitution of Botswana provides that the president of the Republic of Botswana is the head of state. In terms of section 32(1) of the Constitution, the president is elected whenever Parliament is dissolved. The election procedure is set out in section 32. The president is the person who is supported by the majority of persons elected to Parliament.

Section 44 of the Constitution of Botswana provides for a Cabinet consisting of the president, the vice-president and ministers. The main role of Cabinet is to advise the president with respect to the policy of the government. Cabinet is responsible to the National Assembly for all things by or under the authority of the president, vice-president or any minister in the executive of his office, in terms of section 50 of the Constitution of Botswana.

The vice-president is appointed by the president from among the elected members of the National Assembly. This appointment must be endorsed by the members of the National Assembly, in terms of section 39(1) of the Constitution of Botswana. The role of the vice-president is to be the principal assistant to the president, in terms of section 49 of the Constitution of Botswana.

In terms of section 42(1) of the Constitution of Botswana, the other offices of minister (and there must be no more than six of these or such other number as set by Parliament) must be established by Parliament or by the president (subject to the provisions of any act of Parliament). In terms of section 42(2) of the Constitution of Botswana, the offices of assistant minister (and there must be no more than three of these or such other number as set by Parliament) must be established by Parliament or by the president (subject to the provisions of any act of Parliament).

The president generally makes appointments to the office of minister or assistant minister from among the members of the National Assembly. Note that up to four persons who are not members of the National Assembly may be appointed as minister or assistant minister, but they must be qualified for election as such.

THE LEGISLATURE

In terms of section 86 of the Constitution of Botswana, legislative or law-making power in Botswana ‘for the peace, order and good government of Botswana’ vests in Parliament.

In terms of section 57 of the Constitution of Botswana, Parliament consists of the president and the National Assembly. In terms of section 58(2), the National Assembly consists of 57 elected members and four specially elected members.

The process for the election of the four specially elected members is set out in the First Schedule to the Constitution of Botswana:

- The president nominates four candidates for special election and any elected member of the National Assembly nominates four candidates for special election.
- A list of candidates nominated by the president and elected members of the National Assembly is prepared.
- Each elected member of the National Assembly votes for four candidates. The ballot is secret and no candidate may be voted for more than once.
- The four candidates securing the highest number of votes are duly elected.

A similar procedure is followed for by-elections should a vacancy arise in the number of specially elected members.

Ordinary elected members of the National Assembly are elected in terms of a

constituency system (see section 63 of the Botswana Constitution). In terms of section 64, the JSC appoints a Delimitation Commission after every census, or when Parliament has changed the number of seats in the National Assembly, to determine the boundaries of each constituency. Section 65 of the Constitution of Botswana requires the boundaries of each constituency to be such that the number of inhabitants therein is nearly equal to the population quota (that is, the number obtained by dividing the inhabitants of Botswana by the number of constituencies). Although there are certain exceptions, the basic requirements to be registered as a voter in terms of section 67 of the Botswana Constitution are being at least 18 years of age and having citizenship of and residing in Botswana.

THE JUDICIARY

Judicial power, as previously discussed, vests in the courts. The role of the judiciary is to interpret the law and to adjudicate legal disputes in accordance with the law.

2.8.2 Separation of powers

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

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

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

2.9.1 Remove internal limitations to certain rights

As discussed, the Constitution of Botswana makes provision for certain rights to be subject to internal limitations – that is, the provision dealing with rights contains its own limitations clause, which sets out how government can legitimately limit the ambit of the right.

These internal limitations occur in a number of sections in Chapter II of the Constitution of Botswana. They deal specifically with the limitation or qualification of the particular right that is dealt with in that section. As discussed more fully above, the right to freedom of expression contains such an internal limitation. In other words, the section that contains the right also sets out the parameters or limitations allowable in respect of that right.

The rights contained in the provisions dealing with ‘Fundamental human rights and freedoms’ set out in Chapter II of the Constitution of Botswana, would, however, be strengthened if the rights were subject to a single generally applicable limitations clause rather than each having their own limitations clause.

Such a general limitations clause would apply to all of the provisions of Chapter II of the Constitution of Botswana – that is, to the fundamental rights and freedoms. It would allow a government to pass laws limiting rights generally, provided this is done in accordance with the provisions of a limitations clause that applies equally to all rights. It makes the ambit of the rights and the grounds for limitation much clearer for the public because there are no specific limitations provisions that apply to each right separately.

2.9.2 Provide for an independent broadcasting regulator and for a public broadcaster

Given the fact that the Constitution of Botswana came into effect in the mid-1960s, it is not surprising that it does not provide constitutional protection for an independent broadcasting regulator or for a public broadcaster. However, given the importance of both these institutions for ensuring access to news and information by the public, it is suggested that such amendments to the Constitution would be in the public interest, and would serve to strengthen both the media and democracy more generally in Botswana.

3 THE MEDIA AND LEGISLATION

In this section you will learn:

- What legislation is and how it comes into being
- Key legislative provisions governing the publication of print media
- Key legislative provisions governing the making of films
- Key legislative provisions governing media practitioners
- Key legislative provisions governing the broadcasting media generally
- Key legislative provisions governing the state broadcasting sector

- Key legislative provisions governing broadcasting signal distribution
- Generally applicable statutes that threaten a journalist's duty to protect sources
- Generally applicable statutes that prohibit the publication of certain kinds of information
- Generally applicable statutes that prohibit the interception of communication
- Generally applicable statutes that specifically assist the media in performing its functions

3.1 Legislation: An introduction

3.1.1 What is legislation?

Legislation is a body of law consisting of acts properly passed by parliament, which is the legislative authority. As we know, legislative authority in Botswana vests in Parliament, which is made up of the president and the National Assembly. It is important to note, however, that in certain limited cases, legislation must also be referred to a body called *Ntlo ya Dikgosi*. In terms of section 88(2) of the Constitution of Botswana, the National Assembly may not proceed on any bill that would alter the provisions of the Constitution or would have a bearing on traditional matters (including powers of *Dikgosi* and *Dikgosana*, traditional courts, customary law, or tribal organisation or property) unless a copy of the bill has been with *Ntlo ya Dikgosi* for at least 30 days.

In terms of section 77, the *Ntlo ya Dikgosi* comprises 33–35 members made up mostly of members selected by traditional authorities or appointees of the president.

As a general rule, the National Assembly and the president are ordinarily involved in passing legislation. There are detailed rules in sections 87–89 of the Constitution of Botswana, which set out the different law-making processes that apply to different types of legislation. It is important for journalists and others in the media to be aware that the Constitution of Botswana requires different types of legislation to be passed in accordance with particular procedures. The procedures are complicated and need not be explained here. Journalists should, however, be aware that, in terms of the Constitution of Botswana, there are four kinds of legislation, each of which has particular procedures and/or rules applicable to it. These are:

- Legislation that amends the Constitution – the procedures and/or applicable rules are set out in section 89 of the Constitution
- Ordinary legislation – the procedures and/or applicable rules are set out in section 87 of the Constitution

- Legislation that deals with financial measures – the procedures and/or applicable rules are set out in section 88(1) of the Constitution
- Legislation that would affect traditional matters (including the powers of *Dikgosi* and *Dikgosana*, traditional courts, customary law, or tribal organisation or property) – the procedures and/or applicable rules are set out in section 88(2) of the Constitution.

3.1.2 The difference between a bill and an act

A bill is a piece of draft legislation that is debated and usually amended by parliament during the law-making process.

In terms of section 87(5) of the Constitution of Botswana, if a bill is passed by Parliament in accordance with the various applicable procedures required for different types of bills, as set out above, it becomes an act once it is assented to by the president. An act must be published in the Gazette and, in terms of section 87(6) of the Constitution of Botswana, becomes law only when it has been so published. Note, however, that it is possible for Parliament to make retrospective laws in terms of section 87(6).

It is important to note that some of the laws governing certain media-related aspects came into force prior to the coming into effect of the 1966 Constitution of Botswana. As they were passed by the governing authority of the time and have yet to be repealed, they are still law.

3.2 Statutes governing the print media

Unfortunately, in terms of the Printed Publications Act, Act 15 of 1968, there are a number of constraints on the ability to operate as a print media publication in Botswana. In particular, Botswana requires the registration of newspapers (in some instances, even newspapers that are published outside of Botswana), which is out of step with international best practice.

Even though these kinds of restrictions constitute bureaucratic and administrative requirements rather than outright restrictions, they effectively impinge upon the public's right to know by setting barriers to print media operations.

There are certain key requirements laid down by the Printed Publications Act in respect of a 'newspaper' or other 'publications'. The definition of a newspaper is extremely broad and includes:

any publication containing news, intelligence, reports of occurrences, or any remarks, observations or comments on such news or on any other matters of public interest or of a political nature in relation to Botswana, which is printed or published for sale or free distribution at regular or irregular intervals within Botswana.

The effect of this definition is that any publication which contains, for example, a report on any occurrence, or any comment on matters of public interest or of a political nature that is intended for distribution to the public or any section of the public (even if such distribution is free or irregular) constitutes a newspaper for the purposes of the Printed Publications Act. The key aspects of the Printed Publications Act are as follows:

3.2.1 Registration of newspaper

- Section 3 of the Printed Publications Act requires the minister in charge of the Printed Publications Act to appoint a registrar of newspapers by notice in the Gazette.
- Section 4 of the Printed Publications Act requires the registrar of newspapers to establish and maintain a register of newspapers.
- Section 5(5) of the Printed Publications Act makes it an offence to print or publish a newspaper without having registered the newspaper prior to printing and publication, and, if found guilty, the perpetrator will be liable to a fine, a period of imprisonment or both, in terms of section 13 of the Printed Publications Act.
- In terms of section 5(2) of the Printed Publications Act, the particulars required for registration are: title of the newspaper; name and residential address of the editor; name and residential and business addresses of the proprietor (owner), publisher and printer. Furthermore, any change to a newspaper's title, editor or ownership interests must be lodged with the registrar of newspapers. Supplying false information or publishing a newspaper without having filed changes in the relevant registered information is an offence, and, if found guilty, the perpetrator will be liable to a fine, a period of imprisonment or both, in terms of section 13 of the Printed Publications Act.

3.2.2 Publication of details of the publisher

Besides the newspaper registration requirements set out above, section 6(1) of the Printed Publications Act also requires all publications (defined extremely broadly to

mean ‘a document intended to be issued for distribution, by sale or otherwise, to the public or any section thereof in Botswana’) to have printed on one of its pages, in legible type, the name and addresses of the printer and publisher and the year of publication. Any person who prints a publication without complying with the requirements of section 6(1) is guilty of an offence and liable to a fine, a period of imprisonment or both, in terms of section 13 of the Printed Publications Act.

3.2.3 Duty to keep copies of publications and to produce them on demand

Section 7 of the Printed Publications Act requires the printer of any publication to keep a copy of the publication and to produce it upon demand by a police officer of the rank of inspector or above. Again, any person who fails to comply with section 7 is guilty of an offence and is liable to a fine, a period of imprisonment or both, in terms of section 13 of the Printed Publications Act.

3.2.4 Foreign application of the act

An interesting provision in the Printed Publications Act is section 8, which provides that if the minister is satisfied that any publication printed outside of Botswana would constitute a ‘newspaper’ if had been printed and published in Botswana, and is of the opinion that the publication is intended primarily for circulation within Botswana, he may order the publication to be a newspaper under the Printed Publications Act, and ‘thereupon the provisions of this Act shall apply to such publication’ even though it is printed and published outside of the country.

3.2.5 Seizures of publications

Section 11 authorises any police officer with the rank of inspector or above to seize any publication or newspaper which he or she ‘reasonably suspects’ has been published or printed in contravention of the Printed Publications Act. This section also empowers magistrates to issue search and seizure warrants for publications and newspapers printed in contravention of the Printed Publications Act.

3.3 Statutes governing the making of films

Unfortunately, there are a number of constraints on the making of films in Botswana – something that obviously affects the visual media, such as television. Key aspects of the main piece of legislation governing film, namely the Cinematograph Act, Act 73 of 1970, are as follows:

- In terms of section 3 of the Cinematograph Act, no film for public exhibition or

sale either inside or outside of Botswana shall be made in Botswana, except under and in accordance with a filming permit issued by the minister (presumably the minister responsible for the administration of the Cinematograph Act). If a film is made without such a permit, the person making the film (or the person(s) in control of or managing the affairs of a company, if the film is being made by a corporate entity) is guilty of an offence in terms of section 3, and, in terms of section 29, is liable to a fine, imprisonment or both. In addition, the court may order the confiscation and destruction of the film.

- Section 4 of the Cinematograph Act requires an application for a filming permit to be made in writing and to be accompanied with a full description of the scenes in and the full text of the spoken parts (if any) of the entire film which is to be made, even if parts of the film are made outside of Botswana. Note, however, that the minister may accept an application that is otherwise incomplete if the minister has been given such other information as he requires for the determination of the application.
- Section 5 of the Cinematograph Act empowers the minister to issue a filming permit subject to conditions. Indeed, the minister may even order a person appointed by him to be present at the making of the film. Section 8 of the Cinematograph Act provides that any person appointed by the minister to be present at the making of a film has the authority to intervene and order the cessation of any scene which, in his opinion, endangers any person or property (other than the film producer's property), is cruel to animals or is being made in contravention of the conditions of a film permit.
- Note, however, that section 9 of the Cinematograph Act empowers the minister to exempt any film or class of film from the above provisions of the Cinematograph Act.
- There are also a number of restrictions regarding the exhibition of films. These are dealt with elsewhere in this chapter.

3.4 Statutes governing media practitioners

3.4.1 Statutes that regulate media practitioners generally

A recent piece of legislation that has been enacted in Botswana ostensibly to 'preserve the maintenance of high professional standards within the media' is the Media Practitioners Act (MPA), Act 29 of 2008. Section 6 requires every resident media practitioner (defined in section 1 as 'a person engaged in the writing, editing or

transmitting of news and information to the public, and includes a broadcaster ... a journalist, editor or publisher of a publication and the manager or proprietor of a publication or broadcasting station’) to be registered and accredited by the Executive Committee of the Media Council established under the MPA. Failure to register is an offence punishable by a fine, imprisonment or both, in terms of section 7(5) of the MPA.

3.4.2 Institutions established under the MPA

The MPA establishes the Media Council and other subsidiary or related bodies:

- Section 3 establishes the Media Council, and, in terms of section 18, the governing body of the Media Council is its executive committee.
- Section 11 provides for the establishment of a complaints committee.
- Section 15 provides for the establishment of an appeals committee.

3.4.3 Functions of the institutions

THE MEDIA COUNCIL

In terms of section 5, the objects of the Media Council are to:

- Preserve media freedom
- Uphold standards of professional conduct and promote good ethical standards and discipline among media practitioners
- Promote the observance of media ethics in accordance with the Media Council’s code of ethics
- Promote public awareness of the rights and responsibilities of the media
- Establish links with similar organisations
- Monitor activities of media practitioners
- Receive complaints against media practitioners
- Register and accredit media practitioners

- Bring media practitioners and other media stakeholders together to exchange information
- Issue accredited media practitioners with identity cards
- Maintain a media register
- Seek financial and other assistance for its operations
- Sponsor and advise on the training of media practitioners
- Undertake research into the performance of the media

The Media Council is also required to issue a code of ethics, which is to include the following provisions, in terms of section 9 of the MPA:

- Duties and obligations of media practitioners
- Protection of minors
- Protection of persons suffering from physical or mentally disabilities
- Advertising content
- Fair competition in the media industry
- Protection of privacy
- Unlawful publication of defamatory matter

Note that in terms of section 9(4) of the MPA, the minister must be provided with prior notice of any changes to the Code of Ethics.

THE COMPLAINTS COMMITTEE

The main functions of the Complaints Committee are to:

- Investigate and hear complaints against media practitioners regarding:
 - Contraventions of the Code of Ethics – section 9(1) of the MPA
 - Acts or omissions which have aggrieved any person – section 12 of the MPA
- Make rulings on the complaints, in terms of section 14 of the MPA, including:
 - Dismissing the complaint
 - Criticising the conduct of the media practitioner, where warranted
 - Directing that a correction or apology be published
 - Taking disciplinary action. In terms of section 14(2) this could include:

- A warning or a reprimand
 - A fine
 - Suspension of registration for a specific period
 - Removing the media practitioner’s name from the register
- Making any supplementary rulings

THE APPEALS COMMITTEE

The main function of the Appeals Committee is to hear appeals against the decisions of the Complaints Committee. According to section 15 of the MPA, it may dismiss, enhance, reduce or vary a decision of the Complaints Committee. Note that in terms of section 15(6) of the MPA there is a further appeal from the Appeals Committee to the High Court.

3.4.4 Establishment of the institutions

THE MEDIA COUNCIL

- The Media Council is a corporate body, in terms of section 3(2) of the MPA.
- Section 4 of the MPA provides that the Media Council ‘shall operate without any political or other bias or interference, and shall be wholly independent and separate from the government, any political party or other body’.
- Membership of the Media Council consists of ‘all publishers of news and information, whether or not in the private or public sector’, in terms of section 7(1). Importantly, in terms of the definitions contained in section 1 of the MPA:
 - A ‘publisher’ is a person ‘responsible for a publication’
 - ‘Publication’ includes ‘all print, broadcast and electronic information which is published’
 - Published means ‘issued for distribution, by sale or otherwise’
- Furthermore, any person ‘having a legitimate interest in the development of the local media industry’ may apply for associate membership, in terms of section 7(3) of the MPA.

THE EXECUTIVE COMMITTEE OF THE MEDIA COUNCIL

The Executive Committee is made up of a chairperson, a vice-chairperson, a treasurer and six additional members, elected at a general meeting of the members of the Media Council, in terms of subsections 18(1) and (2) of the MPA. It is important to

note, however, that in terms of section 35 of the MPA, the minister may dissolve the Executive Committee if it fails to submit an annual report and, in terms of section 36 of the MPA, may appoint an interim Executive Committee until such time as the Media Council elects a replacement Executive Committee.

THE COMPLAINTS COMMITTEE

The Complaints Committee is made up of a chairperson and eight other members who have a serious interest in the furtherance of the communicative value of the media, but who do not have financial interests in the media and are not employed in the media (section 11(1) of the MPA).

Unfortunately, this critically important body – which in name appears to be a sub-committee of the Media Council – is not appointed by the Media Council at all but rather solely by the minister responsible for the administration of the MPA.

THE APPEALS COMMITTEE

The Appeals Committee is made up of the chairperson, who is required to be a legal practitioner recommended by the Law Society of Botswana, a member of the public, and a representative of the media recommended by the Media Council (section 15(1) of the MPA). Again, this critically important body – which in name appears to be a subcommittee of the Media Council – is not appointed by the Media Council but rather solely by the minister, albeit on the recommendation of other bodies in respect of two of three appointments.

3.4.5 Funding for the institutions

THE MEDIA COUNCIL

In terms of section 32(1) of the MPA, funds of the Media Committee come from:

- Members' voluntary contributions, bequests and subscription fees
- Fees and other monies paid for services rendered by the Media Council
- Monies from the rental or sale of any property by the Media Council
- Grants, gifts or donations from lawful organisations or sources

THE EXECUTIVE COMMITTEE

Allowances paid to members of the Executive Committee are paid from funds generated by the Media Council, in terms of section 22(1) of the MPA.

THE COMPLAINTS AND APPEALS COMMITTEES

Members of these committees are paid allowances determined by the minister and paid for from monies appropriated by the National Assembly (that is, out of the national budget), in terms of section 22(2) of the MPA.

3.4.6 Regulations made in terms of the MPA

The MPA makes provision for the making of regulations by the Executive Committee and the minister.

THE EXECUTIVE COMMITTEE

Regulations made by the Executive Committee in terms of section 37 of the MPA are binding upon all members of the Media Council – that is, all media practitioners resident in Botswana. These regulations deal largely with administrative issues, including the:

- Manner of application for registration and accreditation of media practitioners
- Manner of application for membership of the Executive Council

THE MINISTER

In terms of section 38 of the MPA, the minister has wide regulation-making powers, including:

- Dissolving the Executive Committee of the Media Council for failure to submit an annual report
- Any matter intended to safeguard the interests of the public and promote professional standards in the media
- Giving effect to the code of ethics issued by the Media Council
- Any matter relating to the registration and accreditation of non-resident media practitioners (for example, members of the foreign press)

3.4.7 Amending the legislation to strengthen the media generally

The MPA is not in accordance with international best practice and there are a number of problems with its provisions:

- The MPA is not a genuine industry self-regulatory body because membership of the Media Council is not voluntary but rather mandated under the MPA. Failure to be a member is a criminal offence that brings with it penalties, namely, a fine, a period of imprisonment or both.
- From a media freedom perspective, the most important body that is established under the MPA is the Complaints Committee, which is clearly a governmental body appointed solely by the minister. This body is given enormous powers, including the power to prevent a journalist from being able to practise his or her profession by being stripped of his or her accreditation with the Media Council. Having a governmental body in charge of the disciplinary affairs of journalists runs contrary to democratic principles of media regulation.
- The premise of the MPA is unjustifiable. Regulation of broadcasting is recognised as legitimate due to the technical nature of broadcasting. As such, licensing of frequencies must be coordinated, and stricter content regulation is in order due to the differences between the print media (where the intake of content requires action – reading on the part of the reader) and the broadcast media (where the impact is much more immediate and does not require the same intentional action on the part of the listener or viewer). Internationally, executive regulation of the conduct of the print media (as is effectively provided for in the MPA) is seen as not being consistent with a commitment to freedom of expression and, particularly, to a free press.

3.5 Statutes governing the broadcast media generally

3.5.1 Statutes regulating broadcasting generally

Broadcasting in Botswana is regulated in terms of the Broadcasting Act 2000, Act 6 of 1998. Prior to this, broadcasting was regulated by the Telecommunications Authority in terms of the Telecommunications Act, 1994.

3.5.2 Botswana's National Broadcasting Board

Section 3 of the Broadcasting Act establishes the National Broadcasting Board (NBB) to perform the functions conferred on it by the Broadcasting Act or any other enactment. Section 4 provides that the NBB comprises 11 members.

3.5.3 Main functions of the NBB

In terms of section 10(1) of the Broadcasting Act, the NBB's functions are to:

- Issue broadcasting licences
- Exercise control over and supervise broadcasting activities. It is important to note that section 10(1)(b) specifically mentions the need to exercise control over the cross-border relaying of radio and television programmes to or from Botswana
- Allocate available spectrum resources to ensure the widest possible diversity of programming and optimal utilisation of spectrum resources

3.5.4 Appointment of NBB members

All 11 members of the NBB are appointed by the minister. (Although the specific minister responsible is not stated in the Broadcasting Act, it is presumably the minister responsible for the administration of the Broadcasting Act.) However, the Broadcasting Act does not give the minister a great deal of discretion on many of the appointments. Subsections 5(a)–(d) of the Broadcasting Act provide that four of the appointees must consist of:

- An officer from the Office of the President
- An officer from the Ministry of Commerce and Industry, who is responsible for administering copyright legislation
- An officer from the Department of Cultural and Social Welfare in the Ministry of Labour and Home Affairs
- A representative of the Telecommunications Authority

In addition, the minister must appoint seven persons, one of whom must be designated as chairman of the NBB from a list of 10 candidates nominated by the Nominating Committee. In this regard:

- Section 8(2) establishes that the Nominating Committee is made up of:
 - The chairman, who must be a member of the Law Society nominated by the Council of the Law Society
 - The vice-chancellor of the University of Botswana or his or her nominee
 - A representative of the Office of the President
- Section 8(5) requires the Nominating Committee to invite candidates to apply to be interviewed for nomination in the Gazette but also in a local newspaper.

- Subsections 8(4) and (6) require every candidate to be interviewed, and that the interviews be conducted transparently and openly.
- Section 8(3) requires the Nominating Committee to nominate 10 candidates, by consensus, to the minister.

Interestingly, no criteria for either qualification or disqualification of NBB members are provided for in the Broadcasting Act.

3.5.5 Funding for the NBB

This is an interesting issue. The NBB members are, in terms of section 7 of the Broadcasting Act, paid such allowances as the minister may determine after consulting with the Ministry of Finance and Development Planning. However, it is clear from section 9 of the Broadcasting Act that the NBB has no human resources capacity of its own. Section 9(1) specifically provides that it is the Telecommunications Authority which acts as the ‘secretariat’ of the NBB and which is to discharge functions assigned to it by the board. Furthermore, the Telecommunications Authority must designate to the NBB ‘such officers of the [Telecommunications] Authority as may be necessary for the performance of the functions of the [NBB] and the administration of this Act’, in terms of section 9(2). Consequently, it appears that while the NBB has been created specifically to deal with broadcasting licensing and spectrum issues, the bulk of the necessary resources will continue to come from the Telecommunications Authority.

3.5.6 Making broadcasting regulations

In terms of section 23 of the Broadcasting Act, the minister makes regulations on matters relating to the Broadcasting Act.

3.5.7 The licensing regime for broadcasters in Botswana

BROADCASTING LICENCE REQUIREMENT

Section 12(1) of the Broadcasting Act prohibits any person from carrying out any broadcasting or rebroadcasting activities except under and in accordance with a licence issued under section 12.

Anyone who does not comply with section 12(1) (or indeed any other provision of the Broadcasting Act) is guilty of an offence and, upon conviction, shall be liable to a fine, imprisonment or both, in terms of section 22(b) of the Broadcasting Act.

CATEGORIES OF BROADCASTING LICENCES

Section 10(2) of the Broadcasting Act makes reference to three categories of broadcasting services:

- *Private*: This is defined in section 1 as ‘a broadcasting service operated for profit and controlled by a person who is not a public or community broadcasting licensee’.
- *Community*: This is defined in section 1 as a broadcasting service which:
 - (a) is fully controlled by a non-profit entity and carried on for non-profitable purposes
 - (b) serves a particular community
 - (c) encourages members of the community serviced by it or persons associated with or promoting the interests of such community to participate in the selection and provision of programmes to be broadcast
 - (d) may be funded by donations, grants, sponsorship, advertising, or membership fees or by any combination of them.

It is also important to note that the Broadcasting Act defines a ‘community’ in section 1 as including ‘a geographically founded community’ or ‘any group of persons having a specific, ascertainable, common interest’.

- *Public*: This is defined in section 1 as ‘a broadcasting service provided by any statutory body which is funded either wholly or partly through State revenues’.

Besides these three categories, there are other types of broadcasting licences or services, such as a special event licence and a cable service, as provided for in the Broadcasting Regulations. These are dealt with elsewhere in this section.

BROADCASTING LICENSING PROCESS

Section 10(2) of the Broadcasting Act authorises the NBB to establish different application and assessment procedures for the three types of broadcasting services, namely private, community and public. These procedures include invitations to tender, and the NBB is required ‘to the maximum extent possible, consistent with safety, efficiency and economy, [to] give preference to enterprises which are owned by citizens or in which citizens have significant shareholding’.

The licensing process itself is fairly simple. In terms of section 12(2), an application

for a broadcasting or rebroadcasting service licence is made to the secretariat of the NBB and must include:

- The name of the service
- The name and place of residence of directors or producers of the service
- The name and place of business and residence of the owner
- The prescribed fee
- Any other information which the secretariat may require or as may be prescribed

In terms of section 13, the board may issue a licence to the applicant if it is satisfied that the applicant has fulfilled all the requirements for a grant of licence, and subject to the availability of frequencies.

FREQUENCY SPECTRUM LICENSING

The process of frequency spectrum licensing is not clearly set out in the Broadcasting Act. While one of the NBB's legislated functions is to allocate spectrum resources, the actual process for doing this is unclear. Indeed, the processes for awarding broadcasting service and spectrum licences appear quite different.

Subsections 12(3)(b) and (d) of the Broadcasting Act provide that regulations (which are made by the minister, not the NBB) may provide for the frequencies used in the operation of a station, the power limitations in respect of a station and any other technical specifications, the location of the transmitter station, as well as the geographical area to which the broadcast or rebroadcast may be made. This is the kind of information that is more commonly found in a frequency spectrum licence as opposed to a regulation. Hence, in terms of the wording of the Broadcasting Act it appears that the minister plays a significant role in the effective licensing of frequency spectrum.

3.5.8 Responsibilities of broadcasters in Botswana

ADHERENCE TO LICENCE CONDITIONS

Section 13(2) of the Broadcasting Act provides that a broadcasting or rebroadcasting licence may be issued subject to such conditions and restrictions, including geographic restrictions, as the NBB considers necessary. Broadcasting licences often contain a number of different conditions depending on the type of service. Public broadcasting licences contain conditions setting, among other things, local content quotas, language requirements, educational programming requirements and requiring impartial news coverage.

In terms of section 17(1) of the Broadcasting Act, '[w]here a licensee has failed to comply with any material condition included in his or her licence ... the [NBB] may by notice in writing revoke the licence'. However, in terms of section 17(2) of the Broadcasting Act, the licensee must be given an opportunity to be heard by the NBB prior to the revocation of a licence. And in terms of section 17(3) of the Broadcasting Act, any person aggrieved by such a revocation may appeal to the High Court.

REPORTING OBLIGATIONS

Section 15(1) of the Broadcasting Act requires the owner of any broadcasting or rebroadcasting service to lodge notice with the secretariat of the NBB any of the following changes in regard to a broadcasting or rebroadcasting service:

- Change of name
- Change in ownership or any interest in ownership
- Change of director, producer or owner

Importantly, in terms of section 15(2), no changes in the register of licensees that is established and maintained by the NBB may be effected unless the chairman of the NBB has approved the proposed change.

In terms of section 15(3), where the chairman of the NBB is of the opinion that such a change would be detrimental to the development of the broadcasting sector, he or she shall refer the matter in full to the NBB for determination.

In terms of section 15(4) of the Broadcasting Act, the NBB can either:

- Approve the change, in which case the secretariat must make the consequential changes in the register of licences, or
- Refuse to approve the change and revoke the licence

Record-keeping obligations

In terms of section 19 of the Broadcasting Act, a licensee shall keep and store sound and video recordings of all programmes broadcast or rebroadcast for a minimum of three months after the date of broadcasting, and shall produce such material on demand by the NBB.

Audience advisories

Where a programme to be broadcast or rebroadcast is not suitable for children, the licensee must, in terms of section 20, advise members of the public.

Adherence to broadcasting regulations

Clearly, broadcasters will be subject to regulations made in terms of the Broadcasting Act (these are dealt with later in this chapter). Indeed, section 21 of the Broadcasting Act specifically provides that regulations may be prescribed a code of practice, which shall be observed by all licensees.

3.5.9 Is the NBB an independent regulator?

The NBB cannot be said to be independent. Indeed, nowhere in the Broadcasting Act does it indicate that the NBB is independent.

Effectively, the NBB operates as an arm of the minister in the following ways:

- All the NBB's board members are appointed by the minister. Even though the nominating committee is involved with regard to seven of the NBB's 11 members, this does not render the NBB a body that is independent of government.
- The minister is responsible for making broadcasting regulations.
- While the NBB is responsible for broadcast licensing, the minister is responsible for prescribing the radio frequency aspects for each service, thereby giving him a significant role.

It is fair to say that the Broadcasting Act does not comply with agreed international best practice for broadcasting regulation.

3.5.10 Amending the legislation to strengthen the broadcast media generally

There are a number of problems with the legislative framework for the regulation of broadcasting generally:

- The overriding problem is that the NBB is not an independent body.
- The Broadcasting Act ought to be amended to deal with the following issues:
 - The criteria for appointment to the NBB (as well as grounds for disqualification) should be clearly set out and should focus on relevant skills and experience, as well as on a commitment to freedom of expression and acting in the public interest.
 - NBB members ought to be appointed by the president, acting on the advice of the National Assembly, after the National Assembly has drawn up a list of recommended appointees. As part of this process,

the National Assembly should call for public nominations and should conduct public interviews.

- The NBB should have its own staff, independent of the staff of the Telecommunications Authority, and should be funded out of licence fees and monies appropriated by Parliament (that is, provided for in the national budget).
- The NBB should be empowered to make its own regulations, including with respect to radio frequency allocations and assignments.
- The minister's role ought to be limited to developing appropriate governmental policy. The minister should be involved in matters that are part of the functionality of a regulator, for example making regulations, particularly where these deal with licensing issues, such as the technical specifications of individual frequency assignments.
- The mandate of the NBB ought to be more fully set out. It should be to act in the public interest to ensure that the citizens of Botswana have access to a diverse range of high-quality public, commercial and community broadcasting services, as well as to ensure that freedom of expression is appropriately protected from commercial and governmental interference.

3.6 Statutes that regulate the state broadcast media

Sadly, Botswana does not have legislation to create a public broadcaster. Both Botswana TV and Botswana Radio are operated by the Department of Broadcasting Services, which falls under the Office of the President. Both services operate as arms of government. Given how they operate, these services are clearly state broadcasters and cannot be said to be public broadcasters. It is important to note that the relevant licence conditions of Botswana TV and Botswana Radio do contain public service requirements; however, these are insufficient to change the fundamental nature of the services that remain state as opposed to public broadcasting services.

3.7 Statutes governing broadcasting signal distribution or transmission

The Telecommunications Act, Act 38 of 2004, is relevant to broadcasting signal distribution or transmission, which is the technical process of ensuring that the content-carrying signal of a broadcaster is distributed such that it can be heard and/or viewed by its intended audience. The definitions of, among other things, 'telecommunications service' and 'telecommunications system' in the Telecommunications Act make it clear that broadcasting signal distribution or transmission is a form of telecommunications service which would require to be licensed under the

Telecommunications Act, and would be required to comply with all relevant statutory provisions, including in relation to tariffs and other matters.

3.8 Statutes that undermine a journalist's duty to protect his or her sources

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

3.8.1 Criminal Procedure and Evidence Act, Act 52 of 1938

The Criminal Procedure and Evidence Act (CPEA) was enacted prior to Botswana's independence, but has been amended numerous times since then. A number of provisions of the CPEA might be used to compel a journalist to reveal confidential sources:

- Section 54 of the CPEA allows a judicial officer presiding in any criminal proceedings to issue an order directing a police officer to take possession of any book, document or thing which is required in evidence in the proceeding. Failure to comply with an order to hand over any book, document or thing is an offence punishable by fine or, if the fine is not paid, to a period of imprisonment.
- Section 214 of the CPEA provides that every person is compelled to give evidence in any criminal case in any court in Botswana or before a magistrate on a preparatory examination, except those who are expressly excluded (for example, 'lunatics', the insane or the spouse of an accused).
- Section 65 of the CPEA allows a public prosecutor or magistrate to require the clerk of the court to subpoena any person to attend a preparatory examination to give evidence or to produce any book or document. In this regard:
 - If any persons fail to obey the subpoena, then the magistrate in charge of the preparatory examination can issue a warrant for their arrest, in terms of section 66 of the CPEA
 - If a person refuses to answer any questions or produce any document

at a preparatory examination, then the magistrate may order that the person be imprisoned for up to eight days at a time until the person consents to answer the question or produces the document, in terms of section 68 of the CPEA

- Similarly, section 201 of the CPEA allows the court to subpoena any person to attend court to give evidence or to produce any book or document during the course of a criminal trial. In this regard, if a person refuses to answer any questions or produce any document at a trial, then the court may order that the person be imprisoned for up to eight days at a time until the person consents to answer the question or produce the document, in terms of section 202 of the CPEA.

It is, however, extremely important to note the provisions of section 257 of the CPEA, which provide that no witness shall be compelled or permitted to give evidence in any criminal proceeding if, as a matter of public policy and with regard to the public interest, such a case were being held in the Supreme Court of the Jurisdiction in England and it was found that the evidence would be privileged from disclosure. This allows for reference to English legal practice on matters of public policy regarding compelling witnesses to give evidence.

3.8.2 Penal Code, Law 2 of 1964

The Penal Code was enacted prior to Botswana's independence but has been amended numerous times since then. Part II of the Penal Code sets out a list of crimes. Division II of Part II contains 'Offences against the administration of lawful authority', the second part of which is headed 'Offences relating to the administration of justice'. Section 123 of the Penal Code falls under that heading and deals with offences relating to judicial proceedings. In terms of section 123(1)(b), it is an offence to refuse to answer a question or produce a document if one has been called upon to give evidence in a judicial proceeding. The penalty is imprisonment for up to three years and, if this takes place before the court, an additional fine.

3.8.3 National Security Act, Act 11 of 1986

Section 13(1) of the National Security Act provides that where the director of public prosecutions is satisfied that there are reasonable grounds for suspecting that an offence under the National Security Act has been or is about to be committed and that a particular person is able to furnish information about the matter, he or she may require a named police officer, in writing, to compel that person to give such information to the police officer. Failure to disclose the information to the named

police officer is an offence, and anyone found guilty of either failing to comply with or giving false information is liable to a period of imprisonment of up to 12 years (section 18).

3.8.4 Cybercrime and Computer Related Crimes Act, Act 22 of 2007

Section 22 of the Cybercrime Act empowers a police officer or any person authorised by the commissioner of police or by the director of the Directorate on Corruption or Economic Crime to apply in writing to a judicial officer for an order compelling, among other things, a person to submit specified data in that person's possession, which is stored on a computer or computer system.

Clearly, these provisions might well conflict with a journalist's ethical obligation to protect his or her sources. However, it is important to note that whether or not requiring a journalist to reveal a source is in fact an unconstitutional violation of the right to freedom of expression depends on the particular circumstances in each case, particularly on whether the information is available from any other source. Consequently, it is extremely difficult to state that these provisions are, by themselves, a violation of the right to freedom of expression under the Constitution.

3.9 Statutes that prohibit the publication of certain kinds of information

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

- Information regarding legal proceedings
- Information relating to defence, security, prisons, the administration of justice, public safety, public order, sedition, 'alarming' information, defamation of foreign princes or insults to Botswana
- Expression which is obscene or contrary to public morality
- Expression which constitutes criminal defamation
- Expression which poses a danger to public health
- Expression which promotes hatred
- Expression which incites violence or disobedience of the law

- Expression which wrongfully induces a boycott
- Expression with intent to wound religious feelings
- Expression that relates to economic crime
- Expression by public officials
- Expression that the speaker of the National Assembly has ruled ‘out of order’

3.9.1 Prohibition on the publication of information relating to legal proceedings

In terms of section 123(1)(e) of the Penal Code, Law 2 of 1964, it is an offence to publish a report of the evidence taken in any judicial proceeding which has been directed to be held in private. The penalty is imprisonment for up to three years.

3.9.2 Prohibition on the publication of state security–related information

PENAL CODE, LAW 2 OF 1964

Division I of Part II of the Penal Code contains ‘Offences against public order’, which is divided into three parts:

- Treason and other crimes against the state’s authority
- Offences affecting relations with foreign states and external tranquillity
- Unlawful societies, unlawful assemblies, riots and other offences against public tranquillity

The prohibitions upon publication relating to the above grounds are dealt with in turn.

Treason and other crimes against the state’s authority

Prohibited publications

In terms of section 47(1) of the Penal Code, if the president believes that a publication is contrary to the public interest (defined in section 47(8) as including being in the interests of defence, public safety and public order), he may, in his absolute discretion, declare it to be a prohibited publication. Note that:

- The order must be published in the Gazette and such local newspapers as he considers necessary

- The order can declare the following to be prohibited publications:
 - A particular publication
 - A series of publications
 - All publications published by a particular person or association
- If the order specifies the name of a periodical publication, then all subsequent issues and any substitution thereof will also be prohibited publications (unless a contrary intention is expressly stated) – section 47(2)
- If the order prohibits all the publications of any class published by a specified person, then the order applies to all publications published after the date of the order too – section 47(3)
- Any person who prints, imports, publishes, sells, supplies or even possesses a prohibited publication is guilty of an offence and is liable, upon conviction, to imprisonment for up to three years – section 48
- Section 49 empowers any police or administrative officer to seize any prohibited publication

A clear problem with the provisions of section 47 of the Penal Code is that they are not objective. In other words, the publication does not have to pose a genuine, realistic or objective threat to defence, public safety or public order – the president just has to believe this is the case before he makes an order prohibiting a publication. This does not comply with internationally accepted standards for prohibiting the publication of information.

Seditious publications

Section 51(c) of the Penal Code provides, among other things, that any person who prints, publishes, sells or distributes a seditious publication is guilty of an offence and is liable to imprisonment for up to three years.

Furthermore, any seditious publication is to be forfeited to the state. Note that:

- In terms of section 50(1), a seditious intention is an intention, among others, to:
 - Excite disaffection against the president or government of Botswana
 - Excite the inhabitants of Botswana to procure the alteration, by illegal means, of any matter established by law
 - Excite disaffection against the administration of justice in Botswana
 - Promote feelings of ill-will or hostility between different classes of the population of Botswana

- Raise discontent or disaffection among the inhabitants of Botswana
- Section 50(1) also explicitly provides that a publication is not seditious by reason only that it intends to:
 - Show the president has been misled or is mistaken in any of his measures
 - Point out errors or defects in the government or Constitution of Botswana, or in the legislation or administration of justice in Botswana, with a view to remedying these
 - Persuade the inhabitants of Botswana to attempt to procure changes by lawful means
 - Point out, with a view to their removal, any matters which are producing feelings of ill-will between different classes in the population

Alarming publications

Section 59(1) of the Penal Code provides, among other things, that any person who publishes any false statement, rumour or report that is likely to cause fear and alarm to the public, or to disturb the public peace, is guilty of an offence. Note, however, that section 59(2) specifically provides a defence to this offence, namely, that prior to publication, the person took ‘such measures to verify the accuracy of such statement, rumour or report as to lead him reasonably to believe that it was true’.

Defamation of foreign princes

Section 60 of the Penal Code falls under the heading ‘Offences affecting relations with foreign states and external tranquillity’. It makes it an offence to publish anything tending to degrade, revile, expose to hatred or contempt any foreign prince, potentate, ambassador or other foreign dignitary, with intent to disturb the peace and friendship between Botswana and that person’s country.

Insults to Botswana

Section 91 of the Penal Code falls under the heading ‘Unlawful societies, unlawful assemblies, riots and other offences against public tranquillity’. It makes it an offence to publish any writing with intent to insult, or bring into contempt or ridicule, the arms or ensigns armorial, the national flag, the standard of the president or the national anthem of Botswana. The penalty for this offence is a fine.

NATIONAL SECURITY ACT, ACT 11 OF 1986

The National Security Act contains a number of provisions that not only prohibit the publication of certain information, but which could also hinder the media’s ability to perform its news-gathering functions. In this regard:

Activities prejudicial to Botswana

Section 3 of the National Security Act sets out a list of activities that are prejudicial to Botswana if they are for ‘any purpose prejudicial to the safety or interests of Botswana’. The penalty for violating this provision is a term of imprisonment for up to 30 years. The activities that are particularly relevant to the media include:

- Being in or in the vicinity of a ‘prohibited place’. Note that this means a place where any work of defence is taking place or any place declared to be a prohibited place by the president
- Making a sketch or note that might be useful to a foreign power or disaffected person (that is, someone carrying on ‘seditious activity’)
- Obtaining or publishing any secret official codes, passwords, documents or information that might be useful to a foreign power or disaffected person (that is, someone carrying on ‘seditious activity’)

Wrongful communication of information

Section 4 of the National Security Act sets out a list of prohibited communication-related activities. The penalty for violating this provision is a term of imprisonment for up to 25 or 30 years. The activities that are particularly relevant to the media include the following:

- Having in one’s possession secret official codes, passwords, documents or information that relate to a prohibited place or which has been obtained in contravention of the National Security Act, and communicating the code, password, document or information to any unauthorised person or retaining it when having no right to do so – section 4(1).
- Having in one’s possession secret official codes, passwords, documents or information that relate to munitions of war, and communicating same to any person for any purpose prejudicial to the safety or interests of Botswana – section 4(2).
- Receiving any secret official codes, passwords, documents or information knowing or having reasonable grounds to believe that the codes, passwords, documents or information have been communicated in contravention of the National Security Act – section 4(3).
- Communicating any information relating to the defence or security of Botswana to any person other than someone to whom he is authorised by an authorised

officer to communicate it to or to whom it is, in the interests of Botswana, his duty to communicate it to – section 4(4).

Protection of classified information

Section 5 of the National Security Act prohibits the communication of any classified matter to any person other than someone to whom he is authorised by an authorised officer to communicate it to or to whom it is, in the interests of Botswana, his duty to communicate it to.

INTELLIGENCE AND SECURITY SERVICE ACT, ACT 16 OF 2007

Although not directed at the media itself, certain of the provisions of the Intelligence and Security Service Act relate to the unauthorised disclosure of intelligence-related information and could indirectly hamper the media's reporting ability. However, it is important to note that the provisions do comply with internationally accepted grounds for preventing the disclosure of security-related information:

- Section 19 prohibits the disclosure by any intelligence or security service officer (or someone who has held such a position) of the identity of a confidential source of information to the Directorate of Intelligence and Security or someone who is involved in covert operational activities of the directorate.
- Section 20 prohibits, among other things, the disclosure by an officer or a member of the support staff of the intelligence or security services of any information gained by virtue of his or her employment.
- Failure to comply with sections 19 or 20 is an offence, and the penalty is a term of imprisonment not exceeding 12 years.

3.9.3 Prohibition on the publication of expression that is obscene or contrary to public morality

PENAL CODE, LAW 2 OF 1964

Expression contrary to public morality

Part II, Division I of the Penal Code contains 'Offences against public order', the first part of which is 'Treason and other crimes against the state's authority'. Section 47 of the Penal Code falls under that heading and deals with prohibited publications.

In terms of section 47(1), if the president is of the opinion that a publication is contrary to the public interest (defined in section 47(8) as including being in the

interests of public morality), he may, in his absolute discretion, declare it to be a prohibited publication. Note that:

- The order must be published in the Gazette and such local newspapers as he considers necessary
- The order can declare the following to be prohibited publications:
 - A particular publication
 - A series of publications
 - All publications published by a particular person or association
- If the order specifies the name of a periodical publication, then all subsequent issues and any substitution thereof will also be prohibited publications (unless a contrary intention is expressly stated) – section 47(2)
- If the order prohibits all the publications of any class published by a specified person, then the order also applies to all publications published after the date of the order – section 47(3)
- Any person who prints, imports, publishes, sells, supplies or even possesses a prohibited publication is guilty of an offence and is liable, upon conviction, to imprisonment for up to three years – section 48
- Section 49 empowers any police or administrative officer to seize any prohibited publication

A clear problem with the provisions of section 47 of the Penal Code is that they are not objective. In other words, the publication does not have to pose a genuine, realistic or objective threat to public morality – the president just has to believe that this is the case before he makes an order prohibiting a publication. This does not comply with internationally accepted standards for prohibiting the publication of information.

Traffic in obscene publications

Division III of Part II of the Penal Code contains ‘Offences injurious to the public in general’, the fourth part of which is headed ‘Nuisances and offences against health and convenience’. Section 178 of the Penal Code falls under that heading and deals with traffic in obscene publications. In terms of section 178(1)(a), it is an offence ‘for the purpose of distribution’ to produce or have in one’s possession ‘any one or more obscene writings ... printed matter ... photographs, cinematograph films ... tending to corrupt morals’. The penalty is a fine or imprisonment not exceeding two years.

CYBERCRIME AND COMPUTER RELATED CRIMES ACT, ACT 22 OF 2007

Section 16 of the Cybercrime Act regulates the electronic traffic in pornographic and obscene material. In terms of section 16(2), any person who, among other things:

- Publishes pornographic or obscene material through a computer or computer system
- Possesses pornographic or obscene material in a computer or computer system or on a computer data storage medium
- Accesses pornographic or obscene material through a computer or computer system

commits an offence and the penalty is a fine, imprisonment or both. Note that in terms of section 16(3), where the material relates to child pornography, the penalty fines are higher and periods of imprisonment longer.

3.9.4 Prohibitions on the publication of expression that constitutes criminal defamation

Part II, Division III of the Penal Code contains ‘offences injurious to the public in general’, the fifth part of which is headed ‘Defamation’ and makes criminal defamation an offence.

DEFINITION OF CRIMINAL DEFAMATION

Section 192 of the Penal Code provides for the offence of criminal defamation, which is, in the part that is relevant for the media, the unlawful publication by print or writing of any defamatory matter (defined in section 193 as matter ‘likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or likely to damage any person in his profession or trade by an injury to his reputation’) concerning another person, with the intent to defame that person.

WHEN IS THE PUBLICATION OF DEFAMATORY MATTER UNLAWFUL?

Section 195 provides that any publication of defamatory matter will be unlawful unless:

- The matter is true and publication was in the public interest
- Publication is privileged

There are two types of privilege recognised under the Penal Code: absolute privilege and conditional privilege.

ABSOLUTE PRIVILEGE

In terms of section 196 of the Penal Code, the publication of defamatory matter is absolutely privileged in the following cases:

- Publications published under the authority of the president in any official document
- Publications in the National Assembly or *Ntlo ya Dikgosi* by any member thereof
- Publications by order of the National Assembly
- Publications to and by a person having authority over an individual who is subject to naval, military or air force discipline about that person's conduct
- Publications arising out of judicial proceedings
- Fair reports of anything said, done or published in the National Assembly or the *Ntlo ya Dikgosi*
- If the publisher was legally bound to publish the matter

Once the publication of defamatory matter is absolutely privileged, it is immaterial if the matter is false or published in bad faith.

CONDITIONAL PRIVILEGE

In terms of section 197 of the Penal Code, the publication of defamatory matter is conditionally privileged provided:

- It is published in good faith
- The relationship between the parties by and to whom the publication is made is such that the persons publishing and receiving the matter are under a legal, moral or social duty to publish/receive same or have a legitimate personal interest in publishing/receiving same
- Publication does not exceed, either in extent or subject matter, what is reasonably sufficient for the occasion

In addition, the publication of defamatory matter is conditionally privileged if the matter published:

- Is a fair and substantially accurate report of court proceedings which were not being held in camera
- Is a copy or a fair abstract of any matter which has previously been published and which was absolutely privileged
- Is an expression of opinion in good faith as to the conduct of a person of a judicial, official or other public capacity or as to his personal character, in so far as it appears in such content
- Is an expression of opinion in good faith as to the conduct of a person as disclosed by evidence given in a public legal proceeding, or as to the conduct or character of any person as a party or witness in any such proceeding
- Is an expression of opinion in good faith as to the merits of any book, writing, painting, speech or other work, performance or act published or publicly made or otherwise submitted by the person to the judgment of the public, or as to the character of the person in so far as it appears in such work
- Is a censure passed by a person in good faith on the conduct or character of another person in any matter where he or she has authority over that person
- Is a complaint or accusation about an individual's conduct or character made by a person of good faith to a person having authority over the individual and having authority to hear such complaints
- Is in good faith for the protection of the rights or interests of the person:
 - Publishing it
 - To whom it was published

DEFINITION OF GOOD FAITH

In terms of section 198 of the Penal Code, a publication of defamatory matter will not be deemed to have been made in good faith if it appears that either:

- The publication was made with an intention to injure to a substantially greater degree than was necessary in the public interest, or for a private interest in respect of which a conditional privilege is claimed, or
- The matter was untrue and he did not believe it to be true (unless there was a duty to publish, irrespective of whether it was true or false)

However, in terms of section 199 of the Penal Code, there is a presumption of good faith if defamatory matter was published on a privileged occasion, unless the contrary is proved.

3.9.5 Prohibition on the publication of expression that poses a danger to public health

Part II, Division I of the Penal Code contains ‘Offences against public order’, the first part of which is headed ‘Treason and other crimes against the state’s authority’. Section 47 of the Penal Code falls under that heading and deals with prohibited publications. In terms of section 47(1), if the president is of the opinion that a publication is contrary to the public interest (defined in section 47(8) as including being in the interests of public health), he may, in his absolute discretion, declare it to be a prohibited publication. Note that:

- The order must be published in the Gazette and such local newspapers as he considers necessary
- The order can declare the following to be prohibited publications:
 - A particular publication
 - A series of publications
 - All publications published by a particular person or association
- If the order specifies the name of a periodical publication, then all subsequent issues and any substitution thereof will also be prohibited publications (unless a contrary intention is expressly stated) – section 47(2)
- If the order prohibits all the publications of any class published by a specified person, then the order also applies to all publications published after the date of the order – section 47(3)
- Any person who prints, imports, publishes, sells, supplies or even possesses a prohibited publication is guilty of an offence and is liable, upon conviction, to imprisonment for up to three years – section 48
- Section 49 empowers any police or administrative officer to seize any prohibited publication

A clear problem with the provisions of section 47 of the Penal Code is that they are not objective. In other words, the publication does not have to pose a genuine, realistic or objective threat to public health – the president just has to believe that this is the case before he makes an order prohibiting a publication. This does not comply

with internationally accepted standards for prohibiting the publication of information.

3.9.6 Prohibition on the publication of expression that promotes hatred

Part II, Division I of the Penal Code II contains ‘Offences against public order’, which is divided into three parts, one of which is ‘Unlawful societies, unlawful assemblies, riots and other offences against public tranquillity’. Section 92 of this part makes it an offence to publish any writing expressing ridicule or contempt for any person mainly because of their race, tribe, place of origin, colour or creed. The penalty is a fine.

3.9.7 Prohibition on the publication of expression that incites violence or disobedience of the law

Part II, Division I of the Penal Code contains ‘Offences against public order’, which is divided into three parts, one of which is ‘Unlawful societies, unlawful assemblies, riots and other offences against public tranquillity’. Section 96 of this part makes it an offence to publish any words implying that it is desirable to:

- Bring about the death or physical injury to any person or class, community or body of persons
- Damage or destroy any property
- Defeat by violence, or other unlawful means, the enforcement of any written law
- Defy or disobey any written law or lawful authority

The penalty is a period of imprisonment not exceeding three years.

A clear problem with the provisions of section 96 of the Penal Code is that they go far beyond internationally accepted grounds for prohibiting expression. This is particularly so with the prohibition against words implying that it is desirable to disobey written laws.

3.9.8 Prohibition on the publication of expression that wrongfully induces a boycott

Part II, Division I of the Penal Code II contains ‘Offences against public order’, which is divided into three parts, one of which is ‘Unlawful societies, unlawful assemblies, riots and other offences against public tranquillity’. Section 98(2) of this part makes it an offence to further any designated boycott. Section 98(1) contains the provisions setting out what a designated boycott is. Essentially, it is one declared to be such by the president if he is satisfied that it is intended, among other things, to:

- Excite disaffection against the government
- Endanger public order
- Jeopardise economic life
- Raise discontent or disaffection among the inhabitants of Botswana
- Engender feelings of hostility between different classes or races of the population

The penalty is a period of imprisonment not exceeding six months.

One problem with the provisions of section 98 of the Penal Code is that they go far beyond internationally accepted grounds for prohibiting expression. Most democracies accept that boycotts are, generally speaking, a legitimate form of non-violent direct protest action. As such, it should not be an offence for a publication to merely support a boycott.

Another problem with the provisions of section 98 of the Penal Code is that they are not objective. In other words, the boycott does not have to pose a genuine, realistic or objective threat to, for example, public order or to Botswana's economic life – the president just has to be satisfied that this is the case before he makes an order designating the boycott. This does not comply with internationally accepted standards for prohibiting the publication of information.

3.9.9 Prohibition on the publication of expression that intends to wound religious feelings

Part II, Division III of the Penal Code contains 'Offences injurious to the public in general', the first part of which is headed 'Offences relating to religion'. Section 140 of the Penal Code falls under that heading and deals with '[w]riting or uttering words with intent to wound religious feelings'. In terms of section 140, it is an offence to '[write] any word' with 'the deliberate intention of wounding the religious feelings of any other person'. The penalty is a period of imprisonment not exceeding one year.

3.9.10 Prohibition on the publication of expression that relates to economic crime

Section 44 of the Corruption and Economic Crime Act, Act 13 of 1994, makes it an offence to publish, without lawful authority or reasonable excuse:

- The identity of any person who is the subject of an investigation in respect of an offence suspected to have been committed by that person under the act
- Any details of an investigation in respect of an offence under the act

The penalty upon conviction is a fine, imprisonment not exceeding one year or both.

3.9.11 Prohibition on the publication of expression by public officials

Section 21 read with section 38 of the Public Service Act, Act 13 of 1998, requires every public officer to comply with certain rules of conduct. Some of these rules have an extremely negative affect on the media's ability to report on significant public interest issues. Section 21(b) prohibits any public officer, unless he or she has 'due authority' (which, in section 38(1), is defined as the written permission of the minister), to allow him- or herself 'to be interviewed on questions or connected with any matter affecting or relating to the public policy, defence, military or economic interests or resources of Botswana'.

This extremely broad prohibition effectively renders government unable to communicate with the media, except through official channels or spokespeople. The prohibition is rendered more draconian by the fact that failure to comply is an offence which carries a penalty of a fine or imprisonment not exceeding six months, or both.

3.9.12 Prohibition on the publication of expression that the speaker of the National Assembly has ruled out of order

Section 29 of the Powers and Privileges Proclamation 24 of 1961, provides that where the speaker of the National Assembly rules that any words used by a member of the National Assembly are out of order, he or she may also order that such words, or any words out of which they arose, or arising out of them, shall not be published in any matter. Publication thereof is an offence, and upon conviction the person concerned would be liable to a fine or a term of imprisonment.

3.10 Legislation prohibiting interception of communication

The legality of intercepting communications is becoming an increasingly important issue for the media. This issue is governed by the Cybercrime and Computer Related Crimes Act, Act 22 of 2007.

Section 9 of the Cybercrime Act makes it an offence to intentionally (and without lawful excuse or justification) intercept (defined as acquiring the content of any communication through the use of any device):

- Any non-public transmission to, from or within a computer or computer system
- Electro-magnetic emissions that are carrying data from a computer or computer system

The penalty is a fine, imprisonment or both.

3.11 Legislation that specifically assists the media in performing its functions

In countries that are committed to democracy, governments pass legislation that specifically promotes accountability and transparency of both public and private institutions. Such statutes, while not specifically designed for use by the media, can and often are used by the media to uncover and publicise information in the public interest.

Botswana has yet to enact access to information or whistleblower protection legislation. However, Botswana does have the National Assembly (Powers and Privileges), Proclamation 24 of 1961. Section 25 of the Powers and Privileges Proclamation provides that in any proceedings instituted for publishing a report, summary or abstract of any proceedings in the National Assembly, a defence is that this was done in good faith and without malice. Although this provision is somewhat unclear, it allows the media to report (in good faith) on the activities of the National Assembly without fear of litigation as a result.

4 REGULATIONS AFFECTING THE BROADCAST MEDIA

In this section you will learn:

- What regulations or rules are
- Key regulations governing broadcasting content
- Other key aspects of broadcasting-related regulations

4.1 Definition of regulations

Regulations are subordinate legislation. They are legal rules made in terms of a statute. Broadcasting regulations and rules are legal mechanisms for allowing a body other than parliament to make legally binding rules governing an industry or sector, without parliament having to pass a specific statute thereon. As is more fully set out elsewhere in this chapter, the empowering statute – in this case section 23 of the Broadcasting Act, 1998 – allows the minister to make regulations to give effect to the provisions of the Broadcasting Act.

4.2 Key regulations governing broadcasting content

The Broadcasting Regulations were made by the minister responsible for broadcasting and are dated 29 October 2004. This is the key set of rules governing broadcasting

in Botswana. Failure to comply with the Broadcasting Regulations is an offence, and a person found guilty may be liable to pay a fine if convicted. There are certain harsher penalties for violations of specific aspects, as set out more fully below. This section focuses on the key content and licensing aspects of the Broadcasting Regulations.

4.2.1 Effective code of practice

Although it is not specifically called a code of practice, sections 11–22 of the Broadcasting Regulations lay down content restrictions or requirements on all broadcasters, which is styled in the same way as a code of practice would be. The main aspects of these provisions include the following:

- *Broadcasting Standards – section 11:* A licensee (or any of its employees) shall not broadcast content which, measured by contemporary community standards:
 - Offends against good taste or decency
 - Contains the frequent use of offensive language, including blasphemy
 - Presents sexual matters in an explicit and offensive manner
 - Glorifies violence or depicts it in an offensive manner
 - Is likely to incite crime or lead to disorder
 - Is likely to incite or perpetuate hatred or vilify any person or section of the community on account of race, ethnicity, nationality, gender, sexual preference, age, disability, religion or culture

- *Protection of children – section 12:* When broadcasting programmes at times where a large number of children may be expected to be watching or listening (taking account of available audience research as well as the time of broadcast), a licensee shall exercise due care in avoiding content that may disturb or be harmful to children, including:
 - Offensive language
 - Explicit sexual or violent materials, including music with violent or sexually explicit lyrics

- *Fairness, accuracy and impartiality in news and information programming – section 13:* Licensees (including employees or agents) shall report news and information accurately, fairly and impartially:
 - News and information shall be presented in a balanced manner without intentional or negligent departure from the facts, including through:
 - Distortion, exaggeration or misinterpretation

- Material omissions
 - Excessive summarising or editing
- A licensee (including employees or agents) shall broadcast a fact fairly, having regard to its context and importance.
- Opinions must be clearly presented as such.

- *Broadcast of unconfirmed reports – section 14:*
 - A licensee shall not broadcast any report that is not based on fact, or that is founded on opinion, supposition, rumour or allegation unless the broadcast is carried out in a manner that indicates these circumstances clearly.
 - Where any doubt exists as to the accuracy of a report and verification is not possible, this fact must be mentioned in the report.
 - A licensee shall not broadcast any report where there exists sufficient reason to doubt the accuracy thereof, and it is not possible to verify the accuracy of the report before it is broadcast.

- *Correction of errors in broadcast – section 15:* A licensee shall broadcast the correction of any factual error:
 - Without reservation, as soon as it is reasonably possible after the error has been committed
 - With such degree of prominence and timing as may be adequate and fair so as to easily attract attention, and shall include an apology where appropriate

- *Reporting on controversial issues – section 16:*
 - When reporting on controversial issues, a licensee shall ensure that a wide range of views and opinions is reported, either within a single programme or a series of programmes.
 - Similarly, phone-in programmes on these issues must allow for a wide range of opinions to be represented.
 - Any person or organisation whose views have been criticised in a programme on a controversial issue of political, industrial or public importance is entitled to a reasonable opportunity to reply.
 - A reply to criticism must be given a similar degree of prominence to the original criticism, and shall be broadcast during a similar time slot as soon as possible after the original criticism.

- *Conduct of interviews – section 17:*
 - Written parental or guardian permission must be obtained before interviewing children.

- Persons who are to be interviewed by a licensee must be advised of the subject of the interview and informed beforehand as to whether or not it is to be recorded or broadcast live.
 - Due sensitivity must be exercised when interviewing bereaved persons or witnesses of traumatic incidents.
- *Comments – section 18:* Comment must be clearly indicated and must be made on facts that are clearly stated.
- *Invasion of privacy – section 19:* A licensee shall not present material which invades a person’s privacy unless there is a justifiable reason in the public interest for doing so.
- *Consent to broadcast – section 20:* A licensee shall not broadcast any information acquired from a person without that person’s consent, unless the information is essential to establish the credibility and authority of a source, or where the information is clearly in the public interest.
- *Sexual offences – section 21:*
- A licensee (and its employees or agents) shall not disclose, in a broadcast, the identity of a victim of a sexual offence without his or her written consent. The identities of child victims of sexual offences may not be broadcast under any circumstances.
 - A licensee shall avoid gratuitous and repetitive detail in covering sexual offences.
 - Importantly, a violation of this provision is an offence and, if found guilty, a broadcaster would be liable to a fine, imprisonment or both.
- *Payment of criminals – section 22:* A licensee shall not pay anyone involved in, or who has been convicted of, a crime in order to obtain information, unless there is a compelling public interest in doing so.

4.2.2 Provisions on advertisement and sponsorship

Sections 5–8 and 32 of the Broadcasting Regulations deal with advertising-related issues. Key aspects of these provisions are the following:

- *Fairness in advertising – section 5:*
 - A licensee shall ensure that broadcast advertisements are lawful, honest and decent, and conform to the principles of fair competition in business.

- A licensee shall ensure that advertisements do not contain any misleading descriptions or claims.
 - A licensee must ensure that advertisements do not unfairly attack or discredit other products or advertisements.
 - A licensee must be satisfied that the advertiser has substantiated all descriptions or claims prior to broadcasting the advertisement.
 - A licensee shall not unreasonably discriminate against or in favour of any particular advertiser.
- *Scheduling of advertisements – section 6:*
- A licensee must exercise responsible judgment in the scheduling of advertisements that may be unsuitable for children, when children may be expected to be watching or listening.
 - Advertisements must be clearly distinguishable from programming.
 - A broadcaster's presenters must make a clear distinction between programming material and advertisements when reading advertisements.
- *Sponsorship of programmes – section 7:*
- A licensee shall not accept sponsorship for news broadcasts.
 - A licensee may accept sponsorship of weather broadcasts, financial broadcasts or traffic reports, provided it retains editorial control of the sponsored programmes.
 - A licensee must ensure that sponsorship of an informative programme does not compromise the impartiality and accuracy of the programme.
 - A licensee must not unreasonably discriminate against or in favour of any particular sponsor.
 - A licensee shall not broadcast any programme which has been sponsored by a political party.
 - Sponsorships must be clearly acknowledged before and after the sponsored programme, and any link between the programme's subject matter and the sponsor's commercial activities must be clear.
- *Infomercials – section 8:*
- An infomercial shall not be broadcast:
 - For a period exceeding three hours of the performance period (6 am to 12 am) in any day
 - During prime time
 - During any break in the transmission of a children's programme

- Infomercials must be distinguishable (by visual or audio form) from any programme material broadcast.
 - Note that where a channel broadcasts infomercials exclusively, the above requirements do not comply.
 - A licensee shall ensure that all infomercials are lawful, honest and decent, and conform to the principles of fair competition in business.
- *Advertising restrictions applying only to commercial broadcasters – section 32:* Section 32 sets out a number of restrictions and requirements on commercial broadcasters in respect of advertising. The key ones are as follows:
- Licensees must ensure that advertisements are broadcast in allotted breaks or between programmes.
 - There shall be no more than four advertising breaks per hour on television.
 - Advertising content of any programme shall not exceed:
 - Thirty seconds of a five-minute programme
 - Two minutes of a 10-minute programme
 - Three minutes of a 15-minute programme
 - Five minutes of a 35-minute programme
 - Twelve minutes of a 60-minute programme, except where:
 - The licensee broadcasts the programme as a public service
 - There is a national broadcast that interrupts a scheduled programme and results in the loss of advertising time, in which case the allowable minutes of advertising can be increased to 14 minutes
 - Section 32(6) sets out detailed record-keeping obligations for licensees in respect of programmes and advertisements broadcast.

4.2.3 Ownership restrictions

Besides the ownership restrictions that are implied in the Broadcasting Act, section 3 of the Broadcasting Regulations prohibits a single person from owning a television station and a radio station which serve the same local market.

4.2.4 Local content requirements

Section 10 of the Broadcasting Regulations sets out various local content (defined in section 1 of the Broadcasting Regulations as programmes that ‘have been produced using material gathered in Botswana, and which mostly use Botswana personnel and services in Botswana’) requirements, which are the same across all categories of

broadcasters. These are subject to the specific conditions imposed by the NBB in a broadcasting licence.

- Minimum local content for television broadcasts: 20%
- Minimum local content for radio broadcasts: 40%
- Local news shall constitute the majority of a licensee's news broadcast content.

4.2.5 Public notices of emergencies or public disaster announcements

In terms of section 23 of the Broadcasting Regulations, a licensee shall, free of charge, provide broadcast notice of an emergency service or a public disaster announcement made by any government department.

4.2.6 Obligations of public broadcasters

As discussed elsewhere in this chapter, there is no specific legislation establishing and governing a public broadcaster. Publicly funded radio and television broadcasters are operated directly by the government and are state broadcasters. The Broadcasting Regulations, at section 33, set out general content requirements for public broadcasters. These appear to be a public service mandate – namely, that their programmes:

- Consist of a wide range of subject matter
- Serve the needs of different audiences
- Are transmitted at appropriate times to take into account that children may be in the audience
- Are accurate, fair and impartial
- Do not contain any matter expressing the opinions of the broadcaster on current affairs or matters of public policy
- Do not cause offence to religious communities
- Reflect the diverse cultural activities in Botswana
- Provide coverage of sporting and other leisurely interests
- Contain educational material

- Provide a public service for the dissemination of information, education and entertainment

4.2.7 Other licensing matters

The Broadcasting Regulations contain other licensing-related provisions, the most important of which are the following:

- Section 24 provides for the granting of special event licences, which are valid for only seven days.
- Section 25 provides for the licensing of external satellite feeds. Note that in terms of section 25(5), where the NBB rejects an application to operate an external satellite feed, a right of appeal exists to the minister, who has discretion to grant the licence.
- Section 30 requires cable broadcasters to re-transmit the terrestrial television broadcasts of a local public television service. If the cable service consists of three or fewer channels, then the broadcasts of Botswana Television (the state broadcaster) must be transmitted.

5 MEDIA SELF-REGULATION

The Press Council of Botswana (a voluntary self-regulatory body distinct from the Media Council, discussed earlier in this chapter) has published a code of ethics, which is to govern the conduct and practice of all media practitioners, media owners, publishers and media institutions, and which is to be enforced by the Press Council of Botswana. The key elements contained in the code are highlighted under the headings as they appear in the code:

5.1 General duties

- **General standards**
 - To maintain the highest professional and ethical standards.
 - To inform, educate and entertain the public professionally and responsibly.
 - To disseminate accurate and balanced information, and that comments are genuine and honest.
 - Never to publish information known to be false, or maliciously make unfounded allegations about others, intending to harm their reputations.

■ General duties

- To maintain the highest professional and ethical standards by being honest, fair and courageous in news-gathering, reporting and interpreting information.
- To defend the principle of freedom of the press and other mass media by striving to eliminate news suppression and censorship.

5.2 Good practice

■ Accuracy

- Check facts when compiling reports.
- Editors and publishers must take proper care not to publish inaccurate material.
- Both reporter and editor must ensure that all reasonable steps have been taken to check the accuracy of a report.
- Facts should not be distorted by out-of-context reporting.
- Special care must be taken when reports could harm individuals, organisations or the public interest.
- Before publishing a story of alleged wrongdoing, all reasonable steps must be taken to obtain responses from the named individual or organisation.

■ Correction of inaccuracy or distortion

- Upon discovering the publication of a significant distortion of the facts, a media institution must publish a correction promptly and with comparable prominence. If a person's reputation has been damaged, an apology must also be published promptly and with comparable prominence.
- Any finding by the Press Council on its performance must be reported on fairly and accurately by the media institution concerned.

■ Right of reply/rebuttal

- A fair opportunity to reply must be given to a person or organisation that is the subject of an inaccurate or unfairly critical report.

■ Comment, conjecture and fact

- Clear distinctions must be made between comment, conjecture and fact.
- Comment must be a genuine expression of opinion relating to fact.
- Comment or conjecture must not be presented in such a way as to create the impression that it is fact.

5.3 Rules of the profession

■ Undue pressure or influence

- There can be no suppression or distortion of information that the public has a right to know due to pressure or influence from advertisers or others who have a corporate, political or advocacy interest in the media institution concerned.
- A media practitioner must not succumb to cultural, political or economic intimidation intended to influence reporting.

■ Public interest

- A media practitioner must act in the public interest without undue interference from any quarter.

■ Payment for information

- No report may be published, suppressed, omitted or altered in return for payment of money or other gift or reward.
- No person can be paid to act as an information source unless there is a demonstrable public interest in the information, and the resulting report must indicate that information has been paid for.

■ Reporting of investigations

- While reports may inform the public about arrests of suspects by the police, they should not contain the names of suspects until the police have filed formal charges, unless it is in the public interest to do so.

■ Privacy

- It is normally wrong for a person's private life to be intruded into and reported upon without his or her consent.
- Such reporting can only be justified when this would be in the public interest, such as:
 - Detecting or exposing criminal conduct
 - Detecting or exposing anti-social conduct
 - Protecting public health and safety
 - Preventing the public from being misled by the public statements or actions of an individual, which is contradicted by his or her private conduct

■ Intrusions into grief or shock

- In cases involving personal grief or shock, enquiries and approaches must be made with sympathy and discretion.

- **Interviewing or photographing children**
 - Interviewing or photographing a child under the age of 16 should not normally be done without the consent of a parent or guardian.
 - When interviewing or photographing a child in difficult circumstances or with disabilities, special sympathy and care must be exercised.
 - Children must not be approached or photographed at schools without the permission of the school authorities.
- **Children in criminal cases**
 - The names of any child offender under the age of 16 arrested by the police or tried in the criminal courts must not be published.
- **Victims of crime**
 - Victims of gender violence must not be identified unless they have consented to such publications and the law authorises them to do so.
 - Where such consent is given subject to conditions, these conditions must be respected.
- **Innocent relatives or friends**
 - The relatives and friends of a person accused or convicted of a crime should not be identified unless this is necessary for the full, fair and accurate reporting of the crime or the criminal proceedings.
- **Gathering of information**
 - Gathering information should be done openly, and media practitioners should identify themselves as such.
 - Information and pictures should, as a general rule, not be obtained by misrepresentation, subterfuge or undercover techniques.
 - Surreptitious methods of information gathering may be used only where open methods have failed to yield information. This must be in the public interest – for example, to detect or expose criminal activity, or to bring to light information that will protect the public.

5.4 Editorial rules

- **Hatred and disadvantaged groups**
 - Material that is intended or likely to cause hostility or hatred towards persons on the grounds of their race, ethnic origins, nationality, gender, physical disabilities, religion or political affiliation must not be published.

- Utmost care must be taken to avoid contributing to the spread of ethnic hatred or to the dehumanisation of disadvantaged groups when reporting events and statements of this nature.
 - Dehumanising and degrading pictures of a person may not be published without his or her consent.
- **National security**
- Material must not be published that will prejudice the legitimate national security interests of Botswana in regard to military and security tactics and strategy, or intelligence material held for defence.
 - However, the above does not prevent the media from exposing corruption in security, intelligence and defence agencies, or from commenting on their levels of expenditure and overall performance.
- **Plagiarism**
- Plagiarism (making use of another person’s words or ideas without proper acknowledgement and attribution of the source of those words or ideas) must not be engaged in.
- **Protection of sources**
- When sources are promised confidentiality, that promise shall be honoured unless released by the source.

6 COMMON LAW AND THE MEDIA

In this section you will learn:

- The definition of common law
- How Botswana’s courts have dealt with defamation matters
- What Botswana’s courts have said about the constitutionality of government withdrawing advertisements from newspapers as a response to press criticism

6.1 Definition of common law

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

This section focuses on a number of judgments in relation to defamation, as well as on an important judgment on the constitutionality of a withdrawal of government advertisements as a response to press criticism.

6.2 Defamation

This chapter has already dealt extensively with the general issue of defamation as it arises in respect of criminal defamation. It is important to note, however, that defamation is more usually dealt with in the civil contexts, where a person who has been defamed seeks damages to compensate for the defamation. All the cases dealt with in this section arise in the context of civil cases of defamation.

6.2.1 Defences to an action for defamation

There are several defences to a claim based on defamation.¹ These defences include:

- Truth in the public interest
- Absolute privilege – for example, a member of the National Assembly speaking in Parliament
- Qualified privilege – statements made in the discharge of a duty. For example, the duty to provide information in connection with the investigation of a crime, enquiries as to the creditworthiness of a person, etc.

Besides the above, which constitute defences to a charge of criminal defamation, there are other defences available in a civil defamation claim, including:

- Fair comment upon true facts and which are matters of public interest
- Self-defence (to defend one's character, reputation or conduct)
- Consent

Below are two cases that deal with defences to an action for defamation.

In *Khimbele v Sebenego and Others; Caphers v Sebenego and Others* 2001 (2) BLR 105 (HC), a defamation action was brought by two people named in a newspaper report as having been bribed by an attorney. In fact, the people had received unsolicited cash from the attorney but had immediately handed the money over to their superior, and acted entirely appropriately and honestly. The newspaper raised a number of defences, two of which merit particular attention because of how the court analysed the journalist's conduct:

- The first defence was that the report was comment. The court rejected this, saying that in order to be justifiable as ‘fair comment’, the comment ‘must appear as comment and must not be mixed up with the facts that the reader cannot distinguish between what is a report and what is comment. Care should therefore be taken to keep such comments as are made separate from the fact reported so that readers may be able readily to distinguish between the two’ [at page 114]. The court found that it did not appear ‘that the allegation [was] intermingled with any opinion’ and that in its view the statement that the attorney corruptly gave money to the plaintiffs was ‘a statement of fact and not a comment’ [at page 115].
- The second defence was that the report contained a fair and accurate report of proceedings in a court – that is, was subject to qualified privilege. However, the court did not accept this, saying that the statement that the attorney corrupted (as opposed to attempted to corrupt) the plaintiffs by giving them money was a ‘substantial inaccuracy and not privileged at common law’ [at page 117].

In *Tibone v Tsodilo Services (Pty) Ltd t/a The Sunday Sun and Others* Case No. CVHLB-000235-7 (as yet unreported) the then-minister of minerals, energy and water resources brought a defamation action against the *Sunday Sun* regarding allegations that he was involved in corruption regarding a tender. The newspaper raised a defence of privilege, saying it was reporting on a debate that had taken place in Parliament. This was rejected by the court, which found correctly that:

- ‘Honest, balanced and responsible journalism demands that the readership is presented with a balanced picture of what is reported and where a report or article deals with debate, especially debate of national importance such as we are dealing with here, then the readership is presented with the negative and positive aspects of the debate’ [at page 32]. The judge went on to find on the facts that he ‘cannot accept ... that the articles represented balanced reporting’ and that ‘the manner of reporting brings into focus my concern that imputations of corruption are made against the plaintiff ... without any factual basis whatsoever as the allegations of corruption [made in Parliament] were not aimed at anyone in particular’ [at page 33]
- The journalists involved had, among other things:
 - Interviewed only those MPs who had made adverse comments
 - Not published the press statement released by the permanent secretary of the relevant department
 - Not published the press statement released by the Directorate of Corruption and Economic Crimes that its investigation had revealed no corruption

- Produced no hard evidence that the minister in question had ‘apologised’, as he was alleged to have done in the report

The court found that the defendants had acted in bad faith and maliciously. The defence of qualified privilege regarding the reporting on events in Parliament failed in this case.

6.2.2 Remedies for defamation

There are three main remedies in respect of defamation in the absence of a defence:

PUBLICATION OF A RETRACTION AND AN APOLOGY BY THE MEDIA ORGANISATION CONCERNED

Very often a newspaper or broadcaster will publish a retraction of a story or allegation in a story, together with an apology, where it has published a false defamatory statement. Whether or not this satisfies the person who has been defamed will depend on a number of factors, including: the seriousness of the defamation; how quickly the retraction and apology is published; and the prominence given to the retraction and apology (this is a combination of the size of the retraction, its positioning in the paper and on the particular page concerned).

ACTION FOR DAMAGES

This is where a person who has been defamed sues for monetary compensation. It takes place after the publication has occurred and damages (money) are paid to compensate for the reputational damage caused by the defamation in circumstances where there are no defences to defamation. The quantum of damages (the amount to be paid in compensation) will depend on a number of factors, including whether or not an apology or retraction was published and also the standing or position in society of the person being defamed.

In *Dibotelo v Sechele and Others* 2001 (2) BLR 588 (HC), the plaintiff in the action for damages for defamation was a senior judge who had been defamed by a newspaper, which had alleged (wrongly) that he had misappropriated funds. In making a substantial damages award, the judge made a number of important statements, namely, that:

- The only way of impressing upon ‘all concerned that ... unfounded attacks are not to be made is by awarding exemplary damages’ [at page 594]
- He was ‘anxious not to create the impression that the courts, by their protection

of a person's right to unsullied reputation, unwittingly whittle down the press's freedom of speech' [at page 595]

- Any damages awarded to the plaintiff 'should reflect the delicate balance between the two competing interests' [at page 595]

This has been echoed in *Tibone v Tsodilo Services (Pty) Ltd t/a The Sunday Sun and Others* Case No. CVHLB-000235-7 (as yet unreported) in which the judge held that while he was 'mindful of the effect of robust or excessive damages on freedom of speech, courts should not ... be seen to condone irresponsible journalism or malicious reporting by an award of damages so low as to embolden rather than discourage errant publications' [at page 38].

PRIOR RESTRAINTS

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

6.3 Withdrawal of government advertising as a response to press criticism

In a critically important case, *Media Publishing (Pty) Ltd v The Attorney-General and Another* 2001 (2) BLR 485 (HC), the Botswana High Court, in an application for an interim interdict, granted the applicant – the owner of two newspapers – an interdict declaring that a government directive banning all government advertising in the two newspapers was wrongful and unlawful. The directive had been issued by the president shortly after the newspaper had published a number of articles that were critical of the president and the vice-president. In reaching its decision, the court made a number of extremely important statements, including:

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 [at page 496].

The court found on the facts that the applicant had established a *prima facie* right ‘that the executive’s act of withdrawing advertisement patronage from the applicant’s papers in order to express its displeasure regarding what it perceived to be exceeding the limit of editorial freedom amounts to an infringement of the ... applicant’s freedom of expression’ [at page 497].

NOTE

- 1 See FDJ Brand, ‘Defamation’, *LAWSA*, 2nd ed., Volume 7, paras 245ff. Note that the common law of South Africa is frequently cited and followed in Botswana’s courts.