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Regulating freedom? : an examination of the discourse on internet regulation and freedom of expression in South Africa (2010)

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2011-09-05
http://hdl.handle.net/10539/10399

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CHAPTER ONE

1.1 Introduction

> "The internet is one of the most powerful agents of freedom. It exposes the truth to those who wish to see it. It is no wonder that some governments and organisations fear the internet and its ability to make truth known. But the power of the internet is like a two-edged sword. It can also deliver misinformation and uncorroborated opinion with equal ease. The thoughtless coexist side by side in the internet's electronic universe. What's to be done?" (Cerf 2011)

The Internet has fast become a key instrument for the exercise of the right to freedom of expression. It combines within one medium both the right to receive as well as the right to express and disseminate information, ideas and opinions through writing, audio or video. However, it is precisely because of its diversity of content and ease of use that the Internet has drawn much controversy. Originally hailed as a wonderful medium of communication and the epitome of freedom of expression, the internet as a medium has produced increased tensions particularly in relation to defamation, hate speech and pornography. Increasingly, therefore, the case is put for stronger internet regulation. This raises important issues with regard to the right to freedom of expression, and it is with these issues that this paper is concerned.

This paper aims to outline the most important questions and issues with regard to internet regulation and freedom of expression in South Africa. This will be done by firstly presenting the findings grouped according to the methods of data collection. Thereafter a discussion will ensue, using critical negotiation issues and public regulation theory based on the findings presented. This will also be done through grouping the methods of data collection; furthermore other arising issues will be discussed. Thereafter a conclusion will be drawn.

It is important to note that these issues are all discussed in the context of the legal guarantee of the right to freedom of expression. This paper approaches the issues in terms of the function of the Internet as a tool to disseminate as well as to receive information. It may also be important to note that this paper does not attempt to provide definitive answers but simply examine the discourse on internet regulation and freedom of expression as is in year 2010, drawing on pivotal issues that arise that will reveal a terrain indicative of the extent of the discourse in the country and the implications of the findings.

1.2 Chapter Breakdown

Chapter 1 will outline the research problem, aim, research questions and rationale of the study. Chapter 2 will outline the review of literature done in the study, with the aim of identifying the gap that this study seeks to fill. The literature reviewed is research conducted on internet regulation and freedom of expression. Chapter 3 will outline the methodology of the study. The research approach is qualitative analysis and the methods of data collection are document analysis, interviews and secondary research. In this section, the method of data analysis, namely discourse analysis, will also be outlined in this section. In addition, the theoretical framework pertaining to the subject matter of this paper will be outlined in this chapter and that is Critical Negotiation Issues and Public Interest Theory. Chapter 4 will outline and explore the key themes emerging from the data collected. Document Analysis, secondary research and interviews will form part of the collection of data in this section. In chapter 5, theories will be integrated to provide an analysis of the data and a further exploration of the themes that emerged in Chapter 4. It is in this section that the paper will examine the ways in which the media, policy and audiences have responded to the debate and in chapter 6 theoretical conclusions, limitations of the study and recommendations for future research will inform the chapter.

1.3 Background to the Study

Hamilton Wende, of *The Star* newspaper, stated "In the glaring debate about Media Tribunal and the Protection of Information Bill, there has been one glaring omission-the growing role of the internet in today's world. The ANC has said little, if anything about how they are going to handle something like the recent Wikileaks affair" (The Star 2010).

Wikileaks, established in 2006, is an international non-profit organisation that publishes submissions of private, secret, and classified media from anonymous news sources and news leaks (Atchison 2010). There have been notable attempts at regulating Wikileaks following the release of certain classified and top-secret information mostly in relation to government. Firstly, Amazon removed Wikileaks from its services alleging breach of their terms and conditions. Wikileaks domain provider, DNS, followed suit and removed Wikileaks. Thereafter PayPal froze their donation account, and the bank holding funds for the legal defence of Julian Assange, the alleged founder of the network, froze their account as well.

This continued with Master Card and Visa froze the Wikileaks funds they held (IT News 2010).

Nikola Osborne, writing for TechnoLlama however informs the reader that inspite of the regulation developments as stated in the aforementioned paragraph, "Wikileaks is being mirrored in 1005 different sites…almost 14 new mirrors are going up every hour, or one new mirror every 4 minutes. Wikileaks has also made public the information of how to make more mirrors. Even if all of those mirror sites were removed, Wikileaks has made available an encrypted torrent file which apparently contains all of the cables." She thereafter argues "If governments think that they can stop this leak, they are sorely mistaken…the coming weeks however may shape the Internet for at least the next decade as corporations, governments and regulators scramble to plug the leaks" (Osborne 2010).

Of central importance to the paper about the Wikileaks case is that it contrasts two diametrically opposed views of the internet that inform the discussion content of this paper. Of one view are academics, theorists, journalists who argue for an open internet, free from any form of regulation; directly opposed to that view are governments, some media organisations and corporations arguing for a form of regulation of the internet. IT News reports that "the global internet regulation call follows in reaction to challenges such as Wikileaks", which has spearheaded what has been perceived as a movement for enforcing governmental transparency and openness by leaking secret information" (IT News 2010). At a meeting in New York, representatives from Brazil called for an international body made up of government representatives that would attempt to create global standards for policing the internet - specifically in reaction to challenges such as Wikileaks (IT News 2010).

In many countries globally, there is a growing antagonistic relationship between attempts at censoring and advocating for restrictive legislation of the internet by the state, political groups and different types of organisations; and the internet community advocating for freedom of expression and speech on the internet. One of these countries is South Africa. The former Deputy Minister of Home Affairs in the country, Mr Malusi Gigaba, for instance, in the recent past called for the banning of pornography on the internet, social networking sites like Facebook and on mobile phones. He announced his intention to fast-track the passage of a yet-to-be drafted law, the Internet and Pornography Bill, that would compel Internet service

providers to filter content provided to users to ensure that it does not contain any pornography (Sapa 2010). Mr Gigaba was quoted as saying, "Cars are already provided with brakes and seatbelts, it is not an extra that consumers have to pay for. There is no reason why the internet should be provided without the necessary restrictive mechanisms built into it" (Davies 2010).

Attempts at imposing control in a medium that thrives in free expression and opinion have been met by criticism by those advocating for a free internet, arguing for a case of the state attempting to control a medium that is by nature operational on its decentralized nature and access to free information (Da Silva 2010). Graham Cluley of security firm Sophos said that previous attempts by other nations to ban pornography had not been successful. "One wonders how on earth a democracy like South Africa would be able to introduce such a system, as it's not as though the state has 100% control over telecommunications," he told *BBC News*. He further says, "Although their intentions may be honourable, it's barking mad to think you will be able to completely outlaw pornography from the web which, is after all, the modern equivalent of the wild west" (Davies 2010).

Notably also exist groups that advocate for a form of regulation, arguing that government intervention may be a manner in which some of the ills the internet has been associated with, are curbed. Perhaps it is crucial that particular case studies that have prompted this debate in this country are briefly considered, such as to provide a background that serves to cushion content that will follow in the paper.

1.4 South African case studies

1.4.1 www.outoilet.wen.ru

This website provides for a case study that raised great debate with regard to internet regulation and freedom of expression in the country. On this website, chat rooms had been set up for schools across the country, grouped into provinces. The chat rooms fell into two categories: requests for information about members of the opposite sex, and “scandalous gossip or vicious accusations about fellow learners” (Goldstuck 2010). The gossip became so virulent, that it was blamed for destroying lives, literally and figuratively. There were claims of victims having committed suicide, there were claims of victims having lost jobs and

relationships because of the content posted on the site. The site was so popular such that the daily traffic kept increasing by the minute. If one wanted to paste a comment on the website, "one had to wait 15 minutes on a queue" (Malala 2010)

In the past year, 2010, adults began soliciting children for sex on the site, offering airtime or money in exchange. They also offered to share pornography with schoolchildren, and offered money and airtime for pictures of the children unclothed. In some cases, children offered their services to adults. In a Jules High School incident in Johannesburg, a 15-year-old schoolgirl was allegedly drugged and gang raped by three boys while classmates stood by and filmed the incident on their cellphones. "This video thereafter became the hottest commodity on the Outoilet site as learners from around the country traded it for up to R20 in cash or airtime" (Drum magazine 2010).

This case prompted intense public discourse on internet regulation versus freedom of expression. Malala (2010) wrote "Uncensored, the ANC should implement the 'media tribunal' on the site", however, some noted that because of the website's Internet Service Provider being based in Russia, there was little anyone could do.

1.4.2 Twitter

Twitter has been named a child safety and privacy disaster waiting to happen, according to online safety experts. Online safety experts have raised concerns and are calling for action to prevent trouble for the fast-growing site. They highlight the fact that Twitter's terms state that users must be 13 years or over, but do not offer a 'report abuse' button or explicit ways to flag offensive material or monitor sexually explicit and racist behaviour and links to adult sites (Goldie 2009).

New media age uncovered links to prostitution and escort services, cannabis seed shops and racist and pornographic material on Twitter. It is also being used by escorts to alert followers of their locations, images and videos despite Twitter rules banning pornographic images. A group on Facebook directs escort services to Twitter where they can build their network without fear of being removed by moderators (Goldie 2009).

"Twitter is a truly remarkable tool that has revolutionised the social and media landscapes, but the company's decision-makers need to realise that actually some regulation would

benefit all. Regulation would help make Twitter a safer, cleaner, and more reputable space and surely this can only be a good thing – if only to protect young children from offensive material?" (Rai 2010)

John Carr, who represents The Children's Charities' Coalition on Internet Safety (CHIS), said his concerns about the site's lack of regulatory control would be raised at the next meeting of the UK Council for Child Internet Safety (UKCCIS). "Start-up companies come into the market with these products and it is not regulated. No one will look at it until there's a disaster," he said (Goldie 2009).

In South Africa, The ANC Youth League expressed concerns by the continuous creation of fake Twitter accounts in the name of ANC Youth League President Julius Malema. These accounts were noted to currently and continuously post misleading messages. "Those who are hacking systems and impersonating the ANCYL leadership should immediately stop doing so because the laws of this country will come very hard on them" (The ANCYL Blog 2010). "We will look at ways of stopping this… even if it means going to the police," ANCYL spokesman Floyd Shivhambu said.

1.4.3 Mxit

The leader of the opposition party, Independent Democrats, Patricia de Lille, called for government regulation on Mxit, a free instant messaging software application developed in South Africa that runs on GPRS/3G mobile phones and on PCs, allowing the user to send and receive one-on-one text and multimedia messages to and from other users, as well as in general chat rooms (Mxit 2010). "Mxit is destroying marriages and allowing children to be lured into traps by sexual predators". She also raised concern over blogs on the internet "where [anonymous] members of the public can with impunity slander and defame individuals and organisations they do not like" (Mail and Guardian Online 2007).

The above three cases offer just a few examples that have caused the debate to ensue with intensity in South Africa. Hamilton Wende, undoubtedly advocating for a free internet, in his final argument said "If however the ANC continues with these efforts to stifle legitimate press, they will almost find that they are held to ridicule and embarrassment all across the internet-a medium that is impossible to control" (Wende 2010).

1.5 Research Problem

The rapid expansion of these digitalised and new communication technologies has been heralded as having significant implications for the improved functioning of democracy. As a technology designed and founded on liberal ideology and concepts of freedom of access, information and expression, the advent of the Internet[1] has brought about much hope and "power to the people" (see Lee & Birch, 2000). With the ability to access wider information and the opening up of space for more voices, "technologies such as the Internet are seen as offering potential for bringing government closer to the people, making it more responsive and relevant" (Gibson & Ward, 2000a: 1).

Against this backdrop, the greatly expanded access has also been met with a clear emergence of new and multiple threats to aspects of internet freedom, particularly restrictions on certain and heightened surveillance of users the world over. The question of internet regulation is currently a matter of urgent policy debate in the United Kingdom and Europe, where attention has been focused on some of the least acceptable forms of the freedom spoken of previously. These least acceptable forms include child pornography and other forms of sexual exploitation, obscenity and hatred and the links between easy accessibility and the incidence of physical manifestation of these forms (Newey 1998: 13).

In light of the aforementioned, Parrat and Wadham note that some of the questions that have faced contributors to internet research include: Is it possible to reconcile the imperatives of free speech with the minimum controls that are necessary to protect the vulnerable, weak and minorities? Can the requirements of the law enforcement coincide with the individual's right to privacy? Where can the balance be drawn? These questions provide a framework within which the research problem of this paper is situated (Parrat and Wadham 1998:2).

This study will attempt to situate these problematic debates within the South African context. The study will do so by examining the dominant discourses[2] that have and continue to inform

[1] The usage of the internet throughout the paper will be generalising across different internet media. However it is acknowledged that the internet is not a medium at all, but a network through which a plurality of media can be accessed: e-mail, Usenet, the World Wide Web and so forth (Newey 1999). These will be distinguished only where necessary.

[2] The use of discourse is not only in the traditional linguistic sense describing utterances greater than a sentence but is also used as described by Foucault as 'bodies of knowledge, away from something to do with knowledge and closer to the concept of discipline, scholarly disciplines and disciplinary institutions of social control (McHaul and Grace 1997: 26). These bodies of knowledge express and maintain major truths within

this debate surrounding internet regulation and freedom of expression in South Africa. The discourses that will be examined include liberal discourse of the internet as a medium that will free users from past regulatory constraints as is present in other media; and a discourse on governance and regulation, where the internet is perceived as a technology in need of control. It is the view of this paper that a critical analysis of these discourses that circumscribe the internet will reveal a terrain where it is just likely that structures of domination and control might develop, or have developed along with forms of resistance in this debate.

The discourse will triangulate[3] around policy, the media and audiences' response to this debate in South Africa. The various forms of knowledge that have and continue to serve, to inform, shape and legitimise the ways in which the internet is governed; the different myths, metaphors, analogies and visions about what technology does, how it operates, the kinds of impact it may have on society and what it means for the future, will therefore be central to the study. Attention will be paid to how the internet has been problematised and hailed, the kinds of regulatory strategies and practices that are emerging or have emerged and the implication this has for the future of freedom expression on the internet in South Africa.

1.6 Aim

This study aims to critically examine the ways in which South Africa has responded and is responding to the debate on freedom of expression and internet regulation in 2010. This discourse will emanate from the media, audience and policy-makers' as key contributions to the debate.

The paper's direction will attempt to move beyond answering normative questions that centre on how the internet can or cannot be regulated, but instead considers the ways in which South Africa has responded and attempted to deal with this debate with the ultimate aim of analysing the implications of the findings on the future of freedom of expression on the internet.

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certain social contexts and the more powerful, universal or pervasive discourses likewise govern the reigning truths in society (Tay 2002).

[3] Data triangulation as identified by Denzin (1978) that involves time, space and persons. This is done because by combining multiple observers, theories and methods, researchers can hope to overcome the intrinsic biases and the problems that come from single-observer, single-method, single-observer and single–theory studies.

1.7 Research Questions

- How have the media, policymakers and audiences in South Africa responded to the freedom of expression and internet regulation debate?
- What are the implications of these discourses for the future of freedom of expression over the internet in South Africa?

1.8 Rationale

> "The internet poses a fundamental challenge for effective leadership and governance" (Akdeniz 2001)

Livingstone argues that "it is our purpose to consider the social, political, cultural and economic debates over the internet's shaping, significance and consequences for society" (Livingstone 2005: 10). Parrat and Wadham assert this view by pointing out that the inter-penetration of a medium with every aspect of society means that some of the policy decisions made in the future will be irreversible; hence a study into that particular medium penetration is therefore essential. In South Africa, little has been critically written about the country's approach towards the regulation of information and communication technologies, particularly the internet which is of relevance to this study, although as has been indicated previously, debate over internet regulation and freedom of expression has at a growing alarm ensued in the media, with the audiences and with policymakers . Such a study then that attempts to study the discourse over this debate, with the ultimate aim of finding out the implications of the discourse on the future of freedom of expression over the internet is pivotal. Such an examination of the complex interaction of individuals, interest groups, institutions around this debate may have relevance for policy makers as they seek to understand and manage the debate.

1.8.1 Why 2010?

This period is important because firstly, it documents the increasing penetration of the internet in South Africa than had been in the previous years. This period also comes with the introduction of the platforms-MXit, Facebook, Twitter and other social networking sites from which complaints informing the research problem emanate. It is and has been in this period that the debate over freedom of expression and internet regulation has arguably intensified.

Secondly this study situates the discussion in this period because two studies, although not exclusively focusing on the subject matter of the paper, but considering briefly discussions that will inform the paper, focused the discussions between 1990 and 2003, and 2007-2008. The first one, by Charley Lewis was based on internet diffusion and the development of the internet in South Africa. The second one, by Freedom House declared South Africa's status as free where the internet is concerned. This study therefore traces the discourse in 2010, thereby updating the study and also focusing exclusively on subject matter only partly considered by the two studies, especially in light of the following point.

Thirdly this period is important because this study is conducted against the backdrop of intensified debates over freedom of expression and regulation however as pertaining to print media in the country. Summarily the ruling party, the African National Congress proposed a media appeals tribunal that aims to "protect the public from abuse by wayward journalists" (du Plessis 2010). This stems from the ineffectiveness of the current regulatory institution, Press Ombudsman in detecting irresponsible reporting. As will be indicated in the literature review, this has also raised alarm, some audience members arguing that if the Media Appeals Tribunal is successful in its implementation, there is a high probability that the ruling party, the African National Congress, may extend the control to the internet as well, with devastating consequences for freedom of expression in the country.

1.9 Conclusion

This section has aimed at providing an introduction of the research content that follows, by way of outlining the background of the study, the research problem, the aim, the research questions and the rationale.

It is important that the paper begins with such a section as the content that is about to follow is premised upon this chapter. Moreover, it is also important to begin with such a chapter as further reading of the paper must at all times relevantly correspond with the content of this chapter.

CHAPTER TWO: LITERATURE REVIEW

2.1 Introduction

This section aims to review the critical points of current knowledge around the subject area, such as to form a basis for the gap this paper opts to fill. This literature review is divided into two main sections. The first section considers research conducted on internet and regulation, globally and in South Africa thus far whilst the second section reviews literature on freedom of expression.

2.2 Internet and regulation

A significant portion of this research has noticeably been undertaken by those working in the areas of criminal justice and public policy, who have identified the various challenges that the Internet presents to government and law enforcement agencies, and to proscribing possible solutions to these problems (see Wall 2001a, Jewkes 2007). Grabosky and Smith (1998), for instance, warn of the growing potential for the criminal abuse of new media technology and argue in favour of greater governmental control. They note the growing number of cases where the developments in computing and communications technology have enabled new forms of criminal conduct to emerge (1998: 210). In other cases, these technological advancements have simply allowed already existing forms of crime and deviance to "be carried out more extensively, more efficiently, more quickly, with greater ease of concealment", and thus with greater difficulty of detection (Grabosky and Smith 1998). They thus propose changes using law enforcement: creating specialists units and improving funding, using technological consultancies, generating inter-jurisdictional cooperation between agencies in order to ensure security in cyberspace.

In addition to this other scholars have conducted research on already existing forms of regulation online. This may be perceived as more policy-driven and prescriptive research regarding the governance of the Internet (see, for example, Akdeniz 1999; Loader 1997; Wall 1998, 2000, 2001). David Wall (2001: 167) claims that the internet, contrary to the anarchy predicted by those who favoured early government regulation of Internet technology is "remarkably ordered." He furthermore argues that the Internet is presently governed by a multi-tiered structure of policing and lists five main levels at which this activity is taking place: Internet users and user groups; Internet Service Providers (ISPs); corporate security

organizations; state-funded, non-public police organizations; and state-funded public police organizations (Wall 2001).

Contrary to the aforementioned body of research, another body of research reasons out why the internet cannot be governed (McChesney 1999; Rheingold 1993). They highlight the fact that the internet's original inception was founded on a libertarian vision, purposely designed such that it cannot be controlled by any central source.

> "The Internet, by definition, is the opposite of centralization and, as a result, a conflict between this technology and the state is inevitable. The shift from a highly centralized information and communications infrastructure to a decentralized set of interconnected networks crossing the globe has generated considerable concern about issues of jurisdiction, privacy and censorship" (Mehta 1998: 172)

Robert McChesney asserts that the internet was founded upon a "vision of a non-commercial sharing community of scholars and, eventually, all citizens of the world" (McChesney 1999: 129). Hunter (2003: 443) maintained this view, stating that it is "open, free and replete with possibility". Internet users of this view therefore held strongly to the belief that it must be vigilantly protected from government regulation. Barlow (1996) wrote a letter entitled 'Declaration of Independence of Cyberspace', which was regarded as a rebuttal to government of the internet, by any outside force, particularly the government of the United Stated:

> Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather.
>
> We have no elected government, nor are we likely to have one, so I address you with no greater authority than that with which liberty itself always speaks. I declare the global social space we are building to be naturally independent of the tyrannies you seek to impose on us. You have no moral right to rule us nor do you possess any methods of enforcement we have true reason to fear.
>
> Governments derive their just powers from the consent of the governed. You have neither solicited nor received ours. We did not invite you. You do not know us, nor do you know our world. Cyberspace does not lie within your borders. Do not think that you can build it, as though it were a public construction project. You cannot. It is an act of nature and it grows itself through our collective actions.
>
> You have not engaged in our great and gathering conversation, nor did you

create the wealth of our marketplaces. You do not know our culture, our ethics, or the unwritten codes that already provide our society more order than could be obtained by any of your impositions.

You claim there are problems among us that you need to solve. You use this claim as an excuse to invade our precincts. Many of these problems don't exist. Where there are real conflicts, where there are wrongs, we will identify them and address them by our means. We are forming our own Social Contract . This governance will arise according to the conditions of our world, not yours. Our world is different.

We are creating a world that all may enter without privilege or prejudice accorded by race, economic power, military force, or station of birth.

We are creating a world where anyone, anywhere may express his or her beliefs, no matter how singular, without fear of being coerced into silence or conformity.

Your legal concepts of property, expression, identity, movement, and context do not apply to us. They are based on matter, There is no matter here.

Our identities have no bodies, so, unlike you, we cannot obtain order by physical coercion. We believe that from ethics, enlightened self-interest, and the commonweal, our governance will emerge . Our identities may be distributed across many of your jurisdictions. The only law that all our constituent cultures would generally recognize is the Golden Rule. We hope we will be able to build our particular solutions on that basis. But we cannot accept the solutions you are attempting to impose.

In China, Germany, France, Russia, Singapore, Italy and the United States, you are trying to ward off the virus of liberty by erecting guard posts at the frontiers of Cyberspace. These may keep out the contagion for a small time, but they will not work in a world that will soon be blanketed in bit-bearing media.

Your increasingly obsolete information industries would perpetuate themselves by proposing laws, in America and elsewhere, that claim to own speech itself throughout the world. These laws would declare ideas to be another industrial product, no more noble than pig iron. In our world, whatever the human mind may create can be reproduced and distributed infinitely at no cost. The global conveyance of thought no longer requires your factories to accomplish.

These increasingly hostile and colonial measures place us in the same position as those previous lovers of freedom and self-determination who had to reject the authorities of distant, uninformed powers. We must declare our virtual selves immune to your sovereignty, even as we continue to consent to your rule over our bodies. We will spread ourselves across the Planet so that no one can arrest our thoughts.

> We will create a civilization of the Mind in Cyberspace. May it be more humane and fair than the world your governments have made before.
>
> Davos, Switzerland
> February 8, 1996

Accordingly, a number of scholars have asserted that only users themselves can effectively govern the internet (Johnson 1996, Vohs 2004). This process is called self-regulation whereby users unimpeded by any external force exercise a degree of regulatory authority when using the internet. Johnson (1996) upholds this view by stating that self-regulation enables the user to "decide where to go, what to read and with whom to interact". The internet gives users therefore the power and freedom to what they receive and respond to. Researchers in the fields of media and cultural studies have also demonstrated how virtual communities establish and enforce their own set of norms and values in using the internet (see Jenkins 2004).

Although this current body of research may help one identify the issues surrounding the regulation of internet, however what remains largely absent is a critical examination of this discourse in South Africa. A significant amount of attention in South Africa has been paid on regulating other mediums, print and broadcast exclusively, with little focus on the internet although as has been indicated previously, there is growing concern and consequently stimulation of the debate surrounding internet regulation and freedom of expression in South Africa. Research into this area thus becomes pivotal.

2.2.1 Internet regulation in South Africa

Based on a study conducted by Charley Lewis on the internet in South Africa from 1990-2003, where he accounts on the diffusion of the internet in South Africa and its development, he notes that although there is an abundance of literature that tracks the development of the internet in developed countries, there has been limited documentation, commentary and analysis of the development of the internet in Africa (Lewis 2004). He further notes that many of the studies conducted focus on technology as a driver of positive change. "There is a corresponding tendency to downplay the role of society and social forces, to minimize the aspect of social construction of the Internet, and hence, to overlook contestation between diverse and competing interest groups as a motive force" (Lewis 2004)

Lewis is noticeably one of the very few scholars who have documented internet development in South Africa. "The analysis presented here takes a different approach, seeking to emphasize the dynamics and nature of the contestation between opposing interest groups, to examine the social construction and negotiation that have underpinned the spread of the Internet in the complex and changing society of South Africa" (Lewis 2004). "As this account makes clear, those 13 years were by no means ones of straightforward, uninterrupted growth, of steadily increasing benefits and linear progress. It was a process anything but smooth, characterized by periods of sharp conflict. Neither was it a process driven by uninterrupted technological development and innovation. Clearly the clash of personalities and the contending interests influenced forward movement and negotiational impasse. Finally, the nature of the conflicts, the delays, and the negotiated outcomes resulted in a situation of uneven, often patchy, benefit and erratic growth" (Lewis 2005). It is the purpose of this paper therefore, to advance this argument and situate it in 2010.

Other literature on internet regulation in South Africa falls under grey literature. Hart describes grey literature as being information sources that do not form part of academic literature, for instance news articles, company reports, policy reports, government papers and working papers (Hart 2001: 30). This literature was contributing to the debate and emanating from audience, media and policymakers. As has been attempted to prove therefore even with this section, little research has been conducted in tracing this discourse in the South African context. Academic research into this area is necessary and important then.

2.3 Freedom of Expression

The modern roots of freedom of expression can be traced back to the struggle for freedom of speech of legislators during the 17th century. Sweden-Finland was one of the forerunners of giving legal guarantees to the freedom of speech in the 18th century. The 1766 Freedom of Print decree of Sweden-Finland included the most highly developed protections for freedom of expression in Europe (Kortteinen 1999). In the liberal democracy, freedom of opinion and expression serves both the personal autonomy and self-realisation of the individual and guarantees the democratic process of the society. A free responsible citizen is protected from any outside intervention in order to enable him or her to form and express his or her opinions

without any outside threat or coercion. Freedom of expression and opinion is a typical 'first generation' human right with very classical individual emphasis (Kortteinen 1999).

Article 19 of *The Universal Declaration of Human Rights* states:

> 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.

Chapter 2, section 16 of the South African Bill of Rights states:

1. Everyone has the right to freedom of expression, which includes
    a. freedom of the press and other media;
    b. freedom to receive or impart information or ideas;
    c. freedom of artistic creativity; and
    d. academic freedom and freedom of scientific research.

This right to freedom of opinion and expression as proclaimed in article 19 thus constitutes a cornerstone of a democratic society. A democratic society, therefore, has an interest in ensuring that its members can enjoy and protect the fundamental right to freedom of expression which is core to any democratic society (Nowak 2003).

It follows that many other human rights instruments adopted by the UN bodies since 1948 further display support to the principles set out in this article. According to paragraphs one and two of Article 19 of the 1966 International Covenant on Civil and Political Rights, everyone shall have the right to hold opinions without interference and to freedom of expression. The latter right includes freedom to seek, receive, impart information and ideas of all kinds, through any media, including the internet and regardless of frontiers, that is without limitation to jurisdiction or borders. As one of democracy's most cherished rights, the right of free speech is at the foundation of the rights enjoyed by citizens in a free society. Thus any interference with the right to freedom of expression as laid down in article 19 of the CCPR, whether in the form of imposing sanctions against participating in, or censoring, radio, television programs or content on the internet would tatamount to internet censorship which is a clear violation of freedom of expression on the internet like any other medium of communication.

This has the implication that censorship or any form of regulation of this freedom is a violation of a right. Some of the most compelling arguments against censorship have advanced from British philosopher, John Stuart Mill. John Stuart Mill, in advocating for

freedom of expression argues that an opinion which is not allowed to be voiced and therefore heard might just be true, and that it might contain some truth. Therefore "restrictions on the freedom of opinion can, and most probably will, deprive the world of some truths" (Mill 1849). Restriction on freedom of opinion has the ability therefore to deprive the world of some truths. He further argues that "a good human life is one in which we think, reflect and rationally choose for ourselves from different beliefs and lifestyles according to what seems most true or meaningful to us" (Mill 1999). This is evident in his arguments for freedom of expression. He argues here that people must be allowed to express their individuality as they please "so long as it is at their own risk and peril" (Mill 1849).

Mayambala (2008) agrees, and purports the argument that freedom of expression on the internet or in any other media is very helpful in building a culture of tolerance to divergent views and acceptance of opposing ideas. He also asserts that the best way to fight prejudices is through freedom of expression through which people of different cultures and backgrounds exchange views and ideas in a more human and tolerant way especially on the borderless internet. The right to freedom of expression is a fundamental right that safeguards the exercise of all other rights and is critical underpinning for democracy (Mayambala 2008)

Such arguments for freedom of speech and expression support the claims for lack of restrictions and control of material in the media. Weckert argues that the support is qualified, because "one person's right to freedom of speech or expression can infringe on another's rights, and can clash with other goods" (Weckert 1999). He advances his argument by highlighting that the issue then becomes, where does one draw the line for this freedom? This is because freedom of speech or expression can cause harm to another, he therefore argues for restrictions on how and to what extent a person can be allowed free expression (Weckert 1999). Mill also asserts this by stating that if some utterances are likely to cause disruptions, perhaps restrictions are then necessary (Mill 1849).

Weckert further contends that the above suggest grounds for regulation of the media, if there is action that harms others, there are legitimate reasons for regulatory measures. He thereafter poses a question of whether the same reasons for regulation apply to the internet. He raises questions of three main areas of concern, that is pornography, hate language and information to aid harmful activities. He notes that "while anything available on the internet would also be available elsewhere, or at least material of the same type would be, the situation is slightly different, simply because it is so much more difficult to control the material put on the

internet, and then to control its distribution. Anybody can put anything on, and with varying degrees of difficulty almost anybody can have access to it" (Weckert 1999).

Weckert concludes the discussion by stating that in principle, the internet could justifiably be regulated (Weckert 1999). A study conducted by the London school of economics, suggests the same. The results of this study indicate that there is a range of problematic content on the Internet, illegal content such as child abuse images; harmful content such as advice on how to commit suicide; and offensive content such as pornography. The findings purported an argument that states that in as much as these different cases cannot be regulated in a similar manner but they shouldn't be simply ignored (Darlington 2006). The argument held by the school accepts that the origins of the Internet involved a philosophy of free expression but insists that the user base and the range of activities of the internet are now fundamentally different that it is a mass media and needs regulation like other media (Darlington 2006). In an Oxford Internet Survey published in May 2005 to ascertain the public's views on this matter, when asked if governments should regulate the Internet, 29% said that they should; when asked who should be responsible for restricting children's content, 95% said parents, 75% said ISPs and 46% said government (Dutton et al 2005). Weckert concludes that the question is not whether the internet should be regulated or not, but if the internet can be effectively regulated (Weckert 1999).

Perhaps it is important to note that there are limitations as laid down by the Universal Declaration of Human Rights to the right to freedom of expression. These limitations shall be provided by law and are necessary for the respect of the rights or reputations of others; for the protection of national security or of public orders and for public health or morals. The rights laid down in Article 19 of the CCPR are further restricted by article 20 according to which any propaganda for war and any advocacy of national, racial, or religious hatred that constitutes incitement of discrimination, hostility or violence hall be prohibited by law. In South Africa as well, in chapter 2, section 16 of the Bill of Rights, it is stated that the right in subsection (1) does not extend to

a. propaganda for war;
b. incitement of imminent violence; or
c. advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

According to principle 2 of the Siracusa Principles and Johannesburg principles on national security, restriction of freedom of speech can be permitted only when the threat is so big and the ban on freedom of expression is intended to secure the territory against the external source/or internal threat. Using this information, a government would then be able to ban freedom of expression in any media, including the internet, basing on the likely effects of the threat which government can comfortably call a threat to its national security. Expression therefore may be punished if it is intended to incite imminent violence, or is likely to incite such violence, or if there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

2.4 Conclusion

There has been no academic literature exclusively focusing on freedom of expression in South Africa. Most literature was accessed through newspaper articles and predominantly website sources, all media, policymaker and audience discourse pertaining to the debate of internet regulation and freedom of expression, thereby falling on 'grey literature' as described by Hart.

This study has therefore attempted to provide an overview of the literature that is specific to the topic at hand, such as to identify the gap that this study seeks to fill. As is evident, there have been very few studies that have attempted to situate work on the discourse surrounding the debate on internet regulation and freedom of speech within the South African context. Furthermore, as has been indicated previously, academic research over grey literature that informs the debate currently becomes pivotal.

CHAPTER THREE: METHODOLOGY AND THEORETICAL FRAMEWORK

3.1 Introduction

This chapter entails two main sections. In the first section an overview of the theories used in the analysis of the findings of the study will be provided. The second section will outline the methodology used in collecting the data that will be analysed in the study.

This paper will examine the discourse on internet regulation and freedom of expression by making use of Critical Negotiation Issues as a conceptual framework as outlined by Lewis (2005) and Wilson (2005). The second theory that will be used for analysis is Public Interest theory of regulation as outlined by Golding and Murdock (1997).

3.2 Critical Negotiation Issues

Critical Negotiation Issues is an emerging conceptual framework which has not received widespread scholarly attention. Lewis (2005: 1) states that the majority of the studies done on Internet in Africa and Internet diffusion are marked by a structural or determinist approach that tends to place technology or market structure in an independent role as an unequivocal driver of positive change. There is a corresponding tendency to downplay the role of society and social forces, to minimize the aspect of social construction of the Internet, and hence, to overlook contestation between diverse and competing interest groups as a motive force.

Lewis (2005: 1) further states that such an approach has often tended to concentrate on the macro-economic causes of Internet diffusion, such as Gross Domestic Product per capita, assuming a straightforward, incremental roll-out of Internet technologies and applications. However useful such studies may be, whether they focus on 'e-readiness', or policy priorities, institutional reforms, and best practices, they have underplayed the experience of the development and diffusion of a new social technology, such as the Internet. The dynamic texture of the politicking, bargaining, manoeuvring, and struggling for economic and social leverage that accompany the expansion of such a valuable wealth-generating resource have often been lost (Lewis 2005: 2).

Wilson (2005: 1) argues that the contemporary study of ICTs rests on several faulty assumptions that limit our ability to understand and act upon their diffusion. These misunderstandings also limit one's efforts to enhance wider access to knowledge for the ever

growing numbers of people in the developed and developing world. These limitations show up in faulty theories, faulty concepts and faulty methodologies and thus lead to faulty policies and stunted performance. Wilson (2005: 1) further argues that the dominant tradition of e-readiness reports, descriptions of policy intentions, and discussions of institutional arrangements tends to undervalue the very factors that most drive the policies that affect access to knowledge, and suffer from serious shortcomings. The dominant tradition tends to be static, techno-determinist, a-political, macro-oriented and avoids identifying winners and losers. In order to fully appreciate the factors that most share access to knowledge, and enhanced access to ICTs, analysts and practitioners must pay much more attention to leadership, politics and historical and social contexts.

A small group of researchers and theorists have been working on an alternative theoretical framework and methodology for several years, designed to capture the leadership and political elements of ICT diffusion, while retaining conceptual rigor, methodological transparency and a focus on points of policy leverage. This new approach to ICT or Internet diffusion research has become known as Critical Negotiation Issues (Wilson 2005: 2). Critical Negotiation Issues, as a theoretical, analytical and conceptual framework is a recent framework which was created by researchers and theorists at the University of Maryland in the United States. The research was conducted for *Negotiating the Net,* a project designed to generate an in-depth analyses of Internet diffusion in Ghana, Kenya, Rwanda, South Africa, and Tanzania. The authors of the project consider historical, structural, and political factors involved in each country's case study (Wilson 2005). The book, *Negotiating the Net in Africa: the Politics of Internet Diffusion*, was published in 2006, edited by Ernest Wilson and Kelvin Wong, provided the basis of Critical Negotiation Issues theory as a conceptual and analytical framework.

Lewis (2005: 4) suggests that the focus on Critical Negotiation Issues as an analytical tool proceeds from the premise that policy and legal frameworks have a key influence on economic growth and social development. Some social actors or interest groups benefit from particular policies and seek to maintain them. Others find that their abilities to accumulate wealth, or to derive other forms of social and economic benefit, are hindered by existing policies. This in turn leads them to mobilize for changes to existing policies and laws, or for their replacement by entirely new ones. The ensuing struggle for policy hegemony becomes potentially what is characterized here as a Critical Negotiation Issues. It must be understood

that not every disagreement or dispute constitutes a Critical Negotiation Issue. Lewis (2005: 4) further suggests that there are three defining factors that allow an issue to be characterized as being of critical negotiation importance in the context of the Internet.

First, a Critical Negotiation Issue should centre on a policy matter or legal question with a high degree of relevance to the development or diffusion of the Internet: one for which the outcome will have a significant impact in shaping the future direction and form of that diffusion. Second, a Critical Negotiation Issue should be characterized by a high degree of contestation. It is engaged in by means of antagonistic behaviour on the part of the competing social actors or interest groups; usually on the basis of the perceived impact (either negative or positive) its resolution will have on business, livelihood, or another fundamental interest. Third, owing from the above two characteristics, a Critical Negotiation Issue will, if left unresolved, impede the future development and further diffusion of the Internet, both because of its degree of relevance and its level of contestation.

The study conducted by Lewis (2005), highlighted four Critical Negotiation Issues that have hindered the diffusion of Internet in South Africa. The four Critical Negotiation Issues are: Anti-competitive behaviour; Access to facilities; Telecommunication liberalisation, privatisation and regulation; and E-commerce policy. In brief, Lewis (2005) describes what each Critical Negotiation Issue entails but for the purposes of this paper, telecommunication liberalisation, privatisation and regulation will be considered.

Telecommunication liberalisation, privatisation and regulation, the third issue, saw intense contestation over the shape, structure, and dynamics of the telecoms market as an extensive policy reform was embarked on in the years following the advent of democracy in South Africa (Lewis 2005). The passing of the Telecommunications Act in 1996, confirmed Telkom's exclusivity in public switched telephony and telecommunications facilities until 2002. Its provisions dashed the hopes of many in the private sector for a rapid liberalisation of the sector. A number of players felt betrayed by the process, angry that their recommendations had been excised from the final legislation. A mistrust was created, which coloured relations between the government and the private telecommunication and ISP sector for years to follow (Lewis 2005: 5; 17).

What the approach outlined here seeks to do is to develop a greater degree of understanding of the discourse around the debate of the internet through an analysis of its CNIs. The identification of the CNIs will be based on common themes emerging from the findings. Each will be identified and characterized as having constituted an "issue," or node, around which negotiations ensue. Each such issue will be evaluated in terms of its relevance to the debate concerning internet regulation and freedom of expression, the degree of contestation, and its likely impact if left unresolved. The analysis presented will limit itself to those CNIs which have featured repeatedly and prominently in the data collected, and which meet the three criteria identified at the beginning of this section.

3.3 Public interest theory of regulation

3.3.1 Public Interest

Despite the common occurrence of the term public interest, theorists have argued that it has proven difficult to find an exact definition of it. Hantke-Domas (2003: 167) however suggest that an exemption is Campbell C.J., (1984), who defined a matter of public interest, as:

> [It] does not mean that which is interesting as gratifying curiosity or a love of information or amusement; but that in which a class of the community have a pecuniary interest, or some interest by which their legal rights or liabilities are affected.

Economic interests, legal rights, and liabilities, according to Campbell C.J. can be affected and therefore is a matter of public interest.

The American Supreme Court gave the first interpretation of public interest. In dealing with the scope of government powers to regulate private economic activity and private property rights the court established that regulation was a power inherent in government through the principle of sovereignty, that the government was allowed to regulate on those activities vested with public interest and that its exercise through police powers was justly limited by the due process of law (Hantke-Domas 2003: 171).

This has been a controversial area where academics have advanced different interpretations of the exact use of the concept of public interest in politics. For instance, the lack of clear content might have provided an excuse for politicians and policy-makers with selfish aims to

advance their own interests as the *Public Choice Theory* has suggested, so that no public interest (assumed as to be an unselfish goal) has been achieved by regulation (Couch and Shughart, 1998). At the beginning of the 1960s, some academics came up with important criticisms of the effectiveness of regulation (Stigler and Friedland, 1962). Ten years later academics labelled 'traditional' regulation as being principally a device to serve the public interest. Opposed to it, they advanced a theory explaining that the regulatory phenomenon did not pursue public interest but political self-interest (Stigler and Friedland 1962).

Empirical evidence, presented by academics from the Public Choice School, shows that in various cases the alleged protection of the public interest was not such but was the protection of personal interests of politicians and policy makers. The evidence casts serious doubts upon the exact content and scope of public interest; however, it is not possible to definitively conclude that the protection of public interest by politicians and policy-makers would always lead necessarily to the protection of their personal interests. The correlation between non-public-interest regulation and self-interested politicians—and policy-makers—is not conclusive evidence to affirm what one might call the impossibility of regulation, or the impossibility to achieve public interest through regulation. Partly, because there may be some alternative explanations of regulatory failure, such as the probable incompetence of regulators, inadequate legislation, or the impossibility to know individual preferences by regulators.

If an alternative explanation proves to be a plausible cause of regulatory failure, then the unqualified application of the rational agent proposed by Public Choice might be a fallacy that affirms the consequent (i.e. because no public interest is achieved by regulation, therefore the cause might be in the utility function of politicians and policymakers). Nevertheless, the only evidence academics have now, thanks to Public Choice scholars, argues Hantke-Domas is that declared political goals based on public interest do not always coincide with the actuality of the policy.

3.3.2 Public Interest Theory

The public interest theory of regulation arose historically from the need to protect individuals in the face of private interests. Public interest regulatory theory notes that regulation was established in response to the conflict between private corporations and the general welfare of

society (Golding and Murdock 1997). Therefore, regulatory agencies were created to protect the interests of the public and their welfare. This approach contends that the creation of regulatory agencies was viewed as the tangible expression of the spirit of democratic reform (Golding and Murdock 1997). This approach therefore has its roots in regulatory agencies protecting the public interest in the face of private interests, and their creation was regarded as a personification of democracy.

Public interest theory emerged as an economic theory first developed by Arthur Cecil Pigou that holds that regulation is supplied in response to the demand of the public for the correction of inefficient or inequitable market practices (Hantke-Domas 2003). The inception of public interest theory of regulation in particular is traced back from conflict that arose between private corporations and the general welfare of society (Golding and Murdock 1997). Public interest regulatory theory notes that regulation was established in response of the need to protect individuals in the face of these private interests (Golding and Murdock 1997). Therefore, regulatory agencies were created to protect the interests of the public and their welfare. Public interest theory of regulation is used as the yardstick to measure and assess regulation with regards to the public interest being served (Golding and Murdock 1997).

According to this theory, regulation is assumed initially to benefit society as a whole rather than particular vested interests. The regulatory body is considered to represent the interests of the society in which it operates rather than the private interests of the regulators (Hantke-Domas 2003). This theory assumes that markets are extremely fragile and apt to operate very inefficiently, or inequitably, if left alone, thus government regulation is virtually costless. Put differently, the government is assumed to be a neutral arbiter. Similarly, the public interest is a concept that has also been used to justify the need for media regulation (Govender 2010).

This concept of the public interest is pivotal in debates on regulation as media regulation has traditionally been justified by the argument that media regulation serves the public interest (Croteau and Hoynes 2003). Thus, it can be deduced that media regulation can serve the public interest. This notion that the media can serve the public interest signifies that the media can cultivate the general welfare of society and has a social responsibility role to play within society (McQuail 1991). However, it should be noted that the concept of the public

interest can be used for selfish reasons (Govender 2010). Governments have been found to often attempt using this notion of the public interest as an ideological device intended to conceal unjustified regulatory ambitions that serve not the interests of the public (McQuail 2001).

As has been mentioned, public interest theory of regulation is used as the yardstick to measure and assess regulation with regards to the public interest being served (Golding and Murdock 1997). This approach is regarded as the "mammoth literature assessing regulatory failure" and is conceived as either a theoretical standard or as a historical fact of a regulatory agency's birth (Golding and Murdock 1997: 389). This study uses the public interest theory of regulation as a theoretical standard to assess the perceived regulator's level of effectiveness with regards to the public interest. This approach is furthermore useful to this study as it focuses on regulating in the public interest.

3.4 Methodology

3.4.1 Research Approach: Qualitative Analysis

Quantitative and qualitative methodologies are two dominant methods of content analysis. Quantitative analysis involves counting and looking at trends and patterns (Stempel 1981: 122). Price (1997:192) defines quantitative research as simply recording the number or quantity of events, compared to qualitative research, which aims towards discovering more about the meanings found within events. The major shortcoming of quantitative analysis therefore is that it does not provide explanations and implications of results but is limited to counting phenomena. Deacon et al assert this by saying that "The method is not well suited to studying deep questions about textual and discursive forms. It is not good at exposing aesthetic or rhetorical nuances within texts" (Deacon et al, 1999:105).

This paper draws from the premise of implications of the websites chosen as primary case studies, in examining the tension between regulation of the internet and freedom of speech, therefore qualitative content analysis will be necessary. It must be noted here however, that the paper's primary aim does not rest on investigating the content of the websites, but content analysis is a necessary step for the broader aim of the paper, which is to examine internet regulation and freedom of expression tensions. Content therefore will be briefly studied as to

lead to the broader discussion of barriers and pressures of internet regulation because of the content, and the potential outcomes and implications if either or prevails.

Qualitative Content Analysis uses mostly discourse analysis which is the study of language. Discourse analyses, according to Krippendorff (2004: 16) "tend to focus on how particular phenomenons are represented in text to manifest a particular intention or ideology. Structuralism or rhetorical analysis (study of text structures) focus on the presentation of the message and the effect of the message intended or unintended. Semiotics (the study of signs and the signified), document or policy analysis and thematic studies are other dominant methodologies used in qualitative media analysis (Jensen 2005, Hansen et al 1998, Deacon, et al 1999, Gunter 2004).

Qualitative methodologies can be used for textual analysis of documents, press releases, policy documents, strategy documents and analysis undertaken to investigate themes arising from the documents and online forums and to study the nature of participation and participants (Hasen, 1998). Although qualitative research has been criticised for being impressionistic, subjective and limited in scope (Bryman 2004: 284 -285), it is arguably the best suitable methodology for providing a good understanding and interpretation of issues that will arise from the research.

3.4.2 Methods of Data Collection

3.4.2.1 Document Analysis

Document analysis is a method "for locating, identifying, retrieving and analyzing documents for their relevance, significance and meaning" (Altheide 1996: 2). Document analysis in terms of looking at policies, drafts and final forms of legislation and press releases from government departments and regulatory agencies play an important role in research projects and aid in answering ones research questions (Deacon et al 1999: 18-20). Documents emanating from media discourse as relevant to this study shall include press reports on the cases that have and still inform the debate; and policy and regulatory documents that are concerned with internet regulation and freedom of speech in South Africa. Document analysis shall therefore enable this study to retrieve from the documents the key issues concerned with this study, that will inform and aid progress of discussion in the paper.

3.4.2.2 Secondary Research

Although the study uses traditional methods of collecting data, that is in the form of books, journals and interviews, the study will also use the internet as a secondary research source. Hewson et al (2003: 24) suggests that the Internet provides researchers with quick and easy access to a wealth of information that is constantly updated and results in research being conducted more accurately, appropriately and more efficiently. News articles will be extracted from newspaper websites, Internet inclined websites and online journals will also be used to gain an understanding of updates on developments currently taking place with regards to the essay topic at hand. Cross-referencing will be done for accuracy reasons.

3.4.2.3 Qualitative Interviews

Qualitative interviewing is a form of interpersonal communication where the interviewer and respondent negotiate an understanding of the topic at hand (Jensen 1991). Qualitative interviews possess the strength of generating highly individual responses and building information naturally (Bertrand and Hughes 2005). Qualitative interviews are referred to as, in depth or unstructured interviews (Jankowsi and Wester 1991). Unstructured interviews are likened to an informal conversation (Bertrand and Hughes 2005).

The primary strength of interviewing is its ability to obtain multiple perspectives on a given topic (Newcomb 1991). Interviews allow the researcher to pursue their questions and to probe at length (Kitzinger 2004). The strength of interviews is that it allows the interviewer and interviewee to "explore and negotiate the particular topic" (O'Sullivan 2003: 80). Interviews will be aimed at industry players, at experts responsible for policy making and change in the industry, at audience members affected by the issues that will be found to inform the debate and audience members who have views about the debate. Academics and professionals will be used as informants in the study as well in assessing the implications of the findings.

3.4.5 Methods of Data Analysis

3.4.5.1 Discourse Analysis

Studies of discourse have roots in a range of theoretical traditions that investigate the relations between language, structure and agency (Locke 2004: 13). The focus of discourse

analysis therefore is on any form of written or spoken language, such as a conversation or a newspaper article. The main topic interest is the underlying social structures, which may be assumed or played out within the conversation or text. Fulcher suggests that the researcher attempts to identify categories, themes, ideas, views, roles so as to identify commonly shared discursive resources. This will assist in answering questions such as how the discourse as extracted in newspaper articles, policy documents, interviews and the written surveys will assist in understanding the debate between freedom of expression and internet regulation.

There are many different forms of discourse analysis but for the purposes of this section thematic analysis will be focused on. Thematic analysis is about trying to identify meaningful categories or themes in a body of data (Fulcher 2005). By looking at the text, the researcher asks whether a number of recurring themes can be abstracted about what is being said. Fulcher suggests that at one level one might find an inconsistency, an attempt to assign blame, an attempt to cite others to support one's views; while on another level one might identify a regularly occurring attribution of blame or the repeated reference to some specific cause of an event (Fulcher 2005).

Firstly, the researcher first embarked on a reading and thereafter a re-reading of the texts to get a sense of what was being said. This is required in discourse analysis in order to get a sense of not only surface meanings but also a more in-depth analysis (Bannister et al., 1995). Thereafter the researcher embarked on a process of unitisation, that is writing words, phrases or sentences out and assigning a category to each. This assists in grouping the data into manageable chunks for further analysis.

The data was then grouped into recurring themes of meaning. The criterion for the selection of the themes was based on repeated reading of the articles throughout the research process. Other criterion used was the theoretical framework and understanding that informed the study**,** as well as the researcher's reading and knowledge of previous studies and their findings related to the field of the study.

The grouping of the units together was done as inclusively as possible in contrast to the standard content analysis. Standard content analysis codes data into categories for the purpose of analysing frequency but in this instance all vague and borderline cases need to be included since discourse analysis is concerned with detail (Potter & Wetherell, 1987).

Researchers such as Potter and Wetherell (1987) have offered broad suggestions about how discourse may be studied and their suggestions have been adopted in this study. They suggest essentially two interrelated phases. The first is a search for patterns in the data, namely differences or similarities in the content or manner in which themes are portrayed. The second phase involves analysing the function, purpose or effect of the various themes. According to Potter and Wetherell (1987), during this phase the researcher forms hypotheses about the function and finds evidence to support the hypotheses. This process requires the analyst to focus on discursive practices that are implicitly and explicitly manifest within the text and in particular to examine the function of these practices within discourse (Wetherell & Potter, 1994). In the following sections that present and discuss the findings of this paper, themes will be outlined and then further analysed, thus using both the interrelated phases Potter and Wetherell suggest when doing discourse.

3.5 Conclusion

This section has outlined in detail, firstly, the methodology that will be used in collecting data in this paper, namely document analysis, secondary research and interviews. Secondly in this section, the conceptual and theoretical framework that will be used in this paper's discussion, namely Critical Negotiation Issues and Public Interest Theory of Regulation were also outlined. The rationale behind the methodology that will be used and use of these theoretical frameworks has also been outlined in this section.

In the following section, using the methods of data collection outlined in this chapter, the findings will be presented.

CHAPTER 4: FINDINGS

4.1 Introduction

> "In the end, discourse analysis is one way to engage in a very important human task. The task is this: to think more deeply about the meanings we give people's words so as to make ourselves better, more humane people and the world a better, more humane place" (Gee 2005)

Discourse analysis examines both spoken and written texts (Paltridge 2007). The focus of discourse analysis is on any form of written or spoken language, such as a conversation or a newspaper article (Fulcher 2005). It looks at patterns of language across the relevant text and considers the relationship between language and the social and cultural contexts in which it is used (Paltridge 2007: 2). It also considers how views of the world, and identities, are constructed through the use of discourse (Paltridge 2007: 2)

Discourse analysis will be the method used to analyse the findings that will be presented below. It is important to note that there are different forms of discourse analysis but for the purposes of this section thematic analysis will be focused on. Thematic analysis is about trying to identify meaningful categories or themes in a body of data (Fulcher 2005). This is notably in line with Potter and Wetherell (1987) 's suggestions about how discourse may be studied and their suggestions have been adopted in this study. They suggest essentially two interrelated phases. The first is a search for patterns in the data, namely differences or similarities in the content or manner in which themes are portrayed, this may be argued to be thematic analysis that Fulcher points out. Fulcher further suggests that by looking at the text, the researcher asks whether a number of recurring themes can be abstracted about what is being said. Fulcher suggests that at one level one might find an inconsistency, an attempt to assign blame, an attempt to cite others to support one's views; while on another level one might identify a regularly occurring attribution of blame or the repeated reference to some specific cause of an event (Fulcher 2005).

What the researcher seeks to do is to explore and outline the underlying social structures, which may be assumed or played out within the conversation or text. The researcher will attempt to identify categories, themes, ideas, views, roles so as to identify commonly shared discursive resources (Widdowson 2007). This will assist in answering questions such as how

the discourse as extracted in newspaper articles, policy documents and interviews will assist in understanding the discourse on freedom of expression and internet regulation.

In the following sections, newspaper articles and policy documents as extracted from different newspapers and gazettes in South Africa that have written on the discourse between internet regulation and freedom of speech will be analysed. As a newly emerged discussion, the articles were drawn across community and commercial newspapers, also across provincial and governmental gazettes that contained information on the topic of the paper.

4.2 Newspaper articles

4.2.1 Introduction

This section of the report involves an analysis of discourse structures at a micro or local level and at a macro or global level (Van Dijk, 1987; Potter & Wetherell, 1987). The analysis at a micro-level involves an examination at the level of grammar, namely words, sentences, phrases and how they are structured (van Dijk 1987). At a macro level of analysis the meaning of broader discourse segments are examined to determine discursive themes and trends and analysis at a linguistic level is examined in relation to macro structures and broader discursive themes that have emerged (van Dijk 1987).

Over five hundred newspaper articles on internet regulation and freedom of speech were found. These were accessed mainly through Sabinet and also to a lesser extent through secondary websites that contained the articles analysed. Sabinet Online is an internet based library providing access to a full spectrum of information through its various products (Sabinet Online 2010). This information is contained in various databases, grouped by category. In the category of SA Media, searching under ‘internet and freedom of speech’ of the five hundred, the fifty most relevant, which shall inform the discussion to follow, were extracted for purposes of analysis.

It should be noted that the discourses presented below are those that are most prevalent and salient. While it is acknowledged that there may be other discursive themes that may exist, time and space constraints have limited the analysis of all of those themes. Furthermore, the interpretations of the discourses are relevant to the articles analysed within the specific

timeframe stipulated and are not generalised to all newspaper texts outside the specified period.

4.2.2 Results

The results indicate that advocates for no regulation of the internet far outnumber those advocating for a form of regulation on the internet. This indication is explicit in the manner it is written in the articles. The overall analysis of the topics of the newspapers indicates a strong feeling towards non-regulation of the internet, and how regulation to the writers of the articles analysed, is perceived as a form of censorship by the government and a violation of the right to freedom of expression. Below are a few examples of headlines in which this is clearly indicated:

> 'Blanket censorship' (McLeod, Financial Mail, 06 August 2010)
> 'Cyber highways wait to waylay freedom threat' (Bezedeinhout, Saturday Star, 28 August 2010)
> 'Right to watch porn likely to be trumped over by children's rights' (Keet, The Herald, 28 July 2010)
> 'Resist temptation to censor internet' (Harber, Business Day, 28 April 2010)
> 'Fight porn but leave our liberties alone' (Kgosana, Sunday Independent, 18 April 2010)

On the other hand, topics of newspaper articles analysed that may be said to advocate for a form of regulation did not display as much a strong feeling as may be said to characterise the above headlines. It was through a closer analysis of the content that a discovery was made that these articles were advocating for a form of regulation of the internet. Below are a few examples of those headlines:

> 'Cyber-bullying a growing menace' (Comins, Daily News, 27 September 2010)
> 'The birth of cyberlout' (Ridyard, Citizen, 01 November 2010)
> 'Shut it down' (Ngobese, Witness, 27 September 2010)

In addition to examining the overall topics of newspaper reports, the discourses at the level of headlines, sentences or paragraphs, and the micro meaning of words have been analysed. At a

discursive level a number of strategies have been used to illuminate the points raised for those advocating for internet regulation. Some of the discourses and strategies are explained below, categorised under themes. It is important to note that the themes may be argued to be interrelated but are worthy to be separated into themes as this facilitates easier discussion.

Van Dijk (2001) states that lexicalisation refers to the choice of words used to refer to people, groups or to social contexts. Generally, a journalist has a range of words to describe such instances and chooses a specific word in contrast to another and the word choice may implicitly be a reflection of the opinion of the journalist about the debate and may also be a means through which ideological expression occurs in the texts analysed (van Dijk 2001)

4.2.2.1 Theme 1: *Protection of freedom of expression*

In terms of the choice of words used to strengthen the identification of this theme, it is evident that the opinions reflected point to protection of freedom of expression. This is demonstrated below. It must however be noted that these responses are provided by journalists, opinion columnists, experts in the areas of internet and freedom for expression and the general readers who write into the particular papers analysed, thereby extending to the answering of the research question that asks how the media, policymakers and the audiences have responded to the debate and to the aim that examines how South Africa has responded to the debate by looking at the aforementioned groups with the ultimate aim of discussing the implications of the finding on freedom of expression in the country.

> "Constitutional Court precedents point to a likely ruling that rights of children trump the peripheral rights to watch porn" constitutional lawyer John Smyth said yesterday (Keet, The Herald, 28 April 2010).

Smyth was addressing a films and publications board symposium in Cape Town on what needs to be done to safeguard children from porn. Below are further examples:

> "But it is when this crusade threatens to encroach our civil liberties that we need to step in and tell him to stop it… By all means fight child porn, but do not do that by introducing laws that will cost the country dearly in the long run and will limit the freedoms that your own party cherishes so dearly" (Kgosana, Sunday Independent, 18 April 2010)

> "This should be highly worrying and disconcerting to all South Africans who value their freedom and the values of our supposedly free and secular democracy … If we want to protect our democracy, we need to look beyond our petty personal prejudices and stand together when our freedoms are under attack" (Coetzee, Citizen, 02 September 2010)

> "These developments suggest a growing hostility in the ruling party to the freedom of expression that forms a cornerstone of our constitution" (McLeod, Financial Mail, 06 August 2010)

4.2.2.2 Theme 2: *Regulation leads to censorship*

The second theme, upon closer examination of the text analysed, it is evident in the manner of the explicit display of feeling towards any form of regulation leading to censorship. This is demonstrated as follows:

> "Mbalenhle Cele, attorney for the Freedom of Expression Institute said the institute is opposed to blanket censorship"

Mbalenhle Cele was saying this in response to a symposium that was held to discuss the draft bill that the Deputy Minister of Home Affairs, Malusi Gigaba had proposed as means to regulate access to pornography to children. Cele noted that she was more or less the only different perspective presenter at the symposium, opposing this bill. She further notes that when asked why, the board responded saying that they had invited people who opposed the bill but they had declined or didn't respond. Nonetheless the board concluded that more needed to be done to regulate pornography's access to children. "The law as it stands is not working, so we've no choice but to take it to the next level" said the board's legal affairs manager Dumisani Rorwana.

Following are further examples of articles that displayed fears that any form of internet regulation may lead to censorship:

> "Why should we be concerned about attempts to censor what could be considered a fairly marginal form of expression? Because there are bigger issues at stake? For one

thing, it flies in the face of one of the foundational values of democratic communication regulation, namely that adults should have a right to choose what they see, read and hear. There are real dangers in allowing the state to play parent, as the dead hand of state censorship may not stop with pornography" (Duncan, Cape Argus 08 September 2010)

"With each new technology we always find new ways of isolating and dealing with potential abuse. Let's not fall for the temptation of saying that we must control and censor the internet and limit the good it can do. We will in time learn how to isolate and deal with those who want to spread racism, hated and destruction and we will use Facebook, Twitter and blogging to do it" (Harber, Business Day, 28 April 2010)

"What mustn't happen is proposing a sledgehammer to the problem and, in the process, violating the constitution and taking the country back to the sort of blanket censorship not seen since the 1980s.SA is not Iran or China" (McLeod, Financial Mail, 06 August 2010)

4.2.2.3 Theme 3: *Regulation is necessary*

The following examples illustrate a theme in contrast with the aforeidentified. Here, examples of articles analysed arguably demonstrate a need for regulation or a form of regulation of the internet as an effort to curb the ills associated with the internet.

"The internet is said to be the great democratiser, where anyone and everyone can have an opinion. The beauty of the internet is also its biggest failing: too many users hide behind anonymity and avatars. Protected by secrecy, they post comments and vitriol, racism, misogyny, lies and hate, expressing their missing-link views without fear of retribution or a slap from civilised society. Equally though, this secrecy hides nefarious agendas, and too often it grants privacy to cyber pigs, to bullies and louts and wasters" (Ridyard, Citizen, 2010)

"About 62% of SA high schools have reported that they know of someone who was cyber-bullied. Bullies hide behind anonymity to perpetuate their verbal attacks.

> Research has found that children and teenagers are more skilled at using the internet, but this has only made them more vulnerable. Technology makes it easier for them to download applications for free but we do not see any tools out there to prevent cyber-bullying from happening (Comins, Daily News, 27 September 2010)

The following example may be perceived to be two-edged, attributing factors that fall under the two former themes and the latter one. This will be elucidated in the discussion that will follow presentation of these findings.

> "Two of SA's largest Internet service providers have blocked site Outoilet. This move was welcomed by the Film and Publication Board. The Jules high school chatroom on the site has recently been a cause of concern with users offering a copy of the alleged rape that took place on the school premise. The video was identified as child pornography" (Mashabane, Citizen, 24 November 2010)

> "A teenage girl from Estcourt recently committed suicide following comments on the website that alleged that she was HIV positive. Speaking to echo, one of the victims defamed on the site said 'I strongly believe that the website should be shut down as some of the things that are said are not true. It gives people who have their own personal agendas the opportunity to defame others knowing that people cannot defend themselves" (Ngobese, Witness, 27 September 2010)

The site, outoilet, grew popular particularly in 2010. It was frequently visited by young people, especially school pupils. Ngobese notes that "one had to stand in a long queue" before being able to post a comment (Ngobese 2010). Here she was emphasising the website visitation and busy activity. This site allowed users to create chatrooms, as well as set-up dates, defame others, exchange videos and pictures anonymously. Shutting down the site was said to be difficult because it was being hosted in Russia. A campaign was started by internet service providers and interested parties, in an attempt to block the site. It was eventually blocked by internet service providers.

4.3 Gazettes

4.3.1 Internet protocol television (IPTV) and video on demand (VOD)

The following article appeared in a provincial gazette as accessed on Sabinet Online. This articles is important in informing the debate on internet regulation and freedom of expression, as upon a closer read it reveals contention between regulating internet protocol television (IPTV) and Video-on-demand (VOD). IPTV is in simple terms, television content that is delivered through computer networks, using internet protocol (Government Gazzette 2010: 8). Video-on-demand on the other hand is a term that is used for a wide range of technologies that enable consumers to select what to watch and when to watch it (Government Gazzette 2010: 8). The debate is whether self-regulation as argued for by internet advocates is the most suitable form of regulation since content is transmitted on an internet platform, or is broadcasting regulation more suitable as the content is for television.

There has been a marked convergence in communication technologies in the past few years owing to increased technological developments and advancement. To be specific, technological developments and advancements facilitating the provision of internet protocol television (IPTV) and Video-on-demand (VOD) have necessitated for the Independent Communications Authority of South Africa (ICASA) to consider whether it falls within the scope of the authority to regulate such services in light of the current regulatory framework; the appropriate means by which such services should be regulated, if at all, within the current regulatory framework; and whether any regulatory reform should be undertaken to facilitate the uptake and expansion of such services which allow for new means of content delivery in South Africa.

Electronic and Communications Act (ECA) currently establishes two broad categories of communications services which are provided to end-users: broadcasting services and Electronic Communications Services (ECS). An ECS service is "any service provided to the public, the state, or the subscribers to such service which consists wholly or mainly of the conveyance by any means of electronic communications network, but excludes broadcasting services" (ICASA 2010).

At the present time, it is necessary to determine into which of these two categories of service particular communications services fit. This will have implications for the manner in which such services are required to be licensed and the licence conditions and regulatory

requirements to which the services will be subject. The Authority has considered the most appropriate manner in which to approach the regulation of such services in light of the various regulatory options which are open to it (ICASA discussion document 2010).

4.4 Policy documents

Document analysis is a method "for locating, identifying, retrieving and analysing documents for their relevance, significance and meaning" (Altheide 1996: 2). This section is aimed at analysing such documents in the form of policies, drafts and final forms of legislation from government departments and regulatory agencies that pertain to the discourse on internet regulation versus freedom of speech. This is important as such documents will reveal whether or not there are existent regulatory structures in place for the internet, if there are any developing, and in what form.

Sabinet Online was used as a source to retrieve the documents that were found to have high relevance to this discussion. These documents were retrieved under a section called Policy documents. This section encompasses draft bills, reports, submissions and other parliamentary sourced articles. One such document, a draft bill, entitled Convergence Bill [B9-2005]: Submission by the Internet Service Providers' Association (ISPA) was found to be of high relevance to the discussion of this paper.

4.4.1 Convergence Bill

In the recent past, the telecommunications and broadcasting sector was governed by the following primary pieces of legislation: Independent Broadcasting Authority Act, 1993; Independent Broadcasting Authority Amendment Act, 1995; Independent Broadcasting Authority Amendment Act, 1996; Sentech Act, 1996; Telecommunications Act, 1996; Telecommunications Amendment Act, 1997; Broadcasting Act, 1999; Sentech Amendment Act, 1999; Independent Communications Authority of South Africa Act, 2000; Telecommunications Amendment Act, 2001; Broadcasting Amendment Act, 2002 (ISPA 2004).

During the years of policy development, it is noted that some contradictions have arisen in this body of legislation. Furthermore, since the laws governing the sector are diversified over such a large body of law, clear application of the legislation has proved challenging (ISPA 2004). The Convergence Bill represented an excellent opportunity to develop a single piece of legislation which could replace most, if not all, of the aforementioned Acts. Consolidated definitions and cross-references would bring much need clarity to this body of legislation argues ISPA however it was found that instead, the draft convergence Bill introduced further contradictions and conflicting definitions (ISPA 2004).

The most fundamental issue raised by ISPA's members during discussion of the draft Convergence Bill was the lack of clarity of the new licensing structure. They noted that it is unclear which type of licence Internet service providers are expected to obtain, or if they will be required to apply for multiple licences under the new framework. Similarly they noted that it will be difficult for operators to determine whom they may lawfully buy services from and sell services to, such uncertainly could be extremely damaging to the sector.

> "We welcome the innovation in the Bill giving ICASA the power to determine which licence category a service will fall into and appropriate exemptions. However, we feel that the Bill gives ICASA too little direction of the factors to be considered in determining the categories and gives operators insufficient information to assess themselves. The lack of clarity on the issue of licence categories makes it difficult to understand the impact of several chapters of the draft Bill on the Internet sector. Given the lack of clear definitions of the categories of licences, it seems likely that clarity on the various licence categories will depend wholly on the regulations issued by ICASA. While ISPA fully supports a greater role for the rsegulator in determining the licensing regime, we also believe it would be useful for the legislation to provide some guidance. This will prevent any undue legal challenges to ICASA's regulations and provide vital certainty to industry" (ISPA 2004).

4.4.2 Film and Publications Bill

The Bill's objective as appears on the document entitled Film and Publications Amendment

Bill is as follows:

To amend the Films and Publications Act, 1996, so as to make further provision for the prohibition of child pornography; to provide anew for the designation of the Chairperson of the Review Board; to make certain textual alterations; to make further provision regarding the classification of films and publications; to provide the registration of internet service providers; to provide for an obligation to report offences involving child pornography; and to increase penalties for offences involving child pornography; and to provide for matters connected therewith.

The recently amended Bill received widespread criticism for its powers that extend to beyond regulating pornography access and as pertaining to this paper, powers that have been regarded by some as a form of internet regulation. This is how in the Bill the provision on the internet appears:

‘‘**Registration and other obligations of Internet service providers**
27A. (1) Every Internet service provider shall—
(a) register with the Board in the manner prescribed by regulations made under this Act; and
(b) take all reasonable steps to prevent the use of their services for the hosting or distribution of child pornography.
(2) If an Internet service provider has knowledge that its services are used for the hosting or distribution of child pornography, such Internet service provider shall—
(a) take all reasonable steps to prevent access to the child pornography by person;
b) report the presence thereof, as well as the particulars of the person maintaining or hosting or distributing or in any manner contributing to such Internet address, to a police official of the South African Police Service; and
(c) take all reasonable steps to preserve such evidence for purposes of investigation and prosecution by the relevant authorities.
(3) An Internet service provider shall, upon request by the South African Police Service, furnish the particulars of users who gained or attempted to gain access to an Internet address that contains child pornography.
(4) Any person who fails to comply with the provisions of this section shall be guilty of an offence.’’ (Film and Publications Bill, 2003)

However complaints have emerged that this Act is a means of primary regulation of internet by the government. Below are examples of this:

“Recent amendments to the film and Publications Act are an example. While the Act was amended to protect children against the harmful effects of pornography, it now subjects many forms of controversial expression to pre-publication classification by a government agency (Film and Publications Board)” (Duncan, Cape Argus, 08 July 2010)

> "Equally Zuma endorsed a draconian law-the film and Publications Amendment act-which requires that all material of a sexual nature be referred to the censors before being published or broadcast. It gives the censors the power to ban any material that is deemed offensive from being published or broadcast. This Draconian law was approved by the President despite a long battle by journalistic bodies and the freedom of expression institute to stop it. And the censors are on the same board" (Kgosana, Sunday Independent, 18 April 2010)

The above quote was Kgosana responding to the debate concerning the draft law by the Deputy Minister of Home Affairs, Malusi Gigaba, who perceives it as a response to preventing access of pornography and its effects on children.

> "All material relating to sexual content and controversial forms of expression, including political speech will be subject to scrutiny by what is effectively a government institution. This is inappropriate and will lead to pre-publication censorship being introduced in relation to large amounts of material, with a government institution deciding whether such material could be made available, and if so, under what circumstances. Several of the draft Bill's provisions militate against important values enshrined in the Constitution, such as freedom of expression and due process" (Mail and Guardian, 03 May 2007)

4.5 Interviews

The primary strength of interviewing is its ability to obtain multiple perspectives on a given topic (Newcomb 1991). With qualitative research interviews one tries to understand something from the subject's perspective and to uncover the meaning of their experiences. Interviews allow subjects to convey to others a situation from their own perspective and in their own words (Kvale 1996). Interviews allow the researcher to pursue their questions and to probe at length (Kitzinger 2004).

A series of interviews was conducted in order to obtain multiple perspectives on the topic at hand. These interviews were aimed at industry experts, policy makers, and the general public

who have opinions about the debate on internet regulation and freedom of expression. The interviews were spread across semi-structured, telephonic interviews and email interviews. Below are the findings:

4.5.1 Professor Anton Harber

A semi-structured interview was conducted with Professor Anton Harber. Characteristics of semi-structured interviews are that the interviewer and respondents engage in a formal interview (Wood 2008). The interviewer develops and uses an 'interview guide.' This is a list of questions and topics that need to be covered during the conversation, usually in a particular order. The interviewer follows the guide, but is able to follow topical trajectories in the conversation that may stray from the guide when he or she feels this is appropriate (Wood 2008).

The benefits of this type of interview are that questions can be prepared ahead of time. This allows the interviewer to be thoroughly prepared. Semi-structured interviews also allow informants the freedom to express their views in their own terms and they can provide reliable, comparable qualitative data (Wood 2008).

Perhaps it is important to briefly mention the history of Professor Anton Harber as means of establishing his worth as an interviewee and potential value he adds to the debate discourse. Professor Anton Harber is the Caxton Professor of Journalism and Media Studies and director of the Journalism Programme at the University of the Witwatersrand in Johannesburg. Harber has had a long career in journalism, media management and the training of journalists. He was chairperson of the National Association of Broadcasters for two years (1999/2000), a member of the board of South African Advertising Research Foundation and a trustee of the Media Industry Trust. He has served as a media adviser to the Nelson Mandela Foundation, and is a member of the Advisory Board of the Rosalynn Carter Mental Health Fellowship for Journalists programme of the Carter Center in Atlanta, Georgia, a trustee of the Phil Harber Jazz Education Trust and the Anthony Sampson Foundation and he is a member of the board of directors of the Institute for the Advancement of Journalism. He is convenor of judges for the Sanlam Financial Journalist of the Year Awards and the Taco Kuiper Awards and Grants for Investigative Journalism (The Harbinger 2011). He is also important particularly to this debate because he has written a few articles about the discourse being examined.

Below are the interview questions and Harber's answers (paraphrased):

1. *Interviewer:* When you write in your article: "Let's not fall into the temptation of saying we must control and censor the internet and limit the good it can do". Who exactly were you referring to in your usage of 'lets' and 'we'?

   As a response to this question Harber answered that he was referring to the general public, academics, politicians, anyone who has a view about the debate whether on the side arguing for freedom of expression or on the side arguing for internet regulation or a form of regulation, himself included.

2. *Interviewer*: Should we be worried? Why or why not?

   Yes we should be worried he answered. He drew reference to the fact that the debate is ensuing against the backdrop of attempts at regulating other media, particularly print media, with the Media Appeals Tribunal and Protection of Information Bill whose success is yet unknown.

   He furthermore pointed to the fact that with the advent of a revolution with broadcasting, with the introduction of digital terrestrial television, it would be interesting to see how this will be handled by a regulatory institution such as ICASA. He suggested that digital television carries with it new implications for regulation and he would like to see how this is handled.

3. *Interviewer*: Why is it important to keep the internet free of any form of control, particularly government control? By extension if so, are we saying the government has no ability to be unbiased and be fair in exerting this regulation?

   In answering this question he pointed out to a general parliamentarian concern with porn and sexuality. He drew to instances of how the Minister of Culture, Lulu Xingwana, stormed out in disgust over what she termed a pornographic art exhibition featuring black lesbian couples in 2009. The Johannesburg exhibition had aimed to celebrate the role of black South African women. When asked to respond, Xingwana said "Our mandate is to promote social cohesion and nation-building. I left the exhibition because it expressed the very opposite of this. It was immoral, offensive and going against nation-building" (Nathan 2010)

   Harber also pointed out to another instance when President Zuma appointed a government official known as, and an outspoken homophobic, as SA Ambassador to Uganda, Minister John Qwelane. This raised arguments as people wondered if homophobia is systemic in this government where ironically officials takes an oath to uphold a constitution that protects sexual orientation (Nathan 2010).

   Harber points out that it is problematic therefore that from Ministers of Parliament there are different ideas of what is dangerous and unacceptable. He says that we do have to worry if government controls or introduces any regulation. He argues that once one creates a mechanism for censorship, it can certainly be widened. He further argues that the question is not whether censorship is a good or bad thing but rather then what is acceptable as censorship?

4. *Interviewer*: In your opinion does the internet really need 'saving' or some form of regulation?

   He answered that the internet presents a different kind of problem because the ills that the internet advocates for, for instance porn, crime activities online, anonymity associated with hate speech are not a problem on print and broadcast media because of regulatory structures in place to deal with this. He asked how those advocating for regulation envisage regulating on the internet? He asked whether they envisage a successful control of the internet which by nature is designed for little or no control? He pointed that there are other ways of exerting regulation-in the form of responsible and more interactive parenting for instance.

4.5.2 Emmah Ngomane

Emmah Ngomane studied Journalism with Honours. She works as a journalist at The Citizen. She is important to be interviewed because she has also written on the debate. The most relevant article she wrote was entitled 'Julius slated over threats to close internet'. This article followed after the ANC Youth League expressed concerns by the continuous creation of fake Twitter accounts in the name of ANC Youth League President Julius Malema. At the time this was reported there were twenty two fake Julius Malema accounts on Twitter (Daniel 2010). They pointed out that these accounts currently and continuously post misleading messages. They were quoted as saying "Those who are hacking systems and impersonating the ANC YL leadership should immediately stop doing so because the laws of this country will come very hard on them" (The Blog 2010).

Emma's article served as a response to this statement by the ANCYL. She writes "New media experts warned Juju to avoid making outrageous threat to shut down internet services Instead, he should look towards improving his already tarnished public image". She further writes ""Julius needs to realise that the cyber world doesn't start in Braamfontein, that it's bigger than him or the ANCYL. There's no way in which he can shut down Twitter or Google for that matter" (Ngomane 2010). Emmah therefore provides the view of a journalist who has written about the debate.

Below are the questions and answers (direct quotes):

1. *Interviewer:* What is your opinion to Julius Malema's claim that Twitter must be closed down simply because there are many Juju impostors?

“I think it's absurd. Politicians tend to think they can control everything, but unfortunately for them their power doesn't apply to social networking websites such as Facebook and Twitter. Malema should have learnt a lesson when he previously tried to shut down Facebook and failed.

Social networking websites are not owned or controlled by the government, politicians and thus are free of any types of manipulations. They (websites) are for the average people who want to voice out their concerns and be heard. Twitter and Facebook have become the ultimate platforms for the practice of freedom of speech, hence the outbursts following Julius's threats. Don't get me wrong, I'm not saying that his (Malema) feelings of anger towards having someone impersonate on Twitter are unjust, but I do think he should have followed the proper protocol to have the fake accounts disabled, like e-mailing the Twitter administrators”

4.5.3 Slindile Nyathikazi

Slindile Nyathikazi is a journalist for City Press. She finished a Journalism Honours programme receiving a best journalism student for that year. An interview with her is necessary as she comes in with a range of interest in many issues outside of the internet. It could be arguable that she provides a neutral opinion stance and this thus enhances the objectivity of the interviewing process. Below are the questions that were posed to her and this is how she answered:

1. *Interviewer*: How can regulation of internet content affect your role as a journalist? (Online journalist?)

“As journalists, the free flow of information is pivotal to our work and when that is compromised, it has an impact on our work. As you know, freedom of information is enshrined in our constitution and over regulation of a valuable resource such as the internet goes against that I believe. I am not saying that regulation is necessarily a bad thing, we do need some regulation to protect our children from pornographic material etc. So in that aspect, regulation is helpful and necessary. So what I am trying to say is that it depends what kind of regulation the government has in mind. If the regulation for example goes as far as to limit access to for example public documents, then we have a problem. It not only affects me as a journalist because every South African citizen has a right to see those documents. Such over regulation will make our work more difficult because we then have to go through a number of bureaucratic channels to (telephonically, fax, email) to perhaps find just one document! The internet is supposed to make our lives easier and when things become blocked in this way, it will affect the amount of time it will take us to get a story out there”.

2. *Interviewer*: As a journalist, what are your feelings with regards to Malusi Gigaba's draft law as means preventing access of porn to children.(Some fear government intervention is a primary form of internet regulation)

“The internet is a scary space when one thinks of the things that our children have access to just in their palm of their hands. Children as young as eight have smartphones these days and as far as I know, there are no measures in place stopping them from accessing these sites.

To date, as far as I know, no practical steps have been taken with regards to Gigaba's draft law. I will the recent example of outoilet. The school chatroom from that website was removed but if u look there is nothing stopping children from going onto the other chatrooms. here's Mxit, there's Facebook, nothing is stopping children from going onto these sites.

Personally I feel that if more practical and visible steps are taken with regards to preventing child access to porn, then we would be talking. But unfortunately, as usual, what appears is that the government is all talk and no action. I do however agree that some form of regulation is necessary to stop child access to porn”.

3. *Interviewer*: Some fears have been worsened by the Media Appeals Tribunal, Protection of Info Bill, some arguing that what would prevent government from extending that control to the internet? What are your feelings towards that?

“I have not met a journalist who is in support of the media appeals tribunal. It has been argued over and over that we already have a press ombudsman who already deals with complaints regarding inaccuracies, false reporting etc. It was however noted in the debates that took place last year that the ombudsman needed to improve "its quality of service" and it is doing that.

The media is central to the functioning of our democracy and so is self regulation of the media, that has been working fine over the years, why change it now?

It may be easier for government to clamp down on print and broadcast media, but the internet is way more trickier. I'll use the example of outoilet again. The service provider of the site was in Russia and it was difficult and took a while for them to be able to shut down the school chatrooms after the whole Jeppe saga. At the moment almost anything goes on the internet and the growth of the power of social networking websites is proving a challenge for them, (that is Facebook, Twitter, YouTube). Politicians are often ridiculed on these sites and these are spaces where people can "speak back to power" and they do. The government has even acknowledged and embraced the power of these sites by even inviting members to tweet them during the state of the nation address.

So in as far as the internet is concerned in my view the government still has their work cut out for them”.

4. Interviewer: In your personal and professional capacity, do you think intervention in the form of regulation by government is the way or self-regulation suffices?

“I believe in self regulation personally, the government has and exercises enough power as it is. The media (especially print) are more often than not able to correct their mistakes and acknowledge where there has been wrong. Should there be a MAT, where will that leave the

ombudsman then? What will be its function? I sincerely doubt that government intervention is the answer, it is in the constitution".

4.6 Conclusion

Discourse analysis has been used in this section as means to examine both the written and spoken texts. Written texts were newspaper articles used for analysis, secondary research in the form of policy documents retrieved, while spoken texts were the interviews conducted. Themes were extracted and analysed, and evidence was extracted from the findings gathered. This manner of analysis followed Potter and Wetherell's (1987) two suggestions about how discourse may be studied. Firstly, patterns in the data, namely differences or similarities in the content or manner in which themes are portrayed must be extracted and this is what this section attempted to do.

The second phase involves analysing the function, purpose or effect of the various themes. According to Potter and Wetherell (1987), during this phase the researcher forms hypotheses about the function and finds evidence to support the hypotheses, evidence in this manner in the form of the data presented in this section. This second phase follows in the next section that discusses the findings presented in this chapter.

CHAPTER 5: DISCUSSION

5.1 Introduction

In this section, results emanating from the findings section will be discussed and further analysed. This will be done using Critical Negotiation Issues as a conceptual framework and Public Interest theory of regulation. The discussion will be divided into two sections, a discussion focusing on document analysis findings, and a discussion focusing on findings from interviews. The writer believes that for objectivity and clarification purposes, this is necessary, but further, findings from either methods are not necessarily similar and hence deserve discussion based on their own merit. However, a conclusion that collates all findings will be provided in the next chapter.

5.2 Document Analysis

The results emanating from findings from documents are indicative of how the discourse has been carried out in the media by columnists, journalists, theorists and the general public and how they have responded to the debate. The findings reveal the extent of the discourse and where the debate is swaying with regard to internet regulation and freedom of expression. The following discussion, using concepts of Critical Negotiation Issues and Public Interest theory of regulation will discuss these findings.

A small group of researchers have worked on a framework and methodology that is designed to capture the leadership and political elements of information and communication technologies such as the internet. Critical Negotiation Issues is a theoretical, analytical and conceptual framework that precedes from the base that policy and legal frameworks have a key influence on economic growth and social development. The struggle for policy hegemony becomes potentially what is characterised as Critical negotiation Issues. Lewis (2005) suggests that firstly a critical negotiation issue should centre on a policy matter or legal question with a high degree of relevance to the development or diffusion of the internet: one for which the outcome will have a significant impact in shaping the future direction and form of that diffusion. Secondly, it should be characterised by a high degree of contestation by the competing social actors or interest groups and lastly a critical negotiation issue will, if left unresolved, impede the future development and further diffusion of the internet both because of its degree of relevance and high level of contestation.

Having in the presentation of findings outlines themes that emerged, it is necessary at this stage that from these findings emerge critical negotiation issues and are discussed accordingly.

5.2.1 Newspaper Articles

5.2.1.1 Critical Negotiation Issue 1: Freedom of Expression

The first critical negotiation issue that was identified based on the findings is freedom of expression. As it will be argued, it fulfils the criteria of what constitutes a critical negotiation issue. Firstly, it centres on a policy matter, one for which the outcome will have a significant impact in shaping the future direction and form of the diffusion of the internet in the country. Secondly, it is characterised by a high degree of contestation by the competing social actors or interest groups, and lastly, if left unresolved, the future development of the internet may be impeded because of its degree of relevance of freedom of expression as an issue in examining the discourse on internet regulation and freedom of expression (Lewis 2005).

Policy is described as a plan or course of action, as of a government, political party, or business, intended to influence and determine decisions, actions, and other matters (Merriam-Webster 2011). It can be argued that the former deputy of Home Affairs Minister, Malusi Gigaba's draft law was a plan of course of action by government to influence and determine decisions, that is a decision that would be taken that serves as means to ban access of child pornography on the internet.

As has been highlighted before, this law raised debate as to the infringing on the right to freedom of expression of particularly adults. McLeod wrote in Financial Mail with regards to this proposed law: "These developments suggest a growing hostility in the ruling party to the freedom of expression that forms a cornerstone of our constitution" (McLeod 2010). Keet writing for The Herald, cites John Symth, who is the director of Justice Alliance in South Africa, who was agreeing that freedom of expression was an important right in every democracy. "The right to free speech and a free press for example are essential in any true democracy. Privacy is also an important right". Keet furthermore argued that a balancing exercise is required when rights conflict (Keet 2010).

This law also raised concerns with regards to government's intentions in proposing such a law. It is to be noted that this law was raised against the backdrop of Bills and Acts meant to regulate print and broadcast media, namely the ICASA Amendment Bill, Protection of Information Bill, Public Service Broadcasting Bill and the statutory media appeals tribunal.

Da Silva cites a legal expert who believes that if the media appeals tribunal is established and the Protection of Information Bill is enacted, the ANC could extend its control of the media over the Internet. Okyerebea Ampofo-Anti, of law firm Webber & Wentzel, said: "We might begin to see a situation whereby the ANC will force someone who wants to start a blog site to get some form of registration. Even those who have journalism degrees could be told: you want to become a journalist? Well, register to get a licence, otherwise sit down and shut up". Some observers believe that if the ANC extends its control of media over the Internet as well, there is a possibility that any online content will be closely monitored and possibly filtered, and that companies and individuals found 'guilty of misuse and offending the revolution' will be severely punished (da Silva 2010).

Perhaps it is important to briefly consider at least one of these bills, the ICASA Amendment Bill, such as to vividly state the fears allayed by those arguing against it. The changes thereof will result in the CEO, whose title will be changed to chief operating officer, losing the ability to approach parliament directly (Jones 2010). Instead, he or she will have to speak through the communications minister in government. The campaign also raised concern that the bill forces ICASA to follow policy directives without question, and the department will ultimately determine roles of councilors (Jones 2010). The 'Save Our SABC' campaign coordinator Kate Skinner says South Africa has a long history of independent regulation, free of political control. "Having government play a central role in regulation is problematic, especially if the regulator needs to rule against government in the interests of the country," she says (Jones 2010).

These proposed bills and the tribunal have been perceived to be a serious threat to media freedom, impacting upon the media's democratic role given they would be successfully implemented. According to Prinola Govenden, head of Media Policy at Media Monitoring Africa (MMA), as a response to these bills and acts, argues "the media are key enablers and protectors of our human rights and should be a champion for the realisation of human rights but need the freedom to do so" (da Silva 2010). McLeod wrote about internet regulation in

the form of Gigaba's law, in relation to the acts and bills proposed above. He said: "it sounds ominous, especially given the noises being made at the same time by the ANC about media tribunal and Protection of Information Bill" (McLeod 2010).

William Bird, executive director at Media Monitoring Africa, in response to the Bills and Acts proposed says, "We must work to ensure that any potential law that can be used by some in our government to undermine our democracy must be challenged. We need to all work together to protect, promote and realise human rights for all." Bird pointed out that civil society's default position is that all laws should be drafted to clearly realise the goals and intentions of the of the country's rights-based constitution; "sadly, all of the bills in their current form seem to challenge this default position" he argued (da Silva 2010).

So it is clear that if the regulations in the form of bills and/or laws are successfully implemented, some views raise little doubt that such control may extend to the internet. Furthermore, following the above discussion, it is arguably clear that freedom of expression is a critical negotiation issue indeed as it is a policy issue, of high contestation, whose future may impede the development of the internet if left unresolved.

5.2.1.2 Critical Negotiation Issue 2: Internet regulation

As has been stipulated before, for an issue to be deemed a critical negotiation issue, it must fulfil the following three objectives. Firstly, a critical negotiation Issue should centre on a policy matter or legal question with a high degree of relevance to the development or diffusion of the Internet, secondly it should be characterized by a high degree of contestation and thirdly, owing to the above two characteristics, a critical negotiation issue will, if left unresolved, impede the future development and further diffusion of the Internet, both because of its degree of relevance and its level of contestation. In this next section, it will be argued as means to prove why internet regulation is and can be regarded as a critical negotiation issue. It must be noted that internet regulation is interrelated to freedom of expression but merits its own arguments as other issues arise pertaining to it as it will be outlined below.

Firstly, internet regulation is a policy issue because its central importance as a point of argument arose when the then Deputy Minister of Home affairs, Malusi Gigaba, introduced a draft law to regulate child access to internet pron. Samaraseka writes, pertaining to a symposium that was held to discuss this draft law, 'After the symposium, the board

concluded that more needed to be done to regulate access to internet pornography to safeguard children. “The law as it stands is not working, so we’ve no choice but to take it to the next level” said the board’s legal affairs manager Dumisani Rorwana (Samaraseka and Sapa 2010). This is an issue that was and still is characterised by a high degree of contestation as was evident in the newspaper articles used as analytical sources in this paper on this matter, some arguing for a form on internet regulation, and others arguing that any form of internet regulation compromises the right to freedom of expression in the country.

McLeod states that “It’s true that there’s a world of filth on the internet. But expecting Internet Service providers to block access is a step too far. What is needed is responsible parenting, not the sinister hand of a government censor” (McLeod 2010). Wende (2010) sustains this view by saying that “If however the ANC continues with these efforts to stifle legitimate press, they will almost find that they are held to ridicule and embarrassment all across the internet-a medium that is impossible to control”. Benjamin cites new media expert, Arthur Goldstuck who pointed out, ‘The requirements of filtering out any specific type of communication are massive. It’s only technically and practically feasible in a totalitarian environment where the state has all the control over telecommunications’ (Benjamin 2010). The above arguments raised by these writers further sustain the view of those who argue that by internet regulation, the right to freedom of expression will be severely curtailed.

It is important to note that this critical negotiation issue is contested by those who argue that a form of regulation is necessary. A great debate ensued because of a website, www.outoilet.co.za. The website site was frequently visited by young people, especially school pupils. It allowed users to create chatrooms, as well as set-up dates, defame others, exchange videos and pictures anonymously (Mashabane 2010). A teenage girl from Estcourt, in KwaZulu Natal, committed suicide following comments on the website that alleged that she was HIV positive (Ngobese 2010). One of the victims defamed on the site said ‘I strongly believe that the website should be shut down as some of the things that are said are not true (Ngobese 2010).

The website was eventually blocked, by internet service providers. It had proven difficult experts said, because the site was being hosted in Russia. To terminate the service via legal route, the police will have had to take it up with Interpol which will also have had to take it

up with Russian authorities equalling to a long process. A campaign as a result was started, internet service providers approached, asking them to participate in a campaign to block the site (Mashabane 2010).

The debate because of this website gained resonance with Gigaba's proposed draft law, as it is arguably for similar reasons as was proposed by Gigaba for the proposed law that the website was eventually closed down. Notably, Gigaba said in arguing for his law: "despite recent amendments of the law and other efforts to stop the devastating effect on children of their access to pornography, it's not enough". FPB legal affairs manager Dumisani Rorwana asserted this view by saying, "the law as it stands is not working, so we've no choice but to take it to the next level". He further said: "we expect resistance from those who claim the freedom to access pornography as a fundamental right; however, it is well established in legal circles that the rights of children are paramount. By comparison, viewing pornography remains a peripheral right" (SAPA 2010).

The website on the other hand was called to close down because amongst other detrimental factors, according to Kerry Frizelle, a psychologist at the University of KwaZulu Natal, anything negative published about a person (true or false) could lead to humiliation and anxiety and this could have detrimental psychological effects on the affected and those people close to them. This was proven by the alleged suicide that a teenage girl in Escourt, KwaZulu Natal, committed following defamatory posts on the website. Furthermore, as was noted in the first chapter, adults began soliciting children for sex on the site, offering airtime or money in exchange for that service. They also offered to share pornography with schoolchildren, and offered money and airtime for pictures of the children unclothed. In some cases, children offered their services to adults. In a Jules High School incident in Johannesburg, a 15-year-old schoolgirl was allegedly drugged and gang raped by three boys while classmates stood by and filmed the incident on their cellphones. "This video thereafter became the hottest commodity on the Outoilet site as learners from around the country trade it for up to R20 in cash or airtime" (Drum magazine 2010). This case prompted intense public discourse on internet regulation versus freedom of expression. Malala (2010) wrote "Uncensored, the ANC should implement the 'media tribunal' on the site".

A highly contested issue such as this is important then because, arguably, if left unresolved, the future of the internet may be impeded. Duncan raises these fears when she writes "Why should we be concerned about attempts to censor what could be considered a fairly marginal form of expression? Because there are bigger issues at stake. For one thing, it flies in the face of one of the foundational values of democratic communication regulation, namely that adults should have a right to choose what they see, read and hear. There are real dangers in allowing the state to play parent, as the dead hand of state censorship may not stop with pornography" (Duncan 2010).

There are a few critical points to consider in this discussion pertaining only to findings from secondary research and documents. Firstly in the interest of public regulation theory, which states that the regulatory body is considered to represent the interests of the society in which it operates rather than the private interests of the regulators (Hantke-Domas 2003), this issue is highly relevant. Public interest theory of regulation is used as the yardstick to measure and assess regulation with regards to the public interest being served (Golding and Murdock 1997). This concept of the public interest is pivotal in debates on regulation as media regulation has traditionally been justified by the argument that media regulation serves the public interest (Croteau and Hoynes 2003). However, it should be noted that the concept of the public interest can be used for selfish reasons (Govender 2010). Governments have been found to often attempt using this notion of the public interest as an ideological device intended to conceal unjustified regulatory ambitions that serve not the interests of the public (McQuail 2001).

5.2.1.3 The issue of anonymity

The issue of anonymity arises as a sub-topic that deserved its own discussion as it contributes highly to the discussion at hand. Protection of anonymity is central to both the right to freedom of expression and to the right to respect for private life. "Particularly in those countries where there is heavy state monitoring, anonymity tools can allow users to communicate with the outside world without fear of identification and reprisal" (Article 19, background paper 2001)[4]. Anonymity tools have many other advantages, for example

[4] This is referenced as such because no author was provided, only a title that said 'Background Paper On Internet Regulation and Freedom Of Expression, with link http://www.article19.org/pdfs/publications/freedom-of-expression-and-internet-regulation.pdf

allowing anonymous whistle-blowing or online counselling, or allowing users to participate in all forms of discussions. In addition, many human rights organisations, both nationally and internationally, rely on anonymous email to communicate with their contacts around the world (Article 19, background paper 2001).

Considering the case highlighted in the subsection above, about the toilet website, unlike MXit and Facebook, toilet users could remain anonymous and this, according to child psychologist Tshepiso Matentjie, makes its impact on youth more devastating. "It disempowers the person because there is no way they can identify the culprits. The person writing the damaging things about you has no fear of repercussions" (Louw 2010). Kerry Frizelle, a psychologist from the University of KwaZulu-Natal said that the fact that perpetrators could remain anonymous made them feel secure and powerful. Frizelle said anything negative published about a person (true or false) could lead to humiliation and anxiety. This could have detrimental psychological effects on the people close to them (Gwala 2010).

Ridyard in writing about the ills of anonymity on the internet argues that the beauty of the internet is also its biggest failing: too many user hide behind anonymity and avatars. “Protected by secrecy, they post comments and vitriol, racism, misogyny, lies and hate, expressing their missing-link views without fear of retribution or a slap from civilised society. Equally though, this secrecy hides nefarious agendas, and too often it grants privacy to cyber pigs, to bullies and louts and wasters” (Ridyard 2010).

Author unknown however notes that any restrictions on the use of anonymity tools will impact on the right to freedom of expression. Various courts have recognised that anonymity is an important pre-condition for the exercise of the right to freedom of expression, as well as of other rights. A recurring issue has been whether and to what extent the anonymity of users who post defamatory or otherwise unlawful messages on Internet message boards or chat rooms should be protected. The issue arising from the above discussion is that what restrictions on the internet would be compatible with the right to freedom of expression (Article 19, background paper 2001).

Considering both critical negotiation issues, it is important to furthermore consider a few points that have been raised by the findings warrant further discussion.

5.2.1.4 Contradictions: Is regulation for the public interest?

A case study involving Julius Malema and two social networks, Facebook and Twitter arguably demonstrates a contradiction that contributes to the discourse on internet regulation and freedom of expression. In the year 2010, an e-mail showing a comment from one fan, Thato Mbateti, on Julius Malema's fan page on Facebook posted comments that raised controversy. The fan referred to whites as "pigs" and "whores", among other things, and said that he and his "fellow black people" would rape the whites, "till the last breath is out" (East Coast Radio Newswatch 2010). He also said that white children would be burned and that white men will be tortured (East Coast Radio Newswatch 2010). ANC Youth League spokesperson at the time, Paseka Letsatsi, said that they are aware of these remarks, adding that they disagreed with them. He was quoted as saying:"The ANC Youth League does not have ownership of Facebook but we are saying that it is incumbent upon individuals to approach relevant authorities for investigations" (East Coast Radio Newswatch 2010).

Later in 2010, the ANC Youth League reported that it was concerned by the continuous creation of fake Twitter accounts in the name of ANC Youth League President Julius Malema. These accounts, they noted, currently and continuously post misleading messages. However ANCYL current spokesman Floyd Shivambu said Twitter had been asked to close the fake accounts several times and had done nothing. "Those who are hacking systems and impersonating the ANCYL leadership should immediately stop doing so because the laws of this country will come very hard on them," he warned (The ANCYL Blog 2010).

The ironic factor present here is that when it was not about Julius, but about the white people defamed on a Julius Malema related page on Facebook, the League said the people affected must take it up with Facebook authorities, but when it was Julius directly defamed, his being defamed on Twitter, the League suddenly wanted to take steps to close down Twitter. The question then becomes can we trust government's attempt at regulation that it would be unbiased if such contradictions are present? Ngomane, who covered one of the stories after the League's utterances to close Twitter down, wrote that new media experts warned Malema to avoid making outrageous threats to shut down internet services. New Media analyst Andre Snyman said, "Julius needs to realise that the cyberworld doesn't start in Braamfontein, that it's bigger than him or the ANCYL. There's no way in which he can shut down Twitter or Google" (Ngomane 2010).

Empirical evidence, presented by academics from the Public Choice School, shows that in various cases the alleged protection of the public interest was not such but was the protection of personal interests of politicians and policy makers. In other words, through their research they provided evidence to academics that declared political goals based on public interest do not always coincide with the actuality of the policy (Hantke-Domas 2003). The example cited above may be argued to be a demonstration of the evidence of research done by Public Choice scholars. It may be argued then, that with such contradictions present, is it safe to trust the government's intervention at regulation, that it would not be, as raised by fears of Public Choice School, be such for the protection of personal interests of politicians concerned as the case above arguably demonstrates?

5.2.1.5 Freedom of expression versus blocking a site? When is it justifiable?

In an era where there is great contestation over regulation of the internet versus the right to freedom of expression, it is important to consider when it is justifiable to block an internet site. Is there a line that can be drawn when it is morally justifiable to regulate a particular site as was done on the outoilet website? John Stuart Mill (1859) argues, "there is little sense in the idea of complete freedom of expression for all as my freedom can infringe upon your privacy so the issue is where to draw the line for this freedom?"

Author of the background paper on internet regulation and freedom of expression enlightens one to this area by suggesting that any content regulation must not fall below the standards set by international human rights law, and must take into account the special nature of the Internet. In Europe, North America and Australia, there has been a considerable backlash against government attempts to regulate Internet content. Content restrictions are often seen as censorship, and the US Supreme Court has struck down various legislative proposals to restrict the availability of 'obscene' or 'indecent' material for this reason (Article 19 background paper).

Author unknown elaborates further by stating that international standards on content regulation say that while states can legitimately take action to regulate Internet content, under international human rights law any limitations on expression must remain within the strict parameters set by Article 19(3) of the International Covenant on Civil and Political Rights:
(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order, or of public health or morals.
This piece of information is necessary therefore in highlighting that any restriction, regulation, control over the internet, as recognised by the Human Rights Committee must firstly be provided by law; secondly be for the purpose of safeguarding one of the legitimate interests listed; and thirdly be necessary to achieve this goal (Article 19 of ICCP).

5.2.1.6 A good example of self regulation by ISPA?

It could be argued that the blocking of the site may have been perceived as a successful example of self-regulation by internet service providers, although the call to block or shut down the site was a public call; therefore displaying that as when necessary, internet service providers are able to regulate without an external hand, such as the government, or regulation laws in place that coerce certain actions.

Self-regulation has been hailed by many western countries as the answer. There is considerable enthusiasm for the concept within the industry and governments in Western countries are cautiously supportive. In countries where use of the Internet is tightly controlled, no truly self-regulatory schemes can at the moment be said to exist; content regulation is required by law (Article 19, background paper 2001).

However, self-regulatory schemes, too, pose difficult questions with regard to the right to freedom of expression. Some existing schemes have been set up with government support, and the establishment of at least one self-regulatory scheme has been prompted following 'suggestions' by the police that self-regulation might be beneficial to the Internet industry. This raises serious questions with regard to the independence of such schemes. Second, and more fundamental to the right to freedom of expression, there are questions of self-censorship, and censorship by commercial parties on behalf of the State. In practice, ISPs appear increasingly willing to comply with requests that they shut down sites, or that they block access for their users to a particular site or group of sites as was with the Outoilet case. The important issue raised here is that is self-regulation the preferred way to regulate?

5.2.2 Gazette: The case of IPTV and VOD

In a discussion document that appeared in a government gazette issued by ICASA in February 2010, ICASA clarified its stance to this debate by saying, “According to the ECA, a fixed IPTV service falls within the ambit of broadcasting. The definition of broadcasting is not platform specific, it allows for broadcasting to be transmitted on any platform including an IP network” (ICASA discussion document). Furthermore, the document states, “Given the fact that IPTV is classified as a broadcasting service the logical approach to follow is to licence it as a subscription broadcasting service (SBS) taking into account the definition of SBS in the ECA. In that case the subscription regulations and licence conditions will apply” (ICASA discussion document 2010).

Where VOD is concerned, ICASA noted in the discussion document that VOD does not fall within the scope of broadcasting, therefore a more rational approach is to define it as an ECS service. This means that an ECS licensee providing VOD is not subjected to the same regulations or licencing conditions imposed on broadcasters. However, they argues the importance of noting that VOD has certain broadcasting characteristics which are regulated in other jurisdictions (ICASA discussion document 2010).

Some of the interested parties, including Freedom of Expression Institute (FXI) and Professor Berger, however raised concerns with respect to the regulation of the Internet, as opposed to services delivered over IP-based networks. Professor Berger also warned ICASA against what he has termed the "regulation creep" (Berger 2008). However, ICASA argues that it does not seek to regulate, nor does it contemplate regulating internet videos or Web TV. In fact, they argue that it does not consider that, under the present regulatory framework, it has the power to regulate such services or means of content delivery. All that they seek to do is to delineate those services that are IPTV from those services that are Internet video or Web TV and they do consider that the International Telecommunications Union (ITU) definitions of IPTV are sufficient to ensure that such services will not be confused with Internet video or Web TV (ICASA discussion document 2010).

A number of other interested parties raised concerns regarding the scope of ICASA’s inquiry. For instance, e.tv noted in its written submission that the focus on IPTV is misplaced because the current licensing and regulatory framework already covers all broadcasting services

(including broadcasting services which may be delivered over broadband networks). e.tv submitted that the correct inquiry should seek to provide clarity on the treatment of services which may form part of IPTV but do not fall within the definition of "broadcasting service", such as "true video on demand" (TVOD"). E.tv submitted further that TVOD must be licensed and regulated in terms of an Electronic Communications Service (ECS) licence (ICASA discussion document 2010).

Kagiso Media submitted that the discussion document did not make it clear whether ICASA was looking to regulate the transmission or reception of content using a particular technology, or whether it was looking to regulate what is actually transmitted or received, the content itself. Kagiso noted, in this regard, that ICASA does not have the power, in terms of the ECA, to regulate content specifically, nor does Chapter 9 of the ECA authorise ICASA to deal specifically with programming content. Kagiso noted that IPTV has been classified as a broadcasting service in the Discussion Document and would, accordingly, be subject to editorial content and advertising rules (ICASA discussion document 2010).

Clarification on the regulation of IPTV and VOD is necessary so as to assess the impact of any potential structural changes, communication technologies and technological developments, and the optimal conditions of competitiveness and legal certainty for the provision of communication services in the country. It is important that this clarification is provided so as to ascertain how this case contributes to the discourse on internet regulation and freedom of expression, as parties seem to argue that there is a trace of internet regulation in this debate, if ICASA seeks to regulate content versus the transmission channel of the content.

5.2.3 Policy documents

5.2.3.1 Critique of Convergence Bill by the Internet Service Providers Association (ISPA)

In a number of countries, public policy has the effect of controlling access to the Internet. Such restrictions, whether imposed by private parties or by the State, pose important questions with regard to the right to freedom of expression (Article 19 background paper 2001)).

The Internet Service Providers' Association ("ISPA") is a South African Internet industry body that consists of more than 70 members. It is comprised of large, medium and small Internet service and access providers in South Africa. Formed in 1996, ISPA has historically served as an active industry body, facilitating exchange between the different independent Internet providers, the Department of Communications, ICASA, operators and other service providers in South Africa (ISPA 2004).

Most ISPs (particularly small ones) however feel that the regulatory environment is hostile, rather than supportive. In some ways they argue that it prohibits them from using promising technology; it places significant and costly administrative burdens on ISPs; also, ISPs are governed by many different pieces of legislation; Telecommunications Act (as amended); Electronic Communications and Transactions Act; Interception Act (RICPCI Act); Film and Publications Amendment Act.

The biggest complaint as is relevant to this discussion involves regulation of content through licences. ISPA's understanding is that "content" and "content services" are defined in the Bill only for the purposes of excluding those terms from other definitions. There was also consent in the matter that content should not be regulated by the Bill, however, ISPA remains concerned about this matter. As a form of a recommendation, ISPA suggested that there should be a provision on the draft Bill that holds that no licence shall be required to provide content.

The author of the background paper on internet regulation and freedom of expression argues that the most overt form of restricting access is to impose a requirement for all Internet users to register with the authorities, or to require Internet users to obtain a licence before being allowed to publish on the Internet, or even to use the Internet passively. He argues further that under human rights law, registration requirements for publishers are of very doubtful legitimacy. The UN Human Rights Committee considered that such a requirement established "such [an] obstacle as to restrict the author's freedom to impart information". He argues further that there should be evidence that a regulatory measure is necessary for the protection of public order or for the protection of the rights of others. If not, the requirement constitutes a violation of the right to freedom of expression (Article 19 background paper 2001).

This case raises points that are important to consider within the larger context of this paper. Firstly, it is important to consider whether or not a registration requirement for ISPs can be compatible with the right to freedom of expression. Secondly, could applying for an internet licence for content purposes be regarded as a form, however small, of regulation? Should that raise fears now that the Minister of Communication, a government official, according to the ICASA Amendment Bill has powers in the modus operandi of ICASA?

5.2.3.2 Is holding Internet Service Providers liable for content generated on their websites the answer?

Furthermore there is a related and relevant question that deserves some discussion pertaining to the above, that is whether Internet Service Providers (ISPs) should be held liable for content that is published by their subscribers. ISPs argue that because they provide access to thousands, or even millions, of users, usually as a purely commercial service, it is impossible for them even to monitor the content of their servers, let alone police them. Others argue that there should be some form of liability if an ISP has been warned that there is illegal content on their servers but they fail to take action (Article 19 background paper 2001)

Currently, different measures have been adopted in different countries as means of responding to this issue. The highest complication has ensued from the debate that if ISPs are held liable for content, ISPs may receive a large number of alerts from individuals notifying them that hate speech are on their servers. A requirement for them to examine the material, decide whether it qualifies as, for example, hate speech and remove it will be excessively onerous in view of the large amount of alerts they are likely to receive. Moreover, ISPs are in a purely commercial relationship with their users and, if challenged, they have little reason to protect them. Therefore, they are likely to move to the side of caution and remove most if not all of the material that is challenged. For these reasons in some countries, such as the United States and Germany, ISPs have been afforded far-reaching protection from liability for postings by third parties (Article 19 background paper 2001). Therefore it is important to ask that should Internet Service Providers, having been notified that potentially illegal material is present on their servers, be liable for that content if they take no steps to remove it?

5.2.3.3. Critique of Film and Publications Bill

The draft Films and Publications Amendment Bill goes far beyond banning child pornography, the Freedom of Expression Institute (FXI) says. "In fact, if the Bill goes

through in its current form, a wide range of material will be banned or restricted" (SAPA 2010). The FXI is concerned at the potential to ban or restrict political speech. "Numerous self-regulatory instruments are available, which are not considered in terms of the Bill" (SAPA 2010).

"The underlying principle is that the state does not have the right to decide what its citizens should hear, see or read," Duncan said (Duncan 2010). All material relating to sexual content and controversial forms of expression, including political speech, will be subject to scrutiny by what is effectively a government institution. This is inappropriate and will lead to pre-publication censorship being introduced in relation to large amounts of material, with a government institution deciding whether such material could be made available.

These provisions are censorious in the extreme, and cannot be passed off merely as innocent classification. "We believe one of the basic tenets of freedom of expression to be that the state may not restrict materials for adults simply because children could also see it." "In addition to the distaste the media has for applying for a licence to publish, there is the unacceptable situation where a licence can be withdrawn by the Films and Publications Board, which would constitute bald censorship," Duncan said (Duncan 2010).

Several of the draft Bill's provisions militate against important values enshrined in the Constitution, such as freedom of expression and due process, they said."Under the guise of fighting child porn which, with respect, cannot be done effectively by way of the amendments on the table, a whole series of measures are introduced, which will have a 'chilling effect' on creativity and freedom of expression by not only acting as a muzzle for the media, but also forcing them to operate in a climate of fear of prosecution (SAPA 2010). "The objective to ensure the protection of children from sexual abuse and the depiction of disturbing, harmful age-inappropriate materials, among others, in publications, can be achieved without necessarily crippling the publishing industry by restricting the legitimate exercise of the right to publish as an inherent part of freedom of expression."Important values of the Constitution, including freedom of expression and prohibition of searches without a warrant, may never be compromised," Ngubane and Schroeder said (SAPA 2010).

5.2 Interviews

In this section, the same conceptual framework of Critical Negotiation Issues and Public Regulation Theory will be used in the analysing of the findings resulting from the interviews conducted. As a secondary form of data collection, much of the analysis conducted in this section will draw from the primary form of collection of findings, which was documents and secondary research.

Three interviews were conducted. One with director of Wits journalism Professor Anton Harber and with a journalist from the Citizen who wrote on one of the articles analysed, Emmah Ngomane, and a journalist from City Press, Slindile Nyathikazi. An emerging theme may be argued to be persistent in all interviews and that theme is a protection of freedom of expression. This shall be the only critical negotiation issue discussed hereunder in conjuction with Public Regulation Theory.

5.3.1 Critical Negotiation Issue: Protect freedom of expression

From the three interviews, it is evident that firstly, there is a general opposition to any form of regulation of the internet, and secondly more specifically by government.

The issue of regulating in the public interest is a worthy subject to note even from the findings emanating from the interviews conducted. Stigler and Fidland (1960) point out to the fact that empirical evidence, presented by academics from the Public Choice School, shows that in various cases the alleged protection of the public interest was not such but was the protection of personal interests of politicians and policy makers. The evidence cast serious doubts upon the exact content and scope of public interest. Harber points out to this fact by arguing that it is worrying when draft laws are introduced by the same government who display different ideas about what is dangerous and acceptable, citing the cases of the Minister of Arts and Culture and South African ambassador to India. The extent of regulating for the public interest is a highly debatable area therefore based on previous action displayed by some government officials.

Furthermore, Harber points out to the fears allayed by the proposed Media Appeals Tribunal and Protection of Information Bill; he argued that certainly the country should be worried. He argues that once censorship has been established, it can certainly be widened. This is an

important factor to consider as others as highlighted in document analysis discussion fear that any form of regulation may lead to censorship. McLeod (2010) writes, “What mustn’t happen is proposing a sledgehammer to the problem and, in the process, violating the constitution and taking the country back to the sort of blanket censorship not seen since the 1980s. SA is not Iran or china”. He further argues that although SA has one of the world’s most liberal constitutions, it would behove us all to ensure that our politicians don’t trample on these rights. “It’s a slippery slope to repression” (McLeod 2010). Nyathikazi agrees and points to the fact that that while it may be easier for government to clamp down on print and broadcast media, but the internet is way more trickier. At the moment almost anything goes on the internet and the growth of the power of social networking websites is proving a challenge for them (that is Facebook, Twitter, YouTube) (Nyathikazi 2010).

McQuail argues that governments have been found to often attempt using this notion of the public interest as an ideological device intended to conceal unjustified regulatory ambitions that serve not the interests of the public. Ngomane and Nyathikazi argue that the public interest needs protection from these unjustified regulatory ambitions, because the internet provides a platform of citizens exercising freedom of expression in talking back to the government without regulations in place to hinder this. They state, respectively, “They (websites) are for the average people who want to voice out their concerns and be heard. Twitter and Facebook have become the ultimate platforms for the practice of freedom of speech, hence the outbursts following Julius's threats” (Ngomane 2010).

Nyathikazi agrees and points out to the fact that politicians are often ridiculed on these sites and these are spaces where people can "speak back to power" and they do (Nyathikazi 2010). Karlekar and Cook (2009) point out to the fact that “An increasing number of organizations and civic initiatives use websites to inform the public about their causes and question government performance. Recent years have also featured a blogging revolution, as millions of people have begun keeping online journals, commenting and sharing opinions on a vast number of cultural, social, and political issues”, protection of this public space from regulation serves and ensures this role therefore.

Ngomane firmly raised opposition to any form of regulation as well, her statements a sentiment of the need to protect freedom of expression on the internet. She said’ “Politicians tend to think they can control everything, but unfortunately for them their power doesn't

apply to social networking websites such as Facebook and Twitter. Malema should have learnt a lesson when he previously tried to shut down Facebook and failed. Social networking websites are not owned or controlled by the government, politicians and thus are free of any types of manipulations" (Ngomane 2010)

Based on primary evidence collected in the preceding sections, it can be safely concluded that in the interview section, protection freedom of expression satisfies the three conditions for it to be regarded as a critical negotiation issue: it centres on a policy matter or legal question with a high degree of relevance to the development of the Internet, secondly it is characterised by a high degree of contestation and thirdly, if left unresolved, it may impede the future development of the internet, both because of its degree of relevance and its level of contestation.

5.4 Conclusion

Based on the arguments presented from the findings above, it can be safely concluded that freedom of expression, internet regulation, protection of freedom of expression are critical negotiation issues, that satisfy the three criteria that constitute any critical negotiation issue. It should be noted however that the analysis presented above limits itself to those critical negotiation issues that feature repeatedly and prominently in the data collected, and of course that meet the critical negotiation issues criteria.

It is quite evident from the findings that the majority of the informants display clear fears to any form of regulation to the internet, especially by government intervention. These fears were allayed by what may be perceived as primary forms of regulation on the internet. It was also noted that there are other parties that argue for a form of regulation as a measure to protect the public from the harms that the internet poses. Public Regulation Theory has been pivotal in the discussion above, its elucidation on what should be regulated in the public interest providing great insight in the arguments advanced above.

6. CHAPTER SIX: CONCLUSION

> "All new technologies have unanticipated and unintended effects and one function of policy-making is to understand them so we may avoid or minimise undesirable ones" (Robert McChesney year)

6.1 Introduction

This concluding chapter focuses on the concluding statement of the paper, limitations to the study and recommendation for future research.

6.2 Conclusion

> "Foresight and creativity are needed, particularly on the part of democratic countries, to develop policies and procedures that are applicable to new technologies but consistent with international standards for human rights and democratic governance. In a fast-changing digital world, vigilance is required if we are to ensure continued freedom on the net" (Karlekar and Cook 2009)

The Internet offers great potential for the exercise of the right to freedom of expression and freedom of information, however it does also offer the potential for great harm through what has been regarded as its ills-pornography, paedophilia, terrorist activities online and so forth; the latter calling for a form of regulation of the internet. This study has critically analysed the discourse on internet regulation and freedom of expression in South Africa in the year 2010. This was done by tracing responses of how the media, policymakers and the general public have responded to the debate on internet regulation and freedom of speech through interviews, and the primary form of data collection, document and secondary research. This has revealed a terrain whereby it is clear that there are what may be perceived as primary forms of regulation through the Convergence Bill, Film and Publications Amendment Acts, what would have been Malusi Gigaba's draft law to prevent access of porn to minors and IPTV and VOD debate.

Furthermore the implication of this to the right of freedom of expression and by extension the democratic role of the media in our country was thoroughly discussed. The paper alluded to the fact that the Internet should not be used by governments as an excuse for introducing new technologies of control or for curtailing existing liberties. Although the right to freedom of expression can be restricted, the circumstances under which this may be done have to be narrowly circumscribed. This is the case for expression on the Internet as it is in any other

forum. Given the *ad hoc* nature of many national initiatives, it is necessary that any means to regulate must give a clear indication of the extent to which regulation of the Internet is compatible with the international legal guarantee of the right to freedom of expression.

In doing so, this research has answered the research questions and fulfilled its aim as outlined in the Introduction chapter. Critical Negotiation Issues as a conceptual framework has been utilised in the identification of three high contested that continue to provide the biggest impact over the debate. Public Interest Theory of regulation was also highly useful in discussing the findings.

6.3 Limitations to the study

The main limitation of this study rests on the premise of having had less than 12 months to complete the dissertation, and completing it in 10 months, noting that 12 months is the stipulated length of time of dissertation. Furthermore, the window period between proposal acceptance, 12 December and due date for submission, 15 February, limited certain areas and issues that could have been tackled with more time. However, the researcher attempted at giving a quality a paper as possible.

This study is limited in that the analysis has focused on selected media resources only and has examined a limited number of articles for pragmatic reasons, including time constraints. Therefore, the results are specific to these media sources during the selected time period, and are not applicable to all forms of media and all newspapers, but only to those specifically analysed.

Owing to time constraints, the researcher was afforded very limited time to especially conduct more interviews as would have been desired, and thoroughly exhaust certain issues that were briefly looked at in the research As a result of this, this research could have benefited from conducting more interviews. Some interviewees approached did not respond on time. It is advisable that future studies conducted in examining this debate on internet regulation and freedom of expression make use of a substantial amount of interviews, and perhaps make use of questionnaires, so as to strengthen the findings. Written surveys in the form of questionnaires are perceived to not be subject to bias because there is no interviewer. In this manner, the researcher can be more objective in his or her findings pertaining to the

relevant topic. This will remove the reliance on secondary sources and provide better insights from industry experts and industry players on the subject.

6.4 Recommendations

> "Without persistent public pressure and vigilant oversight by the international community, this trend could continue, with more countries passing restrictive, internet-specific criminal legislation; more powerful societal actors using defamation suits to silence critics; and more bloggers being sentenced to long prison terms, tortured, or killed. Indeed, since the end of this study's coverage period, Kenya's president has ratified a controversial cybercrimes bill, a prominent Chinese blogger has been stabbed in a public place, and an Iranian blogger has
> died in prison" (Karlekar and Cook 2009: 11)

Very little academic research is being done on this discourse on internet regulation and freedom of expression, although it has gained prominence in media coverage in South Africa. It is the researcher's contention that had such studies been done in countries such as China, Australia, Singapore, countries that have strong internet regulation controls in place, the nations involved, and the world would have been alerted earlier and subjected this to intense discussion prior to implementation. This is evident in South Africa in the discussions pertaining to the proposed Media Appeals Tribunal and Protection of Information Bill, where proposed regulation of the relevant media led to intense debate with regards to the proposed regulation, aim, motives, implications being some of the areas being discussed, which is what this paper has attempted to do. There is thus a need to encourage more research in this area.

This study examined the discourse within selected newspaper articles that have dealt with the subject matter at hand within the time period of the year 2010. Therefore, the findings may not apply to other newspapers or different social contexts. It is therefore recommended that further research be conducted to examine how this debate has ensued within other contexts and other newspapers. An examination of other forms of media coverage such as television and radio pertaining to the discourse may also prove to be useful.

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APPENDICES