In the Supreme Court of Zimbabwe
Case No. SC 162/2001

BETWEEN:

CAPITAL RADIO (PRIVATE) LIMITED

Applicant

and

THE BROADCASTING AUTHORITY OF ZIMBABWE

First Respondent

and

THE MINISTER OF STATE FOR INFORMATION AND PUBLICITY

Second Respondent

and

THE ATTORNEY GENERAL OF ZIMBABWE

Intervener

WRITTEN COMMENTS SUBMITTED BY ARTICLE 19, GLOBAL CAMPAIGN FOR FREE EXPRESSION

RESTRICTIONS ON PRIVATE BROADCASTING

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1. Introduction

This Brief assesses the *Broadcasting Services Act 2001* in light of international and constitutional guarantees of freedom of expression. The analysis is based on a survey of international and comparative constitutional law and practice – including decisions and statements of international bodies and national appellate courts, as well as practice in national jurisdictions – relevant to the issue.

Numerous provisions of the Act breach international and comparative guarantees of freedom of expression. These include provisions seriously limiting the independence of the broadcast regulator, provisions granting the Minister enormous direct powers in the area of broadcast regulation, provisions restricting, rather than promoting, pluralism and diversity in broadcasting, and provisions imposing unrealistic or unwarranted restrictions on the content of what may be broadcast. There is a wealth of international and comparative standards relating to all of these issues. Furthermore, the approach taken in the Act stands in stark contrast to that of other democratic countries. Cumulatively, the invalidity of these provisions renders the regulatory scheme envisaged by the Act unconstitutional. As a result, it is submitted that the Act as a whole is unconstitutional.

Furthermore, it is submitted that the Act as a whole is unconstitutional because its overall purpose is to ensure firm Government control over broadcasting while formally complying with this Court's ruling that the State broadcasting monopoly be dismantled.

2. Brief Statements of Facts and Law

The applicant is a private company incorporated in Zimbabwe wishing to provide broadcasting services throughout the country. Until recently, private broadcasting was prohibited in Zimbabwe due to the broadcasting monopoly established in favour of the Zimbabwe Broadcasting Corporation.[1] In April 2000, the applicant launched a constitutional challenge against the State broadcasting monopoly and, on 22 September 2000, the Supreme Court of Zimbabwe ruled that this monopoly was inconsistent with freedom of expression as guaranteed by section 20(1) of the Constitution of Zimbabwe, and hence invalid.[2] As a result, the Court held that the applicant was free to provide a broadcasting service, stating:

> [T]here is at the present time…nothing to prevent the applicant from proceeding with immediate effect to operate and provide a broadcasting service from within Zimbabwe.[3]

The applicant began to broadcast on 28 September 2000. Upon being publicly threatened by the Minister of State for Information and Publicity (the second respondent) to stop broadcasting, the applicant obtained a High Court interdict against

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[1] See the *Broadcasting Act* [*Chapter 12:01*], section 27 and the Radiocommunication Services Act [*Chapter 12:04*], section 14.

[2] *Capital Radio (Private) Limited v. Minister of Information, Posts and Telecommunications*, Judgment No. S.C. 99/2000, Constit. Application No. 130/00.

[3] *Ibid.*, p. 4.

the second respondent, as well as the Commissioner of Police and the Attorney General, to prevent them from interfering with its operations. Despite this, the applicant's studio was raided by the police and its equipment was confiscated. This led to the Assistant Commissioner responsible for the confiscation being convicted of contempt of court by the High Court. The applicant also obtained a Consent Order that ordered the return of all equipment seized save the transmitter unit.[4] Addressing journalists after these proceedings, the second respondent stated that Capital Radio would never be granted a licence.[5]

Around the same time, in early October, the *Presidential Powers (Temporary Provisions) Broadcasting Regulations, 2000*,[6] were promulgated under the *Presidential Powers (Emergency Regulations) Act*. These Regulations set up a framework for broadcast regulation, including a licence requirement and the establishment of a regulatory authority, largely under the control of the Government. The second respondent, the Minister responsible for implementation, never issued a call for applications for broadcast licences as envisaged under the Regulations.

The Regulations were valid only until 3 April and, on 26 March 2001, the second respondent promulgated the *Broadcasting Services Bill 2001*.[7] The Parliamentary Legal Committee, on 29 March 2001, delivered a report to Parliament noting that a number of sections of the Bill were inconsistent with section 20 of the Constitution. Despite this, the Bill was rushed through Parliament without emendation in an exceptional procedure on 3 April 2001 to become the *Broadcasting Services Act 2001* (BSA). No call for applications for broadcast licences has so far been issued by the second respondent, the Minister responsible for implementation of the BSA. The *Broadcasting Regulations* and the successor *Broadcasting Services Act* have been widely criticised by civil society.[8]

As a result of the *Broadcasting Regulations* and the *Broadcasting Services Act*, it has in practice been impossible for the applicant, or anyone else, to provide private broadcasting services to Zimbabweans. Thus, in practice the September 2000 ruling by this Court declaring the State broadcasting monopoly invalid has never been implemented.

The present application to the Supreme Court argues that numerous provisions in the BSA are incompatible with the guarantee of freedom of expression in section 20 of the Constitution of Zimbabwe and calls for an order declaring these provisions invalid, declaring that the applicant has the right to broadcast and calling upon the second respondent to develop a legal framework for broadcasting which is consistent with the guarantee of freedom of expression.

The Act, which is similar to the Regulations which preceded it, establishes a licensing

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[4] See Case Nos. H.C. 10658/00 and 11900/00.

[5] *Daily News* article cited in "Police hold onto broadcaster's equipment" IFEX Alert issued by the Media Institute of Southern Africa, 11 October 2000. The second respondent later denied these statements. See *Zimbabwe Independent* article of 27 October 2000.

[6] Statutory Instrument 225A of 2000.

[7] H.B. 6, 2001.

[8] See, for example, the Joint Statement by Civic Groups, Daily News article of 7 April 2001. See also "Broadcasting Regulations Read in Parliament for First Time", IFEX Alert issued by the Media Institute of Southern Africa, 28 March 2001 and "Report on WPFC's press freedom mission to Zimbabwe", IFEX Alert issued by the World Press Freedom Committee, 5 June 2001.

system under the control of the Minister, upon the advice of the Broadcasting Authority of Zimbabwe, a body established under the Act and which is under firm ministerial control. The Act also sets out a number of restrictions on who may be awarded a licence, as well as strict limits on the number of national licenses. Finally, the Act imposes a number of stringent restrictions on the content of what may be broadcast. Further detail on the specific provisions of the Act which are challenged herein is provided below.

Section 20 of the Constitution of Zimbabwe guarantees freedom of expression in the following terms:

> (1) Except with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence.
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> (2) Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) to the extent that the law in question makes provision–
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> (a) in the interests of defence, public safety, public order, the economic interests of the State, public morality or public health;
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> (b) for the purpose of–
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> (i) protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings;
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> (ii) preventing the disclosure of information received in confidence;
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> (iii) maintaining the authority and independence of the courts or tribunals or Parliament;
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> (iv) regulating the technical administration, technical operation or general efficiency of telephony, telegraphy, posts, wireless broadcasting or television or creating or regulating any monopoly in these fields;
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> (v) in the case of correspondence, preventing the unlawful dispatch therewith of other matter; or
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> (c) that imposes restrictions upon public officers;
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> except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

3. Freedom of Expression and Human Rights

3.1 International Guarantees

Article 19 of the *Universal Declaration of Human Rights*,[9] binding on all States as a matter of customary international law, proclaims the right to freedom of expression in the following terms:

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

Zimbabwe's international legal obligations to respect freedom of expression are also spelt out in Article 19 of the *International Covenant on Civil and Political Rights*

[9] UN General Assembly Resolution 217A(III), 10 December 1948.

(ICCPR),[10] to which Zimbabwe became a State Party in 1991. Article 19 states:

> (1) Everyone shall have the right to hold opinions without interference.
> (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

Zimbabwe is also a State Party to the *African Charter on Human and Peoples' Rights*, (ACHPR)[11] which guarantees freedom of expression at Article 9. Both the European *Convention for the Protection of Human Rights and Fundamental Freedoms* (the European Convention)[12] and the *American Convention on Human Rights*[13] also guarantee freedom of expression.[14]

3.2 The Fundamental Nature of Freedom of Expression

The overriding importance of freedom of expression – including the right to information – as a human right has been widely recognised, both for its own sake and as an essential underpinning of democracy and means of safeguarding other human rights. At its very first session in 1946 the United Nations General Assembly declared:

> Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.[15]

These views have been reiterated by all three regional judicial bodies dealing with human rights. The African Commission on Human and Peoples' Rights noted, in respect of Article 9 of the ACHPR:

> This Article reflects the fact that freedom of expression is a basic human right, vital to an individual's personal development, his political consciousness, and participation in the conduct of the public affairs of his country.[16]

The European Court of Human Rights (ECHR) has also recognised the key role of freedom of expression:

> [F]reedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man…it is applicable not only to "information" or "ideas" that are favourably received…but also to those which offend, shock or disturb the State or any other sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society".[17]

Similarly, the Inter-American Court of Human Rights stated:

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[10] UN General Assembly Resolution 2200A(XXI), 16 December 1966, in force 23 March 1976.
[11] Adopted 26 June 1981, in force 21 October 1986.
[12] E.T.S. No. 5, in force 3 September 1953.
[13] Adopted 22 November 1969, in force 18 July 1978.
[14] Articles 10 and 13 respectively.
[15] Resolution 59(1), 14 December 1946.
[16] *Media Rights Agenda and Constitutional Rights Project v. Nigeria* , 31 October 1998, Communication Nos. 105/93, 128/94, 130/94 and 152/96, para. 52.
[17] *Handyside v. United Kingdom*, 7 December 1976, 1 EHRR 737, para. 49.

> Freedom of expression is a cornerstone upon which the very existence of a democratic society rests.[18]

These views have been reiterated by numerous national courts around the world, including the Zimbabwean Supreme Court:

> This Court has held that s 20(1) of the Constitution is to be given a benevolent and purposive interpretation. It has repeatedly declared the importance of freedom of expression to the Zimbabwean democracy…. Furthermore, what has been emphasised is that freedom of expression has four broad special objectives to serve: (i) it helps an individual to obtain self-fulfilment; (ii) it assists in the discovery of truth, and in promoting political and social participation; (iii) it strengthens the capacity of an individual to participate in decision-making; and, (iv) it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change.[19]

3.3 Restrictions on Freedom of Expression

3.3.1 International Standards

Freedom of expression is not, however, absolute. Every system of international and domestic rights recognises carefully drawn and limited restrictions on freedom of expression to take into account the values of individual dignity and democracy. Under international human rights law, national laws that restrict freedom of expression must comply with the provisions of Article 19(3) of the ICCPR:

> The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
> (a) For respect of the rights or reputations of others;
> (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Restrictions must meet a strict three-part test.[20] First, the restriction must be provided by law. Second, the restriction must pursue one of the legitimate aims listed in Article 19(3); this list is exclusive. Third, the restriction must be necessary to secure that aim. International jurisprudence makes it clear that this is a strict test, presenting a high standard which any restriction must overcome.[21]

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[18] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5, para. 70.
[19] *Chavunduka & Choto v. Minister of Home Affairs and Another*, Judgement No. S.C.36/2000, 22 May 2000, p. 9.
[20] This test has been affirmed by the UN Human Rights Committee. See, *Mukong v. Cameroon*, 21 July 1994, Communication No. 458/1991, para. 9.7. The same test is applied by the ECHR. See *The Sunday Times v. United Kingdom*, 26 April 1979, 2 EHRR 245, para. 45.
[21] See, for example, *Thorgeirson v. Iceland*, 25 June 1992, 14 EHRR 843, para. 63.

3.3.2 National Standards

National constitutions, like international law, normally permit restrictions on freedom of expression but only if they meet a strict test, commonly set as a requirement that they are 'reasonably justifiable in a democratic society'.[22] National courts have elaborated a test for assessing whether a restriction is reasonably justifiable. In 1986, the Canadian Supreme Court set out what has come to be known as the "Oakes Test", the accepted standard since that time:

> To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. The standard must be high…. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial…. Second…the party invoking [the limitation] must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352.… There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: *R. v. Big M Drug Mart Ltd*., supra, at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".[23]

This test has been followed in substance in a number of other jurisdictions, including Zimbabwe.[24] In addition, the Canadian constitution, in common with many other constitutions, only permits restrictions that are "prescribed by law".[25]

The similarity between this test and the test under international law may be noted. Both permit only restrictions that are set out clearly in law, that pursue objectives or aims of sufficient importance to warrant limiting a fundamental right and that meet a test of necessity and proportionality. Furthermore, as Lord Wilberforce, writing as a member of the Privy Council, has noted, international human rights law is a relevant guide to interpreting constitutional clauses.[26] Similarly, the High Court of Australia has noted: "[I]nternational law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights."[27]

3.3.3 Elaboration of the Test

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[22] See, for example, the Constitution of Zimbabwe, section 20(2).
[23] *R. v. Oakes* [1986] 1 SCR 103, pp. 138-9.
[24] See, for example, *Nyambirai v. National Social Security Authority and Anor* [1995] (9) BCLR 1221 (SC), p. 1231.
[25] *Canadian Charter of Rights and Freedoms*, section 1.
[26] *Minister of Home Affairs v. Fisher* [1980] AC 319, pp. 328-9.
[27] *Mabo v. Queensland (No. 2)*, (1992) 175 CLR 1, para. 42.

3.3.3.1 Provided by Law

International law and most constitutions, including the Zimbabwean Constitution, permit only restrictions on fundamental rights that are provided by law.[28] This implies not only that the restriction is based in law but also that the relevant law meets certain standards of clarity and accessibility, sometimes referred to as the "void for vagueness" doctrine. The ECHR has elaborated on the requirement of "prescribed by law" under the European Convention on Human Rights:

> [A] norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.[29]

Vague provisions are susceptible of wide interpretation by both authorities and those subject to the law. As a result, they are an invitation to abuse and authorities may seek to apply them in situations that bear no relation to the original purpose of the law or to the legitimate aim sought to be achieved. Vague provisions also fail to provide sufficient notice of exactly what conduct is prohibited. As a result, they exert an unacceptable 'chilling effect' on freedom of expression as individuals steer well clear of the potential zone of application to avoid censure.

The requirement of provided by law also prohibits laws that grant authorities excessively broad discretionary powers to limit expression. In *Re Ontario Film & Video Appreciation Society v. Ontario Board of Censors*, the Ontario High Court considered a law granting the Board of Censors power to censor any film it did not approve of. In striking down the law, the Court noted that the evils of vagueness extend to situations in which unfettered discretion is granted to public authorities responsible for enforcing the law:

> It is accepted that law cannot be vague, undefined, and totally discretionary; it must be ascertainable and understandable. Any limits placed on the freedom of expression cannot be left to the whim of an official; such limits must be articulated with some precision or they cannot be considered to be law.[30]

3.3.3.2 Legitimate Aim

International instruments normally provide a full list of the aims which may justify a restriction on freedom of expression. It is quite clear from both the wording of Article 19 of the ICCPR and the views of the UN Human Rights Committee that restrictions on freedom of expression that do not serve one of the legitimate aims listed in paragraph 19(3) are not valid.[31] This is also the position under the European Convention and the American Convention.[32] Many national constitutions, including the Constitution of Zimbabwe, mirror this approach, providing a full list of all aims which may justify a

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[28] In the Zimbabwean Constitution, the term is "under the authority of any law", section 20(2).
[29] *The Sunday Times v. United Kingdom*, note **Error! Bookmark not defined.**, para. 49.
[30] (1983) 41 OR (2d) 583 (Ont. HC), p. 592.
[31] See *Mukong v. Cameroon*, note **Error! Bookmark not defined.**, para. 9.7.
[32] The African Charter takes a different approach, simply protecting freedom of expression, "within the law".

restriction on freedom of expression.[33]

It is not sufficient, to satisfy this part of the test, that the restriction in question has a merely incidental effect on the legitimate aim. The restriction must be primarily directed at that aim, as the Indian Supreme Court has noted:

> So long as the possibility [of a restriction] being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly unconstitutional and void.[34]

In assessing the legitimate aim, courts go beyond the general legitimate aim the law serves and look at its specific objectives. As the Canadian Supreme Court has noted:

> Justification under s. 1 requires more than the general goal of protection from harm common to all criminal legislation; it requires a specific purpose so pressing and substantial as to be capable of overriding the Charter's guarantees.[35]

In assessing whether a restriction on freedom of expression addresses a legitimate aim, regard must be had to both the purpose and the effect of the restriction. Where the original purpose was to achieve an aim other than one of those listed, the restriction cannot be upheld. As the Canadian Supreme Court has noted:

> [B]oth purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation.[36]

It may be noted that the list of legitimate aims in section 20 of the Constitution of Zimbabwe goes beyond those allowed under international law, additionally including public safety and the economic interests of the State. The former presumably falls largely, if not entirely, within the ambit of public order, recognised as a legitimate aim under the ICCPR. The latter – the economic interests of the State – is not, under international law, considered a legitimate ground for restricting expression. It is, therefore, incumbent upon Zimbabwean courts to construe it narrowly, so as to minimise any potential breach by Zimbabwe of its international obligations.

3.3.3.3 Necessity or Reasonable Justification

Different constitutions and treaties use different terms to describe the third part of the test for restrictions on freedom of expression – treaties normally require restrictions to be 'necessary' while national constitutions more commonly refer to 'reasonably justifiable in a democratic society' – but there is a strong thread of commonality running through the jurisprudence. The European Court has noted that necessity involves an analysis of whether:

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[33] See section 20 of the Constitution of Zimbabwe. Some constitutions, like the Canadian Charter of Rights and Freedoms, do not provide a list of legitimate aims. Instead, the Supreme Court of Canada determines whether the objective of a restriction is "of sufficient importance to warrant overriding a constitutionally protected right or freedom" as part of the test of whether the restriction is "reasonable and demonstrably justifiable in a free and democratic society".

[34] *Thappar v. State of Madras* [1950] SCR 594, p. 603.

[35] *R. v. Zundel* [1992] 2 SCR 731, p. 733.

[36] *R. v. Big M Drug Mart Ltd* [1985] 1 SCR 295, p. 331.

> [There is a] "pressing social need" [whether] the interference at issue was "proportionate to the legitimate aim pursued" and whether the reasons adduced…to justify it are "relevant and sufficient".[37]

This closely resembles the Oakes test, which sets out three aspects of this part of the test. First, restrictions must be rationally connected to the objective they seek to promote, in the sense that they are carefully designed to achieve that objective and that they are not arbitrary or unfair. This is analogous to the international requirement of relevant reasons for a restriction. Second, the restriction should impair the right as little as possible (a prohibition on overbroad restrictions), analogous to the sufficient reasons required under international law. Third, the restriction must be proportionate to the legitimate aim, a requirement also found in international law. The proportionality part of the test involves comparing two considerations, namely the likely effect of the restriction on freedom of expression and the importance of the goal or legitimate aim which is sought to be protected.

This element of the test presents a high standard to be overcome by the State seeking to justify the interference, apparent from the following quotation, cited repeatedly by the European Court:

> Freedom of expression, as enshrined in Article 10, is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established. [38]

3.4 Broadcasting and Freedom of Expression

The guarantee of freedom of expression applies with particular force to the media, including the broadcast media. As the Inter-American Court of Human Rights has stated: "[I]t is the mass media that make the exercise of freedom of expression a reality."[39] The European Court of Human Rights has consistently emphasised "the pre-eminent role of the press in a State governed by the rule of law."[40]

This Court has also recognised the importance of broadcasting freedom, quoting the following from the Belize Court of Appeal:

> Today television is the most powerful medium for communications, ideas and disseminating information. The enjoyment of freedom of expression therefore includes freedom to use such a medium.[41]

Signal distribution, as a means of communication, is similarly protected by the

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[37] See *Lingens v. Austria*, 8 July 1986, 8 EHRR 407, paras. 39-40.

[38] See, for example, *Thorgeirson v. Iceland*, note **Error! Bookmark not defined.**, para. 63.

[39] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note **Error! Bookmark not defined.**, para. 34.

[40] *Thorgeirson v. Iceland*, note **Error! Bookmark not defined.**, para. 63. The UN Human Rights Committee has also emphasised the importance of broadcasting freedom. See below under Political Interference in Private Broadcasting, International and Comparative Standards.

[41] *Belize Broadcasting Authority v. Courtenay and Hoare* [1988] LRC (Const) 276, p. 284, quoting the court below. This was cited by the Supreme Court of Zimbabwe in *Retrofit (Pvt) Ltd v. Posts and Telecommunications Corporation* [1996] 4 LRC 489, p. 503.

guarantee of freedom of expression, as the European Court of Human Rights has noted:

> [The guarantee applies] not only to the content of information but also to the means of transmission or reception since any restriction imposed on the means necessarily interferes with the right to receive and impart information.[42]

This Court has also protected the means of communication, stating:

> These cases, and there are others, underline the principle that restriction upon or interference with the means of communication, whatever form it may take, abridges the guarantee of freedom of expression.[43]

Broadcasting is important to freedom of expression in two ways. First, individuals have a right to express themselves, including through broadcasting. While limitations in the number of frequencies means that not everyone has a right to a frequency, broadcasters do have a right to have their freedom of expression respected. This is clear from the quotations above.

Even more important is the second aspect of the right, which is the right of the public to have access to a diversity of information and ideas through broadcasting. This second aspect of the right to freedom of expression in relation to broadcasting has been recognised by international and national courts. For example, the European Court of Human Rights has noted the need for special protection of the freedom of expression rights of the media, in part because of their role in making public,

> …information and ideas on matters of public interest. Not only does [the press] have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of 'public watchdog'.[44]

Similarly, the US Supreme Court has noted:

> [T]he people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. [45]

The State has the right to regulate broadcasting, for example to ensure orderly use of the airwaves, but the guarantee of freedom of expression still applies to this regulation. Section 20(2)(b)(iv) of the Constitution of Zimbabwe contains a specific provision allowing for the regulation of broadcasting in its technical aspects or the creation or regulation of any broadcasting monopoly. However such regulation, like other restrictions on freedom of expression, is permitted only if "reasonably justifiable in a democratic society". Similarly, Article 10(1) of the European Convention contains a

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[42] *Autronic AG v. Switzerland*, 22 May 1990, Application No. 12726/87, para. 47. See also, *Cable and Wireless (Dominica) Limited v. Marpin Telecommunications and Broadcasting Company*, 30 October 2000, Appeal No. 15 of 2000 (PC).

[43] *Retrofit v. Posts and Telecommunications Corporation*, note **Error! Bookmark not defined.**, p. 503.

[44] *Thorgeirson v. Iceland*, note **Error! Bookmark not defined.**, para. 63.

[45] *Red Lion Broadcasting Co., Inc., etc., v. Federal Communications Commission (No. 2)*, 395 US 367 (1969), p. 390.

specific restriction allowing States to require "the licensing of broadcasting, television or cinema enterprises". However, the European Court has emphasised that such licensing is subject to the test for restrictions set out in Article 10(2):

> [T]he purpose of the third sentence of Article 10.1 of the Convention is to make it clear that States are permitted to control by a licensing system the way in which broadcasting is organised in their territories, particularly in its technical aspects. It does not, however, provide that licensing measures shall not otherwise be subject to the requirements of paragraph 2, for that would lead to a result contrary to the object and purpose of Article 10 taken as a whole.[46]

In other words, restrictions on broadcasters, even though they are for purposes of regulation, must meet the same three-part test as all restrictions on freedom of expression.

In elaborating the specific implications of the guarantee of freedom of expression for broadcasters, international and national courts and bodies have stressed two key State obligations. First, it is essential that regulatory powers in relation to broadcasting be exercised by bodies which are independent of government. Otherwise, there is a risk of political interference in this crucial medium. Second, the State is under an obligation to promote pluralism in broadcasting, both by refraining from unnecessary restrictions and by taking positive measures. These obligations are elaborated in greater detail below.[47] Furthermore, any restrictions on the content of what may be broadcast must pass the three-part test for restrictions on freedom of expression.

4. The State Media

An important part of the context for broadcasting in Zimbabwe is the role of the State broadcaster, the Zimbabwe Broadcasting Corporation (ZBC). Unfortunately, ZBC continues to suffer from a high degree of Government control over its operations, which results in extensive bias in favour of the ruling party. This highlights the need for independent and pluralistic private broadcasters in Zimbabwe. In striking down the ZBC's monopoly, this Court relied on its decision in *Retrofit (Pvt.) Ltd v. Posts and Telecommunications Corporation*, which stressed the importance of considering the effect of that monopoly when assessing its constitutionality.[48] The effect of the monopoly is, among other things, to deprive Zimbabweans, at least in relation to broadcasting, of access to balanced news, as well as news from a variety of sources.

Government control over, and bias in the reporting of, ZBC is well documented. In 1999 three organisations, ARTICLE 19, the Catholic Commission for Justice and Peace in Zimbabwe and the Media Institute of Southern Africa, established the Media Monitoring Project Zimbabwe (MMPZ), an organisation dedicated to objective monitoring of the media, including the State media.
The MMPZ's first report, covering the period from January to May 1999, highlighted

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[46] *Groppera Radio & Ors v. Switzerland*, 28 March 1990, Application No. 10890/84, para. 61.
[47] See the sections on International and Comparative Standards under Political Interference in Broadcasting and under Provisions Limiting Pluralism.
[48] *Retrofit v. Posts and Telecommunications Corporation*, note **Error! Bookmark not defined.**, p. 505.

the extent of Government control over the ZBC:

> [A serious problem is] the continuing attitude on the part of government that the ZBC is its mouthpiece rather than a vehicle for general matters of public interest. This could be seen in the intermittent sacking or suspension of broadcasters who display a degree of independence…. It could be seen in the notices pinned on ZBC noticeboards prohibiting the broadcasting of interviews with certain critical public figures…. And most of all it could be seen in the almost total absence of alternative voices on the airwaves themselves.[49]

Radio is the most important medium in Zimbabwe, given the almost universal geographical reach of ZBC and the relatively high level of radio ownership, in contrast to newspapers and television.[50] The MMPZ noted serious problems with bias in radio news in favour of the ruling party:

> Fairness, equitable coverage, public services and balance are foreign to radio news. There are obvious cases of abuse. Party political propaganda goes out as news. Outrageous claims and statements made by leading politicians are reported without challenge. Politicians receive coverage, not necessarily because they say or made news, but merely because they spoke in public.[51]

Furthermore, critical voices were largely excluded from radio. The MMPZ noted,

> …the lack of a professional journalistic ethos…there are many alternative, interesting voices in Zimbabwe who are challenging the ruling party's performance. This diversity of voices was not represented on radio. This means the news bulletins were not only one-sided, they were also dull and predictable.[52]

The MMPZ has continued to monitor ZBC and reported serious bias in ZBC's coverage of the campaign for the constitutional referendum, held on 12-13 February 2000:

> In the absence of any external guidelines…the corporation chose to broadcast direct access programming exclusively on behalf of the Constitutional Commission, which was campaigning for a yes vote. This blatant censorship was challenged by the NCA, which won a ruling in its favour from the High Court on 14 January. The ZBC refused to comply. By this time, of course, the campaign was already more than half way through.[53]

This bias continued right up until and throughout the actual polling period:

> On 13 February, the second day of voting, all radio stations devoted almost the entire period between 2.00 and 3.00pm to Constitutional Commission advertisements calling for a Yes vote. The announcer spoke between advertisements urging people who had not voted to go and do so – at the same time emphasizing that they should vote Yes.[54]

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[49] *A Duty to Inform: a report on Zimbabwe's publicly-owned media, January – May 1999,* p. 7.
[50] *Ibid.*, p. 55.
[51] *Ibid.*
[52] *Ibid.*, p. 58.
[53] *A Question of Balance: the Zimbabwean Media and the Constitutional Referendum*, March 2000, p. 13.
[54] *Ibid.*, p. 17.

Given the biased track record of the ZBC both generally and during elections, it is particularly important that an independent and pluralistic broadcasting system is established before the Presidential election, due by April 2002.

5. Issues Addressed

The contested provisions of the *Broadcasting Services Act 2001* represent a substantial limitation on the right of the Zimbabwean people to freedom of expression and information. The following issues are considered in this brief.

A. Is the Act as a whole unconstitutional:
because it is directed at an individual legal person (the applicant)?
because its intention is to restrict freedom of expression and information?

B. Do various provisions of the Act render the regulation of private broadcasting subject to political interference, contrary to the guarantee of freedom of expression?

C. Do various provisions of the Act limit, rather than promote, pluralism in the broadcast media, contrary to the guarantee of freedom of expression?

D. Do various provisions of the Act unduly restrict the content of broadcast programming, contrary to the guarantee of freedom of expression?

Issue A. is analysed in light of general international standards and principles. Issues B. to D. are analysed by applying the test for restrictions on freedom of expression, namely by looking at whether the provisions in question are provided by law, pursue a legitimate aim and are necessary or reasonably justifiable in a democratic society.

5.1 Is the Act as a Whole Unconstitutional?

In certain circumstances a legislative enactment as a whole can fail to pass constitutional muster either because it is directed towards limiting the rights of a specific individual or because its fundamental purpose is to restrict a human right.

5.1.1 Laws Directed at Individuals

It is well established under international law that laws restricting freedom of expression which are directed at individuals cannot be justified. This is because they are arbitrary in their application and therefore do not meet the standard of 'provided by law'. Furthermore, they bear a serious risk of being discriminatory.

A case before the African Commission on Human and Peoples' Rights challenged, among other things, decrees proscribing the publication of various magazines and newspapers. In assessing the legitimacy of these decrees under the *African Charter of Human and Peoples' Rights*, the Commission stated:

Laws made to apply specifically to one individual or legal personality raise the serious danger of

> discrimination and lack of equal treatment before the law, guaranteed by Article 3. The proscription of "The News" cannot therefore be said to be "within the law" and constitutes a violation of Article 9.2 [guaranteeing freedom of expression].[55]

Article 3 of the African Charter provides:

> Every individual shall be equal before the law.
> Every individual shall be entitled to equal protection of the law.[56]

Although the African Commission was considering decrees that specifically banned certain publications, the same reasoning applies to provisions that are, on their face, general in application, but that are really aimed at preventing one individual or legal person from exercising their right to freedom of expression. The latter is more subtle, but no less offensive to the right to freedom of expression.

Two circumstances suggest that the BSA may have been passed in its current form in order to prevent the applicant from broadcasting. First, the second respondent and other officials have on several occasions made statements or acted in a manner which indicates a lack of good faith in relation to the applicant. This is particularly true in the period after the September decision of this Court in Judgment No. 99/2000, declaring invalid the State broadcasting monopoly. For example, the Government, including through the second respondent, threatened the applicant, resulting in the issuance, by the High Court, of an interdict forbidding the second respondent, the Commissioner of Police and the Attorney General from interfering with the applicant's broadcasting operations. In breach of this interdict, the applicant's premises were raided by the police and its equipment was confiscated, leading to the conviction of the Assistant Commissioner responsible, for contempt of court.[57] Addressing journalists around the time of these events, the second respondent was quoted in the media as saying that Capital Radio would never be granted a licence:

> All the directors are white and one of them, Gerry Jackson, has been confirmed to be British. We are going to make sure that no single foreigner will be given a licence to broadcast in this country, particularly if it is a Briton. [58]

Second, several provisions in the BSA appear to be specifically tailored to preventing the applicant from obtaining a licence. These provisions are suspect in part because they appear to be closely tailored to the circumstances of the application. Such suspicion is bolstered by the total absence of any reasonable legitimate aim that might justify these provisions and the fact that they are not found in other democratic countries. For example, section 9(3) prohibits anyone from holding both a signal carrier and a private broadcasting licence. This prohibition, rarely if ever found in other countries, effectively makes it impossible for the applicant to operate without relying on the public transmission system, and deprives it of valuable capital invested in both production and transmission equipment. Similarly, section 8(5) prohibits anyone from holding more than 10% of the shares of a broadcasting or signal carrier licence. While provisions to prevent undue concentration of ownership are found in legislation around the world,

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[55] *Media Rights Agenda v. Nigeria*, note **Error! Bookmark not defined.**, para. 69.
[56] The ICCPR and the Constitution of Zimbabwe contain similar provisions, at article 26 and section 23, respectively.
[57] See note **Error! Bookmark not defined.**.
[58] *Daily News* article. See note **Error! Bookmark not defined.**.

these relate mainly to ownership within the sector as a whole (market share) or cross-ownership, not shares in one broadcaster. A specific and incredibly stringent prohibition on controlling an individual broadcaster, as represented by section 8(5), is quite different. Significantly, the applicant has only two shareholders.

There is reason to believe other provisions in the BSA may also be designed to prevent the applicant from being eligible for a licence, especially in light of statements made by the second respondent. Section 8(1) provides that licensees must be wholly controlled by Zimbabwean citizens who are ordinarily resident in Zimbabwe, thus excluding the involvement of non-citizen residents and even a tiny amount of foreign ownership. Section 22(2) provides that a licensee may not have any directors who are not citizens of Zimbabwe, ordinarily resident in Zimbabwe. One of the directors and shareholders of Capital Radio, Gerry Jackson, is a foreign national who is resident in Zimbabwe.

5.1.2 Laws Whose Purpose is to Restrict Rights

It is clear that under international law and comparative law, national laws whose purpose is to restrict rights are illegitimate. As the Canadian Supreme Court has noted, "an unconstitutional purpose…can invalidate legislation."[59] Indeed, under international law, States are specifically required to promote, not restrict, rights.[60]

The High Court of Enugu, Nigeria has stressed the importance of looking at the overall historical context in assessing the constitutional legitimacy of a law:

> [I]n order to determine whether a law is reasonably justifiable in a democratic society or not the history of that law and the surrounding circumstances in which that law came into our statute book, the underlying object of that law and the mischief or evil it was aimed at preventing must of necessity be considered.[61]

Formally, the *Broadcasting Services Act 2001* establishes a system for licensing private broadcasters, in formal compliance with the decision of this Court in Judgment 99/2000. It is submitted, however, that its real purpose is to ensure effective Government control over broadcasting, including private broadcasting, albeit within a framework of technical respect for the rule of law. This conclusion is warranted not only by the reaction of the authorities to Judgment 99/2000 but also by the system of regulation established by the BSA.

In September 2000, the Government was required by Judgment 99/2000 of this Court, apparently against its will, to dismantle the State monopoly on broadcasting and to undertake a liberalisation of broadcasting. Since that time, the Government has consistently acted in a manner that has in fact made it illegal to undertake private broadcasting in Zimbabwe, through the promulgation, very shortly after that Judgment, of Broadcasting Regulations and then, just as the Regulations expired, the BSA. No call for licence applications was ever issued under the Regulations and one has yet to be issued under the Act. All of this suggests a distinct reluctance on the part of the authorities to undertake this liberalisation.

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[59] *R. v. Big M Drug Mart Ltd* [1985] 1 SCR 295, p. 331.
[60] See ICCPR, article 2(2).
[61] *The State v. The Ivory Trumpet Publishing Co.* [1984] 5 NCLR 736, p. 750.

Furthermore, the overall scheme of the BSA undermines, rather than promotes, independent private broadcasting and media pluralism. The Act allows for only one national free-to-air private broadcaster for each of radio and television,[62] despite the wealth of frequencies available in Zimbabwe and the lack of any apparent competition for them. The Act provides simply that licences may be issued but places the second respondent under no requirement to actually issue licences.[63]

The BSA also ensures that the responsible Minister, the second respondent, remains firmly in control of the licensing process and the Broadcasting Authority.[64] The Minister retains ultimate licensing power over broadcasters, including the power to issue, renew, amend and suspend or cancel licences.[65] The Minister also appoints the members of the Board, after consultation with the President of Zimbabwe, and exercises significant powers over them thereafter.[66]

A number of conditions are placed upon licensees which seriously undermine the practical or economic viability of private broadcasting and which are not found in other jurisdictions.[67] Many of these provisions do not serve any apparent aim or lack serious justification given their severe impact on broadcasting. These include:

a total prohibition on foreign investment (see sections 8(1) and (2));

a total prohibition on anyone who is not a resident citizen from holding a directorship (section 22(2));

a prohibition on any individual owning more than 10% of the shares of a broadcaster (section 8(5));

a prohibition on anyone holding both a broadcasting and a signal carrier licence (section 9(3));

limitation of the duration of licences to just one or two years, for community and commercial stations, respectively (sections 12(2) and (3)).

The BSA also imposes a number of unrealistic or illegitimate limitations on broadcasting content, again not found in other jurisdictions.[68] These include excessively stringent local content and aboriginal language requirements as well as a prohibition on broadcasting false news.[69]

The cumulative impact of these provisions represents a serious obstacle for broadcasters, one which even established broadcasters in wealthy countries would find hard to surmount. They represent an almost total barrier for the as yet almost totally undeveloped Zimbabwean private broadcasting sector and cannot but have the effect of stunting its development.

The records of the Parliamentary debate of 3 April 2001 provide some insight into the Government's motivation for passing this legislation. A presidential election is due to

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[62] Section 9(1).
[63] See section 10(10).
[64] See below under Political Interference in Private Broadcasting.
[65] See sections 6, 10 (10), 11(1)(c), 14, 15(1) and 16(1).
[66] See section 4(2) and the Third Schedule.
[67] See below, under Provisions Limiting Pluralism.
[68] See below, under Content Restrictions.
[69] See section 11(4), Fifth Schedule, paragraph 7 and the Sixth Schedule.

be held in Zimbabwe by the end of March 2002 and the importance of broadcasting in relation to this event was highlighted by the following contribution, during the second reading of the Bill, from an MP from the governing ZANU PF party:

> Next year we will be holding a Presidential Election. In its preparation the opposition is looking for ways to create loop-holes that will allow it to be supported by foreign players. They would like to leave room for their foreign supporters to introduce their radio or television stations so that they cannot only interfere with our democratic process but also fight against what we fought for in the liberation struggle…. Let me hasten to add that broadcasting is a very powerful instrument.[70]

Concern about foreign domination of broadcasting is justified and all countries take measures to prevent this. However, the rhetoric above suggests that the real purpose of the restrictions in the BSA is to ensure that the private broadcast media remain firmly under government control and seriously undeveloped. Taken in conjunction with its control over ZBC, this would mean continued Government domination over the airwaves, at least until after the presidential election, preventing the opposition from having an effective medium to articulate its views to the public.

It is possible that the Government may seek to justify these provisions on the basis of the need to ensure national unity. While this is a legitimate objective, the UN Human Rights Committee has stated:

> [T]he legitimate objective of safeguarding and indeed strengthening national unity under difficult political circumstances cannot be achieved by attempting to muzzle advocacy of multi-party democracy, democratic tenets and human rights.[71]

The cumulative weight of the analysis above suggests that the BSA was passed to provide for formal satisfaction of this Court's ruling, while in practice limiting the development of independent private broadcasting as much as possible.

5.2 Political Interference in Private Broadcasting

5.2.1 Overview

It is well established under international and comparative law that licensing and other regulatory powers in relation to the media must be exercised by bodies that are independent of political or commercial control. The reason is obvious: otherwise, those vested with such control will be tempted to use this power to interfere and thereby restrict freedom of expression. Protection against such interference is, in regulatory regimes around the world, provided in a number of ways, including through the manner of appointing members to regulatory bodies and by protecting their tenure, by ensuring members are not subject to conflicts of interest, by ensuring that processes and regulatory instruments, such as any codes of conduct, are developed in close consultation with broadcasters and other interested parties, and by ensuring that licensing processes are clear, open and fair.

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[70] 3rd April 2001, Mr. Shamu, 6412-6413.

[71] *Mukong v. Cameroon*, note **Error! Bookmark not defined.**, para. 9.7.

In stark contrast to these accepted international standards, the BSA gives the responsible Minister, the second respondent, effective control over the Authority, the regulatory body established under the Act. The Minister appoints members, sets their term of office and can require them to vacate their office. Furthermore, the Minister, not the Authority, is the licensing authority under the Act, with powers to issue, restrict, vary and cancel licences. The Minister also has various other powers, such as to amend the codes of conduct and to take over broadcasting facilities in case of an emergency. Finally, the BSA imposes various 'must-carry' requirements on private broadcasters, including, for example, a requirement to allocate one hour of programming time per week to the Government.

5.2.2 International and Comparative Standards

The need for bodies with regulatory powers over the media to be independent of political and commercial interference, particularly by the Government, finds support in statements and decisions from a number of authoritative international and national bodies and courts.

The United Nations

Within the UN system, both the Human Rights Committee and the Special Rapporteur on Freedom of Opinion and Expression have made statements on this issue. The Human Rights Committee is the body officially responsible for supervising State compliance with their obligations under the ICCPR. It is composed of 18 independent experts representing all the regions of the world. The Committee monitors State compliance with the ICCPR, *inter alia*, by providing comments on the regular reports States are obliged to submit to it.

On a number of occasions in recent years, the Human Rights Committee has expressed concern about restrictions on private broadcasting and lack of independence of regulatory authorities. Perhaps the clearest statement was in its Concluding Observations on Lebanon's Second Periodic Report, where it stated:

> 354. The Committee notes with concern that a number of provisions of the Media Law No. 382 of November 1994 and Decree No. 7997 of February 1996, on the basis of which the licensing of television and radio stations has been restricted to 3 and 11 stations, respectively, do not appear to be consistent with the guarantees enshrined in article 19 of the Covenant, as there are no reasonable and objective criteria for the award of licences. The licensing process has had the effect of restricting media pluralism and freedom of expression….
>
> 355. The Committee therefore recommends that the State party review and amend the Media Law of November 1994, as well as its implementing decree, with a view to bringing it into conformity with article 19 of the Covenant. It recommends that the State party establish an independent broadcasting licensing authority, with the power to examine broadcasting applications and to grant licences in accordance with reasonable and objective criteria.[72]

[72] *Annual Report of the UN Human Rights Committee*, 21 September 1997, UN Doc. A/52/40.

In 2000, the Human Rights Committee expressed the following concern in relation to Kyrgyzstan:

> It is also concerned about the functions of the National Communications Agency, which is attached to the Ministry of Justice and has wholly discretionary power to grant or deny licences to radio and television broadcasters. Delay in the granting of licences and the denial of licences have a negative impact on the exercise of freedom of expression and the press guaranteed under article 19 and result in serious limitations in the exercise of political rights prescribed in article 25, in particular with regard to fair elections.[73]

The Human Rights Committee has also expressed concern at the lack of independence of the Sudanese National Press and Publication Council.[74] Similarly, in 1996, the UN Human Rights Committee expressed the hope, in relation to Mauritius, that "that the envisaged Independent Broadcasting Authority is established as soon as possible."[75]

The UN Special Rapporteur on Freedom of Opinion and Expression has also stressed the need for independent regulation of broadcasting, stating:

> 15. The Special Rapporteur continues to receive allegations of bias in broadcasting which severely limits or seriously compromises the right to seek, receive and impart information. In this regard, the Special Rapporteur wishes to recall points made in previous reports.
>
> 16. There are several fundamental principles which, if promoted and respected, enhance the right to seek, receive and impart information. These principles are…laws governing the registration of media and the allocation of broadcasting frequencies must be clear and balanced; any regulatory mechanism, whether for electronic or print media, should be independent of all political parties and function at an arms-length relationship to Government….[76]

<u>African Statements</u>

A case before the African Commission on Human and Peoples' Rights challenged, among other things, a law establishing a licensing system and registration board for the print media. Although the Commission noted that registration itself was not contrary to the guarantee of freedom of expression, it was concerned in this case that the licensing body was not independent of government and had broad discretionary powers to refuse registration:

> Of more concern is the total discretion and finality of the decision of the registration board, which effectively gives the government the power to prohibit publication of any newspapers or magazines they choose. This invites censorship and seriously endangers the rights of the public to receive information, protected by Article 9.1

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[73] Concluding Observations on Kyrgyzstan's Initial Report, 24 July 2000, UN Doc. CCPR/CO/69/KGZ, para. 21.

[74] Concluding Observations on Sudan's Second Periodic Report, 19 November 1997, UN Doc. CCPR/C/79/Add.85, para. 18.

[75] Concluding Observations on Mauritius' Third Periodic Report, 4 April 1996, UN Doc. CCPR/C/79/Add.60, para. 27.

[76] Annual Report of the Special Rapporteur to the UN Commission on Human Rights, 29 January 1999, UN Doc. E/CN.4/1999/64. See also Annual Report of the Special Rapporteur to the UN Commission on Human Rights, 28 January 1998, UN Doc. E/CN.4/1998/40, para. 20, where the Special Rapporteur noted the need for independent regulatory frameworks for private broadcasters.

> There has thus been a violation of Article 9.1 [guaranteeing the right to receive information].[77]

The same principles apply to licensing of broadcasters.

The *African Charter on Broadcasting 2001* was recently adopted by a UNESCO/MISA-sponsored conference, "Ten Years On: Assessment, Challenges and Prospects", celebrating the 10th anniversary of the Declaration of Windhoek on Promoting an Independent and Pluralistic African Press. The Charter states, under the heading General Regulatory Issues:

> 1. The legal framework for broadcasting should include a clear statement of the principles underpinning broadcast regulation, including promoting respect for freedom of expression, diversity, and the free flow of information and ideas, as well as a three-tier system for broadcasting: public service, commercial and community.
>
> 2. All formal powers in the areas of broadcast and telecommunications regulation should be exercised by public authorities which are protected against interference, particularly of a political or economic nature, by, among other things, an appointments process for members which is open, transparent, involves the participation of civil society and is not controlled by any particular political party….
>
> 5. Licensing processes for the allocation of specific frequencies to individual broadcasters should be fair and transparent, and based on clear criteria which include promoting media diversity in ownership and content.

<u>European Statements</u>

The need for independent regulatory mechanisms for broadcasting finds strong support in a recommendation adopted recently by the Committee of Ministers of the Council of Europe, *Recommendation on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector*.[78] The Recommendation includes a set of Guidelines regarding broadcast regulatory bodies; the first three sections are of particular relevance here:

> Member States should ensure the establishment and unimpeded functioning of regulatory authorities for the broadcasting sector by devising an appropriate legislative framework for this purpose. The rules and procedures governing or affecting the functioning of regulatory authorities should clearly affirm and protect their independence.
>
> The duties and powers of regulatory authorities for the broadcasting sector, as well as the ways of making them accountable, the procedures for appointment of their members and the means of their funding should be clearly defined in law.
>
> The rules governing regulatory authorities for the broadcasting sector, especially their membership, are a key element of their independence. Therefore, they should be defined so as to protect them against any interference, in particular by political forces or economic interests.

As regards licensing, the Guidelines note:

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[77] *Media Rights Agenda v. Nigeria* , note **Error! Bookmark not defined.**, para. 55.
[78] Recommendation (2000) 23, adopted 20 December 2000.

13. One of the essential tasks of regulatory authorities in the broadcasting sector is normally the granting of broadcasting licences. The basic conditions and criteria governing the granting and renewal of broadcasting licences should be clearly defined in the law.

Inter-American Statements

The Inter-American *Declaration of Principles on Freedom of Expression*, recently adopted by the Inter-American Commission on Human Rights, reiterates the need for independent regulation of broadcasting:

12. …The concession of radio and television broadcast frequencies should take into account democratic criteria that provide equal opportunity of access for all individuals.

13. …the concession of radio and television broadcast frequencies, among others, with the intent to put pressure on and punish or reward and provide privileges to social communicators and communications media because of the opinions they express threaten freedom of expression, and must be explicitly prohibited by law. The means of communication have the right to carry out their role in an independent manner….[79]

ARTICLE 19's Measures

ARTICLE 19 has adopted a set of recommendations drawn from international law and practice relating to broadcasting, entitled, *Measures Necessary to Protect and Promote Broadcasting Freedom*.[80] Recommendation 5 reads as follows:

Recommendation 5: Licences must be allocated by a body that is independent of government.

The body that allocates licences must be independent of government. The body may be the one which manages public broadcasting or a separate authority. However, a single authority with jurisdiction over public and private broadcasting is recommended because it facilitates the development and implementation of broadcasting policy, including a coordinated strategy to ensure that pluralism is achieved in broadcasting as a whole.

The independent licensing body should also have responsibility for the allocation of frequencies and other technical aspects of broadcasting.

ARTICLE 19's Measures also address the question of licensing processes:

Recommendation 4: The process for allocating broadcast licences should be independent and non-discriminatory.

The mechanisms for allocating licences have often been used to restrict private broadcasting. Secretive and unfair licensing mechanisms may result in long delays in the awarding of licences, refusal of licences on insubstantial grounds, or the granting of licenses only to supporters of the government. These mechanisms should be amended to establish a procedure, preferably by statute, whereby private broadcasters can apply for and be awarded broadcasting licences according to a process that is fair and non-

[79] Adopted at the 108th regular session, October 2000.
[80] ARTICLE 19, *Who Rules the Airwaves? Broadcasting in Africa* (London: Article 19, 1995), pp. 133-140.

discriminatory, and for rates that are commercially viable.

The criteria for awarding licences should take account of the public interest in promoting pluralism in viewing, programming and ownership. In particular, the licensing authority should have statutory powers to ensure pluralism of social, ethnic and political voices, so that the country's broadcasting fairly reflects the diversity of the population.

Licence application hearings should be public, so that the merit of the application and the reasons for the authority's decisions are matters of public knowledge and debate.

Statements by National Courts

These international statements have been echoed by a number of national courts. *Athukorale and others v. Attorney-General* involved a challenge before the Supreme Court of Sri Lanka to a Broadcasting Bill. One of the key issues was the lack of independence of the Broadcasting Authority. The Court held that the Bill was unconstitutional, among other things because the Broadcasting Authority was insufficiently independent, stating:

While a regulatory authority is, for the reasons explained, necessary, it is imperative that such an authority should be independent…. The airways/frequencies, as we have seen, are universally regarded as public property. In this area, a government is a trustee for the public: its right and duty is to provide an independent statutory authority to safeguard the interests of the People in the exercise of their fundamental rights: No more and no less. Otherwise the freedoms of thought and speech, including the right to information, will be placed in jeopardy.[81]

The Broadcasting Authority in that case was made up of five members appointed by the Minister and six *ex officio* members, five of whom were secretaries to ministries or their representatives. The Minister also had various additional powers, including to remove members. The Sri Lankan Supreme Court noted:

Having regard to the composition of the Board of Directors of the Authority, the lack of security of tenure in office either of the Chairman or of the appointed members, and having regard to the power of the Minister to give directions which the Authority is obliged to follow, the Authority…lacks the independence required of a body entrusted with the regulation of the electronic media which, it is acknowledged on all hands, is the most potent means of influencing thought.[82]

The Constitutional Courts of both Germany and Italy have stressed the need to broadcast regulators to be independent of Government. As far back as 1974, the Italian Constitutional Court held that radio and television should be under parliamentary, not executive control to ensure independence.[83] Similarly, the German Constitutional Court held unconstitutional the establishment of a government-controlled national broadcaster, since the guarantee of freedom of expression prohibits direct or indirect government control.[84] Later on, the same Court held that licensing criteria should be set

[81] Supreme Court of Sri Lanka, 5 May 1997, S.D. No. 1/97-15/97, p. 22.
[82] *Ibid.*, p. 23.
[83] Decision 225/1974 [1974] *Guir. cost.* 1775. The material in this brief on French, German and Italian constitutional decisions is drawn from Barendt, E., *Broadcasting Law: A Comparative Survey* (1995, Clarendon Press, Oxford).
[84] *First Television* case, 12 BverfGE 205 (1961).

out in the law, not left up to the licensing authority, even if it were independent, so as to ensure fair and equal access to broadcasting.[85] The need to confine the discretion of the licensing authority was further developed in later cases.[86]

In *New Patriotic Party v. Ghana Broadcasting Corp.*, the key issue was equitable access of political parties to the State broadcaster. However, the Supreme Court of Ghana noted the role of the independent broadcast regulator "to breathe the air of independence into the state media to ensure that they are insulated from Governmental control."[87]

5.2.3 The Independence of the Authority

Provisions Contested:
Section 4(2)
Section 4(4) as read with the Third Schedule, paragraphs 1, 4(1)(a) and (b), 6(1), 7(2)(b)(i) and 9
Section 5 as read with the Fourth Schedule, paragraphs 9(1) and (3)

Under the BSA, the Minister appoints the members of the Board of the Authority, after consultation with the President of Zimbabwe (section 4(2)). Individual members hold office for such period and on such terms as the Minister may set for members generally (Third Schedule, para. 1). The Minister may require a member to vacate his or her office on various grounds, including if he or she has behaved in an "unsuitable" manner (Third Schedule, para. 4(1)(a)) or has failed to comply with any term of office fixed by the Minister (Third Schedule, para. 4(1)(b)). The Minister also exercises control over remuneration of members both generally and in terms of allowances for expenses incurred (Third Schedule, para. 9). There is no provision to appeal these ministerial decisions.

The Minister also exercises considerable control over the functioning of the Board. The Minister designates the chair and vice-chair of the Board (Third Schedule, para. 6(1)) and can call a special meeting of the Board at any time (Third Schedule, para. 7(2)(b)(i)). The Board must also consult with the Minister regarding the appointment of the Chief Executive of the Authority and the Minister must approve any discretionary termination of such Chief Executive (Fourth Schedule, paras. 9(1) and (3)).

The BSA provides no specific protection against Government interference in the Authority, even to the extent of a statement in the legislation that the Authority is independent. While there are a number of restrictions on the appointment of members to the Board, for example dealing with insolvency or conflict of interest (see Third Schedule, para. 2), the only positive obligation on the Minister is to "endeavour to secure that members are representative of groups or sectors of the community." (section 4(3)).

These provisions clearly breach the test for restrictions on freedom of expression.

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[85] *Third Television* case, 57 BverfGE 295 (1981).
[86] See *Fourth Television* case, 73 BverfGE 118 (1986) and *Sixth Television* case, 83 BverfGE 238 (1991).
[87] 30 November 1993, Writ No. 1/93, p. 13.

Furthermore, the approach of the BSA is inconsistent with comparative practice in democracies around the world.

5.2.3.1 The Test for Restrictions

Restriction on Freedom of Expression

Cumulatively, these provisions give the Minister enormous control over the Board. In particular, members are appointed by the Minister, without any requirement that the process be open or transparent or involve civil society, and members have very little protection against dismissal, which can be based on vague and subjective grounds. The powers of the Minister, acting with the President of Zimbabwe, under the BSA exceed those struck down as unacceptable in the *Athukorale* case from Sri Lanka, noted above. The Authority is clearly not independent, a restriction on freedom of expression as outlined above.

Provided by Law

Although most of the provisions contested in this part are sufficiently clear to meet the test for provided by law, some do not even meet this basic standard. For example, the Minister may remove a member of the Board of the Authority for having acted in a manner "that renders him unsuitable as a member". (Third Schedule, para. 4(1)(a)) This is highly subjective and hardly enables a member to foresee the consequences of a given action.

More problematical in this regard is the extremely wide discretion granted to the Minister by many of these provisions, contrary to the rule as set out in *Re Ontario Film & Video Appreciation Society v. Ontario Board of Censors*,[88] which requires clear fetters to be placed on any official discretion which may restrict freedom of expression. Most of the contested provisions breach this standard. In particular, the Minister has wide discretion in the appointment of members to the Board of the Authority (section 4(2)), apart from a requirement to consult with the President and to endeavour to ensure members represent society as a whole. Similar breadth of discretion applies to the length of tenure of members, subject to a maximum of three years (Third Schedule, para. 1(1)), terms and conditions of office (Third Schedule, para. 1(3)), designation of the chair and vice-chair of the Board (Third Schedule, para. 6(1)) and setting of remuneration (Third Schedule, para. 9).

Legitimate Aim

There can be no constitutionally legitimate reason for subjecting the Broadcasting Authority to Government control. It is universally accepted that broadcasting must be regulated and the Constitution of Zimbabwe specifically provides for technical regulation of broadcasting in section 20(2)(b)(iv). However, it is perfectly possible to establish a regulatory authority to undertake these tasks in ways which protect it against interference and yet ensure accountability, as is clear from the comparative analysis below. Indeed, it is hard to avoid the conclusion that the real goal of giving the Minister

[88] Note **Error! Bookmark not defined.**.

effective control over the Authority is to ensure that private broadcasting remains firmly under the control of the Government.

Necessity

Given the total absence of any legitimate aim for the contested provisions, analysis under this part of the test is unnecessary. In the total absence of any conceivable legitimate aim, it is simply not possible for a restriction to be necessary.

5.2.3.2 Comparative Approaches

This section contains an analysis of measures to ensure the independence of broadcast regulatory authorities in South Africa, Poland, France, the United Kingdom and Malawi. These countries have been selected for geographic relevance to Zimbabwe, to reflect the approach taken in countries which have recently liberalised broadcasting, and to present the main regulatory systems around the world. They have also been selected on the basis of respect for freedom of expression within broadcasting.

South Africa

The approach taken to broadcast regulation in the South African *Independent Broadcasting Authority Act* of 1993 (IBA Act)[89] and the *Independent Communications Authority of South Africa Act* of 2000 (ICASA Act)[90] stands in stark contrast to that of the Zimbabwean BSA. As regards independence, the very names, 'Independent Broadcasting Authority' and 'Independent Communications Authority', indicate the importance which South Africa attaches to this aspect of broadcast regulation. The ICASA Act specifically guarantees the independence of the regulator:

> The Authority is independent, and subject only to the Constitution and the law, and must be impartial and must perform its functions without fear, favour or prejudice.[91]

The process of appointments further bolsters independence. Members are appointed by the President on the advice of the National Assembly, in accordance with the following principles:

> (a) participation by the public in the nomination process;
> (b) transparency and openness; and
> (c) the publication of a shortlist of candidates for appointment…[92]

In practice, candidates are interviewed in public hearings by an independent interviewing panel chaired by a judge, which makes its recommendations to the National Assembly. Although the President is formally responsible for appointments, in practice he or she has only limited powers to refer the names of nominees back to the National Assembly.

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[89] No. 153 of 1993.
[90] No. 13 of 2000.
[91] Section 3(3).
[92] *Ibid.*, section 5(1).

The ICASA Act also confines the discretion of appointing authorities by requiring members to have professional qualifications, be committed to various values, represent a broad cross-section of society, and be committed to the objects and principles of the Act.[93] It also places strict conditions on members, including in relation to political activities.[94] The ICASA Act sets a fixed term of office[95] and sets clear conditions on removals.[96] Finally, under the ICASA Act, the Minister or other political figures have no power to interfere in the work of the Authority or to force it to hold meetings.

Poland

In Poland, the National Broadcasting Council, established under the *Broadcasting Act of 1992*, has an explicit duty to promote broadcasting independence:

> It will be the duty of the National Council to protect the freedom of speech, the right of information and the public interests in broadcasting. The National Council protects in particular the independence of the broadcasters, the interests of the receivers and the open and pluralistic nature of the broadcasting system.[97]

The independence of members of the National Council is also guaranteed in practice, albeit in a different manner than under the South African law. Consistent with the approach in many civil law countries in Europe, the power of appointment is spread among a number of official bodies, rather than being vested in one body or individual. Specifically, of the 9 members of the National Council, 4 are appointed by the Diet, 2 by the Senate and 3 by the President, "from among people with knowledge and experience in the field of mass communications."[98] As in South Africa, the term of office of members is set and they may be removed only in narrowly defined circumstances clearly set out in the law.[99] The Council elects its own Chairman from amongst the members, who may then remove him or her only by a two-thirds majority vote.[100]

France

In France, the Conseil Superior de l'Audiovisuel (CSA) was established by the *Loi relative à la liberté de communication* of 1986.[101] Article 1 explicitly guarantees the independence of the CSA and gives it the function, among other things, of guaranteeing freedom of expression through broadcasting.

In a system similar to that of Poland, the CSA comprises 9 members, 3 appointed by the President of France, 3 by the President of the National Assembly and 3 by the President of the Senate. The President of the CSA is named by the President of France. The term of office for a member of the CSA is six years and is neither renewable nor revocable.

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[93] Sections 5(3) and (4).
[94] Section 6.
[95] Section 7.
[96] Section 8.
[97] 29 December 1992, article 6(1).
[98] *Ibid.*, article 7 (1).
[99] *Ibid.*, article 7(6).
[100] *Ibid.*, articles 7(2) and (2a).
[101] Law No. 86-1067 of 30 September 1986 as amended, including by Law No. 89-25 of 17 January 1989.

Members may not, therefore, be dismissed by their appointing bodies. A member may be dismissed by a two-thirds vote of the members of the CSA if he or she undertakes an activity or accepts a job or elected office which is incompatible with his or her capacity as a member, or otherwise breaches the rules regarding conflict of interest.[102]

United Kingdom

In some democratic States, including in the United Kingdom, licensing authorities are appointed by the executive. For example, members of the Independent Television Commission are appointed by the Secretary of State,[103] as are members of the Radio Authority.[104] However, in the United Kingdom the independence of these bodies is ensured by a long-established tradition of respect for this independence, by a process of appointments which guarantees independence in practice and by the active involvement of civil society.

Malawi

In Malawi, the independence of the licensing authority, the Malawi Communications Regulatory Authority (MACRA), is explicitly protected in its founding law, the *Communications Act 1998*, which provides: "The Authority shall be independent in the performance of its functions."[105] Although members are appointed by the executive, they are required to possess "qualifications, expertise and experience" in one of a number of fields[106] and the term of office is set at four years.[107] Significantly, a member may be removed only by the appointing authority on the basis of objective and non-discretionary grounds, such as continual absence from meetings or bankruptcy, and after a "due inquiry".[108]

5.2.4 Direct Regulatory Powers of the Minister

Provisions Contested:
Section 6
Section 10(9)
Section 10(10)
Section 11(1)(b) as read with the Fifth Schedule, paragraph 8(1)(c)
Section 11(1)(c)
Section 11(8)
Section 14(3)
Section 15
Section 16
Section 24(8)
Section 25(1)

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[102] Articles 4 and 5.
[103] *Broadcasting Act 1990*, section 1(2).
[104] *Ibid.*, section 83(2).
[105] Section 4(3).
[106] *Ibid.*, section 6(2).
[107] *Ibid.*, Schedule 1, para. 1(1).
[108] *Ibid.*

The BSA gives the Minister enormous direct regulatory powers, in particular in relation to licensing. The Minister is the licensing authority for broadcasting and signal carriage (section 6) but the BSA fails to give any direction as to the criteria by which licence applications should be assessed, leaving the Minister with almost unlimited discretion in this regard (section 10(10)). The same process applies to renewal of licences as to the original application (section 14(3)). Although the Authority is responsible for the process relating to licences – for example in terms of receiving and assessing licence applications – the Minister can refuse their recommendations (sections 10(10) and 14(3)). The Minister may attach terms and conditions to licences, after consultation with the Authority, although such conditions must be reasonable and they must be relevant to broadcasting (section 11(1)(c)). The Minister also has the power, after consultation with the Authority, to amend licence conditions, including on such vague grounds as if he considers the amendment necessary "to reflect the true nature of the service" or where "necessary or desirable in the public interest" (section 15(1)). Finally, the Minister may, again after consulting the Authority, suspend or cancel a licence including for such general matters as failing to comply with any of the terms imposed by the Minister or acting in a manner "prejudicial to the defence, public safety, public order, public morality or public health of Zimbabwe" (section 16(1)). For both amendment and cancellation, the Minister must give the licensee an opportunity to be heard and, for cancellation, may, if he or she feels such a course is justified, request the Authority to institute a public inquiry (section 16(3)).

The Minister also has a number of other direct powers in relation to broadcast regulation. Section 11(8) prohibits licensees from hiring anyone who is not a resident citizen, unless the Minister specifically authorises this in writing. Pursuant to section 24, the Authority is to develop codes of conduct governing a wide range of programming and other matters. However, the Minister retains ultimate power in this regard, having the power, if he or she is satisfied that a code is "not operating to provide appropriate community safeguards" in any area, direct the Authority to vary or revoke the code (section 25(1)). Furthermore, the Minister sets the schedule of financial and other penalties to be imposed for breach of the codes of conduct (section 24(8)).

Paragraph 8(1)(c) of the Fifth Schedule provides that licensees must, if notified by the Minister that an emergency has arisen, give control over their broadcasting facilities to such persons as may be authorised by the Minister for that purpose, where this is important in the public interest. Although an emergency is defined in section 39(1), its scope is restricted to that section so it has no relevance to paragraph 8(1)(c); the BSA contains no general definition of an emergency. The BSA does not impose any procedural conditions on the exercise of this power other than the requirement of notification in writing.

5.2.4.1 The Test for Restrictions

Restriction on Freedom of Expression

These provisions, cumulatively, give the Minister complete control over the licensing process, including in relation to the grant, renewal, amendment and cancellation of licences. Although he or she is routinely required to consult with the Authority (which he or she appointed and controls), there is no requirement to take into account their

views and the BSA explicitly gives the Minister the power to ignore these views, for example in relation to granting licences. The Minister also exercises considerable powers over the codes of conduct, internal hiring processes of broadcasters and to take over stations in times of 'emergency'.

The key problem with Ministerial control, as noted above, is that it presents the possibility of interference of a political or commercial nature in broadcasting. It is as a result of this risk that international and national bodies and courts have declared legal provisions granting government officials direct regulatory powers over broadcasting to breach the guarantee of freedom of expression.

The ban on non-citizen employment in broadcasting corporations is also discriminatory and therefore unconstitutional and contrary to international guarantees. In *Larbi-Odam v. Member of the Executive Council for Education*, the Constitutional Court of South Africa found that a provision prohibiting non-citizens from permanent employment as educators was unconstitutional. The Court emphasised that "citizenship is a personal attribute which is difficult to change".[109] Similar reasoning applies to section 11(8).

Provided by Law

Several of the powers granted to the Minister which are contested in this section are unacceptably broad or grant the Minister an unacceptable degree of discretion over matters that are of great importance to the exercise of the right to freedom of expression. No fetters are placed on the power of the Minister to issue or refuse to issue or renew a licence or, for that matter, on the power of the Authority to make a recommendation in this regard (sections 10(9) and (10), and section 14(3)). This effectively leaves the matter in his or her sole discretion. The conditions placed on the Minister's power to amend licences – in particular where necessary "to reflect the true nature of the service" or where "necessary or desirable in the public interest" (section 15(1)) – or to suspend or cancel licences – in particular for failing to comply with any of the terms imposed by the Minister or for acting in a manner "prejudicial to the defence, public safety, public order, public morality or public health of Zimbabwe" (section 16(1)) – are susceptible of extremely wide interpretation.

It would have been relatively simple to redress these problems but no attempt has been made in the BSA to do so, giving the impression that the goal was to provide the Minister with extremely broad powers over licensing and licensees. None of the operative terms – such as public interest, defence and emergency – are defined and no elaboration is provided as to their content. No criteria are provided as to the exercise of many of these powers, in particular the issuance and/or renewal of licences. And no fetters on the exercise of these discretionary powers are established. These provisions thus fail to pass the provided by law part of the test for restrictions on freedom of expression.

Legitimate Aim

A more serious problem with the provisions contested under this section is the lack of any legitimate aim to justify the restrictions they place on freedom of expression. There

[109] Case CCT 2/97, 26 November 1997, para. 19.

is simply no reason for the Minster, or any Government official, to exercise direct control over broadcasting when the legitimate goals of broadcast regulation can easily be ensured where these powers are vested in an independent regulatory body. This is amply demonstrated by the fact that in most democratic countries the allocation, renewal, amendment and suspension or cancellation of licences, as well as the imposition of licence conditions, is done entirely by an independent regulatory body, without any direct input from Ministers or other civil servants. The same is true of any codes of conduct, which are normally developed and applied entirely by independent regulatory bodies. Furthermore, it is hard to see what legitimate aim would require direct Ministerial control over the employment of non-citizens in broadcasting, over and above the rules relating generally to employment in the country. There is no special reason for excluding those who have the general right to work in Zimbabwe from employment in the broadcasting sector.

Necessity

Given the total absence of any legitimate aim for most of the provisions contested under this section, analysis under this part of the test is unnecessary. In the total absence of any conceivable legitimate aim, it is simply not possible for a restriction to be necessary. In particular, the grant of direct powers to the Minister over licensing, hiring and the codes of conduct lack any legitimate aim.

In any case, the broad nature of the Minister's powers, and in particular the lack of guidelines for the exercise of the considerable discretion he or she has under the BSA, mean there is a clear risk of unjustifiable interference with freedom of expression. As a result, even if these powers passed the provided by law and legitimate aim parts of the test for restrictions, they would fail here for overbreadth. In other countries, criteria for deciding whether or not to issue licences are provided in the law, thereby constraining the discretion of the licensing authority which, in any case, is independent. The UN Human Rights Committee has called for "reasonable and objective criteria for the award of licenses,"[110] as has the Council of Europe.[111] The same is true for renewal, amendment and suspension or cancellation of licences. In most countries, there is a strong presumption in favour of renewal of licences, which prevents the licensing authority from interfering through this process in stations which are critical of Government. The lack of analogous criteria in the BSA means that these powers may be used for illegitimate ends. This is a particular concern regarding renewals, given the excessively short licence period. Overall, these powers represent an illegitimate interference with freedom of expression.

5.2.4.2 Comparative Approaches

In other jurisdictions, Ministers and other officials have no direct power in relation to licensing and the development and application of codes of conduct. Such powers are exercised, without interference, by independent broadcast regulators. These bodies alone undertake all functions in relation to licences, including issuing them, setting any additional terms and conditions (that is to those already provided for in the law),

[110] See note **Error! Bookmark not defined.** and surrounding text.
[111] See under International and Comparative Standards.

amending them, renewing them and exercising any powers to suspend or cancel them. This is the case in all of the jurisdictions reviewed above – South Africa, Poland, France, the United Kingdom and Malawi – as well as in other democracies.

Licence Criteria

In most democracies, the law provides for clear criteria for deciding between competing licence applications. In South Africa, for example, licensing decisions must take into account the objectives of the Act, as well as a number of specific licence criteria.[112] Similarly, in Poland, the law refers both to the goals of broadcasting, as well as to a number of specific licensing criteria.[113] In France, the law establishes a long list of licence criteria, including promoting pluralism and ensuring free competition.[114] In the United Kingdom, the law also sets out a number of licence criteria, including the promotion of diversity, quality programming and fair competition.[115] In Malawi, the law requires each call for licences to specify "the criteria by which applicants will be assessed".[116] The need for clear criteria for the allocation of licences is also reflected in international standards in this area, quoted above.[117]

Licence Renewal

In most jurisdictions, there is a strong presumption in favour of licence renewal, a necessary condition to promote stability and investment in this sector and to prevent political interference. In South Africa, for example, the IBA Act provides for renewal unless "the licensee has failed to materially comply with the licence conditions or the provisions of this Act during the term of the existing licence and if the Authority is satisfied that the applicant would not so comply if his or her licence were renewed."[118] In France, licences are renewed twice by the CSA for five years on a non-competitive basis, except in limited circumstances (for example where the licensee is no longer financially viable or no longer fits the licence criteria).[119] Similarly, in the United Kingdom there is a strong presumption of renewal for a Channel 3 or Channel 5 licence, which may only be refused in limited circumstances.[120]

Licence Amendment

In South Africa, licences may be amended only in specific, non-discriminatory circumstances which largely protect the licensee against adverse consequences.[121] In Malawi, licences may be amended only under three circumstances: a) as necessary for the efficient management of frequencies, provided the amendment will not cause substantial prejudice to the licensee; b) to the extent strictly necessary to comply with an international agreement; or c) if the licensee agrees. There are also procedural

[112] See the IBA Act, articles 2 and 46.
[113] See the *Broadcasting Act of 1992*, articles 1(1) and 36(1).
[114] No. 86-1067 of 30 September 1986 as amended, articles 29 and 30.
[115] *Broadcasting Act 1990*, section 2(2) for television and sections 85(2) and (3) for radio.
[116] *Communications Act 1998*, section 48(2)((d)(ii). See also section 48(6).
[117] See the *African Charter on Broadcasting 2001*, Clause 5, the Council of Europe Recommendation (2000) 23, Guideline 13 and the ARTICLE 19 Measures, Recommendation 4.
[118] Section 44(4).
[119] No. 86-1067 of 30 September 1986 as amended, article 28-1.
[120] *Broadcasting Act 1990*, sections 20(4) and 29(1).
[121] IBA Act, section 52.

safeguards in relation to licence amendment.[122]

Licence Suspension or Cancellation

Suspension or cancellation of a licence is one of the most severe penalties that can be imposed on a licensee and, as a result, in most jurisdictions there are both substantive and procedural protections against the application of this penalty. In South Africa, the Broadcasting Monitoring and Complaints Committee, an independent body, is responsible for inquiring into and adjudicating upon any alleged or suspected non-compliance, either in response to a complaint or of its own motion.[123] The law provides for extensive procedural safeguards including the right to legal representation at any hearing.[124] The IBA Act contains a list of graduated penalties that may be applied for non-compliance and, although the list does include licence suspension, this may be applied "only in circumstances where the Broadcasting Monitoring and Complaints Committee has repeatedly in terms of section 63(7) found complaints against a licensee to be justified."[125]

Similarly, in Malawi, MACRA monitors compliance with licence conditions and may ultimately suspend the licence. However, this is possible only after other less harsh measures have been imposed – such as a correction, desisting from non-compliance or a fine – and the broadcaster has failed to comply with them. Even then the period of suspension may not, in the first instance, exceed thirty days.[126]

The need for caution in the application of such an extreme penalty as licence suspension or cancellation has been recognised by international organisations. Recommendation 6 of ARTICLE 19's Measures is titled "Licences should be revoked only in extreme circumstances" and reads:

> Broadcasting licences should only be revoked in the event of gross abuse by the broadcaster, such as direct incitement to racial or ethnic violence… Licences may only be revoked by the issuing authority. However, licences should also be subject to periodic renewal; the licensing authority may at this point refuse to renew a licence if the broadcaster has failed to meet the agreed conditions under which the licence was originally issued.

5.2.4.3 Emergencies

International Standards

The ICCPR allows derogation from certain rights, including the right to freedom of expression, at times of emergency:

> In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation…

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[122] *Communications Act 1998*, section 53.
[123] IBA Act, sections 62 and 63.
[124] *Ibid.*, section 63.
[125] *Ibid.*, section 66(2).
[126] *Communications Act 1998*, section 54(5).

> Any State Party…availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations….[127]

As is clear from the quotation, derogation is only countenanced in times of genuine emergency, clearly defined, of which the other States Parties have been informed. Furthermore, rights may only be restricted to the extent strictly required.

The African Commission has said:

> In contrast to other international human rights instruments, the African Charter does not contain a derogation clause. Therefore limitations on the rights and freedoms enshrined in the Charter can hardly be justified by emergencies or special circumstances.[128]

The Test for Restrictions

Section 8(1)(c) of the Fifth Schedule of the BSA allows for the taking over of stations simply upon notification by the Minister that an emergency has arisen. The only condition on this power is that this is important in the public interest. The BSA provides no definition of an emergency for this purpose. All that is required is a notice in writing to the licensee. It is thus not 'provided by law' as required by the guarantee of freedom of expression both because it is excessively vague and because it grants excessive discretion to the Minister.

The power of the Minister to take over stations in 'emergencies' could be used to further legitimate aims, such as defence, public safety or public order. However, this element of the test is not satisfied merely because a restriction has the potential to serve a legitimate aim; the restriction must be directed primarily at that aim. This is quite clearly not the case here, as it would have been a simple matter to qualify the notion of emergency by reference to these aims, if indeed these were the primary aims of this provision.

The BSA places no procedural conditions on the declaration of an emergency, even to the extent of requiring the Minister to publish a notice to that effect in the *Gazette*. Furthermore, the standard of need in section 8(1)(c), that taking over the station is "important in the public interest", falls far short of the "strictly required" standard in Article 4 of the ICCPR. As a result, section 8(1)(c) does not restrict the right as little as possible and is thus cannot be justified as necessary.

Comparative Approaches

None of the South African, Polish or United Kingdom laws on broadcasting allow for the taking over of stations in case of emergency. In South Africa, the Defence Act, which dates from 1957, does allow the President "during operations in defence of the Republic or for the prevention or suppression of terrorism or for the prevention or suppression of internal disorder" to censor broadcast material.[129] However, there is no provision for for the requisitioning of broadcasting facilities. Furthermore, this is

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[127] Article 4.
[128] *Media Rights Agenda v. Nigeria*, note **Error! Bookmark not defined.**, para. 65.
[129] Defence Act, No. 44 of 1957, section 101.

Apartheid era legislation which has yet to be subjected to constitutional scrutiny.

In Malawi, section 43 of the *Communications Act 1998* provides:

(1) The President may, on the occurrence of a public emergency and after consulting with the Authority make an order directing the Authority to-
require the operator of any radio station to transmit a message relating to the emergency or in the interests of public safety or tranquillity; and
take over a radio station specified in the order and any associated equipment and premises necessary for the proper working and maintenance of the radio station and to make the same available to an officer or authority of the Government.
(2) Any property taken over pursuant to subsection (1) shall be returned to its owner when the President declares that the public emergency is at an end.

Although also questionable, this is far more carefully worded than paragraph 8(1)(c) of the Fifth Schedule. There is an objective requirement that a public emergency has occurred before action can be taken. The President must consult with the independent authority before acting and any action must be taken through that authority. Furthermore, there are strict conditions placed on any messages required to be broadcast and any property taken over must be returned at the end of the emergency.

5.2.5 'Must Carry' Requirements

Provisions Contested:
Section 11(1) as read with the Fifth Schedule Section 8(1)(b)
Section 11(5)
Section 39(3)

The BSA imposes a number of requirements on private broadcasters to carry material as required by the Government. Section 11(5) provides that a licensee shall make one hour per week of its broadcasting time available to the Government, at its request, to explain its policies to the nation. Pursuant to paragraph 8(1)(b) of the Fifth Schedule, commercial television broadcasters must, if the Minister by notice in the Gazette, so requires, broadcast such items of national interest as are specified in the notice, without charge. Finally, section 39(3) requires licensees to "provide sufficient coverage of national events." A "national event" is "any event or occasion which is prescribed to be such by notice published in the *Gazette* by the Minister."

5.2.5.1 The Test for Restrictions

Restriction on Freedom of Expression

As a result of these provisions, all private broadcasters must provide the Government with one hour of broadcasting time a week and provide sufficient coverage of any event the Minister decides is a national event; the term national event is nowhere defined. Furthermore, commercial television broadcasters must broadcast items as directed by the Minister, the only condition being that these are "of national interest", which again is nowhere defined. As a result, the freedom of broadcasters to decide themselves what programming to carry is curtailed, a clear restriction on freedom of expression.

Provided by Law

Both section 39(3) and paragraph 8(1)(b) of the Fifth Schedule are excessively vague. The former refers to "sufficient coverage of national events." The term "sufficient" is not defined and is extremely subjective. Nor is it easily capable of clarification, since sufficiency will vary considerably depending on the importance of the specific event. The term "national event" is even more problematic, since it is left to the sole discretion of the Minister. This clearly breaches the rule on excessive discretion and practically invites abuse as there will be clear temptation to include events showing the Government in a positive light. The same problems apply to paragraph 8(1)(b) which requires licensees to broadcast such items of national interest as the Minister may specify.

Legitimate Aim

The only possible legitimate aim of the provisions contested in this section is to ensure that the public receives information about Government policies, national events and matters of national interest. While this may be a legitimate aim in theory, it is questionable whether it is in practice, given the role of the public broadcaster in ensuring that a comprehensive, quality news service is available to the public. Furthermore, the guarantee of freedom of expression rests on the idea that an open, competitive environment, including in broadcasting, is the best way of ensuring that the public receives a wide range of information on important matters.

Necessity

Even if these provisions are seen as serving the general legitimate aim of ensuring the provision of key information to the public, they do not impair the right to freedom of expression as little as possible, given that they are open to abuse as noted above. Other provisions in the BSA promote the provision of adequate news without the risk of political interference. For example, section 24(2)(d) provides that the codes of conduct shall ensure accuracy, balance, fairness and completeness in news and current affairs programming and section 39(4) requires licensees who provide an information service to ensure that it is fair, balanced, accurate and complete. Furthermore, provision of adequate news services is a key obligation for public service broadcasters.

In some countries broadcasters may be required, as a licence condition, to include a certain proportion of news within their overall broadcasting output, as a way of ensuring adequate news services. But this is quite different from prescribing the specific content of this news. Freedom to decide what news is important and what is not is at the very core of the concept of freedom of expression. If the Government can prescribe what we should hear and see, freedom of expression has little meaning.

There is a particular problem with section 11(5), requiring licensees to allocate one hour per week of broadcast time to the Government to explain its policies. This is essentially free advertising for the Government, denied to other parties, and hence totally disproportionate as a restriction on freedom of expression. As noted above, the Government already has privileged access to ZBC which, inappropriate as it may be, renders this provision even more unjustifiable.

Granting the Government privileged access to broadcasting also undermines the right of the public to freely decide their government in periodic elections, as guaranteed by Article 25(2) of the ICCPR and Article 13 of the ACHPR. As the Supreme Court of Ghana noted, it is essential for each political party to be given equal access to the public media to ensure that they are able to present their programmes and policies to the electorate.[130] Forcing the private media to give disproportionate coverage to the Government, particularly where the ZBC has also been shown to be biased, is clearly inappropriate. Furthermore, as the Supreme Court of Ghana has noted, fair access must apply all the time, not just during elections:

> In a democracy, the right of individuals to form or join political parties, and of the parties to participate in shaping the political will of the people and to disseminate political, economic and social ideas and programmes are not rights which are enjoyed by the people only when elections are about to take place.[131]

5.2.5.2 Comparative Approaches

None of the broadcasting laws of South Africa, Poland, France or Malawi require broadcasters to carry government messages or to carry certain types of messages. Indeed, in Poland, article 13(1) of the *Broadcasting Act of 1992* specifically protects against this, stating:

> The sender shall enjoy full independence in determining the content of programming in accordance with Art. 1, para. 1 and shall bear responsibility for the contents.

In the United Kingdom, the law does allow the Secretary of State to require the television and radio regulators to direct licensees to publish an announcement, or to refrain from including certain material in programmes.[132] The former power has not been used for many years. Instead, the broadcasters have voluntary agreements with the main parties whereby the Prime Minister and senior ministers can request time to address the nation; where these are granted (and this remains up to the broadcasters), all major parties are given an opportunity to respond. This power is used very rarely (only 3-4 times during the period of conservative government between 1979 and 1997).

The power to prevent the broadcasting of certain material was last invoked in October 1988, in the form of a ban on broadcasting any words spoken by persons representing banned organisations, directed primarily at the political wing of the IRA, Sinn Féin, at that time a legal political party. The ban was the subject of much criticism, controversy and derision, as broadcasters got around it by simply dubbing over the voices, and was ultimately lifted.

5.2.6 Conclusion

Under the BSA, the system for licensing broadcasters, central to the whole regulatory

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[130] *New Patriotic Party v. Ghana Broadcasting Corporation*, Writ No. 1/93, 30 November 1993, p.17.
[131] *Ibid.*
[132] *Broadcasting Act 1990*, sections 10(1) and (3) for television and sections 94(1) and (3) for radio.

scheme, remains firmly under Government control, opening up a real risk of political interference, contrary to international and comparative standards. The Minister and President exercise effective control over the Broadcasting Authority, including through the appointments process, the power to remove members and various other powers to influence the work of the Authority. Even more problematic is the fact that the Minister is the licensing authority under the BSA, with largely unfettered power in relation to the granting, amendment, renewal and suspension or cancellation of licences. In addition, private broadcasters are required to carry both direct Government messages and cover events which the Government deemed to be of importance, further undermining their independence.

These enormous direct governmental powers over broadcasting are in clear breach of the guarantee of freedom of expression. Since they are central to the regulatory scheme, it is submitted that the Act as a whole should be declared of no force and effect.

5.3 Provisions Limiting Pluralism

5.3.1 Overview

The right to freedom of expression includes the right to seek and receive information from a diversity of sources. The public's right to know can only be ensured if people can choose between competing information suppliers, including in the area of broadcasting. This has been recognised by international and national courts, as well as numerous other official bodies. In relation to broadcasting, this obligation requires States both to refrain from imposing regulatory conditions which undermine the development of the sector and to promote an environment in which broadcasting can thrive. These obligations are of particular importance in developing countries, where a strong broadcasting sector is essential to ensure local voices in an increasingly competitive environment.

The BSA signally fails to establish a regulatory framework which will nurture and support local broadcasting, instead imposing arbitrary restrictions on the number of broadcasters and a number of oppressive conditions on individual broadcasters. The BSA limits the number of private national free-to-air licences to one for each of radio and television, thus arbitrarily and unreasonably limiting pluralism. Furthermore, broadcasters are subject to a number of unjustifiable restrictions, including a ban on any investment or other involvement other than by resident citizens, a limit on ownership of any broadcaster to 10% and incredibly short licence periods.

5.3.2 International and Comparative Standards

It is now well established that international and constitutional guarantees of freedom of expression include the idea that it is only through a diverse and pluralistic media that the public's right to seek and receive information and ideas can be secured. The obligation to promote media pluralism incorporates both freedom from unnecessary interference by States, as well as the need for the State to take positive steps to promote pluralism. Thus, States may not impose restrictions which have the effect of unduly limiting or

restricting the development of the broadcasting sector and, at the same time, States should put in place systems to ensure that the sector does develop, and in a manner that promotes diversity and pluralism.

It is submitted that these obligations are of particular importance in light of the trend towards globalisation, including in the broadcasting sector. It is only through the development of a strong, free and pluralistic local media that Zimbabwean voices can be preserved in broadcasting against the growing dominance of multi-national media companies. The threat of international domination in this area is a particular threat in developing countries.

The European Court of Human Rights has held in a series of judgments, starting with *Informationsverein Lentia v. Austria*,[133] that State broadcasting monopolies are an unjustifiable restriction on freedom of expression. State broadcasting monopolies have also been held by national courts, including this Court, to breach the guarantee of freedom of expression.[134] The underlying reason for this, as the European Court noted in the *Lentia* case, is that:

> [Imparting] information and ideas of general interest, which the public is moreover entitled to receive…cannot be successfully accomplished unless it is grounded in the principle of pluralism, of which the State is the ultimate guarantor. This observation is especially valid in relation to audio-visual media, whose programmes are often broadcast very widely.[135]

The *African Charter on Broadcasting 2001* includes a number of provisions stressing the importance of pluralism in broadcasting in Part I: General Regulatory Issues, including the following:

> 1. The legal framework for broadcasting should include a clear statement of the principles underpinning broadcast regulation, including promoting respect for freedom of expression, diversity, and the free flow of information and ideas, as well as a three-tier system for broadcasting: public service, commercial and community….
> 5. Licensing processes for the allocation of specific frequencies to individual broadcasters should be fair and transparent, and based on clear criteria which include promoting media diversity in ownership and content….
> 7. States should promote an economic environment that facilitates the development of independent production and diversity in broadcasting.[136]

Pluralism necessarily involves broadcasting by different entities and international and comparative statements on this clearly reflect the idea that open, if regulated, competition in the broadcasting sector, as in the print sector, should be the primary means of ensuring diversity.

The UN Special Rapporteur on Freedom of Opinion and Expression, in his 1999 Report to the UN Commission on Human Rights, stated:

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[133] 24 November 1993, Application Nos. 13914/88, 15041/89, 15717/89, 15779/89, 17207/90.
[134] *Capital Radio (Private) Limited v. The Minister of Information, Posts and Telecommunications*, note **Error! Bookmark not defined.**.
[135] Note **Error! Bookmark not defined.**, para. 38.
[136] See also the ARTICLE 19 Measures, Recommendation 9.

> There are several fundamental principles which, if promoted and respected, enhance the right to seek, receive and impart information…a monopoly or excessive concentration of ownership of media in the hands of a few is to be avoided in the interest of developing a plurality of viewpoints and voices… access to technology, newsprint, printing facilities and distribution points should only be regulated by the supply and demand of the free market.[137]

This was emphasised by the Report of the European Commission of Human Rights in *Lentia*, which noted that one-sided programmes within the context of a diversity of views over the airwaves are, taken together, preferable to a monopoly.[138] The fact that the Austrian Broadcasting Corporation provided "guarantees ensuring the plurality and objectivity of opinions" was not sufficient because "no allowance is made at all ... for private initiative, for instance on a local or regional level, which would enable the applicants adequately to enjoy their freedom to impart information".[139]

Similarly, a *Declaration on Freedom of Expression and Information* adopted by the Committee of Ministers of the Council of Europe states:

> [S]tates have the duty to guard against infringements of the freedom of expression and information and should adopt policies designed to foster as much as possible a variety of media and a plurality of information sources, thereby allowing a plurality of ideas and opinions.[140]

The US Supreme Court has referred to the need for free and open competition in broadcasting, quoting the Federal Radio Commission:

> [The] public interest requires ample play for the free and fair competition of opposing views. [141]

Furthermore:

> It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolisation of that market, whether it be by the Government itself or a private licensee.[142]

Both the German and French Constitutional Courts have held that the State is under an obligation, when designing a regulatory framework for broadcasting, to promote pluralism. The French Conseil constitutionnel, assessing the legitimacy of the 1986 law, found that the principle of pluralism of information was of constitutional significance.[143] Similarly, the German Constitutional Court has consistently held that broadcasting must be structured in such a way as to ensure the transmission of a wide range of views and opinions.[144]

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[137] UN Doc. E/CN.4/1999/64, 29 January 1999, para. 16.
[138] Commission Report of 9 September 1992, para. 82.
[139] *Ibid.*, para. 84.
[140] Committee of Ministers, Declaration on the Freedom of Expression and Information, 29 April 1982, reprinted in Council of Europe DH-MM (91) 1.
[141] *Red Lion Broadcasting Co., Inc., etc., v. Federal Communications Commission (No. 2)*, 395 US 367 (1969), p. 377.
[142] *Ibid.,* p. 390.
[143] Decision 86-217 of 18 September 1986, Debbasch, 245.
[144] See the *First Television* case, 12 BverfGE 205 (1961).

These values are also reflected in the legal framework and practice regarding broadcasting in democratic countries around the world. For example, one of the primary objectives of the South African IBA Act is to:

> [P]romote the provision of a diverse range of sound and television broadcasting services on a national, regional and local level which, when viewed collectively, cater for all language and cultural groups and provide entertainment, education and information…[145]

The Malawi *Communications Act 1998* provides that MACRA has the "general duty to ensure that, so far as it is practicable, there are provided throughout Malawi reliable and affordable communication services sufficient to meet the demand for them."[146] Pursuant to section 34(3), "Any radio spectrum plan adopted by the Authority shall…provide opportunities for the introduction of the widest range of telecommunication services and for the widest take up of such services as is practically feasible". Finally, section 48(1) states: "The Authority shall issue broadcasting licences in sufficient numbers to meet the public demand for broadcasting services."

Article 6 of the Polish *Broadcasting Act of 1992* requires that, "the National Council protects in particular the…open and pluralistic nature of the broadcasting system." Similarly, the *Broadcasting Act 1990* of the United Kingdom mandates the Independent Television Commission:

> (a) [T]o discharge their functions…in the manner which they consider is best calculated–
> (i) to ensure that a wide range of [television] services is available throughout the United Kingdom, and…
> (b) [T]o discharge their functions…in the manner which they consider is best calculated to ensure the provision of [services which] are of high quality and offer a wide range of programmes calculated to appeal to a variety of tastes and interests.[147]

5.3.3 Direct Restrictions on Pluralism

Provisions Contested:
Sections 9(1) and (2)

Section 9(1) of the BSA restricts the number of licences to be issued for national free-to-air broadcasting services to one for each of radio and television, not including services provided by a public broadcaster. Pursuant to section 9(2), only one signal carrier licence shall be issued to a person other than a public broadcaster.

5.3.3.1 The Test for Restrictions

Restriction on Freedom of Expression

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[145] Section 2(a).
[146] Section 4(1).
[147] Section 2(2). See also section 85(2) in respect of radio.

Sections 9(1) and (2) clearly restrict freedom of expression by placing limits on the number of licences of a certain type that are available. They thus restrict the rights of those who may be interested in such a licence, as well as the right of the public to a diversity of viewpoints in the media. This is particularly the case given the important role that national licensees play in the broadcasting system in most countries.

Regulatory regimes in other jurisdictions employ a very different approach to managing the frequency spectrum. Instead of setting out rigidly in the law the number of licences of a given type, the responsible regulatory authorities – which for these purposes may include the body looking after telecommunications generally if different from the broadcast regulator – undertake this task. These authorities assess the entire range of frequencies available for broadcasting and then allocate these frequencies between the various broadcasting uses (community, local, national, radio, television) in such a manner as to maximise utilisation of this resource in the public interest. This approach allows for flexible frequency management and can respond to changing public needs and interests in this area. It also balances the need to regulate frequency usage and the obligation to promote pluralism.

The limit of one on signal carrier licences, not restricted to national carriers, effectively means that even if such a licence is granted, all broadcasters nation-wide will have to use either that licensee or ZBC to transmit their programmes. This is a clear restriction on their right to access the means of communication.

Provided by Law

These provisions are clear and hence satisfy this part of the test.

Legitimate Aim

These restrictions do not promote any legitimate aim. It is clear that the range of frequencies available for broadcasting is, ultimately, limited and that this public resource must be managed in the public interest. However, Zimbabwe is a relatively large country with an as yet undeveloped broadcasting sector so that a wide range of frequencies is still available. Overall frequency limits are, therefore, no reason to impose an arbitrary limit of one on the number of private national free-to-air broadcasters in radio and television. There is even less justification for such an arbitrary and stringent limit on the number of signal carrier licenses, where frequency limits are not relevant.

Necessity

These provisions do not provide for frequency management – the only possible legitimate aim – in a way which impairs the right to freedom of expression as little as possible. Arbitrarily limiting the number of national licenses to two manifestly fails to maximise use of the airwaves, breaching the obligation to promote diversity. As noted above, there are far more effective ways of managing the frequency spectrum in the public interest.

Furthermore, limiting the number of national broadcasters to two for each of radio and

television minimises competition (for both the private and the public broadcaster) and leads to a *de facto* concentration of control over broadcasting. This undermines the sector and the public's right to competitive, quality broadcasting and leads to a situation of undue concentration of ownership.[148] Furthermore, so severely restricting the number of national private broadcasters leads to a greater chance of Government interference and control.

The limit on the number of signal carrier licences is not only unnecessary but also manifestly impractical, particularly for community broadcasters. Community broadcasters may well wish to operate in a very small area, with a radius as small as 1-2 kilometres. It is most unlikely that either ZBC or a national private signal carrier will be able to offer them this kind of service, forcing them to operate on a much larger scale. This, in turn, will increase costs, reducing accessibility, and reduce the number of licences that may be issued (since large-scale transmission is more likely to cause interference), reducing pluralism. It may be noted that community broadcasting is low-cost and hence relatively accessible, providing a particularly effective way of promoting diverse access to the airwaves.

5.3.4 Indirect Restrictions on Pluralism

5.3.4.1 Ownership Concentration

Provisions Contested:
Sections 8(1) and (2)
Section 8(5)
Section 9(3)
Section 22(2)

The combined impact of sections 8(1) and (2) is to forbid absolutely any investment in broadcasting by anyone who is not a resident citizen of Zimbabwe. Section 22(2) prohibits those who are not resident citizens from holding directorships in licensed companies. Section 8(5) prohibits licences being given to a corporation if any one person controls more than 10% of the shares.[149] This means that only broadcasting corporations with at least 10 shareholders may be issued with licenses. Finally, section 9(3) prohibits anyone other than a public broadcaster from holding both a broadcasting and a signal carrier licence.

Restriction on Freedom of Expression

Some limits on foreign ownership of and control over broadcasting are justified and may even promote freedom of expression to the extent that they ensure the presence of local voices in broadcasting. However, excessively stringent limits may seriously undermine the development of the sector by depriving it of much needed investment. In such cases, the restrictions actually undermine freedom of expression by limiting the

[148] It may be noted that provisions in the BSA which seek to prevent undue concentration are, therefore, directly undermined by section 9.
[149] Pursuant to section 8(3), only corporate bodies may be granted licences.

growth of the sector. There is little point in ensuring local control over a sector that barely exists or that manifestly fails to provide access to a diverse range of programme content. This is particularly relevant in Zimbabwe where, to date, the broadcasting sector is underdeveloped and in serious need of investment.

Furthermore, diverse local broadcasting content can be promoted in a number of ways in addition to limiting foreign investment in broadcasting. These include local content requirements, obligations of balance and impartiality in news and current affairs programming, protection for children during peak listening and viewing times and rules relating to good taste and decency.

Provided by Law

These provisions are clear and hence satisfy this part of the test.

Legitimate Aim

Restrictions upon foreign ownership in and control over broadcasting are legitimate to promote local programming and to ensure local control over this crucial resource. Restrictions of this sort are found in some measure in most countries.

The aims of the limitation of ownership to 10% of the shares and of the prohibition on holding both a broadcasting licence and a signal carrier licence are less clear. It is possible that these provisions were designed to prevent undue concentration of ownership, perhaps particularly in light of the restriction on the number of national licences, although they go far beyond measures applied in other countries.

Necessity

It is clear that these provisions are excessive, depriving the broadcasting sector in Zimbabwe of much needed foreign investment and expertise, thereby stunting its development and hence undermining, rather than promoting pluralism.

This is highlighted by the fact that these measures go far beyond what is considered necessary in other countries. Most democratic countries limit foreign investment and involvement in broadcasting but none prohibit it outright. Thus sections 8(1) and (2) and section 22(2) go far beyond measures deemed necessary in other countries. For example, in South Africa, "foreign persons" are barred, directly or indirectly, from exercising control over a private broadcasting licensee, from owning more than 20% of the financial or voting interests in a licensee or from holding more than 20% of the directorships.[150]

In Poland, companies with foreign shareholders may be granted licences if foreigners do not hold more than 49% of the opening capital or stock of the company and the agreement or the statutes of the company specify that Polish citizens resident in Poland constitute a majority of the Board of Directors and the Board of Management.[151] Although these provisions make reference to Polish citizens resident in Poland, they allow for significant non-citizen participation in broadcasting.

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[150] IBA Act, section 48. These levels are doubled to 40% for signal carrier licensees. See section 38A.
[151] *Broadcasting Act of 1992*, article 35(2).

In France, foreign ownership is limited to 20% of the voting rights of broadcasters.[152] In the United Kingdom, corporations in which non-residents hold a controlling share, defined as effective control or more than 50% of the shares, may not be awarded licences.[153] Licences may also be granted to individuals and, although the law restricts such licences to residents, this includes non-citizens.

In Malawi, for non-community licences, MACRA may limit the financial or voting interest in the licence held by one or more foreign persons to forty per cent, as long as the restriction applies to all such licensees.[154]

Section 8(5), limiting even resident citizen ownership to a maximum of 10%, represents a serious practical obstacle to the formation of a viable broadcasting enterprise and is unnecessary to prevent undue concentration of ownership. As with foreign investment, there is little point in ensuring that ownership is diverse, if this measure significantly undermines the sector. It is clear that such a drastic interference in the structure of the business of broadcasting cannot but significantly undermine its vitality. Furthermore, if the unreasonable restriction on national broadcasters to one for each of radio and television is removed, the limited justification for section 8(5) largely disappears.

There is no equivalent to section 8(5) in other democratic jurisdictions. Prohibitions on undue concentration in other jurisdictions take the form of limitations on owning or controlling more than one licence[155] or of dominating the sector overall. The Polish law is typical in this area, providing that a licence should not be granted if it would give the applicant "a dominant position in mass communications in the given area."[156]

Section 9(3) requires the separation of signal carrying and broadcasting operations. As with section 8(5), any limited benefits this section may have in preventing undue concentration of ownership are significantly outweighed by the harm done to broadcasting viability. The combined impact of these two sections means that two organisations, representing not less than 20 shareholders, must agree on common objectives before a broadcaster may begin operations.

Furthermore, in Zimbabwe at present, in the absence of an established private signal carrier, this requirement means that a private broadcaster would be dependent on the transmission system run by ZBC, with whom it would be in direct competition. This is clearly undesirable.

As with section 8(5), there is no equivalent to section 9(3) in any of the jurisdictions surveyed here, including South Africa, Poland, France, the United Kingdom or Malawi. Indeed, in South Africa, the law explicitly provides for a broadcasters to transmit their own programmes, providing that a signal distribution licence may be granted to, among others:

> [A] broadcasting licensee who chooses to provide, either wholly or partly, broadcasting signal

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[152] No. 86-1067 of 30 September 1986 as amended, article 40.
[153] *Broadcasting Act 1990*, schedule 2, part II, paragraph 1.
[154] *Communications Act 1998*, section 51(3).
[155] See, for example, the South Africa IBA Act, section 49.
[156] *Broadcasting Act of 1992*, article 36(2)(2).

> distribution for himself or herself but who does not provide the same for any other broadcasting licensee…[157]

Actual practice in this area varies, with some broadcasters preferring to run their own signal distribution systems and others using pre-established systems. Much depends on the nature of the existing infrastructure.

5.3.4.2 Other Indirect Restrictions

Provisions Contested:
Section 8(3)
Sections 12(2) and (3)

Section 8(3) provides that a private broadcasting licence, including for a community broadcaster, may only be issued to a corporate body. Sections 12(2) and (3) restrict the duration of community and commercial licences, respectively, to one and two years.

Restriction on Freedom of Expression

Entities which are not corporations may wish to engage in broadcasting and to refuse to allow them to do so clearly restricts their freedom of expression. A requirement of corporate identity would pose a particular burden on community broadcasters, who may well wish to be organised in some other form.

The extremely short licence duration also exerts a serious 'chilling effect' on freedom of expression in at least two key ways. First, the cost, in both financial and human terms, of starting up a broadcasting enterprise is large, and it is difficult to attract financial backing and commitment unless there is a realistic chance that these investments will pay off. This is extremely unlikely in such a short time frame so investors would have to risk the licence not being renewed, something they may be unwilling to do. The lack of investor confidence would undermine the sector and harm pluralistic development.

Second, the constant need to have the licence renewed, especially given the high degree of Government control over this process, seriously compromises the editorial independence of licensees. Broadcasters would be unwilling to criticise the Government, knowing this may result in their licenses not being renewed. This is a particular risk given that under the BSA, broadcasters do not benefit from any presumption in favour of licence renewal, unlike in other jurisdictions.[158]

Provided by Law

These provisions are clear and hence satisfy this part of the test.

Legitimate aim

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[157] IBA Act, section 33(a)(iii).
[158] See above, under Direct Regulatory Powers of the Minister.

There can be no legitimate aim for either of these provisions. Corporate form is not necessary to impose legal liability and it is hard to see why this condition has been imposed.

Similarly, there is no reason for having such a short licence period. The BSA provides ample authority to address any breaches of licence conditions. Furthermore, the BSA provides for an opportunity to amend licences, should circumstances change and this be necessary.

Necessity

Given the total absence of any legitimate aim for the contested provisions, analysis under this part of the test is unnecessary. In the total absence of any conceivable legitimate aim, it is simply not possible for a restriction to be necessary.

The licence lengths provided for in the BSA are considerably shorter than those in other jurisdictions, highlighting the lack of any justification for them. In South Africa, television licences are valid for eight years, radio licences for six years, and community licences normally for four years.[159] In Malawi, broadcasting licences are valid for seven years.[160] In France, the CSA issues television licences for up to ten years and radio licences for up to five years.[161] In Poland, the National Council grants television licences for between three and ten years, and radio licences for between three and seven years.[162]

Similarly, other jurisdictions do not prohibit the award of licences to non-corporate entities or even to individuals.

5.3.5 Conclusion

The BSA undermines, rather than promotes, broadcasting pluralism in a number of ways. The arbitrary limit of one on the number of private national free-to-air licences is the most extreme example of this and simply cannot be justified. The impact of this restriction is of particular concern given the key role of national broadcasters in providing news and current affairs to the public. The BSA also imposes many other harsh and unnecessary restrictions on broadcasters, including a total ban on foreign investment, a ban on holding a signal carrier and broadcasting licence, and extremely short licence periods. Cumulatively, these make it very difficult for broadcasters to get started and therefore seriously breach the State's obligation to promote diversity.

5.4 Content Restrictions

[159] IBA Act, section 54.
[160] *Communications Act 1998*, section 51(1).
[161] Law No. 86-1067 of 30 September 1986 as amended, Article 28-1.
[162] *Broadcasting Act of 1992*, article 36(3).

5.4.1 Language and Local Content Restrictions

Contested Provisions:
Section 11(3) as read with the Sixth Schedule
Section 11(4)

Section 11(3) provides that every broadcasting licence is subject to the local content restrictions in the Sixth Schedule. There are a number of different provisions on local content in the Sixth Schedule but the more salient for present purposes are the following:

Television Broadcasters:
75% local or African programming, immediately or as the Authority may require (paragraph 2(1));
70% or more of its drama, current affairs, social documentary, informal knowledge building, educational and children's programming from Zimbabwean sources (paragraph 2(3));
40% independent television productions from among its local content, spread evenly between the programming genres noted in the preceding bullet point (paragraph 4); and
for subscription services, 30% or more of its programming from local sources (paragraph 3).

Radio Broadcasters:
75% local and 10% African music, immediately or as the Authority may require; a 30% + 10% requirement applies to subscription radio (paragraph 5).

Pursuant to section 11(4), programming in national aboriginal languages other than Shona or Ndebele must account for a total of at least 10% of all programming. For television, 10% shall similarly be broadcast in a manner that may be understood by audiences with a hearing impairment.

Restriction on freedom of expression

Local content requirements actually promote freedom of expression inasmuch as they lead to greater diversity of programming and the availability of a wider spectrum of material to the public. The same is true of local language requirements, which both promote greater diversity of programming and help ensure wider audience appeal. These sorts of quotas, if appropriately applied, can help promote investment in local production and, over time, ensure a healthy local sector. As the *African Charter on Broadcasting 2001* states:

> Broadcasters should be required to promote and develop local content, which should be defined to include African content, including through the introduction of minimum quotas.[163]

However, where local content or language quotas are excessively high, they can have the effect of stifling development of the broadcasting sector. In particular, broadcasters will be unable to meet quotas which are too high, making it difficult for new

[163] Part I, Paragraph 6.

broadcasters to start up and leaving established broadcasters open to sanction. Alternatively, broadcasters will be required to air local programmes repeatedly to meet the quota, thus reducing, not increasing, the range of material available to viewers and listeners. To promote diversity, local content requirements must take into account local production capacity. This principle is reflected in the ruling by the German Constitutional Court that it was acceptable to impose certain programming requirements on private broadcasters, but these should not be so onerous as to threaten their existence.[164]

A number of means are used in different jurisdictions to ensure that local content quotas do not lead to these negative effects. The local content requirement in the European Convention on Transfrontier Television is illustrative, stating:

> Each transmitting Party shall ensure, where practicable and by appropriate means, that broadcasters reserve for European works a majority proportion of their transmission time, excluding the time appointed to news, sports events, games, advertising and teletext services. This proportion, having regard to the broadcaster's informational, educational, cultural and entertainment responsibilities to its viewing public, should be achieved progressively, on the basis of suitable criteria.[165]

Thus a quota of 50% is set for European works, but the rigidity of the provision is softened by a number of qualifiers, namely that the quota should be implemented "where practicable and by appropriate means", "progressively" and "on the basis of suitable criteria."

These qualifications, as reflected in State practice, give rise to a number of conditions which local content quotas must respect if they are to promote, rather than restrict, freedom of expression. First, quotas should be set at levels which are practical, taking into account local production capacity. Second, quotas must take into account the particular situation of individual broadcasters. Different quotas may be appropriate, for example, for a pop music and a classical music station. In Canada, music on radio must be 35% Canadian, but an exception is made for stations which carry a significant proportion of instrumental music, due to lower availability of this genre from local producers.[166] Third, quotas should be achieved progressively, giving broadcasters time to achieve the levels set. This last condition is particularly important since it balances the need for broadcasters to be commercially viable with the desire to require them to invest in local production, which is often more costly.

Provided by Law

These provisions are clear and hence satisfy this part of the test.

Legitimate Aim

These provisions pursue the legitimate aim of promoting diversity in the media through ensuring the presence of local voices in broadcasting.

Necessity

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[164] *Fourth Television* case, 73 BverfGE 118 (1986).
[165] E.T.S. No. 132, in force 1 May 1993, article 10(1).
[166] See Radio Regulations, 1986, SOR/86-982, sections 2.2(6)-(9).

The issue of necessity in relation to these provisions involves an assessment of the extent to which in practice they promote, or alternatively restrict, pluralism and the extent to which the State has tried to ensure that they are carefully tailored to the end they are supposed to achieve.

It is immediately apparent that the BSA fails to take into account the very different circumstances of different broadcasters, national, local and community, or different market niches, such as contemporary or classical music. The default timing of implementation of the quotas, immediately for broadcasters not operating legally at the time the BSA came into force, that is to say for all private broadcasters is unreasonable although this may be overridden by the Authority. The language provisions of section 11(4) appear to apply immediately, without any opportunity to work up to the 10%.

The key problem with the quotas, both local content and language, however, is that they are excessively high given the strength of local production. The extremely high quotas in relation to drama, current affairs, social documentary, informal knowledge building, educational and children's programming may actually have an adverse impact on these sectors as broadcasters avoid these genres, knowing that they cannot possibly meet the quotas.

A comparison of the Zimbabwean provisions with those in jurisdictions, many of which have far more developed production industries, gives an indication of how excessive the BSA quotas are.

In South Africa, the law provides that the regulator shall set local content quotas, allowing for flexibility in relation to different kinds of broadcasters.[167] In practice, most private broadcasters are required to carry at least 20% South African content and are given two years to implement this quota. Subscription television services usually required to carry only 5% South African content. Significantly, public television is required to meet a much higher standard – 50% – reflecting the role of public broadcasting in protecting and nurturing local content.[168]

In Poland, the independent National Council shall determine by regulation the local content restrictions (with the minimum level being 30%). This shall be done "taking into account the nature of the particular broadcasters, their programming and broadcasting hours."[169]

In France, which is known for its strict policy in this area, television broadcasters must carry 40% French material and 60% European material.[170]

As noted above, the European Convention on Transfrontier Television sets an overall quota of 50% for European works.

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[167] See IBA Act, section 53(2) and *Broadcasting Act No. 4 of 1999*, section 30(2)(b).
[168] See the Independent Broadcasting Authority Local Television Content Regulations of 1997, sections 3.1, 4.1 and 5.1, and the Independent Broadcasting Authority of South Africa Music Regulations, section 3.1.
[169] *Broadcasting Act of 1992*, article 15(1).
[170] Law No. 86-1067 of 30 September 1986 as amended, Article 27.

In none of these jurisdictions are private broadcasters required to carry productions by independent producers.

The provisions on language in section 11(4) of the BSA are also unusual; specific minority language requirements for private broadcasters are rarely found in legislation in other countries. Instead, this is seen as an obligation primarily for the public broadcaster.

In South Africa, for example, the law simply provides:

> Commercial broadcasting services when viewed collectively--
>
> (a) must as a whole provide a diverse range of programming addressing a wide section of the South African public;
>
> (b) must provide, as a whole, programming in all South African official languages….[171]

Thus instead of imposing strict language requirements on all broadcasters, the South African approach seeks to ensure that the sector as whole caters to all languages.

As regards Zimbabwe, it is simply not possible for broadcasters to provide 10% of their programming in the smaller national aboriginal languages, even through dubbing, at present. It may be noted that none of these languages is spoken by more than a couple of hundred thousand people from a population of over eleven million.[172] This raises a further question as to the practical viability of these quotas, even if they could be met. To require broadcasters, including those of national reach, to provide 10% of their programming in languages which by definition only a very tiny percentage of the populace speaks, is hardly conducive to the growth of the sector.

Furthermore, section 11(4) fails to take into account the different geographic scope of different broadcasters. It is clearly illegitimate to require community licensees, who will often operate in areas where only one language is spoken, to provide programming in other languages. Furthermore, the smaller aboriginal languages tend to be concentrated, often in geographically remote areas of the country. To this extent section 11(4) is hardly carefully tailored to restricting the right to freedom of expression as little as possible.

5.4.2 False News

Contested Provisions:
Section 11(1)(b) as read with the Fifth Schedule, paragraph 7

Paragraph 7 of the Fifth Schedule states: "No licensee shall broadcast any matter that contains any false or misleading news."

Restriction on freedom of expression

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[171] *Broadcasting Act No. 4 of 1999*, section 30(1).
[172] Ethnologue: Languages of the World, 14th Edition, Copyright © 2001 SIL International, http://www.ethnologue.com/show_country.asp?name=Zimbabwe.

It is clear that this provision restricts freedom of expression which includes false statements within its ambit of protection. In holding that false statements were covered by the constitutional guarantee of freedom of expression, the Canadian Supreme Court stated:

> Applying the broad, purposive interpretation of the freedom of expression guaranteed by s. 2(b) [of the Canadian Charter of Rights and Freedoms] hitherto adhered to by this Court, I cannot accede to the argument that those who deliberately publish falsehoods are for that reason alone precluded from claiming the benefit of the constitutional guarantees of free speech.[173]

It is equally clear that laws which make it a criminal offence to disseminate false news cannot pass constitutional muster, as this Court held in the *Chavunduka and Choto* case.[174]

It is, however, appropriate to promote accuracy in broadcasting through regulatory means, something that is common in jurisdictions around the world. The legitimacy of these regulatory approaches hinges on the fact that they promote accuracy rather than ban false news. Paragraph 7 is more analogous to the criminal restrictions, absolutely forbidding the broadcasting of any false material, but doing so in a regulatory rather than criminal form. To this extent it may be contrasted with section 24(2)(d) of the BSA which states that the codes of conduct shall provide for:

> [P]romoting accuracy, balance, fairness and completeness in news and current affairs programmes…

Provided by Law

There are serious problems with falsity serving as the basis for an absolute prohibition, as in paragraph 7, given the range of concepts associated with this term. As this Court held in the *Chavunduka and Choto* case:

> The use of the word "false" is wide enough to embrace a statement, rumour or report which is merely incorrect or inaccurate, as well as a blatant lie; and actual knowledge of such condition is not an element of liability….[175]

It may be noted that this problem does not apply to a provision like section 24(2)(d) which requires an effort to promote accuracy, something which is much more precise and susceptible of clear measurement.

Legitimate Aim

Provisions banning false news lack any legitimate aim. While they may have some incidental impact in terms of reducing the risk of public disorder, this is hardly their main aim.

Necessity

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[173] *R. v. Zundel*, note **Error! Bookmark not defined.**, p. 733.
[174] See, for example, the decision of this Court in *Chavunduka v. Minister of Home Affairs*, note **Error! Bookmark not defined.**.
[175] *Ibid.*, p. 17.

Paragraph 7 of the Fifth Schedule is not necessary to protect any legitimate interest, as is clear from the fact that provisions of this sort are not found in other jurisdictions and from its overbreadth. The existence of other provisions in the BSA, like section 24(2)(d),[176] promoting accuracy in the news, highlights the fact that paragraph 7 is unnecessary. As this Court said in *Chavunduka and Choto*, in respect of a false news provision which was narrower in scope than paragraph 7:

> It only suffices to state, in sum, that the expansive sweep of s 50(2)(a) gives rise to the inevitable consequence of failing to confine and impair the exercise by the applicants of their right to freedom of expression as little as possible.[177]

Other jurisdictions also promote accuracy rather than ban false news. The IBA Act in South Africa includes a Code of Conduct in Schedule 1 to which all broadcasters must adhere.[178] The Code includes a number of provisions on accuracy, including:

> News shall be presented in the correct context and in a balanced manner, without intentional or negligent departure from the facts….

and:

> Only that which may reasonably be true, having due regard to the source of the news, may be presented as fact, and such facts shall be broadcast fairly with due regard to context and importance. Where a report is not based on fact or is founded on opinion, supposition, rumours or allegations, it shall be presented in such manner as to indicate clearly that such is the case.[179]

This may be contrasted with paragraph 7 inasmuch as it prohibits only intentional or negligent departure from the facts and permits presentation of rumours, as long as these are identified as such. Similarly, in the United Kingdom broadcasters are required to ensure,

> …that any news given (in whatever form) in its programmes is presented with due accuracy and impartiality…[180]

By conditioning the requirement of accuracy with the word "due", this avoids the problems associated with a strict prohibition on false news.

5.4.3 Conclusion

The local content and language requirements in the BSA serve a commendable aim, namely to ensure local voices in broadcasting and to ensure that broadcasting is accessible to everyone in the country. However, since they impose excessive obligations which broadcasters will not, in practice, be able to meet, they actually undermine broadcasting as a whole. As a result, they both fail to promote their aims and represent

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[176] See also, section 39(4).
[177] *Ibid.*, p. 28.
[178] Applicable by virtue of section 56.
[179] Schedule 1, paragraphs 3(2) and (3).
[180] *Broadcasting Act 1990*, section 6(1)(b).

an unjustifiable restriction on freedom of expression.

The prohibition on broadcasting false news in paragraph 7 of the Fifth Schedule also breaches the guarantee of freedom of expression because absolute restrictions on falsity, unlike softer requirements, for example to promote accuracy, do not serve a legitimate aim and exert an unacceptable chilling effect on free speech.