

Open Justice and Broadcasting of Legal Proceedings in Botswana: The Need for Reform

Badala Tachilisa Balule*

ABSTRACT

The principle of open justice is a central tenet of the administration of justice in Botswana. Open justice requires that, as a general rule, courts of law must conduct their business publicly unless this could result in injustice. The principle is a safeguard against judicial bias, incompetence and unfairness and ensures that judges are accountable in the execution of their judicial functions. There is a special connection between the principle of open justice and media coverage of court proceedings. Open justice ensures that justice is open to public scrutiny and the media are a medium through which the majority of the public receive information about court proceedings. Media coverage of legal proceedings does not only promote open justice, but it is also an exercise of the constitutionally guaranteed right to media freedom. This paper examines the issue of the live broadcast coverage of judicial proceedings in Botswana with a view of establishing whether the practice of the courts is consistent with the constitutional principles.

1. INTRODUCTION

Botswana has, since attaining independence in 1966, been a functioning constitutional multi-party democracy. One of the important principles in constitutional democracies is the doctrine of separation of powers. This doctrine provides for the separation of functions between the three main branches of government: the executive, legislature and judiciary. The rationale behind this doctrine is to prevent the excessive concentration of power in a single branch of government.¹ The separation of powers between the three organs of government is built into the text of the Constitution of Botswana.² In terms of

* LLB (Botswana); LLM; PhD (Edinburgh), Associate Professor of Law, Department of Law, University of Botswana. E-mail: Balulebt@mopipi.ub.bw.

1 See I. Currie and J. de Waal, *The Bill of Rights Handbook*, 5th ed., Juta & Co Ltd (2005), pp. 18 – 19.

2 *Kgafela II and Another v The Attorney General and Others In Re: Gabaokelwe v The Director of Public*

the constitutional principle of separation of powers, justice is administered by the judiciary through the courts of law. A central tenet of the administration of justice in democratic societies, which is incorporated in almost all major international human rights instruments, is the principle of open justice.³

The open justice principle requires that in general, courts of law must conduct their business publicly unless this would result in injustice.⁴ The principle serves two functions:

- a) It is a safeguard against judicial bias, unfairness and incompetence, by ensuring that judges are accountable in the performance of their duties; and
- b) It maintains public confidence in the impartial administration of justice by ensuring that judicial hearings are subject to public scrutiny.⁵

The essence of the open justice principle is that it allows the public as well as the parties to a case to be present during judicial proceedings. It is an embodiment of the values of openness, accountability and the rule of law in the administration of justice in a democracy. The principle therefore promotes transparency and the integrity of the judicial process by guarding against any potential abuse of the process.

There is a special connection between the principle of open justice and media coverage of court proceedings. The United Kingdom's Supreme Court has opined that since the rationale of open justice is that justice should be open to public scrutiny, the media are the conduit through which most members of the public receive information about court proceedings.⁶ Open justice is thus inextricably linked to the freedom of the media to report judicial proceedings. The principle demands that courts of law should not discourage fair and accurate reports of their proceedings.⁷

The media in Botswana plays a critical role in opening the administration of justice to the public. The broadcast media, in particular, has potential to promote transparency of the administration of justice because it is the most accessible

Prosecutions [2012] 1 BLR (CA) 699 at 711.

3 See Articles: 10 Universal Declaration of Human Rights; 14 (1) International Covenant on Civil and Political Rights; 6 (1) European Convention on Human Rights, and 8 (5) American Convention of Human Rights.

4 *The Queen on the Application of Guardian News and Media Limited v City of Westminster Magistrates' Court* [2012] EWCA Civ 420 at para. 2.

5 *Ibid.*

6 *A (Respondent) v British Broadcasting Corporation (Appellant) (Scotland)* [2014] UKSC 25 at para. 26.

7 See *Attorney General v Leveller Magazine* [1978] AC 440 at 450.

due to its ability to overcome barriers of illiteracy. Although the media plays an important role in promoting open justice, there may be instances where opening the judicial process to the public through the media may conflict with other equally important constitutional values such as the right to a fair trial and the privacy of participants in the judicial process. When such cases do occur, a fair balance must be struck between the competing interests. In many countries around the world, it would appear that whenever there is a clash between the freedom of expression of the media to cover legal proceedings, especially the broadcast media, and other rights, the former is often sacrificed.

This article examines whether in the fifty years of independence, Botswana courts have developed guidelines that seek to strike a fair balance between the right of the broadcast media to cover judicial proceedings and other competing rights. Before examining the main issue, it will be apposite to look at the protection of the critical rights that underpin the discussion in this paper – open justice and broadcast media’s freedom of expression.

2. THE GUARANTEE OF OPEN JUSTICE PRINCIPLE IN BOTSWANA

The value of open justice is recognised in the administration of justice in Botswana. The High Court has observed that the principle maintains confidence in the functioning of the administration of justice.⁸ The Constitution guarantees the principle of open justice under Section 10 (10), which provides that:

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

The Court of Appeal in case of *Your Friend (Pty) Ltd t/a Gabz FM v Law Society of Botswana and Others* has observed that in the light of the above provision, the right of the public and the media to access judicial proceedings is not in any doubt.⁹ The guarantee of the open justice principle in the Constitution

⁸ *Collins Newman & Co and Others v Genuispoint Investment (Pty) Ltd and Others* UAHGB-000085-16 (unreported, delivered on 12 May 2016) at para. 93.

⁹ CACGB-130-15 (delivered on 4 July 2016), at para. 22.

is expressed in terms that differ slightly from the guarantee of the principle under international human rights instruments such as the Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR). The stated international human rights instruments guarantee a right to “a fair and public hearing” while the Constitution only refers to a right to “a public hearing”. The Constitution however provides under Section 10 (1) that any person charged with a criminal offence shall be afforded a “fair hearing within a reasonable time”. In criminal proceedings, the Constitution guarantees a right to a fair and public hearing. The question that arises is does the Constitution only guarantee a right to a public hearing in civil matters? The Human Rights Committee has opined that the notion of a fair trial includes the guarantee of a fair and public hearing.¹⁰ The courts in Botswana have not yet had opportunity to pronounce on the issue. It is, however, submitted that we may seek guidance on the interpretation of this provision of the Constitution from international law and comparative foreign law. The Interpretation Act, 1984 permits courts to have regard to any relevant international treaty or convention as an aid to the construction of an enactment.¹¹ The Court of Appeal has further held that courts must interpret domestic laws in a way as compatible with the State’s responsibility not to be in breach of international law as laid down in law creating treaties of the United Nations (UN) and African Union (AU).¹² Furthermore, the Court of Appeal held that in interpreting the provisions of the Constitution, respect must be paid to the language which has been used and the traditions and usages which have given meaning to that language.¹³

Botswana has ratified the ICCPR but has not domesticated it. It is however contended that even though the ICCPR has not been domesticated, it is still relevant when interpreting the provisions of the Constitution because of the principle that courts must interpret the domestic laws in a way that is compatible with the State’s duty not to be in breach of international law as contained in law creating treaties. In addition, the ECHR is also relevant when interpreting

10 United Nations Human Rights Committee, General Comment No. 32 – Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32 (23 August 2007), para.25.

11 Section 24, Interpretation Act, 1984 [Cap. 01:04].

12 See *Attorney General v Dow* [1992] BLR 119 (CA) at 165.

13 *Ibid.*

the provisions in the Bill of Rights as it is based on this Convention.¹⁴ It is submitted that even though the Constitution does not expressly refer to a right to a fair hearing in civil proceedings, the provision should be interpreted as guaranteeing a right to a fair and public hearing consistent with international law. The fair trial standards contained in Articles 14 of the ICCPR and 6 of the ECHR, which include a fair and public hearing, are interlinked.¹⁵

The argument above that the Constitution must be interpreted as guaranteeing a right to a fair and public hearing in civil proceedings is also in line with a principle that has been laid down by both the Court of Appeal and the High Court on the interpretation of the provisions of the Constitution. Both courts have held that a “broad, generous and purposive approach” is required in the interpretation of the provisions of the Constitution.¹⁶ The Court of Appeal has elaborated that a generous and purposive approach means that when interpreting the provisions of the Constitution, courts should not whittle down any rights and freedoms unless by very clear and unambiguous words, such interpretation is compelling.¹⁷ There is nothing in the wording of section 10 (10) of the Constitution which suggests that the intention is to exclude a fair hearing in civil proceedings. A generous and purposive interpretation of the provision would require that a right to a public hearing must necessarily encompass a right to a fair hearing consistent with international norms. The public nature of legal proceedings promotes fairness as it guards against judicial bias and unfairness and ensures that judicial officers are accountable in the performance of their duties. Both the High Court Act and the Magistrates Courts Act, which all provide that proceedings in the two courts must be open to the public,¹⁸ must also be interpreted as requiring that the proceedings before the two courts must be fair and open.

The right to a fair and public hearing under both the ICCPR and ECHR is said to be encompassing the right of the media to be present in court proceedings.¹⁹

¹⁴ Ibid, at 152.

¹⁵ See OSCE Office for Democratic Institutions, *Legal Digest of International Fair Trial Rights*, OSCE/ODIHR (2012), p. 19.

¹⁶ See *Attorney General v Dow* n 10 above at 152 and *Ketlhaotswe and Others v Debswana Diamond Company (Pty) Ltd* CVHLB-001160-07 (unreported, delivered on 27 September 2012), at para. 35.

¹⁷ *Attorney General v Dow* n 10 above at 165.

¹⁸ High Court Act [Cap. 04:02], section 9 (1) and Magistrates Courts Act [Cap. 04:04], section 6 (1).

¹⁹ OSCE Office for Democratic Institutions, *Legal Digest of International Fair Trial Rights*, n 15 above pp. 79.

The rationale for recognising that open justice at international law embraces the right of the media to attend and report on court proceedings is premised on two arguments:

- a) It gives effect to the freedom of expression of the media; and
- b) It promotes the media's oversight mechanism in a democracy to ensure public scrutiny over the administration of justice.²⁰

In the case of *Collins Newman & Co and Others v Genuispoint Investment (Pty) Ltd and Others* (supra), the High Court of Botswana acknowledged that open justice envisages reporting of court proceedings by the media. The court opined that media reporting of judicial proceedings is a corollary to the right of access to the court by members of the public, a hallmark of the principle of open justice.²¹

The right of the public, including the media, to be present in legal proceedings guaranteed under Section 10 (10) of the Constitution of Botswana is qualified. In an appropriate case, a court is empowered to exclude the public from the whole or part of the legal proceedings in the specific instances provided for in Section 10 (11), which states:

“Nothing in subsection (10) shall prevent the court or other adjudicating authority from excluding from the proceedings persons other than the parties thereto and their legal representatives to such extent as the court or other authority-

- (a) may consider necessary or expedient in circumstances where publicity would prejudice the interests of justice or in interlocutory proceedings;
- or
- (b) may be empowered by law to do so in the interests of defence, public safety, public order, public morality, the welfare of persons under the age of 18 years or the protection of the private lives of persons concerned in the proceedings.”

The limitation clause on the public's right of access to judicial proceedings requires that any limitation must comply with a two-part test. The Court of Appeal has elaborated that this test demands that:

- a) The limitation must be shown to be for the protection of a legitimate

²⁰ Ibid.

²¹ *Collins Newman & Co and Others v Genuispoint Investment (Pty) Ltd and Others* n 8 above at para. 92.

aim set out in the provision; and

b) Reasonably justifiable in a democratic society.²²

The limitation clause on the public's right of access to judicial proceedings under the Constitution is similar to those contained under international human rights instruments. Although worded slightly different, both the ICCPR and ECHR permit a court to exclude the public from judicial proceedings where such exclusion is shown to be in the interests of:

(i) Morals;

(ii) Public order;

(iii) National security in a democratic society;

(iv) When the interests of the private lives of the parties so requires; and

(v) To the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the administration of justice.

Both the Human Rights Committee (HRC) and the ECtHR have emphasised that before excluding the public from particular legal proceedings, the court must consider whether exclusion is necessary in the specific circumstances in order to protect a public interest, and must confine the measure to what is strictly necessary to attain the objective pursued.²³ Limitations on the public and the media's right to attend legal proceedings under international law are subject to the following two conditions:

a) Necessity – any limitation to a public hearing must pursue a legitimate aim (it must be based on one of the grounds of exclusion set out); and

b) Proportionality – the exclusion must be strictly required and assessed on a case-by-case basis.²⁴

The Constitution guarantees the principle of open justice in terms that are consistent with the protection of the principle under international law. The guarantee of the principle is however qualified. In those instances where limitations are necessary on the principle of open justice, the Constitution provides a strict two-part test that ensures that any derogation on the principle

22 Ibid, at paras. 22- 23.

23 See United Nations Human Rights Committee, General Comment No. 32 – Article 14: Right to equality before courts and tribunals and to a fair trial, n 10 above at para.29 and *Nikolov and Vandova v Bulgaria*, Application no. 20688/04 (delivered on 17 December 2013) at para. 74.

24 OSCE Office for Democratic Institutions, *Legal Digest of International Fair Trial Rights*, n 15 above pp. 80.

is narrowly interpreted.

3. THE GUARANTEE OF MEDIA FREEDOM IN BOTSWANA

The media is considered to be one of the cornerstones of a democratic society because of its perceived role of facilitating the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives.²⁵ The media also act as agents in ensuring that government is open, responsive and accountable to the people in a democracy.²⁶ There is thus a special relationship between the principle of open justice and the media as the latter not only opens the administration of justice to the public, but also exercises public scrutiny over the process. The freedom of expression of the media is an important right enshrined under Section 12 (1) of the Constitution in the following terms:

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

Media freedom is not expressly mentioned in the above cited provision. The High Court has however held in several cases that the freedom is subsumed under freedom of expression.²⁷ The protection of media freedom does not only recognise the theoretical right to speak or write, but also extends to the right to use whatever medium is deemed appropriate to impart ideas and to have them reach as wide an audience as possible.²⁸ The constitutional provision guarantees

25 United Nations Human Rights Committee, General Comment No. 34: Article 19: Freedoms of opinion and expression, CCPR/C/GC/34 (adopted at 102nd session, Geneva, 11 – 29 July 2011) para. 13.

26 See *Khumalo v Holomisa* 2002 (5) SA 401 (CC) at 417.

27 See among others, *Media Publishing (Pty) Ltd v The Attorney General and others* [2001] 2 BLR 485 at 494 and *Collins Newman & Co and Others v Genuispoint Investment (Pty) Ltd and Others* n 8 above at para. 77.

28 See Inter-American Court of Human Rights, Advisory Opinion OC-5/85 of November 13, 1985, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts 13 and 29 American Convention on Human Rights)* at par 13.

a right to communicate ideas and information generally or to a class of persons. It is submitted that the provision recognises that they are various modes of disseminating information to the public, including by different media platforms. In the case of *Your Friend (Pty) Ltd t/a Gabz FM v Law Society of Botswana and Others*, in which the Court of Appeal was dealing with an appeal against a decision of the High Court denying the appellant a right to cover judicial proceedings, the court made reference to Section 12 (1) of the Constitution and, by way of *obiter dictum*, stated that “the real issue would not have been the existence of such right”.²⁹ It can be inferred from the decision of the Court of Appeal that the constitutional provision recognises that broadcasters have a right to freedom of expression.

Since the guarantee of media freedom extends to the right to use whatever medium is deemed appropriate to impart information, this in principle should allow a broadcaster to set up and use its broadcasting and recording equipment in a courtroom so that it could transmit judicial proceedings. The South African High Court has held that the right of the electronic media to exercise freedom of expression in court proceedings should be no less than that enjoyed by the print media.³⁰ The court further observed that the equivalent of the newspaper journalist’s shorthand notes to the radio broadcaster is an audio recording.³¹ The decision of the court is persuasive as there is no logical constitutional reason to distinguish the substance of the guarantee of the print media’s freedom of expression from other media. This position is well articulated by Moseneke DCJ in the case of *South African Broadcasting Corporation Limited v National Director of Public Prosecutions and Others* in the following terms:

“At the threshold enquiry, the rights to freedom of expression, freedom of the media and freedom to impart information and ideas must carry a generous import. It seems entirely apposite that its reach must include the right of the media to gather information, video footage and audio- recordings for dissemination to the public. The right to freedom of expression would serve little purpose if the media, though entitled to convey information and broadcast footage and recordings, were not entitled to gather information,

29 *Your Friend (Pty) Ltd t/a Gabz FM v Law Society of Botswana and Others* n 9 above at para. 22.

30 *South African Broadcasting Corporation Limited v Mark Thatcher and Others* [2005] 4 ALL SA 353 (C) at para. 39.

31 *Ibid*, at para. 41.

footage and recordings.”³²

It is true that there are differences between different types of media platforms, including between the print and the broadcast media. The guarantee of media freedom recognises that each media platform has its own distinguishing features.³³ It is contended that any limitations placed on any particular type of media platform based solely on its characteristics in the coverage of legal proceedings, should be considered to be unjustifiable, unless it can be shown that the use of that particular medium will compromise a legitimate interest. As long as the live broadcast of legal proceedings is accurate, fair and balanced, courts should allow it unless it is shown that it is a case that falls within the exception to the general rule.

The freedom of expression of the media guaranteed under the Constitution is qualified under Section 12 (2), which provides:

“Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision-

- (a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health; or
- (b) that is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, regulating educational institutions in the interests of persons receiving instruction therein, or regulating the technical administration or the technical operation of telephony, telegraphy, posts, wireless, broadcasting or television; or
- (c) that imposes restrictions upon public officers, employees of local government bodies, or teachers,

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

32 *South African Broadcasting Corporation Limited v National Director of Public Prosecutions and Others* 2007 (1) 523 (CC) at 560.

33 See *Doicom Trading 121 (PTY) Ltd t/a Live Africa Network News v King and Others* 2000 (4) SA 973 at 987.

The limitation clause on the right to freedom of expression requires that for any limitation on media freedom to be lawful, it must comply with the following three-part test:

- i) It must be done under the authority of any law;
- ii) Must serve a legitimate interest; and be
- iii) Reasonably justifiable in a democratic society.

There is no case law in Botswana elaborating on the requirements of this test. Guidance on the requirements of the test can be sought from international law and comparative foreign law. With regard to the first limb of the test, the Zimbabwean Supreme Court has opined, when interpreting a similar provision, that the phrase ‘done under the authority of any law’, although worded differently from equivalent phrases such as ‘provided by law’ or ‘prescribed by law’ used in international human rights instruments, carries substantially the same meaning.³⁴ The HRC has authoritatively pronounced that the phrase ‘provided by law’ used in Article 19 (3) of the ICCPR means that a restriction:

- a) Must be formulated with sufficient precision to enable an individual to regulate his/her conduct accordingly and be accessible to the public; and
- b) A law may not confer unfettered discretion on those charged with its execution.³⁵

The second limb of the test is that a restriction must be necessary in the sense that it must pursue a legitimate aim set out in the provision. There is an overlap between the interests that would justify limitations on the principle of open justice under Botswana laws and international law, and those that will justify limitations on the media’s freedom of expression under Section 12 (2) of the Constitution. The interests set out in Section 12 (2) (a) are identical to those found in Articles 14 of the ICCPR and 6 of the ECHR. In addition to these, Section 12 (2) (b) also spells out further interests that may justify limitations on the media’s freedom of expression, which in so far as they apply to open justice and the media, would constitute what under international law is referred to as special circumstances where publicity would prejudice the interests of justice.

³⁴ *Chavunduka & Another v Minister of Home Affairs* 2000 4 SA 1 at 11.

³⁵ United Nations Human Rights Committee, General Comment No. 34: Article 19: Freedoms of opinion and expression, n 25 above para. 25.

The final limb of the test is that a restriction must be shown to be reasonably justifiable in a democracy. The HRC has said this requires that a restriction on freedom of expression must conform to the principle of proportionality.³⁶ The principle of proportionality demands that a restriction must be appropriate to achieve their protective function, be the least intrusive measure amongst those which might achieve their protective function, and be proportionate to the interest to be protected.³⁷

4. OPEN JUSTICE AND BROADCASTING OF LEGAL PROCEEDINGS

The value of publicity in judicial proceedings, coupled with the public's right of access to court proceedings, present a compelling argument that the broadcasting of legal proceedings should ordinarily be permitted. The broadcast media today is an important source of news and information for the general public. The medium has one special value in the dissemination of news and information; it "provides the audience with a personal experience of current events instead of a second-hand reported version".³⁸ The potential of the broadcast media in promoting transparency of judicial proceedings and its accessibility to the public has been acknowledged by the Court of Appeal of Botswana. The court has observed that audio and visual recording of judicial proceedings may compensate for the sometimes imperfect reports of court proceedings that are conveyed through the print media.³⁹

There is a strong argument that the default position should be, unless there are demonstrable fundamental rights and other interests that are properly substantiated which outweigh the interests of justice, judicial proceedings should be broadcasted. However, the reality on the ground seems to be that there is general reluctance by courts world-wide to permit the broadcasting of judicial proceedings. In Botswana, this attitude is reflected in the High Court's decision in the case of *Your Friend (Pty) Ltd t/a Gabz FM v The Law Society of Botswana and Others, In re: The Law Society of Botswana and Another v The*

36 Ibid, para. 34.

37 Ibid.

38 M. Dockray, "Courts on Television," 51 *Modern Law Review* (1988), pp. 593 – 604.

39 *Your Friend (Pty) Ltd t/a Gabz FM v Law Society of Botswana and Others* n 24 above at para. 33.

President of Botswana and Others.⁴⁰ The applicant in this case, a private radio station, had brought an application for permission to be allowed to bring into the courtroom its equipment and to broadcast live proceedings in a matter that was before the court. The matter concerned an application in which the Law Society of Botswana and another were challenging the powers of the President in the appointment of judges of the High Court. In rejecting the application, the court held that the practicalities on the ground did not permit the broadcasting of the proceedings. The court noted that the inclusion of the broadcast media would take-up the limited space in the courtroom leading to over-crowding. It is curious that the decision was taken even though the court had not inquired about the size of the equipment or number of people that the applicant would bring into the court if granted permission. The proceedings which the applicant wished to cover were obviously of public importance. Allowing the broadcasting of the proceedings would have opened the proceedings to the public on an issue of national importance, thereby serving not only the principle of open justice, but also giving due regard to the broadcaster's freedom of expression. The court did not consider these important issues in its judgment.

Several arguments have been advanced to justify reluctance by courts to allow live broadcasting of the judicial proceedings, but the main arguments are: first, that broadcasting may infringe upon the privacy of litigants and witnesses;⁴¹ and, second, that broadcasting may interfere with the proper administration of justice.⁴² There are two facets to the second argument. The first is that the presence of recording equipment in the courtroom may compromise the right to a fair trial. It is argued that the presence of broadcasting equipment would put stress on witnesses, lawyers and judges and inhibit interaction, thereby creating a material risk that justice may be impaired.⁴³ Another argument is that the knowledge by potential witnesses that their testimony will receive extensive radio and television broadcasting may deter witnesses from testifying.⁴⁴ The

40 MAHGB-000562-15 (unreported, delivered on 15 October 2015).

41 See *South African Broadcasting Corporation Limited v Mark Thatcher and Others* n 31 above at para. 31.

42 E. Thompson, "Does the Open Justice Principle Require Cameras to be Permitted in the Courtroom and the Broadcasting of Legal Proceedings?" 3 (2) *Journal of Media Law* (2011), pp. 211 – 236.

43 See among others, M. Dockray, "Courts on Television," n 38 above and *South African Broadcasting Corporation Limited v National Director of Public Prosecutions and Others* n 33 above at pp. 532.

44 *Ibid.*

second facet of the argument is concerned with avoiding physical disruption of judicial proceedings and maintaining the dignity and decorum of the court.⁴⁵ Opponents of live broadcasting of judicial proceedings contend that cameras and broadcasting equipment may cause physical disruption, for example, that the lighting equipment may be intrusive. Furthermore, that the presence of the equipment could also have a distracting effect on the participants, thereby interfering with a court's primary role in administering justice.⁴⁶

Restrictions on the public's right of access and the broadcasting of legal proceedings constitute limitations on both the open justice principle and the broadcast media's freedom of expression. These two values are not only internationally recognised rights, but are also entrenched in the Constitution of Botswana. Any limitations on the two rights under both international law and Botswana law are required to satisfy both the conditions of necessity and proportionality. These are designed to ensure that derogations from these rights are narrowly and strictly interpreted. The reasons advanced to justify limitations on the right of broadcasters to cover judicial proceedings pursue legitimate aims - protection of privacy and the right to a fair trial. However, a general approach where courts consider the exclusion of broadcasters from covering legal proceedings as the rule and not as an exception fails the requirement of proportionality. The principle of proportionality would require that the exclusion of the broadcast media from judicial proceedings must be strictly required and assessed on a case-by-case basis. A court will be called upon to assess all the competing legal interests in a particular case before excluding the broadcast media from covering judicial proceedings. Where there are constitutional rights that clash, it is the responsibility of the court to reconcile them.

5. STRIKING A BALANCE BETWEEN OPEN JUSTICE, BROADCAST MEDIA'S FREEDOM OF EXPRESSION AND OTHER COMPETING CONSTITUTIONAL RIGHTS

When the principle of open justice and the broadcast media's right of freedom of expression on the one hand, clash with other constitutional rights on the other

⁴⁵ E. Thompson, "Does the Open Justice Principle Require Cameras to be Permitted in the Courtroom and the Broadcasting of Legal Proceedings?" n 42 above.

⁴⁶ Ibid.

hand, it is the duty of the courts to strike a fair balance between the competing rights by reconciling them. All protected rights and freedoms in the Constitution have equal value and there is no hierarchy of rights and freedoms in the Bill of Rights. The importance of promoting open justice through the media and at the same time ensuring the proper administration of justice, both entrenched rights in the Constitution of Botswana, is succinctly reflected in an observation made by a US judge, Justice Felix Frankfurter, who said:

“A free press is not to be preferred to an independent judiciary, nor an independent judiciary to a free press. Neither has primacy over the other, both are indispensable to a free society. The freedom of the press in itself presupposes an independent judiciary through which freedom may, if necessary, be vindicated. One of the potent means for assuring judges their independence is a free press.”⁴⁷

Although the above observation was made in the context of the US, the sentiments expressed are equally applicable to Botswana, a State that prides itself in the upholding of constitutionalism and the rule of law. The ECtHR has also expressed a similar view in the case of *Pinto Coelho v Portugal (No.2)*.⁴⁸ In this case, Ms Coelho was convicted by the Portuguese courts for unauthorised use of broadcast extracts of sound recording in judicial proceedings. She took her matter to the ECtHR alleging a violation of her right to freedom of expression under Article 10 of the ECHR. The ECtHR found a violation of the applicant’s right to freedom of expression and noted that in principle, the rights to freedom of expression and privacy guaranteed in the ECHR deserve equal treatment.

Judicial officers have an inherent discretion to regulate the conduct of proceedings in their courts and this includes a decision whether or not to allow the live broadcast of proceedings.⁴⁹ Where a judicial officer feels that allowing the broadcasting of proceedings would interfere with other constitutional rights, the officer must try and strike a fair balance between the competing rights. The exercise of the discretion by a judicial officer in striking a balance between conflicting rights must be guided by the principle that when two constitutional provisions are in conflict, an interpretation favouring the protection of

47 *Pennekamp v State of Florida*, 328 US 331 (1946) at 335.

48 [2016] ECHR 296.

49 See *Your Friend (Pty) Ltd t/a Gabz FM v Law Society of Botswana and Others* n 24 above at para. 32.

fundamental rights must be preferred.⁵⁰ The proper approach in striking a balance between competing fundamental rights is well articulated by the South African Supreme Court in the case of *Midi Television Pty Limited v Director of Public Prosecutions (Western Cape)*:⁵¹

“Where constitutional rights themselves have the potential to be mutually limiting - in that the full enjoyment of one necessarily curtails the full enjoyment of another and vice versa - a court must necessarily reconcile them. They cannot be reconciled by purporting to weigh the value of one right against the value of the other and then preferring the right that is considered to be more valued, and jettisoning the other, because all protected rights have equal value. They are rather to be reconciled by recognising a limitation upon the exercise of one right to the extent that it is necessary to do so in order to accommodate the exercise of the other (or in some cases, by recognising an appropriate limitation upon the exercise of both rights) according to what is required by the particular circumstances...”

When balancing competing constitutional rights, the aim of the court should be to ensure that each right finds expression to the extent necessary and not just to give preference to one right over the other. The Botswana Court of Appeal has noted that there are currently no guidelines that guide courts on whether or not to permit audio and video coverage of court proceedings.⁵² The court went on to observe that it is for the Chief Justice to determine whether to issue any guidelines or whether the matter should be left to the presiding judicial officers to decide. In the process, the court made the following disturbing comment:

“It would be difficult for this court sitting on appeal to accede to the request by the appellant’s counsel that this Court should give guidance to the other Courts on the question of permitting live audio recordings in the courts below.”⁵³

It is contended that the approach taken by the Court is wanting and does not give due regard to the freedom of expression of broadcasters and the

50 Article 19, *The interpretation of Fundamental Rights Provisions: International & Regional Standards in African and other Commonwealth Law Jurisdictions*, Article 19 (1997) pp. 18.

51 2007 (5) SA 540 (SCA) at 544.

52 *Your Friend (Pty) Ltd t/a Gabz FM v Law Society of Botswana and Others* n 9 above at para. 32.

53 *Ibid.*

open justice principle. The court has an obligation and a constitutional role to protect fundamental rights and freedoms entrenched in the Constitution. This obligation entails a duty to guide other courts to adopt a purposive approach in the interpretation of the provisions of the Constitution in order to fulfil the purpose of the guarantee of rights and thereby securing for individuals the full benefit of the constitutional protection. The Court of Appeal in *Your Friend (Pty) Ltd t/a Gabz FM v Law Society of Botswana and Others* noted that there were no guidelines on how the High Court should exercise its discretion where it is considering an application for the live broadcast of judicial proceedings. The Court of Appeal should in fact have attempted to give some guidance to the High Court and referred the matter back, especially since it was apparent that the High Court had failed to identify the constitutional rights at stake in the case and had not done a balancing exercise.

While it may be desirable for the Chief Justice to issue guidelines on the live broadcast of judicial proceedings, courts do not have to wait for the promulgation of such guidelines if the void is detrimental to the enjoyment of rights and freedoms guaranteed in the Constitution. It is submitted that courts must use the existing principles on the interpretation of the provisions of the Constitution to give full expression to the principle of open justice and the broadcast media's right to freedom of expression while at the same time giving due regard to other rights. All that a court needs to do is to be alive to the constitutional rights at stake, and be conscious that its role is to reconcile the rights and not just to prefer one right over the other. In turning down the request by the applicant to cover judicial proceedings in *Your Friend (Pty) Ltd t/a Gabz FM v The Law Society of Botswana and Others, In re: The Law Society of Botswana and Another v The President of Botswana and Others*, there is no evidence that suggests the High Court ever attempted to identify the constitutional rights at stake or that an attempt was made to reconcile the rights. This was a misdirection on the part of the court on the exercise of its discretion and should have prompted the Court of Appeal to remit the matter back to the High Court for a proper exercise of its discretion. It is disappointing to observe that after fifty years of independence, the broadcast media's right to cover judicial proceedings is yet to be clarified by the courts, notwithstanding that this is a constitutionally entrenched right which also plays an important

role in the promotion of the open justice principle. Botswana in this respect has been overtaken by young democracies such as South Africa. The South African courts have in the 20 years of that country's democracy developed rich jurisprudence on the live broadcast of judicial proceedings which ensures that broadcaster's rights of freedom of expression are not unduly inhibited.

6. CONCLUSION

The Court of Appeal of Botswana made an important observation that courts ought to accept that properly managed audio and visual recording of their proceedings may enhance their image in the public eye and allow the ordinary member of the community to observe first-hand how the courts work and make their own independent judgment.⁵⁴ What the court should also have emphasised is that it is not just a mere privilege for broadcasters to be granted permission to cover judicial proceedings, but rather that broadcasters have a constitutional right to cover judicial proceedings. The broadcasting of judicial proceedings also promotes another important constitutional right of open justice. While these two rights do not have primacy over other rights entrenched in the constitution, it is important that courts should accord the two rights the weight they deserve. It would appear that the current practice in the courts is to subordinate the right of broadcasters to cover judicial proceedings to other rights whenever this right is alleged to be clashing with other rights. Such a practice is improper and violates the fundamental principle that when constitutional rights clash, it is the duty of the court to reconcile the rights and not just to prefer one right over the other. There is need for a radical change by the courts on how they approach the issue of the live broadcast of judicial proceedings. Courts must recognise that the constitutional right of the broadcast media to cover judicial proceedings can only be limited where it is proved that a limitation is necessary and proportionate.

54 Ibid at para. 34.