

**A critical analysis of freedom of the press under the state of national disaster
relating to the corona virus pandemic in South Africa**



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Declaration

I, Nemusunda Pfunzo, student number: 17002161, hereby declare that this thesis titled “Critical analysis of freedom of the press under the state of national disaster relating to the corona virus pandemic in South Africa” submitted herewith in partial fulfilment of my Masters of Laws in Human Rights Laws (LWMLHR) degree is my own original work, contains no plagiarism and has, to the best of my knowledge, not previously been submitted by me or any other person to this or any other institution.

Dedication

To my father Nthungufhadzeni Rudolf Nemusunda and my mother Ndishavhelafhi Tshililo.

Acknowledgements

I would like to extend a special thanks to Dr D Mailula, my supervisor, for assistance during the research and preparation of this thesis. His guidance and patience were of paramount importance to the completion of this thesis. Staff members of the University of Venda, I am grateful for your support and patience. I would also like to thank my family, and my friends, who silently or vociferously supported me over the year. I am thankful for that love and appreciation. An extended thanks goes to those who did not know about this thesis, who I know are supporting me anyway. A special thanks to the Almighty God for giving me the strength to complete this study.

List of Abbreviations

1. ACDEG : African Charter on Democracy, Elections and Governance
2. ACHPR : African Charter on Human and People' Rights
3. BCCSA : Broadcast Complaints Commission of South Africa
4. CLAA : Criminal Law Amendment Act
5. CPA : Criminal Procedure Act
6. CUN : Charter of the United Nations
7. DAA : Defence Amendment Act
8. DMA : Disaster Management Act
9. DPFEAIA : Declaration of Principle on Freedom of Expression and
Access to Information in Africa
10. DRICBSADC : Declaration on the Role of Information and Communication in
Building the Southern African Development Community
11. DSADC : Declaration of the Southern African Development
Community
12. FPA : Films and Publications Act
13. FPB : Films and Publications Board
14. GLAA : General Law Amendment Act
15. HRC : Human Rights Committee
16. ICASA : Independent Communications Authority of South Africa
17. ICCPR : International Covenant on Civil and Political Rights

18. MCGTA : Minister of Co-operative Government and Traditional Affairs
19. NDMC : National Disaster Management Center
20. NIRA : Newspaper and Imprint Registration Act
21. OAU : Organization of African Unity
22. OHCHR : Office of the United Nations High Commissioner for Human Rights
23. OSA : Official Secrets Act
24. PCSA : Press Council of South Africa
25. PCISSADC : Protocol on Culture, Information and Sport of the Southern African Development Community
26. PSA : Public Safety Act
27. RAA : Riotous Assembly Act
28. SADC : Southern African Development Community
29. SCA : Suppression of Communism Act
30. TSADC : Treaty of the Southern African Development Community
31. UDHR : Universal Declaration of Human Rights
32. UN : United Nations
33. UN-UPR : United Nations Universal Periodic Review
34. UNESCO : United Nations Educational, Scientific and Cultural Organisation
35. UNCHR : United Nations Commission on Human Rights

36. UNHRC : United Nations Human Rights Council
37. VCLT : Vienna Convention on the Law of Treaties
38. WHO : World Health Organisation
39. WG-UPR : Working Group on the Universal Periodic Review

Abstract

The protection of the right to freedom of the press is vitally important in a democratic state. The purpose of this study is to critically analyse the right to freedom of the press in South Africa under the national state of disaster relating to the corona virus pandemic. The aim is to establish how the right to freedom of the press in South Africa can be promoted and protected under the national state of disaster relating to the corona virus pandemic. This study focuses on determining the approaches that maybe utilised to improve the promotion and protection of the right to freedom of the press in South Africa under the national state of disaster relating to the corona virus pandemic. The method that is going to be utilised is the doctrinal research method as it is the appropriate method to answer the research question.

The right to free press is embraced by international, regional and sub-regional human rights instruments. Prior to 1994, there was a lot of government oversight and rules to make sure that the right to free press is excised in a mode that the government of South Africa at that time wanted. In the current democratic South Africa, the right to free press is constitutionally protected. However, this does not mean that the right to free press is an unlimited right. As it is the case with any other right in the Constitution, it can also be limited. Regulation 14(2) of the Disaster Management Act under the national state of disaster relating to the corona virus pandemic can potentially violate the right to free press in South Africa by criminalising the publication or broadcasting of fake news relating to corona virus pandemic.

This study makes some recommendations to the South African government on how it can deal with fake news relating to the corona virus pandemic under the national state of disaster without affecting the enjoyment of the right to free press.

Key words: right to freedom of the press; democratic state; national state of disaster Regulations; fake news; corona virus pandemic.

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CHAPTER 1

Introduction

1.1. Introduction and Background

The right to free speech is one of the essential rights in the current South African democratic dispensation. The right to free press is one of identifiable types of the right to free speech, which is provided for under section 16(1)(a) of the Constitution.¹

The press executes a significant function in the South African society. The press ensures that other aspects of the right to free speech and other rights in the Constitution are enjoyed by a way of publication or broadcasting of information, by educating the public about their constitutional rights and by holding those in power accountable. The right to free press also guarantees that the government is open, transparent, responsive and accountable to the society.²

The right to free press is part of international human rights instruments including the International Covenant on Civil and Political Rights (the ICCPR),³ the Universal Declaration of Human Rights (the UDHR)⁴ and the Declaration on the Role of Information and Communication in Building the Southern African Development Community (the DRICBSADC).⁵ The African Charter on Human and People's Rights (the ACHPR) also indirectly safeguard the right to free press.⁶

In pre-democratic South Africa, there was a lot of government oversight and rules to make sure that the press was not publishing or broadcasting content which was against the government of South Africa at that time. The government used to abuse the then

¹ The Constitution of the Republic of South Africa, 1996 (the Constitution).

² *Government of the Republic of South Africa v Sunday Times Newspaper and Another* 1995 (2) SA 221 (T) 227H-228A.

³ Article 19(2) of the International Covenant on Civil and Political Rights (adopted 16 December 1966), entry to force 23 March 1976, UNGA Res 2200A (XXI) (the ICCPR).

⁴ Article 19 of the Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217A (III) (the UDHR).

⁵ Paragraph 4 of the Declaration on the Role of Information and Communication in Building the Southern African Development Community (adopted 25 and 26 August 1995) (the DRICBSADC).

⁶ Article 9(2) of the African Charter on Human and People's Rights ("Banjul Charter") (adopted 27 June 1981) OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (the ACHPR).

system of parliamentary supremacy to enact its controversial pieces of legislations that severely limited the right to free press.⁷ The banning of newspapers and the arrest of newspaper editors was the order of the day.⁸ The situation changed drastically with the adoption of the Interim Constitution as the press became able to enjoy the freedom.⁹ As indicated above, this right is currently protected under section 16(1)(a) of the 1996 Constitution. The press is one of democratic institutions which are affected by the current global pandemic called the corona virus.

The corona virus pandemic has had a massive effect on public's livelihoods in the world. In South Africa one of the consequences of the corona virus pandemic was a declaration of national state of disaster, generally known as the national lockdown. Thus, the corona virus pandemic was declared as a national disaster.¹⁰ A national disaster is a disaster categorised in harmony with section 23 of the Disaster Management Act (the DMA).¹¹

The declaration of a state of national disaster affected most activities in the country, such as the freedom of movement of people¹² and goods,¹³ human gatherings,¹⁴ numbers of people allowed to attend funerals,¹⁵ the utilisation of public transport,¹⁶ the sale and distribution of alcohol,¹⁷ operations of the economic sector,¹⁸ distribution of resources by the state,¹⁹ physical access to education facilities,²⁰ initiation practices,²¹ and the distribution of information.²² It also created new statutory offences.²³ These activities where now regulated by the national state of disaster alert levels. The alert

⁷ JJ Paust 'International Law and Control of the Media: Terror, Repression and the Alternatives' (1978) 53 (4) *Indiana Law Journal* 633.

⁸ Paust (n 7 above) 633.

⁹ The Constitution of the Republic of South Africa, 1993 (the Interim Constitution).

¹⁰ Section 23 of the Disaster Management Act 57 of 2002 (the DMA).

¹¹ Section 1 of the DMA.

¹² Regulation 66 & 74 of the DMA.

¹³ Regulation 75A of the DMA.

¹⁴ Regulation 69 of the DMA.

¹⁵ Regulation 68 of the DMA.

¹⁶ Regulation 76 of the DMA.

¹⁷ Regulation 77 of the DMA.

¹⁸ Regulation 78 of the DMA.

¹⁹ Regulation 65A of the DMA.

²⁰ Regulation 66A of the DMA.

²¹ Regulation 73 of the DMA.

²² Regulation 14 of the DMA.

²³ For example, Regulation 80 of the DMA.

levels range from alert level 1 up to alert level 5.²⁴ This left the right to free press and democracy at risk of being violated.²⁵

The Regulations also enlisted newspapers as an essential service.²⁶ However, this does not mean that the press was operating smoothly without obstacles during national state of disaster relating to the corona virus pandemic. There have been reports of violence and threats against journalists during the national state of disaster relating to the corona virus pandemic. One of the noticeable threats against the press is what happened to Paul Nthoba who is a newspaper editor of a South African community newspaper *Mohokare News*. The editor was threatened and assaulted by the police during an operation of the enforcement of national state of disaster regulations. The editor was exiled to Lesotho because of fear of being victimised again.²⁷

Therefore, this study focuses on establishing how the right to freedom of the press in South Africa can be promoted and protected under the national state of disaster relating to the corona virus pandemic. The study is important because it deals with freedom of the press which is a vital organ of a prosperous democracy and it also deals with the current circumstance which freedom of the press is facing, which is the national state of disaster relating to the corona virus pandemic.

It is the view of the researcher that the right to free press should not be violated under the national state of disaster relating to the corona virus pandemic. It should be protected at this time, where information is crucial, as most individual are at their residential areas because of travel restrictions. The international law framework of the right to freedom of the press is also considered. This also includes regional instruments which protect the right to free press. The legal framework of the right to freedom of the press in South Africa follows. There is also a consideration of the impacts of the national state of disaster Regulations in South Africa on the right to freedom of the press.

²⁴ National State of Disaster Regulations of the DMA.

²⁵ Regulation 14(2) of the DMA.

²⁶ Part G3 of Table 4 of Alert Level 1 of the DMA.

²⁷ Reliefweb 'The 2020 Pandemic has Challenged Press Freedom in Africa' 27 November 2020 <http://www.reliefweb.int> (accessed 11 June 2021).

1.2. The Research Problem

The right to free press is a foundation of a progressive and prosperous democracy. Even though the right to free press is embraced by the ICCPR,²⁸ this right is still violated in most African countries.²⁹ In South Africa, the right to free press is constitutionally safeguarded.³⁰ However, journalists have been under attacks and threats since the commencement of the national state of disaster Regulations in South Africa.³¹ The South African government has also published Regulation 14(2) of the Disaster Management Act. Regulation 14(2) criminalises fake news relating to corona virus in South Africa which is totally different from delictual claims of slander and defamation. The claims of slander and defamation are civil in nature compared to Regulation 14(2) which is aimed at inflicting criminal punishment to the press. Therefore, the implementation of Regulation 14(2) negatively affects the publications or broadcastings of information during the national state of disaster period, which also jeopardises the work of the press.³²

There is a need to protect and promote the right to free press under the national state of disaster relating to the corona virus pandemic. This study therefore, attempts to ascertain whether the national state of disaster Regulations and policies which were published under national state of disaster relating to the corona virus pandemic violate the right to free press. This study demonstrates approaches which can be utilised to promote and protect the right to free press in South Africa under the national state of disaster relating to the corona virus pandemic.

²⁸ Article 19(2) of the ICCPR.

²⁹ In Nigeria, Kufre Carter who is a journalist of radio station *XL 106.9 FM* was arrested on 27 April 2020 for conspiracy and defamation, he was in custody for a month for condemning the handling of the health problem by the local authorities. In Rwanda, Dieudonne Niyonsenga who owns the YouTube news channel called *Ishema TV* was arrested, while reporting the consequences of lockdown on the community, for infringing lockdown regulations. Any criticism of the king can be handled as high treason and is punishable by the death penalty in Eswatini. The Tanzanian government enacted Media Service Act 120 of 2016, which imposes heavy restrictions on the press.

³⁰ Section 16(1) of the Constitution.

³¹ Reliefweb (n 27 above).

³² Regulation 14(2) of the DMA.

1.3. Aims and Objectives

The aim of this study is to establish how the right to freedom of the press in South Africa can be promoted and protected under the national state of disaster relating to the corona virus pandemic. The objectives of this aim are as follows:

- to assess the protection of the right to freedom of the press under international law;
- to provide the history of the right to freedom of the press in South Africa as a background against the right to freedom of the press in the context of the national state of disaster;
- to determine the protection of the right to freedom of the press in South Africa;
- to determine the limitation of the right to freedom of the press in South Africa;
- to determine the impacts of the national state of disaster Regulations on the right to freedom of the press in South Africa; and
- to make recommendations to the South African state on how it can protect the right to freedom of the press under the national state of disaster relating to the corona virus pandemic.

1.4. Research Questions

The main question in this study is how the right to freedom of the press in South Africa can be promoted and protected under the national state of disaster relating to the corona virus pandemic?

In order to adequately answer this question, the following sub-questions must also be addressed, namely:

- (a) How does international law protect the right to freedom of the press?
- (b) What legal framework does South Africa have for the promotion and protection of the right to freedom of the press?
- (c) What are the impacts of the national state of disaster Regulations on the right to freedom of the press in South Africa?

1.5. Hypothesis

It is hypothesised that the right to freedom of the press in South Africa can be promoted and protected under the national state of disaster relating to the corona virus pandemic.

1.6. Literature Review

Although there is some literature on the right to free press under normal circumstances, there is little in the circumstance of the national state of disaster. The right to free press is protected in different types of human rights instruments, including the ICCPR,³³ the UDHR,³⁴ the ACHPR³⁵ and the DRICBSADC.³⁶ There are general comments which cater for the right to free press.³⁷ The United Nation Human Rights Committee (HRC), General Comment No.34: Freedom of Opinion and Expression (Article 19 of the Covenant), 2011 (General Comment No. 34)³⁸ recognised the significance of the press in a democratic state as a one of the foundations of a democratic country.³⁹

Few cases have been heard relating to the national state of disaster Regulations in South Africa. However, there is no single case that dealt with the national state of disaster Regulations that affect the right to free press. For instance, the case of *De Beer and Others v Minister of Cooperative Governance and Traditional Affairs*,⁴⁰ is one of the cases which dealt with the national state of disaster Regulations.⁴¹ The applicants approached the court for the national state of disaster and Regulations enacted by the Minister to be declared invalid, illegal and unconstitutional; that all assemblies of people be legal; and all businesses to be allowed to function under reasonable precautionary measures.⁴² The court concluded that the declaration of national state of disaster was lawful. The national state of disaster Regulations in relation to Alert Level 3 and 4,

³³ Article 19(2) of the ICCPR.

³⁴ Article 19 of the UDHR.

³⁵ Article 9(2) of the ACHPR.

³⁶ Paragraph 4 of the DRICBSADC.

³⁷ General Comment No. 34 on "Article 19: Freedom of Opinion and Expression", UN Human Rights Committee, CCPR/C/GC/34, 2011 (General Comment No. 34).

³⁸ As above.

³⁹ As above, para 13 & 14.

⁴⁰ (21542/2020) [2020] ZAGPPHC 184 (Unreported).

⁴¹ See also, *Mohamed and Others v President of the Republic of South Africa* [2020] ZAGPPHC 120.

⁴² *De Beer and Others v Minister of Cooperative Governance and Traditional Affairs* (n 40 above), para 3.

promulgated in accordance with section 27(2) of the DMA, were found to be unlawful.⁴³ The limitation and infringement of constitutional rights, imposed by national state of disaster Regulations are not reasonable in an open and democratic country founded on human dignity, equality and freedom as stated by the general limitation clause of the Constitution.⁴⁴

In addition, the significance of the right to free press has been a focus of commentary by international organisations. The International Press Institute states that raising awareness among public officials, encouraging harmonisation and shared knowledge, and assigning a dedicated prosecutor are some of the measures that can be used to assist in the eradication of violence against women journalist.⁴⁵

Many scholars wrote about different features of the right to free press. Ronkova⁴⁶ defined mass media as a way of mass communication which achieves distribution of the idea or statements from informant to the countless group of receivers, or group of audience.⁴⁷ The author also states that the press falls under mass media.⁴⁸ The author emphasises the importance of the UDHR, the ICCPR and Resolution 59 (1) on freedom of information to media rules under the United Nations (the UN).⁴⁹ The author recognises that the presence of a robust and excellent legal framework is the foundation and assurance for the genuine presence and operation of freedom of the media and their influence on the democratic relations in the community.⁵⁰ Ronkova argues that freedom of the media occupies an enormously significant position in the general livelihood of the world.⁵¹ This study also examines the protection of the right to free press under international law. International law provides the framework for the right to

⁴³ (n 42above) para 9.1- 9.2.

⁴⁴ (n 43 above) para 9.4.

⁴⁵ D Simonovic 'Written Submission from International Press Institute (IPI) for the Call from UN Special Rapporteur on Violence Against Women, Ms Dubravka Simonovic, for the Forthcoming Report on Violence Against Women Journalist', <https://ipi.media/> (accessed 14 September 2021).

⁴⁶ N Ronkova 'International Legal Framework for Media' (2016) 4 (2) (*JPMNT*) *Journal of Process Management – New Technologies, International* 57- 63.

⁴⁷ Ronkova (n 46 above) 57- 58.

⁴⁸ Ronkova (n 46 above) 58.

⁴⁹ Ronkova (n 46 above) 60.

⁵⁰ Ronkova (n 46 above) 63.

⁵¹ Ronkova (n 46 above) 63.

free press and the right to free press in South Africa is framed in terms of the rules of international law.

Carter and Westenskow⁵² argued that the international law protection for freedom of journalism should identify personal freedom differently from the right to press. They also argue that freedom of journalism does not require the government in order for lawful violation to happen.⁵³ The writings of these scholars were influenced by the last journal article of Khashoggi, in which he argued that Arab states have been allowed to carry on suppressing the media at an increase speed,⁵⁴ and his death, which he was allegedly killed for his dissident and critics to the Saudi Arabian leadership. This study also discusses the international, regional and sub-regional protection of the right to free press. However, this study has been influenced by incidents of violence against journalists in South Africa, which took place while journalists were reporting about non-compliance with the national state of disaster Regulations by the South African society.⁵⁵

Sturges's study was based on group of cartoons demonstrating mocking portrayals of Prophet Mohammed, which was published by the Danish newspaper *Jyllands Posten*.⁵⁶ The author discussed the basis for the right to free speech under UDHR.⁵⁷ He argued that the restrictions on free speech are created reasonably clear in the official contracts on human rights crafted by states.⁵⁸ The author argues that it is not completely sensible to allege that the approach that safeguarded the right to free press and the right to free speech is relevant just as much to a present newspaper as it did to the newspaper of eighteenth century.⁵⁹ The author concluded, in favour of the publication of cartoons, that the role of information professionals is to allow the progress of public access to thoughts

⁵² EL Carter and R Westenskow 'Freedom of Journalism in International Human Rights Law' (2020) *BYU ScholarsAchieve* 48.

⁵³ Carter & Westenskow (n 52 above) 48.

⁵⁴ J Khashoggi, 'What the Arab World Needs Most is Free Expression' WASH, Post, Oct, 17, 2018, <https://www.washingtonpost.com> (accessed 20 June 2021).

⁵⁵ Reliefweb (n 35 above).

⁵⁶ P Sturges 'Limits to Freedom of Expression? Considerations Arising from the Danish Cartoons Affair' (2006) 32 *IFLA Journal* 1.

⁵⁷ Sturges (n 56 above) 2-4.

⁵⁸ Sturges (n 56 above) 4.

⁵⁹ Sturges (n 56 above) 7.

and information. Even where the information is the foundation of easily roused disagreement, as in the situation of Danish cartoons.⁶⁰ This study will also refer to international human rights instruments such as the UDHR when it discusses the international law protection of the right to free press. International law instruments such as the UDHR provided a background to the right to free press in the South African Constitution.

Bouhot⁶¹ discussed the reaction of the media to the political sphere of the apartheid government. Bouhot argues that the media had an influence on the decision-making process of the apartheid government.⁶² He also stated that the apartheid government used to heavily regulate the media.⁶³ Bouhot recognises that the media plays a vital role in the community. He also recognises that the media played a role in democratisation of different countries around the world.⁶⁴ The author raised the concern that some African countries reversed towards dictatorship and started to prevent the voices of those who have different views from theirs.⁶⁵ This study also discusses the historical development of the right to free press, including a discussion of the apartheid era. The history of the right to free press provides an important background to the law discussed in this study as the law were created based on their predecessor.

Van Vollenhoven based his study on the broad right to free speech.⁶⁶ The author argued that the right to free speech is a pillar of democracy.⁶⁷ Van Vollenhoven further argued that there are four avenues which support the view that free speech is the basic right in a democracy, namely, it is a market location of thoughts; it allows persons to self-develop; it permits involvement in the democratic practice; and it preserves the

⁶⁰ Sturges (n 56 above) 10.

⁶¹P Bouhot 'Freedom of Expression under Apartheid' (2009), Dissertation presented in partial requirement for the degree of Magister Legum in the Faculty of Law of the University of Western Cape 72.

⁶² Bouhot (n 61 above) 72.

⁶³ Bouhot (n 61 above) 49.

⁶⁴ Bouhot (n 61 above) 24- 32.

⁶⁵ Bouhot (n 61 above) 32.

⁶⁶ WJ Van Wollenhoven 'The Right to freedom of Expression: The Mother of our Democracy' (2015) 18 (6) *PER/PELJ* 2304.

⁶⁷ Van Wollenhoven (n 66 above) 2304.

equilibrium among constancy and transformation in the community.⁶⁸ However, this study focuses on the type of the right to free speech which is the right to free press.

Kekana also focus on the right to free access to information and free speech in South Africa and international level.⁶⁹ He argued that the right to free speech is supported by different Acts of Parliament, practice of the state and governmental bodies.⁷⁰ He also argues that the biggest obstacle to the right to free speech is the judiciary in the field of defamation.⁷¹ The author also argues that the role of the press has not been given the enough weight it deserves as the public watchdog.⁷² This is why this study only focused on the right to free press under the national state of disaster relating to the corona virus pandemic, not the whole right to free speech because the right to free press is a vital right to democracy.

Brickhill's study is based on a distinction between the declaration of state of emergency in accordance with the Constitution and the national state of disaster in reacting to the corona virus pandemic in South Africa.⁷³ The author argued that the South African national state of emergency is suitable for security-related emergencies than public health emergencies as it requires the declaration from Parliament and suspension of rights in the Constitution.⁷⁴ The author states that the state of emergency is impractical for corona virus pandemic because Parliament, at certain instances during the pandemic was not sitting. He argued that a national state of disaster is best suited for corona virus pandemic because it does not suspend the constitutional rights and it does not require a declaration from Parliament.⁷⁵ The author argued that the national state of disaster Regulations are broad and similar to state of emergency Regulations because

⁶⁸ Van Wollenhoven (n 66 above) 2305- 2312.

⁶⁹ AP Kekana 'The State of Free Access to Information and Freedom of Expression Trends in South Africa and Internationally' (1999), Paper submitted in Workshop at Technikon SA 1.

⁷⁰ Kekana (n 69 above) 3.

⁷¹ Kekana (n 69 above) 3.

⁷² Kekana (n 69 above) 4.

⁷³ J Brickhill 'Constitutional Implications of Covid-19' (1) (2020) *Juta* 1.

⁷⁴ Brickhill (n 73 above) 1.

⁷⁵ Brickhill (n 73 above) 1.

they extensively restrict constitutional rights.⁷⁶ This study determines the impacts of the national state of disaster Regulations on the right to free press in South Africa.

This study is different because it is dealing with the current circumstance that freedom of the press has never faced since it was conceived, due to current situation in the world, which is corona virus pandemic, most scholars have not yet write about the right to free press under the national state of disaster relating to the corona virus pandemic. Those authors who had written about national state of disaster relating to the corona virus such as Brickhill, most of them did not concentrate on a certain right which is affected by national state of disaster Regulation, instead they examined all national state of disaster Regulations in general.

1.7. The Research Methodology

The methodology employed in this study is the doctrinal research methodology, which focus on primary sources and secondary sources of law. The primary sources to be consulted include the Constitution, pieces of legislation and case law. Examples include the Disaster Management Act⁷⁷ and *Print Media South Africa and Another v Minister of Home Affairs and Another*.⁷⁸ Secondary sources include international law, books and journal articles. This study will use the doctrinal research method as it is the appropriate method to answer the research question.

1.8. Definition of Key/Technical Concepts

1.8.1. Democratic state

A democratic state is a state where the government is built on the agreement of the individuals and were any citizen is uniformly safeguarded by law.⁷⁹

⁷⁶ Brickhill (n 73 above) 1-2.

⁷⁷ n 26 above.

⁷⁸ 2012 (6) SA 443 (CC).

⁷⁹ Preamble of the Constitution.

1.8.2. Corona virus pandemic

Corona viruses are a big group of viruses which cause diseases such as common cold, Middle East Respiratory Syndrome and Severe Acute Respiratory Syndrome. The new corona virus is a novel strain which has not yet been found before in humans. This new strain was first discovered in the city of Wuhan, in the province of Hubei, in China.⁸⁰

1.8.3. National state of disaster Regulations

The national state of disaster Regulations are regulations enacted in accordance with section 27(2) and 59 of the DMA⁸¹ or regulations which were enacted by the government in relation to the corona virus pandemic.

1.8.4. Fake news

Fake news is news that do mischief with the truth. Fake news do not have the truth and truthfulness. Fake news is false and is published with the intention to deceive.⁸²

1.8.5. Press

The press means news media and agencies collectively.⁸³

1.9. Ethical Considerations

Information is gathered from different sources of law. The dissertation references its source using the University of Venda School Law referencing style, which is adopted from the *African Human Rights Law Journal*. The level of similarity in this study is twenty percent or less.

1.10. Structural Framework

This study is comprised of five chapters. The first chapter is the background and overall introduction of the dissertation.

⁸⁰ P Arora 'Information About Coronavirus Pandemic' (2020) *CSIR-Central Scientific Instrument Organization Chandigarh* 2- 3.

⁸¹ n 77 above.

⁸² R Jaster & D Lanus 'What is Fake News?' (2018) *ResearchGate* 2.

⁸³ 'Collins Dictionary' available at <https://www.collinsdictionary.com/dictionary/english/the-press> (accessed 19 January 2022).

Chapter two examines the protection of the right to freedom of the press under international law, including a discussion of regional and sub-regional human rights instruments which protect the right to free press.

Chapter three considers the legal framework in South Africa that promote and protect the right to freedom of the press. Firstly, the historical evolution of right to free press in South Africa is outlined. The research takes the reader from the state of press in the pre-apartheid era to transitional period to democracy. This chapter examines the role of the press in the current South African democratic dispensation, regulation of the press, the publication or broadcasting of court proceedings by the press and instances where the press must have approval from regulatory institution before it can publish or broadcast information. This chapter also determines the restriction of the right to free press.

Chapter four considers the impacts of national state of disaster Regulations in South Africa on the right to freedom of the press. This chapter determines the power of the Minister of Cooperative Governance and Traditional Affairs to make and promulgate the national state of disaster Regulations. This is followed by an examination of whether national state of disaster Regulations are lawful or not. It also assesses the impacts of the Regulations on freedom of the press.

Chapter five concludes the dissertation and the recommendations are also provided on how the right to freedom of the press can be promoted and protected during the national state of disaster relating to the corona virus pandemic.

1.11. Limitations and delimitations of the study

This study mainly concentrates on the right to free press. The study also focuses on other factors of the right to freedom to receive information, which affects the role of the press in the South African democratic dispensation. The study extends to aspects of the national state of disaster relating to the corona virus pandemic which affects the press. The study does not cover other forms of the right to free speech, such as the right to liberty of artistic creativity, and the right to liberty of academic and liberty of scientific research.

CHAPTER 2

The protection of the right to freedom of the press under international law

2.1. Introduction

This chapter focuses on the protection of the right to freedom of the press under international human rights law. International human rights law is made up of layers of protection beyond the domain of the domestic level. These layers of protection are available at three levels, namely: global; regional and sub-regional.⁸⁴ This chapter introduces the safeguard of the right to free press in international, regional and sub-regional level of safeguard of the right to free press. The safeguard of the right to free press under international, regional and sub-regional level is usually implicit. The chapter analyses the United Nations human rights treaty-based system, African human rights instruments and Southern African Development Community (SADC) human rights instruments which provide the safeguard of the right to free press and obligations imposed to the states. This chapter, thus, presents a comprehensive examination of international human rights instruments promoting and advancing the right to free press. The chapter also discusses the way in which the appropriate organisations responsible with supervising the execution of these human rights instruments have interpreted the right to free press.

2.2. The importance of international human rights law

International human rights law protects the rights that affect things that are shared among human beings.⁸⁵ It also protects rights relating to specific individuals and not others. It further imposes the rights that create positive and negative obligations and rights that requires individual to attend to the needs of others.⁸⁶ International human rights law has both indirect and direct influences on human rights protection.⁸⁷

⁸⁴ H Strydom *et al International Law* (2017) 326.

⁸⁵ P Macklem 'What is International Human Rights Laws? Three Applications of a Distributive Account' (2007) 52 *McGill Law Journal/Revue De Droit De McGill* 582.

⁸⁶ P Macklem (n 85 above) 582.

⁸⁷ D Cassel 'Does International Human Rights Law Make a Difference?' (2001) 2 (1) *NDLScholarship Publication* 126.

In the way of mutual reinforcement, international human rights law exercises many different roles indirectly.⁸⁸ All parts of the world enforce the same forms of rights stated in the same words, interpreted by the same United Nations human rights bodies.⁸⁹ International human rights law reinforces the universality of human rights, through government ratifications of the United Nations human rights instruments.⁹⁰ It legitimises the claims of rights because international human rights treaties are adopted by states.⁹¹ It highlights the apparent will of the international community, through the process of negotiations and ratifications of treaties by states.⁹² When international human rights law is reduced into treaty format, the national judicial can readily enforce the rights contained in the human rights treaty because some countries incorporate human rights treaties into domestic law, other countries give human rights treaties higher national legal status.⁹³ These are some of the ways in which international human rights law indirectly influence human rights protection.

The direct impact of international human rights law has been visible in United Nations through state reporting requirements, individual complaints procedures under different treaties, and special rapporteurs and experts who investigate and publish reports.⁹⁴

2.3. The right to freedom of the press under United Nations

2.3.1 The right to freedom of the press under United Nations treaty-based human rights system

The United Nations was established in 1945 after the Second World War by the Charter of the United Nations (CUN).⁹⁵ The right to free press is protected under the United Nations (the UN) system by different instruments. The Universal Declaration of Human Rights (the UDHR) was approved in 1948, shortly after the United Nations was

⁸⁸ Cassel (n 87 above) 126.

⁸⁹ Cassel (n 87 above) 126.

⁹⁰ Cassel (n 87 above) 127.

⁹¹ Cassel (n 87 above) 127.

⁹² Cassel (n 87 above) 127.

⁹³ Cassel (n 87 above) 127.

⁹⁴ Cassel (n 87 above) 132.

⁹⁵ Charter of the United Nation (signed at San Francisco 0n 26 June1945) came into force 24 October 1945 (CUN).

formed.⁹⁶ The UDHR is accepted as binding because the declaration has developed into customary international law and because of the duties imposed by the CUN.⁹⁷ The UDHR provides human rights in the manner of the intrinsic dignity and the uniform and indisputable rights of all parties of the human family.⁹⁸

UDHR guarantees all people the right to free expression and opinion, which comprises of free opinions without intervention and to request, accept and communicate information and thought in any media.⁹⁹ This is a crucially important statement for the press as it makes it apparent that news medias are embraced in the right to freedom of the expression.¹⁰⁰

The UDHR also provides for the restraint of the right to free press.¹⁰¹ In the enjoyment of the right to free press, any individual must be subjected only to those restrictions as are stated by law exclusively for the goal of defending the rights and liberty of others and of fulfilling the entirely prerequisites of societal arrangement, morality and the common interests of a democratic society.¹⁰² The right to free press in terms of the UDHR, may not be enjoyed against the aims and values of the UN.¹⁰³ The right to free press in terms of the UDHR, cannot be explained as entailing for any person, state or group any right to get involved in any action or to do any act intended at the disturbance of any of the rights and freedom enclosed in the UDHR.¹⁰⁴

The UN developed the International Covenant on Civil and Political Rights (the ICCPR) and adopted it in 1966,¹⁰⁵ to defend human rights, such as the right to free press.¹⁰⁶ This instrument provides that every individual must have the right to free speech, which

⁹⁶ The declaration was adopted by Resolution 217A (111) of the United Nations General Assembly on 10 December 1948. Forty-eight states voted in its favour, no state voted against it and eight abstained.

⁹⁷ JC Mubangizi *The Protection of Human Rights in South Africa: A Legal and Practical Guide* 2nd ed (2013) 15.

⁹⁸ Preamble of the UDHR.

⁹⁹ Article 19 of the UDHR.

¹⁰⁰ J Limpitlaw *Media Law Handbook for Southern Africa* (2021) 8.

¹⁰¹ Article 29 of the UDHR.

¹⁰² Article 29(2) of the UDHR.

¹⁰³ Article 29(3) of the UDHR.

¹⁰⁴ Article 30 of the UDHR.

¹⁰⁵ International Covenant on Civil and Political Rights (adopted 16 December 1966), entry to force 23 March 1976, UNGA Res 2200A (XXI) (the ICCPR).

¹⁰⁶ Article 19(2) of the ICCPR.

comprises of the right to freedom to receive, look for and communicate statements and thoughts of the entire types in print or writing, orally, in an art format, or in any media of her option.¹⁰⁷

However, even though the ICCPR protects this right, it is not absolute, it can be limited. The right to free press can be constrained in favour of the rights or status of others, or for the safeguard of the domestic safety or of community arrangement or of community morals or health.¹⁰⁸ The right to freedom of the press can also be constrained if it is being used as promotion for war or advocate for hate speech that results in provocation of hostility, violence or discrimination.¹⁰⁹ However, these limitations do not promote censorship of the press.

The ICCPR inflict a positive obligation on states that ratified it, to apply the required measures to guarantee the safeguard of ICCPR, including implementing laws or other steps as it might be crucial and granting an actual relief to those whose freedom of the press has been infringed.¹¹⁰ This is made possible by the treaty-monitoring body called the Human Rights Committee (the HRC). The HRC is the treaty monitory body of the ICCPR.¹¹¹ The First Optional Protocol to the International Covenant on Civil and Political Right¹¹² (the Optional Protocol) is founding document of the HRC. The HRC is made up of eighteen independent experts. The HRC is responsible for hearing individual complaints of the rights enshrined in the ICCPR, consideration of states reports, inter-states complaints, and its drafting of substantive statements, general comments, and common debates on subjects dealt with in the ICCPR.¹¹³

¹⁰⁷ As above.

¹⁰⁸ Article 19(3) of the ICCPR.

¹⁰⁹ Article 20 of the ICCPR.

¹¹⁰ B Heller & J Van Hoboken 'Freedom of Expression: A Comparative Summary of United States European Law' (2019) *Transatlantic Working Group* 4.

¹¹¹ Heller & Van Hoboken (n 110 above) 4.

¹¹² The First Optional Protocol to the International Covenant on Civil and Political Rights (adopted in 16 December 1966), entry into force 23 March 1976, UNGA Res 2200A (XXX) (the Optional Protocol).

¹¹³ International Justice Resource Center 'Human Rights Committee', available at <http://ijrcenter.org/un-treaty-bodies/human-rights-committee/> (accessed 21 October 2021).

In adopting General Comment no. 34, the HRC recognised the importance of the press in a democratic state.¹¹⁴ The HRC states that free press without being censored and hindered or other media, is important to maintain free expression and opinion and the pleasure of other rights contained in the ICCPR. The right to free press is one of the fundamentals of a democratic country.¹¹⁵ The HRC encourages states members to promote a free and distinct media.¹¹⁶ The HRC provides that to avoid contravention of the right to free press, the government should not have dominant control on the media.¹¹⁷ The government must also undertake necessary action to avoid excessive media monopoly or intensity by privately governed media companies in monopolistic positions that can be detrimental to a variety of views and sources.¹¹⁸

The HRC has made a comment on limitation of the right to free press. It provides that a member state may act according to a lawful purpose to rationalise the provision limiting freedom of the press, may only act so by showing in precise and customised approach the exact nature of that danger, and the requirement and proportionality of the certain conduct utilised, discovering a straight and instant link among the danger and the expression.¹¹⁹

In exercising its responsibilities, the HRC has heard different communications concerning the right to free press. One of those communications is *Marques de Morais v Angola*,¹²⁰ where the applicant was apprehended for 40 days without knowing any formal charges against him. The applicant was found guilty after trial for defamation and slander for piece of writing about news of corruption by the president of Angola.¹²¹ The HRC found that the conviction was not proper in terms of international law. The HRC highlighted that a free and unrestricted press or other media is vital important in a democratic country. The HRC stated that the president of the state can be opposed and

¹¹⁴ Paragraph 13 of the General Comment No. 34 on “Article 19: Freedom of Opinion and Expression”, UN Human Rights Committee, CCPR/C/GC/34, 2011 (General Comment No. 34).

¹¹⁵ As above.

¹¹⁶ Paragraph 14 of the General Comment No. 34.

¹¹⁷ Paragraph 40 of the General Comment No. 34.

¹¹⁸ Paragraph 40 of the General Comment No. 34.

¹¹⁹ Paragraph 21 of the General Comment No. 34).

¹²⁰ (Communication No. 1128/2002), UN Doc CCPR/C/83/D/1128/2002 (2005).

¹²¹ *Morais v Angola* (n 120 above) para 2.3-2.12.

criticised.¹²² The courts in Angola incorrectly did not permit the applicant to allege accuracy as a justification to the defamation charge. Therefore, Angola infringed the rights of the applicant contained in article 19 of the ICCPR.¹²³

However, that does not mean that in every communication, the HRC will always find in favour of the journalist. In one of its communications, the HRC restricted the safeguard for wrong journalism, by founding that the rights of a journalist have not infringed, by a court decision of defamation originated on allegations of corruption for which the clamant, the university professor had been discharged in a criminal trial.¹²⁴

The HRC face different challenges in enforcing this right, one of the challenges were demonstrated in *Kusherbaev v Kazakhstan*.¹²⁵ In this communication, the applicant was employed by an independent newspaper which published a piece of writing concerning the position of Kazakhstan in the world economy because of the choice to prohibit grain exports by the government. The piece of writing was more focused on a parliamentary member of the country, which results in legal action against the journalist. The parliamentary member succeeds in claiming defamation against the applicant.¹²⁶ The HRC did not have jurisdiction in this matter. It merely outlined comments in favour of free journalism. The HRC held that the press has a very important duty to give meaning to the facts for the purpose of informing the public and participate on issues of public essential. There are small limitations on political arguments. The HRC states that grain export was a matter of public importance because the country was a major grain producer. The position of a parliamentary member in that circumstance was under the duty of journalist to report.¹²⁷ The lack of jurisdiction of the HRC means that it cannot give recommendation in this communication.

The HRC in most communications has stressed out the value of free press in a democratic state, as discussed above. However, even though the HRC is robust in enforcing the right to free press, lots still to be done to realise this right in the UN level.

¹²² *Morais v Angola* (n 120 above) para 6.1, 6.7 & 6.8.

¹²³ *Morais v Angola* (n 120 above) para 6.5, 6.6 & 7.

¹²⁴ *Allakulov v Uzbekistan* (Communication No. 2430/2014), UN Doc CCPR/C/120/D/2430/2014 (2017).

¹²⁵ (Communication No. 2027/2011), UN Doc CCPR/C/107/2027/2011 (2013).

¹²⁶ *Kusherbaev v Kazakhstan* (n 125 above) para 3.5-3.8.

¹²⁷ *Kusherbaev v Kazakhstan* (n 125 above), para 33 & 3.7.

2.3.2. The right to freedom of the press under the United Nations Human Rights Council

The United Nations Human Rights Council (the UNHRC) is the institution of the UN in created on 15 March 2006 to take the position of the United Nations Commission on Human Rights (the UNCHR). The UNCHR consist of forty-seven members.¹²⁸ The United Nations Universal Periodic Review (the UN-UPR) is a mechanism of the UNHRC that was introduced in 24 October 2005 United Nations reform process.¹²⁹ It was further recognised by the General Assembly Resolution 60/251 on 03 April 2006. The UP-UPR periodically investigates the human rights execution by all one hundred and ninety-three UN member states. Countries are reviewed every four years.¹³⁰

The review of a state comprises of three documents. A national document presented by the state under review. A collection of the United Nations statements of the state being reviewed presented by the Office of the United Nations High Commissioner for Human Rights (the OHCHR). The last document is a synopsis of information presented by other stakeholders.¹³¹ For the aim of this study and in the notice of their importance to the right to free press, the study will concentrate on the national report of Tanzania, report submitted by Global Campaign for Free Expression and the Report of the Working Group on the Universal Periodic Review to the UNHRC, about the status of the right to free press in Tanzania, in which the recommendations concerning the right to free press are well articulated.

The United Republic of Tanzania submitted its national report to the UNHRC on 19 July 2011.¹³² Tanzania submitted that the right to free press is embraced under both

¹²⁸ T Rathgeber 'Performance and Challenges of the UN Human Rights Council' (2013) *FRIEDRICH EBERT STIFTUNG* 3.

¹²⁹ 'In Lager Freedom: Towards Development, Security and Human Rights for All', Report of the Secretary-General (A/59/2005), 21 March 2005; World Summit Outcome, General Assembly Resolution 60/1, 24 October 2005.

¹³⁰ T Bejar & E Dike 'A Practical Guide to the United Nations' Universal Periodic Review (UPR)' (2010) *Human Rights Project at the Urban Justice Center* 5.

¹³¹ United Nation Office of the High Commissioner for Human Rights (OHCHR) 'Universal Periodic Review: A Practical Guide for Civil Society' (2014) 2.

¹³² Human Rights Council, Working Group on the Universal Periodic Review, Twelfth Session, Geneva, 3—14 October 2011: Resolution adopted by Human Rights Council TZA/1, National Report Submitted in

Constitutions of Tanzania and Zanzibar. The Media Council of Tanzania protects the rights of media practitioners.¹³³

On October 2011, the UNHRC considered the report of Tanzania, presented by an international non-governmental organization called Global Campaign for Free Expression (ARTICLE 19). The report is about Tanzania's compliance with international human rights obligation on the right to free speech and free information. ARTICLE 19 found that Tanzanian laws are basically contrary with regional and international scales on free speech. ARTICLE 19 also discovered that there is media censorship and other violence against freedom of the media. ARTICLE 19 recommended to the UNHRC, that it must urge the government of Tanzania to adopt and implement a full program on reform of freedom of the expression.¹³⁴

On 08 December 2011, the UNHRC compiled a Report of the Working Group on the Universal Periodic Review (the WG-UPR) of the United Republic of Tanzania.¹³⁵ Tanzania presented to the WG-UPR, that it is devoted to review laws regulating freedom of the press in Tanzania. The WG-UPR heard that Tanzania is a country which highly respects the right to free press. According to Tanzania, this is demonstrated by high volume of privately owned print media companies.¹³⁶ The UNHRC is concerned about the limitations on freedom of the press in Tanzania.¹³⁷ The UNHRC conclude that Tanzania must act together with the media and other role players to guarantee that all governments stakeholders must appreciate and understand the safeguard of the right to free press in terms of the Constitution.¹³⁸ The UNHRC urges Tanzania to stop direct and indirect limitation on free speech and implement relevant steps to avoid intimidation

Accordance with Paragraph 15(a) of the Annex to Human Rights Council Resolution 5/1, A/HRC/WG.6/12/TZA/1, General, on 19 July 2011.

¹³³ (n 132 above) para K.1.

¹³⁴ The United Republic of Tanzania, ARTICLE 19's Submission to the UN Universal Periodic Review, For Consideration at the Twelfth Session of the UPR Working Group, October 2011, <https://www.ohchr.org> (accessed 25 September 2021).

¹³⁵ Human Rights Council, Agenda item 6, Universal Periodic Review: Resolution adopted by Human Rights Council 19/4, Report of the Working Group on the Universal Periodic Review of the United Republic of Tanzania, A/HRC/19/4, General, on 8 December 2011.

¹³⁶ (n 135 above) para 18.

¹³⁷ (n 135 above) para 58 & 67.

¹³⁸ (n 135 above) para 85 & 73.

of journalists.¹³⁹ The UNHRC recommended to the Unitary Republic of Tanzania, that it must repeal its laws that that limits freedom of the press, and creates laws that will protect this right in harmony with the international human rights standards.¹⁴⁰

2.3.3. The right to freedom of the press under United Nations: soft law

The right to free press is openly and implicitly declared by some international soft laws. There will be a detailed discussion of the Resolutions made affecting the right to free press and international report which discussed the defence and realisation of the right to free press world-wide: United Nations General Assembly: Resolution A/RES/68/163; United Nations Human Rights Council: Resolution A/HRC/RES/44/12; United Nations General Assembly A/HRC/22/17/Add.4; and Worlds Trends in Freedom of Expression and Media Development: Paris in 2018.

2.3.3.1 General Assembly Resolutions

2.3.3.1.1. United Nations General Assembly: Resolution A/RES/68/163

In 18 December 2013, the United Nations General Assembly firmly acknowledged the safety of journalists and the matter of impunity by adoption of Resolution 68/163.¹⁴¹ The General Assembly criticises clearly all violence against journalists and media employees.¹⁴² The states parties are urged to inhibit attacks against journalists and other media employees by successful investigating all suspected attacks against journalists and media employees under their borders and to penalised offenders of those offences and provide necessary remedies to the victims.¹⁴³

States must promote an enabling and protected surroundings for journalists to function their works freely and without unwarranted influence, by a way of: statutory approach; awareness-raising about international humanitarian and human rights law duties and obligations regarding the protection of journalists; the observing and report of violence

¹³⁹ (n 135 above) para 86 & 42.

¹⁴⁰ (n 135 above) para 86, 40, 86, 41, 86 & 43.

¹⁴¹ Resolution adopted by the United Nation General Assembly on 18 December 2013 [on the report of the Third Committee (A/68/456/Add.2)] 68/163. The safety of journalists and the issue of impunity.

¹⁴² (n 141 above) para 2.

¹⁴³ (n 141 above) para 5.

against journalists; criticising violence in public; and securing the necessary funds to investigate and brought to justice such violence.¹⁴⁴

2.3.3.1.2. United Nations Human Rights Council: Resolution A/HRC/RES/44/12

Resolution 44/12 was approved and adopted by the UNHRC in 16 July 2020.¹⁴⁵ The Resolution emphasises the right to free speech and opinion, and all other rights which fall under its umbrella, including the right to free press.¹⁴⁶ It reaffirms its ongoing worry that contraventions of the right to free press still taking place, frequently with impunity, and are assisted and motivated by the misuse of states of emergency.¹⁴⁷ The UNHRC robustly criticises the violence, threats and reprisals targeting and against, disappearance, torture, arbitrary detention, intimidation, criminalising and murdering any person, including journalists and other media employees for reporting and searching for information on human rights infringements and abuses.¹⁴⁸

The Resolution emphasises that a democratic state is based on defence of the right to free speech and opinion, and that unwarranted restraints on the right to liberty of searching for, accepting and pass on information damage the rule of law and democracy by inhibiting attempts intended at holding state administrations responsible and revealing corruption.¹⁴⁹

The states are urged to protect, promote and guarantee the complete pleasure of the right to free press, and to undertake all necessary approaches to avoid and to put a stop to infringements and abuses of the right to free press, including guarantying those necessary domestic pieces of legislations are in harmony with their international human rights duties and is successfully enacted.¹⁵⁰ States must ensure safety of journalists and

¹⁴⁴ (n 141 above) para 6.

¹⁴⁵ Human Rights Council Forty-four session, Agenda item 3, Promotion and protection of all human rights, civil, political, economic, social, and cultural rights, including the right to development: Resolution adopted by the Human Rights Council 44/12, Freedom of opinion and expression, A/HRC/RES/44/12: General 16 July 2020.

¹⁴⁶ (n 145 above) para 1.

¹⁴⁷ (n 145 above) para 3.

¹⁴⁸ (n 145 above) para 4.

¹⁴⁹ (n 145 above) para 7.

¹⁵⁰ (n 145 above) para 8(a).

other media employees and that confidentiality of sources of journalists must be protected.¹⁵¹

2.3.3.1.3. United Nations General Assembly A/HRC/22/17/Add.4

In 11 January 2013, Resolution 22/17/Add.4 was approved and adopted by the United Nations General Assembly.¹⁵² This Resolution has been adopted after the 2008 expert seminar on the connection among articles 19 and 20 of ICCPR, in relation to the right to free speech and encouragement of hatred. The Office of the High Commissioner for Human Rights (OHCHR) prepared, in 2011 and 2012, a progression of expert seminars on the banning of encouragement to religious, racial or national hatred, in which statutory models, judicial policies and practices in this subject were exploited.¹⁵³

The engagements in different seminars discover that there is a *lacuna* on banning of encouragement of hatred in various domestic legal frameworks worldwide. Where there is law that prohibits encouragement of hatred, most of terminology concepts that are used are often not in harmony with article 20 of the ICCPR.¹⁵⁴ The Resolution recommend that states must guarantee that their national legal framework on encouragement of hatred are directed by explicit reference to article 20 of the ICCPR and must also defines the key concepts.¹⁵⁵

States, society and media have joint duty to guarantee that actions of encouragement to hatred are brought to light in contrast and dealt ahead with the necessary approaches, in terms of international human rights law.¹⁵⁶ It is significant to protect the media, for the purpose of enabling the right to free speech and the attainment of equality.¹⁵⁷ It is recommended to the states that they must enact a public policy and a governing

¹⁵¹ (n 145 above) para 8(d).

¹⁵² United Nation General Assembly, Human Rights Council Twenty-second session, Agenda item 2, Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General: Annual report of the United Nations High Commissioner for Human Rights; Addendum, Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred, A/HRC/22/17/Add.4, Distr.: General, on 11 January 2013.

¹⁵³ (n 152 above) para 1.

¹⁵⁴ (n 152 above) para 15.

¹⁵⁵ (n 152 above) para 21.

¹⁵⁶ (n 152 above) para 35.

¹⁵⁷ (n 152 above) para 40.

strategy which encourage diversity and pluralism of the media.¹⁵⁸ The Resolution also recommends to other stakeholders that self-regulation is the most relevant approach to tackle professional matters affecting the media, if it is effective.¹⁵⁹ Voluntary professional codes of conduct for the media and journalists must comply with the principle of equality and valuable measures must be undertaken to enact and apply such codes.¹⁶⁰

2.3.3.2. International reports

2.3.3.2.1. Worlds Trends in Freedom of Expression and Media Development: Paris in 2018

On 22 May 2018, the United Nation Educational, Scientific and Cultural Organisation (UNESCO) coordinated a Global Report on Worlds Trends in Freedom of Expression and Media Development (the WFEMD) in Paris. About 44 experts around the world contributed on this report.¹⁶¹

According to UNESCO, the right to free press and the right to access to information are consequences of the general right to free speech and opinion.¹⁶² The right to free press is not restricted to media organisations only. The right to free press includes the free will of all people or organisations to utilise media platforms for the purpose of spreading their expression to the public.¹⁶³ The right to free press requires freedom of the media.¹⁶⁴

The right to free press covers the liberty from unlawful limitation, the free will to select from a plurality of media and the freedom to express oneself publicly without commercial or political intervention.¹⁶⁵ Another unique part of the right to free press that has developed over the years, is safety for public expression. It has also become clear

¹⁵⁸ (n 152 above) para 48.

¹⁵⁹ (n 152 above) para 58.

¹⁶⁰ (n 152 above) para 59.

¹⁶¹ United Nation Educational, Scientific and Cultural Organisation (UNESCO) *World Trends in Freedom of Expression and Media Development* (2018) 8-9.

¹⁶² UNESCO (n 161 above) 20.

¹⁶³ UNESCO (n 161 above) 20- 21.

¹⁶⁴ UNESCO (n 161 above) 21.

¹⁶⁵ UNESCO (n 161 above) 21.

that gender-sensitive considerations are necessitated in the course of all features of the right to free press.¹⁶⁶

The liberty of the media emphasises the thoughts of free press from on high, and freedom makes available a favourable position that takes into consideration bottom-up functions, such as promotion of protection of this privilege and complying with the professional expectations of a journalist.¹⁶⁷ Where the society is to benefit from news that is crafted by professional scales and ethical decision-making, a pluralistic media setting must be independent.¹⁶⁸

Gender equality must be observed in all factors of the right to freedom of the press.¹⁶⁹ Journalism is vital to news media organisation in all platforms. The presence of freedom of the press in its gender-sensitive positions of freedom of the media, pluralism, independence and safety toughens peace, development and democratic practice.¹⁷⁰

2.4. The right to freedom of the press outside the United Nations human rights system

2.4.1. The Johannesburg Principles on National Security, Freedom of Expression and Access to Information (Johannesburg Principles)

On 01 October 1995, one year after the initial democratic elections in South Africa, a group of experts in human rights, International law, and national security under ARTICLE 19, the International Center Against Censorship, in partnership with the Center for Applied Legal Studies of the University of the Witwatersrand, in Johannesburg, approved the Johannesburg Principles on National Security, Freedom of Expression and Access to Information (the Johannesburg Principles).¹⁷¹

¹⁶⁶ UNESCO (n 161 above) 21.

¹⁶⁷ UNESCO (n 161 above) 21.

¹⁶⁸ UNESCO (n 161 above) 21.

¹⁶⁹ UNESCO (n 161 above) 21.

¹⁷⁰ UNESCO (n 161 above) 22.

¹⁷¹ The Johannesburg Principles on National Security, Freedom of Expression and Access to Information (the Johannesburg Principles) was adopted in Johannesburg, South Africa 1995.

Johannesburg Principles emphasises the safeguard of the right to free press.¹⁷² The Johannesburg Principles states that the right to free press can be restricted based on specific reasons, as permitted by international law, including for the safeguard of public safety.¹⁷³ The constraint of the right to free press founded on safety of the public may only be enforced where the state has proved that the restraint is allowed by law and is required in a democratic country to safeguard a lawful public safety concern.¹⁷⁴

Under the state of emergency, the state which is recognised by both international and national level, may impose limitations on the right to free press. However, to the degree rigorously demanded by the emergencies of the circumstance and merely when and for as long as they are not in conflict with other duties of the government imposed by international law.¹⁷⁵

The restrictions of the right to freedom of the press may not be imposed, under any circumstance, as a form of discrimination.¹⁷⁶ The right to free press cannot be restricted only because it distributes statements published by or concerning an institution that the state has proclaimed it to put in danger national security or related matters.¹⁷⁷ The press cannot be banned based on the reason that it publishes or broadcasts information in a certain language, particularly the language of a national minority.¹⁷⁸

The Johannesburg Principles provides that public safety should not be utilised as a ground to induce journalists to expose a secret source.¹⁷⁹ The press must not be under suppression in the concern of safeguarding the safety of the society, apart from the occasion of state of emergency which puts in danger the existence of the state.¹⁸⁰ An individual or media company may not be placed under sanctions, limitations or

¹⁷² Principle 1(b) of the Johannesburg Principles.

¹⁷³ Principle 1(c) of the Johannesburg Principles.

¹⁷⁴ Principle 1(d) of the Johannesburg Principles.

¹⁷⁵ Principle 3 of the Johannesburg Principles.

¹⁷⁶ Principle 4 of the Johannesburg Principles.

¹⁷⁷ Principle 8 of the Johannesburg Principles.

¹⁷⁸ Principle 9 of the Johannesburg Principles.

¹⁷⁹ Principle 18 of the Johannesburg Principles.

¹⁸⁰ Principle 23 of the Johannesburg Principles.

punishments for security-related offence including freedom of the press that are uneven to the seriousness of the definite offence.¹⁸¹

2.5. The right to freedom of the press under the African Union human right system

2.5.1. The African Charter on Human and People's Rights

The African Charter on Human and Peoples' Rights (the ACHPR) was adopted by the Eighteenth Assembly of the Heads of State and Governments of the Organisation of African Unity (the OAU), in 1981. The ACHPR entered into force in 1986.¹⁸² The ACHPR protects different types of rights, such as civil, social, economic and cultural rights.¹⁸³

Article 9(2) of the ACHPR provides that every individual has the right to freely express herself.¹⁸⁴ Unlike international instruments, it does not explicitly embrace the right to free press.¹⁸⁵ Nevertheless, the right to free speech includes the right to free press. Thus, the threats and arrest or detention of journalists, which took place in most African countries, for information published or broadcasted and questions asked, are violation of their right to free speech and publish their thoughts, and the right to information of the society.¹⁸⁶ The press is significant in the progress of the political economy of the African region as it could pinch corruptive activity in early stages.¹⁸⁷

Nevertheless, the right to free press is not unlimited, it is restricted by article 27(2) of the ACHPR. In terms of the said provision, the right must be enjoyed with consideration of the rights of others, general interests, societal safety and morality.¹⁸⁸ This cannot be

¹⁸¹ Principle 24 of the Johannesburg Principles.

¹⁸² African Charter on Human and People's Rights, adopted in Nairobi, on 27 June 1981, entered into force 21 October 1986.

¹⁸³ CE Welch 'The African Commission on Human and Peoples' Rights: A five year-report and assessment' (1992) *Human Rights Quarterly* 43- 45.

¹⁸⁴ Organization of African Unity (OAU), African Charter on Human and People's Rights (Banjul Charter), 27 June 1981, CAB/LEG/67/3 REV. 5, 21 I.L.M. 58 (1982), Entry into force: 21 October 1986, (the ACHPR).

¹⁸⁵ J Limpitlaw (n 100 above) 9.

¹⁸⁶ A Bosi *et al Human Rights in Africa: Legal Perspectives on their Protection and Promotion* (2009) 190.

¹⁸⁷ CW Ogbondah 'Press Freedom and Political Development in Africa' (1994) *Institute for Communication Development and Research (African Council on Communication Education)* 9.

¹⁸⁸ Article 27(2) of the ACHPR.

construed in such a manner that the domestic law can remove the right to express and distribute one's thought-protected by international sphere.¹⁸⁹ The justifications of the restrictions are needed to be precisely balanced with and entirely required for the predictable benefits. The restriction may not corrode the right in a way that the right itself turn out to be deceptive.¹⁹⁰

2.5.2. African Commission on Human and People's Rights

The African Commission on Human and People's Rights (the Commission) has been an important body in realising the rights in the ACHPR, as a monitory body.¹⁹¹ The Commission was formed in 1986, the same year in which the ACHPR came into force. The Commission is in charge of interpreting the ACHPR.¹⁹² The Commission comprised of eleven members, which are chosen by voting at the OAU of Heads of States and Government. The members should be citizens of member states but they are independent from their states.¹⁹³

In terms of the Commission, the provision which vests the government with the power to ban publication, cause censorship critically risks the right to free press and the rights of the community to accept information, which is defended by article 9 of the ACHPR.¹⁹⁴ One of the communications which the Commission shows a strong effort in realising the right to free press, is the communication of *Egyptian Initiative for Personal and INTERIGHTS v Egypt*.¹⁹⁵ In this communication, four women journalist were sexually assaulted and physically attacked throughout the protest for a referendum to change the Constitution of Egypt. The African Commission found that the attacks were intended to suppress females who were part of the protest and discourage political activists in

¹⁸⁹ Bosi *et al* (n 186 above) 191.

¹⁹⁰ As above.

¹⁹¹ Article 30- 44 of the ACHPR.

¹⁹² Article 42(3) of the ACHPR.

¹⁹³ R Gittleman 'The African Charter on Human and Peoples' Rights: A Legal Analysis' 22 (4) *Virginia Journal of International Law* 709.

¹⁹⁴ *Media Rights Agenda and Constitutional Rights Project v Nigeria* COM NO.105/93-128/94-152/96.

¹⁹⁵ Communication No. 323/2006, (2011), para 239-56.

Egypt. The Commission concludes that Egypt infringed the article of the ACHPR by failing to protect journalists.¹⁹⁶

2.5.3. African Charter on Democracy, Elections Governance

In 30 January 2007, the African Union established and adopted the African Charter on Democracy, Elections and Governance (the ACDEG). The ACDEG came into force in February 2012.¹⁹⁷ In terms of the preamble of the ADEG, the primary intention of this African instrument is to advance human rights, universal values and principles of democracy, the right to development and good governance.¹⁹⁸ State members are obliged to execute this Charter in terms of the principle of honouring human rights and democratic principles.¹⁹⁹ The ACDEG provides that member states must advance free press and promote a professional media, for the process of promoting political, social and economic control.²⁰⁰

However, even though there has been ratification and assertion of the right to free press, by most African states, recent occasions have increased growing concerns of authorities-style regressing. This backsliding has taken place in the form of increasing limitations on freedom of the press.²⁰¹

2.5.4. African Court on Human and People's Rights

The African Court on Human and Peoples' Rights was adopted in terms of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (the Court Protocol).²⁰² The African Court has both advisory and contentious jurisdiction vested by article 3 and 4 of the Court Protocol. Article 3(1) of the states that the court in exercising adjudicatory jurisdiction, can hear claims presented to it affecting the application and interpretation of the

¹⁹⁶ *Egyptian Initiative for Personal and INTERIGHTS v Egypt* (n 194 above) para 239-56.

¹⁹⁷ African Charter on Democracy, Elections and Governance, African Union, adopted on 30 January 2007, came into force in February 2012 (the ACDEG).

¹⁹⁸ As above.

¹⁹⁹ Article 3 of the ACDEG.

²⁰⁰ Article 27(8) of the ACDEG.

²⁰¹ C Logan & P Penar 'Are Africans' Freedoms Slipping Away?' (2019) 55 *AFRO BAROMETER: Let the People Have a Say* 3.

²⁰² Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (adopted in 10 June 1998), entered into force in 25 January 2004.

ACHPR, Protocol and any other necessary human rights instruments ratified by the countries affected.²⁰³

In a landmark decision of *Konate v Burkina Faso*,²⁰⁴ the applicant was a contributing editor of the weekly newspaper which published different pieces of writings about the suspected corrupt activities by a public prosecutor.²⁰⁵ The piece of writing alleged that the prosecutor had illegally intervened in cases about suspected unlawful trading in second-hand motors and currency forging.²⁰⁶ The applicant was found guilty for the insult of a Magistrate, defamation and public insult, and was given a sentence of imprisonment of twelve months and ordered to pay fine to the prosecutor.²⁰⁷ The newspaper was suspended for six months by the court.²⁰⁸ The matter was presented to the African Court on behalf of the applicant by an organisation. The court concluded that the infringements of laws on free speech and the press should not be punished by imprisonment sentence, except if there is public incitement to hatred, incitement to international crimes, violence or discrimination or intimidations against an individual or a class of individuals, as a result of certain factors such as nationality, religion, colour or race.²⁰⁹ The court found that Burkina Faso infringed article 9 of the ACHPR and other international instruments that it ratified. The sentence was inconsistent to the intended pursued by the necessary provision of the 'Information Code and the Burkina Penal Code'. The court ordered Burkina Faso to change its statute so that it complies with the necessary provisions of international instruments and to provide a report of its execution approaches before the end of two years.²¹⁰

In *Konate*, the court concurs with the resolution of the African Commission to decriminalise defamation against journalists, which will be discussed below.²¹¹ This decision is important as it lays foundation to discourage African states from enacting laws which promote imprisonment of journalists for defamation.

²⁰³ As above.

²⁰⁴ App No.004/2013/(2014).

²⁰⁵ *Konate v Burkina Faso* (n 204 above) para 3.

²⁰⁶ *Konate v Burkina Faso* (n 204 above) para 3.

²⁰⁷ *Konate v Burkina Faso* (n 204 above) para 5.

²⁰⁸ *Konate v Burkina Faso* (n 204 above) para 6.

²⁰⁹ *Konate v Burkina Faso* (n 204 above) para 165.

²¹⁰ *Konate v Burkina Faso* (n 204 above) para 176.

²¹¹ *Konate v Burkina Faso* (n 204 above) para 151.

2.5.5. Soft law under the African Union human rights system

The right to free press is explicitly and implicitly declared in few numbers of African soft laws. The following, are comprehensive evaluation of the Resolutions prepared affecting the right to free press and a Declaration in which the right to free press was emphasised: African Commission on Human and Peoples' Rights Resolution ACHPR/Res. 169 (XLVIII) 10; African Commission on Human and Peoples' Rights Resolution ACHPR/Res.122 (XXXI) 07; and Declaration of Principle on Freedom of Expression and Access to Information in Africa.

2.5.5.1. African Commission on Human and People's Rights Resolutions

2.5.5.1.1. African Commission on Human and People's Rights Resolution ACHPR/Res. 169 (XLVIII) 10

On 24 November 2010, the African Commission on Human and People's Rights approved and adopted Resolution 169 (XLVIII) 10.²¹² The Resolution provides that all state members must strike down their Laws on insults laws or criminal defamation which has negative impact on free speech and press. The Resolution calls on the states to abstain from enacting limitations that are contravening the right to free speech. The Resolution recommends that journalists and other media employees to adhere to the principles of ethical journalism and values in collecting, reporting and explaining reliable information.²¹³

2.5.5.1.2. African Commission on Human and People's Rights Resolution ACHPR/Res.122 (XXXI) 07

On 28 November 2007, the African Commission on Human and People's Rights approved and adopted Resolution 122 (XXXI) 07.²¹⁴ The Resolution was about renewing the term of the Special Rapporteur on freedom of expression in Africa. The

²¹² African Commission on Human and People's Rights 48th Ordinary Session, 169 Resolution on Repealing Criminal Defamation Laws in Africa- ACHPR/Res. 169 (XLVIII) 10, 24 November 2010.

²¹³ African Human Commission on Human and People's Rights Resolution, available at <http://www.achpr.org/session/resolution?id=343> (accessed 26 September 2021).

²¹⁴ African Commission on Human and People's Rights, meeting at its 42nd Ordinary Session, 122 Resolution on the Expansion of the Mandate and Re-appointment of the Special Rapporteur on Freedom of Expression and Access to Information in Africa- ACHPR/Res. 122 (XXXI) 07, 28 November 2007.

Special Rapporteur is mandated to examine domestic pieces of legislation, policies and practice in state parties. To determine whether there is conformity with free speech and access to information standards in general. The Special Rapporteur must give a state party an advice in regards to the matters that affect free press and speech in general. The Special Rapporteur must embark on fact-finding missions to state parties where there are general contraventions of the right to free speech and formulate community involvements on the infringements. The Special Rapporteur must also embark on promotional state missions concerning freedom of expression. The Special Rapporteur must observe a suitable record of the infringement of the right to free speech and rejection to access to information and submit a report to the Commission.²¹⁵

2.5.5.2. African Commission on Human and People’s Rights Declaration

2.5.5.2.1 Declaration of Principle on Freedom of Expression and Access to Information in Africa

On 10 November 2019, the African Commission on Human and People’s Rights approved and adopted the Declaration of Principle on Freedom of Expression and Access to Information in Africa (the DPFEAIA) to replace the Declaration on Principles of Freedom of Expression in Africa (the Declaration), which was adopted in 10 November 2002.²¹⁶

The DPFEAIA emphasises the significance of the protection of the right to free speech and access to information.²¹⁷ The right to free speech does not require state or private monopoly of the news media.²¹⁸ The states must undertake positive obligations to encourage a diverse and pluralistic media.²¹⁹ The states must protect the right to ascertain different types of independent media, including news media.²²⁰ Media registration system must only be done for administrative purpose, not to inflict

²¹⁵ African Human Commission on Human and People’s Rights Resolution, available at <http://www.achpr.org/session/resolution?id=343> (accessed 26 September 2021).

²¹⁶ The Declaration of Principles on Freedom of Expression and Access to Information in Africa was adopted in the 65th Ordinary Session of the African Commission on Human and People’s Rights in 10 November 2019 in Banjul, The Gambia (the DPFEAIA).

²¹⁷ Principle 1 of the DPFEAIA.

²¹⁸ Principle 11(1) of the DPFEAIA.

²¹⁹ Principle 11(3) of the DPFEAIA.

²²⁰ Principle 12(1) of the DPFEAIA.

unnecessary fees and other limitations on the media.²²¹ States must promote editorial independence of media and inhibit commercial and other interferences of the media.²²²

The DPFEAIA impose an obligation to the states to promote media self-regulation which is neutral, speedy, cost-effective, and encourage high values in the media.²²³ The media must develop the Codes of ethics and conduct. The development process of the Codes must be transparent and participatory in nature. The Codes of ethics and conduct must be actually enacted to guarantee the promotion of highest standards of professionalism by the media.²²⁴ The states can also promote co-regulation to media as a balance to self-regulation.²²⁵ The public complaints system for news media must be extensively accessible and resolute in harmony with the enacted rules and codes of conduct.²²⁶ The regulatory institution responsible for receiving complaints, must be safeguarded against commercial, political or other unwarranted intervention.²²⁷

Journalists and other media role players must be protected against unwarranted limitations and must be free to join any union or association.²²⁸ States must ensure the safety of journalists and other media role players.²²⁹ States must undertake steps to avoid violence on journalists and other role players.²³⁰ States must undertake legal and other steps to examine, put on trial and penalise offenders of crimes against journalists and other media role players, and the government must be liable for actions of law enforcement.²³¹ States must respect journalists and other media role players in occasions of armed conflicts.²³²

The states must guarantee that laws that affect defamation must not hold accountable journalists and other media role players for accurate information or information which

²²¹ Principle 12(2) of the DPFEAIA.

²²² Principle 12(3) of the DPFEAIA.

²²³ Principle 16(1) of the DPFEAIA.

²²⁴ Principle 16(2) of the DPFEAIA.

²²⁵ Principle 16(3) of the DPFEAIA.

²²⁶ Principle 18(1) of the DPFEAIA.

²²⁷ Principle 18(2) of the DPFEAIA.

²²⁸ Principle 19 of the DPFEAIA.

²²⁹ Principle 20(1) of the DPFEAIA.

²³⁰ Principle 20(2) of the DPFEAIA.

²³¹ Principle 20(4) & (5) of the DPFEAIA.

²³² Principle 20(7) of the DPFEAIA.

are justifiable to construe in the circumstances.²³³ Public officials must accept high rate of disapproval.²³⁴ The punishments must not be too harsh as to negatively influence the right to free speech.²³⁵ The states must evaluate all criminal limitations to content in order to guarantee that they are rational and abide with international human rights law and values.²³⁶ The states must remove all laws that criminalise insult, sedition and publication of false news.²³⁷ The states must revise criminal laws on libel and defamation in support of civil punishments.²³⁸ The enforcement of imprisonment sentences for the crime of libel and defamation are an infringement of the right to free speech.²³⁹

2.6. The right to freedom of the press outside the African Union Human Rights System

2.6.1. Declaration of Table Mountain on Abolishment ‘Insult Laws’ and Criminal Defamation in Africa and Setting a Free Higher on the Agenda

The Declaration of Table Mountain on Abolishment ‘Insult Laws’ and Criminal Defamation in Africa and Setting a Free Higher on the Agenda (the Declaration of Table Mountain), created by the World Editors Forum and World Association of Newspapers and News Publishers in 6 June 2007.²⁴⁰ The Declaration of Table Mountain provides that African states must acknowledge the non-separation of freedom of the press and their duties to comply with their dedications to African and international standards defending the safety, liberty and impartiality of the press. The declaration urges African nation to remove ‘insult’ and criminal defamation laws. African countries must encourage highest standards of freedom of the press.²⁴¹

²³³ Principle 21(1)(a) of the DPFEAIA.

²³⁴ Principle 21(1)(b) of the DPFEAIA.

²³⁵ Principle 21(1)(c) of the DPFEAIA.

²³⁶ Principle 22(1) of the DPFEAIA.

²³⁷ Principle 22(2) of the DPFEAIA.

²³⁸ Principle 22(3) of the DPFEAIA.

²³⁹ Principle 22(4) of the DPFEAIA.

²⁴⁰ Declaration of Table Mountain: Abolishing ‘insults Law’ and Criminal Defamation in Africa and Setting a Free Press Higher on the Agenda, The World Association of Newspapers and Publishers 60th meeting & World Newspaper Congress & 14th World Editors Forum (adopted 6 June 2007), Cape Town (the Declaration of Table Mountain).

²⁴¹ As above.

2.6.2. The Windhoek Declaration on Promoting an Independent and Pluralistic African Press

The Windhoek Declaration on Promoting an Independent and Pluralistic African Press (the Windhoek Declaration) was approved and adopted on 3 May 1991 by the United Nations or United Nations Educational, Scientific and Cultural Organisation.²⁴² In terms of the Windhoek Declaration, African states must constitutionally protect the right to freedom of the press.²⁴³ Non-governmental newspapers, magazines and periodicals must receive funding to promote plural and independent press.²⁴⁴ In order to maintain freedom of the press, formation of independent, representative unions of journalists, editors and publishers, must be permitted to all African states.²⁴⁵ The domestic media and laws affecting labour relation of African states must be crafted in such a manner as to guarantee that such agent organisation can be present and attain their essential duties in protection of freedom of the press.²⁴⁶ The Windhoek Declaration calls all African states who have imprison journalists for their professional occupation must be released as soon as possible.²⁴⁷ The collaboration among publishers from Africa, and among publishers from the rest of the world must be supported and promoted.²⁴⁸

2.7. The right to freedom of the press under the SADC human rights system

SADC was established by the Declaration of the Southern African Development Community (the DSADC)²⁴⁹ and the Treaty of the Southern African Development Community (the TSADC) on 17 August 1992, in Windhoek.²⁵⁰ The DSADC and TSADC do not have a clear article that defends the right to free press. The TSADC only states

²⁴² Windhoek Declaration Promoting an Independent and Pluralistic African Press was adopted at a General Conference at its twenty-sixth session, held by United Nations/ United Nations Educational, Scientific and Cultural Organization in Windhoek, Namibia, in 1991, (the Windhoek Declaration).

²⁴³ Paragraph 9 of the Windhoek Declaration.

²⁴⁴ Paragraph 10 & 11 of the Windhoek Declaration.

²⁴⁵ Paragraph 12 of the Windhoek Declaration.

²⁴⁶ Paragraph 13 of the Windhoek Declaration.

²⁴⁷ Paragraph 14 of the Windhoek Declaration.

²⁴⁸ Paragraph 15 of the Windhoek Declaration.

²⁴⁹ Declaration of the Southern African Development Community (adopted on 17 August 1992), Windhoek (the DSADC).

²⁵⁰ Treaty of the Southern African Development Community (adopted on 17 August 1992), Windhoek (the TSADC).

that the state members must realise the principles of democracy, the rule of law and human rights.²⁵¹

On 25 and 26 August 1995, The Southern African Development Community Council of Ministers approved and adopted the Declaration on the Role of Information and Communication in Building the Southern African Development Community (the DRICBSADC).²⁵² According to the DRICBSADC, all States parties must enact their Information and Communication Policies in a way that they will make sure that media and labour relations laws in the community identify the importance for the survival of trade unions or representative associations of journalists, editors and publishers founded to protect freedom of the press. The state parties must enshrine the right to free press in their constitution and promote the presence of free and diverse media.²⁵³

On 14 of August 2001, the Heads of States and governments of SADC approved and adopted the Protocol on Culture, Information and Sport of the Southern African Development Community (the PCISSADC).²⁵⁴ Article 19(2) of the PCISSADC provides that member states must work together to build capacity in the formation of media for the distribution of information and promote information distribution and dissemination by networking of news organisations in the region.²⁵⁵ In terms of the PCISSADC, state parties must embark on required steps to make sure that there are progress of the media that are editorially impartiality and aware of their duties to the community and the rest of the society.²⁵⁶

2.8. Conclusion

This chapter concentrated on the defence and promotion of the right to free press within international, African and SADC human rights systems, and the way in which the necessary organisations responsible with overseeing the execution of these instruments

²⁵¹ Article 4(c) of the TSADC.

²⁵² Declaration on the Role of Information and Communication in Building the Southern African Development Community (adopted 25 and 26 August 1995) (the DRICBSADC).

²⁵³ Paragraph 4 of the DRICBSADC.

²⁵⁴ Protocol on Culture, Information and Sport of the Southern African Development Community (adopted 14 August 2001) (the PCISSADC).

²⁵⁵ As above.

²⁵⁶ Article 20 of the PCISSADC.

has analysed the right to freedom of the press. The SADC human rights system remains the only system under this chapter, which does not have a monitoring body. In terms of international law, every individual has the right to free speech, which includes the right to freedom to receive, look for and communicate information and thoughts of entire types in print or writing, orally, in an art format, or in any media of her option.²⁵⁷ Most international human rights instruments do not clearly cater for the right to free press. The states also have a legal responsibility to defend and advance the right to free press, in harmony with international law and values. The next chapter deals with the promotion and protection of the right to freedom of the press under South African legal framework.

²⁵⁷ Article 19 of the UNDHR & ICCPR.

CHAPTER 3

The promotion and protection of the right to freedom of the press under the South African legal framework

3.1. Introduction

The previous chapter dealt with the protection and promotion of the right to freedom of the press under international, regional and sub-regional instruments, and treaty based bodies and non-treaty based bodies, which supervise the implementation and fulfilment of such right under international human rights system. This chapter concentrates on examining the South African legal framework intended to promote and protect the right to freedom of the press. It provides a historical overview of the right to freedom of the press in South Africa; ratification of international treaties relevant to the protection and promotion of the right to freedom of the press; the constitutional protection of the right to freedom of the press; the role of the press on South African democracy; the regulation of the press; the right to freedom of the press and the court proceedings; instances where the press must have approval from regulatory institution before it can publish or broadcast information or where the press may be prevented to publish or broadcast certain information; and the limitation of the right to freedom of the press.

3.2. Historical perspective of the right to freedom of the press in South Africa

Before 1994, South Africa was a parliamentary supremacy state, which followed a Westminster system. Parliament was sovereign and could enact any legislation which the courts were not empowered to judicially review,²⁵⁸ the courts were only able to strike out the legislation only if the parliament did follow the correct procedure to enact that piece of legislation.²⁵⁹ This power was abused by the apartheid government in trying to regulate the press.

²⁵⁸ *Harris and Others v Minister of the Interior and Another* 1952 (2) SA 428 (A).

²⁵⁹ As above.

3.2.1. Pre-apartheid era

Under this period, courts were able to develop the common-law principle of liability of the press against defamation. In *Willoughby v Mcwade and Others*,²⁶⁰ the court recognised the English Law principle which protects distributors from liability of defamation based on lack of negligence. This principle was confirmed by the court in *Masters v Central News Agency*.²⁶¹

During this period, there were few pieces of legislation which regulated the press. One of those pieces of legislation was the Electoral Consolidation Act.²⁶² The Act provided that any cartoon, report, circular, letter, pamphlet, article, placard, bill, poster or other printed material that was planned or had potential to influence the outcome of an election or by-election to the House of Assembly or provincial council must have the name and address of the individual who has written or created it.²⁶³ This Act was aimed at controlling publication about election.

The other Act was the Commissions Act, which created regulations which placed broad-ranging restraints on the press reporting of operations of commissions.²⁶⁴ It prohibited the press from the attendance of sittings of commissions or obtaining the records of commissions and provided punishments for the publication of statements in relation to the actions of the commission.²⁶⁵ This was one of the legislations which directly violated freedom of the press prior to commencement of apartheid.

3.2.2. Apartheid era

3.2.2.1. Legal principle which affect press

Under apartheid, an individual could attain an interdict to inhibit the press from publishing defamatory statements.²⁶⁶ The press was not allowed to publish matters that

²⁶⁰ 1931 CPD 536.

²⁶¹ 1936 CPD 388.

²⁶² Act 31 of 1946.

²⁶³ Electoral Consolidation Act (n 262 above).

²⁶⁴ Act 8 of 1947.

²⁶⁵ The Commission Act (n 264 above).

²⁶⁶ *Buthelezi v Poorter & Another* 1974 (4) SA 831 (W).

could have defamatory content.²⁶⁷ The principle which protected distributor from liability against defamation was rejected in *Pakendorf en Andere v de Flamingh*.²⁶⁸ In this case the distributors were listed with newspaper owners, publishers, and editors as individuals who are strictly liable for defamation. The distributors of newspaper were now liable for defamation.²⁶⁹ The courts also participated on the prohibition of the press by enforcing controversial pieces of legislations against the press.²⁷⁰

3.2.2.2. Legislative interventions

The apartheid government tried by all means to control what was published by the press. The publication was almost prohibited in every sector of the government. The apartheid government enacted several pieces of legislation which censored the press. The relationship between the press and the state was very sour.²⁷¹ These pieces of legislation were mainly used to threaten the press and compel it to oppress itself.²⁷² The way in which these statutes were made it was difficult for the press, not to break these statutes.²⁷³

The Suppression of Communism Act (the SCA) was enacted in early years of apartheid which commenced in 1948.²⁷⁴ The SCA permitted the banning of publications that supported communism. The SCA defined communism very broadly as to contain any description for what might be taken as radical change.²⁷⁵ The then Governor-General who was latter replaced by State President was vested with the power to prohibit any publication that was intended at advancing communism and banned all newspapers

²⁶⁷ *Neethling v du Preez* 1994 (1) SA 708 (A).

²⁶⁸ 1982 (3) SA 146 (A).

²⁶⁹ *Pakendorf en Andere v De Flamingh* (n 268 above).

²⁷⁰ See *Publications Control Board v William Heinemann, Ltd And Others* 1965 (4) SA 137 (A), para 160E- F. In this case, the court prohibited a book because of the description of sexual activity in the book was "indecent, obscene and objectionable." The decision of the court was based on the provision of the Publications Act 42 of 1974.

²⁷¹ WA Hachten & CA Giffard *The Press and Apartheid: Repression and Propaganda in South Africa* (1984) viii & 3.

²⁷² E Potter *The Press as Opposition: The Political Role of South African Newspapers* (1975) 120.

²⁷³ GB Sperling & JE Mckenzie *Getting the Real Story: Censorship and Propaganda in South Africa* (1990) 68.

²⁷⁴ Act 15 of 1950.

²⁷⁵ The Suppression of Communism Act 15 of 1950 (SCA).

from publishing information regarding communism.²⁷⁶ The newspapers were also prohibited from publishing information regarding organisation which were banned by the Governor-General in terms of the SCA. The banning decisions of the Governor-General in terms of the SCA were not reviewable. Registration of newspapers was only legitimate if newspapers published information at least once a month. Banned newspapers lost the major amount of money which was usually needed when registering.²⁷⁷ The SCA prohibited newspapers from publishing views of prohibited individuals, except if the Minister of Justice provided his approval to do so.²⁷⁸ The SCA also provided that journalists were also not allowed to visit banned individuals for interview. If a journalist were to do so, he would be arrested for inciting the commission of an offence.²⁷⁹

Shortly after the enactment of SCA, Parliament passed the Criminal Law Amendment Act (the CLAA).²⁸⁰ The CLAA banned newspapers from editorially supporting campaigns against the law. In terms of the CLAA, where an individual provided a speech promoting the abolishment of that law, and a court of law shortly made a finding that the speech was revolutionary and infringed the law, a newspaper that had promoted the movement could be held accountable.²⁸¹

The Public Safety Act (the PSA) allowed the government to declare state of emergency without approval by the Parliament.²⁸² The PSA empowered the Minister to shut down newspaper and prohibit publication of information which has the potential of undermining the administrators, inciting the society to resist the government, or causing sensations of aggression among parts of the population.²⁸³ The government used the PSA to ban the publication, printing and distribution of any statements which was regarded as revolutionary, through Regulations of state of emergency. Newspapers

²⁷⁶ Section 6 of the SCA.

²⁷⁷ n 275 above.

²⁷⁸ Section 11 of the SCA.

²⁷⁹ As above.

²⁸⁰ Act 8 of 1953.

²⁸¹ Criminal Law Amendment Act (n 279 above).

²⁸² Section 3 of Public Safety Act 3 of 1953 (PSA).

²⁸³ Regulation 11 of the PSA.

were also not allowed to reveal the identities of those who were detained or arrested in the course of the state of emergency.²⁸⁴

The police had the discretion to require journalists to provide their sources and if they declined, they were imprisoned, in accordance with the Criminal Procedure Act (the CPA).²⁸⁵ The imprisonment was for eight days, which was later expanded to one year. If that journalist continues to refuse to reveal his sources, the imprisonment could be added annually. The police were further provided with the power to receive information affecting a state security or crime that it was found in other sources by newspapers prior to publication of such information.²⁸⁶

The Official Secrets Act (the OSA) criminalised the publication by any newspaper about official confidential statements that could possibly be utilised by an enemy of the state.²⁸⁷ The Minister of Justice was able to recognise any place as a restricted area, in which no photographs or news reports could be allowed. The OSA allowed the court procedure to take place in closed doors.²⁸⁸

The Riotous Assembly Act (the RAA) vested the government with the power to prohibit publications that are regarded as provoking racial tensions among various sections of community.²⁸⁹ Section 2 of the RAA criminalised printing, publishing and advertising about an assembly which has been prohibited. If the newspaper prosecuted under the RAA, it was required to prove that the statements that it published did not incite that hostility.²⁹⁰

The General Law Amendment Act (the GLAA) banned the publication of any statements affecting the Bureau for State Security or affecting the relationship existing among any individual and the Bureau.²⁹¹ The publication of any type of information from an

²⁸⁴ Regulation 9 of the PSA.

²⁸⁵ Act 56 of 1955.

²⁸⁶ Criminal Procedure Act (n 285 above).

²⁸⁷ Act 16 of 1956.

²⁸⁸ The Official Secrets Act (n 287 above).

²⁸⁹ Act 17 of 1956.

²⁹⁰ The Riotous Assembly Act (n 289 above).

²⁹¹ Act 76 of 1962.

individual banned from attending gatherings was a criminal offence in terms of the GLAA.²⁹²

The Defence Amendment Act (the DAA) criminalised the publication of naval or military action lacking the express given consent of the Minister of Defence or other empowered person.²⁹³ The DAA further banned the publication without consent of any information, rumour or comment affecting any affiliate of the South African Defence Force or any force of another state, intended to humiliate or prejudice the state in its foreign dealings or to fear or sadden the community.²⁹⁴

The Prison Act prohibited newspapers from publishing any photograph, sketch of prisoners or prisoner, including publishing untrue statements about prisoners, former prisoners, prisons or their authority.²⁹⁵ The Prison Act was enacted to place an intense burden of proof on the press, when it makes publications on the matters concerning prison conditions. The burden was so intense to the point where publications on those matters were almost entirely stopped.²⁹⁶

The Terrorism Act stated that leading articles, stories, columns, letters to the editor and advertisements should not include subject that promoted or persuaded individuals to commit terrorism.²⁹⁷ Journalists who had terrorism activities information may be detained for ever without charge or trial against them.²⁹⁸

Newspaper where required to state their proposed nature and contents; even addresses and prior connections of their editors and other individuals, in terms of the Newspaper and Imprint Registration Act (the NIRA).²⁹⁹ If the Minister of Justice deemed that section 6 of Suppression of Communism Act could be employed against a new newspaper in

²⁹² The General Law Amendment Act (n 291 above).

²⁹³ Act 85 of 1967.

²⁹⁴ The Defence Amendment Act (n 293 above).

²⁹⁵ Act 8 of 1959.

²⁹⁶ The Prison Act (n 295 above).

²⁹⁷ Act 83 of 1967.

²⁹⁸ The Terrorism Act (n 297 above).

²⁹⁹ Act 63 of 1971.

future, wanting to register under the NIRA, the newspaper was ordered to pay a special deposit of R10 000-R20 000.³⁰⁰

The Publications Act created a censorship board that evaluated books, newspaper and magazines and decided what was ready for publication.³⁰¹ The state bureaucracy had the power to prohibit current and future publications which were regarded as undesirable. The decisions which were taken under this Act were not appealable in the court of law. If a person is found with undesirable materials was guilty of a crime which was punished by imprisonment or a fine.³⁰²

3.2.2.3. State of emergency

Government could invoke the state of emergency in accordance with the Public Safety Act (the PSA). Section 3 of the PSA permitted the government to promulgate state of emergency Regulations.³⁰³ The government was able to create more Regulations to increase restriction against the press.

3.2.2.3.1. The first state of emergency

The first state of emergency was declared in 1960 by the Governor-General after the Sharpeville massacre. In terms of the state of emergency Regulations, it was illegal to publish the names without authorisation by the Minister of Interior, of those who are detained at that time.³⁰⁴ It was an offence to distribute information which can possibly undermine the authority of the government. The Minister of Interior was vested with the power to shut down any newspaper if he believes that it had systematically published matter of revolutionary nature.³⁰⁵

³⁰⁰ The Newspaper and Imprint Registration Act (n 299 above).

³⁰¹ Act 42 of 1974.

³⁰² The Publications Act (n 301 above).

³⁰³ The Public Safety Act 3 of 1953.

³⁰⁴ JJ Paust 'International Law and Control of the Media: Terror, Repression and the Alternatives' (1978) 53 (4) *Indiana Law Journal* 637.

³⁰⁵ As above.

3.2.2.3.2. The second state of emergency

The second state of emergency was declared in 1986. In terms of Regulation 9 of the PSA, journalists were not allowed to take photographs of ‘unrest situations’ and/or of police officers and to publish them.³⁰⁶ Regulation 10 of the PSA created a new crime which was about publishing, displaying or distributing a revolutionary information and was punished by imprisonment for ten years or R20 000 fine.³⁰⁷ Regulation 11 of the PSA provided that the Minister of Law and Order had the authority to permit that all copies of a publication be taken, if the Minister believed that it comprised of revolutionary information or statements which might place the security of the society in danger.³⁰⁸

The government further amended Regulations with new ones, which invented a ‘publication control’ system. The new system required the editors to obtain approval from the state before publishing certain kinds of information.³⁰⁹ The Minister had power, through notice of maximum of three months, to prohibit future editions of a publication. The violation of media Regulations was reported to the Minister of Home Affairs.³¹⁰ Journalists employed by news agencies were required to register with the Department of Home Affairs. If the journalist failed to do so, within the stipulated duration, the news agency was closed.³¹¹ The news agency had to submit a list of publications and individuals implicated to the Department of Home Affairs.³¹² During the last year of state of emergency, the government imposed emergency Regulations that provided that journalists, editors and newspaper would be subjected to fine of R20 000 or ten years’ imprisonment, if they contravened states of emergency Regulations. What makes these new Regulations different to other previous Regulations was that the power to determine the contravention of these Regulations was now vested to the courts.³¹³

³⁰⁶ n 303 above.

³⁰⁷ Paust (n 304 above).

³⁰⁸ Paust (n 304 above).

³⁰⁹ J Corrigan *et al* *Subverting Apartheid: Education, Information and Culture under Emergency Rule* (1990) 16.

³¹⁰ Corrigan *et al* (n 309 above) 16.

³¹¹ Corrigan *et al* (n 309 above) 28.

³¹² Corrigan *et al* (n 309 above) 28.

³¹³ Corrigan *et al* (n 309 above) 28.

3.2.3. Transitional period to democracy

The transitional period to democracy started when the Interim Constitution started to be enforceable in 1994.³¹⁴ The Constitution was now a supreme law of the country in harmony with section 4 of the Interim Constitution.³¹⁵ The right to free press was first recognised in section 15 (1) of the Interim Constitution.³¹⁶ Apartheid restrictions to the press were now removed. The defamatory information published by the press was now protected by the Constitution even if there are not true, except if the claimant proves that the information was unduly construed.³¹⁷ Regulations which banned the publication of a report of a commission of inquiry were now unconstitutional.³¹⁸

One of the cases about freedom of the press which was heard during the transition period is *National Media Limited and Others v Bogoshi*.³¹⁹ In this matter the defendants were an owner and publisher, editor, distributor, and the printer of the *City Press* newspaper. The defendants were being sued for defamatory information which was published in the newspaper.³²⁰ The defendant applied to amend their plea which originally stated that the information were considerably accurate and had been distributed for the advantage of the public. The proposed amendments sought to introduce three defences namely, the third defendant lacks the intention to defame the plaintiff, the fourth defendant did not aim to defame the plaintiff, and that the publication of the information was legitimate and was constitutionally safeguarded by freedom of speech and expression.³²¹ The court of first instance heard the third defence only and held that it is not good in law. The court rejected the amendment of a plea and found that the right to free press under the Interim Constitution did not change the common-law position. The court rejected the application.³²² The appeal to succeed and the appeal court allowed the amendments of the plea. The court held that amendments of

³¹⁴The Constitution of the Republic of South Africa, 1993 (The Interim Constitution).

³¹⁵ The Interim Constitution.

³¹⁶The Interim Constitution.

³¹⁷ *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W).

³¹⁸ *Government of the Republic South Africa v Sunday Times' Newspaper and Another* 1995 (2) SA 221 (T), para 227H- 228A.

³¹⁹ (579/96) [1998] ZASCA 94.

³²⁰ *National Media Limited v Bogoshi* (n 319 above) 2.

³²¹ *National Media Limited v Bogoshi* (n 319 above) 2-3.

³²² *National Media Limited v Bogoshi* (n 319 above) 3.

the plea will allow the plea to have all important arguments for valid defence.³²³ This judgment demonstrates the early impact of the Constitution to freedom of the press.

Under the Interim Constitution, the courts had already recognised the function of the press in the South African community compared to those in apartheid era.³²⁴ In *Government of the Republic South Africa v Sunday Times' Newspaper and Another*, the court described the function of the press in a democratic country. The press search out corruption, untruthfulness and graft wherever it may happen and to show out the individuals responsible. The press is responsible to expose dishonest maladministration and it must participate to the discussion of ideas already suggested. The press must promote communication between the state and citizens.³²⁵

3.3. Ratification of international treaties relevant to the protection and promotion of the right to freedom of the press in South Africa

Treaties are the main expression of international law. Treaties are the main approach of the evolution of the human rights movement. It is only the treaties which can form an international organisation in which all member state can participate and which they may owe obligations.³²⁶ The Vienna Convention on the Law of Treaties (the VCLT) provides that a treaty is an international contract entered into among states in written format and regulated by international law, it can be in one instrument or in two or more connected instruments and in any certain description.³²⁷ 'Ratification', 'acceptance', 'approval' and 'accession' are considered as international acts whereby a state shows that it is agreeing to be bound by a treaty.³²⁸

Section 39(1)(b) of the Constitution is the most important provision when examining the position and effect of international law on South African human rights law.³²⁹ Section 39(1)(b) of the Constitution state that the courts and other necessary institutions are

³²³ *National Media Limited v Bogoshi* (n 319 above) 46-48.

³²⁴ n 318 above.

³²⁵ n 318 above.

³²⁶ HJ Steiner & P Alison *International Human Rights in Context: Law and Politics Morals* (1996) 30.

³²⁷ Article 2(1)(a) of the Vienna Convention on the Law of Treaties; done at Vienna on 23 May 1969; entered into force on 27 January 1980; United Nations, *Treaties Series*, vol. 1155, p.331 (VCLT).

³²⁸ Article 2(1)(b) of the VCLT.

³²⁹ MP Oliver *et al*, *Social Security: A Legal Analysis* (2003) 620.

compelled to refer to international law when construing the chapter 2 of the Constitution.³³⁰ Therefore, section 39 of the Constitution is a component of the basics of South African constitutional framework and is part of the core mechanisms which the Constitution is aimed to do its pioneering function, by demanding that all statutes, customary law and common-law be construed and transformed in terms of the importance, objects and spirit of the Bill of Rights.³³¹

South Africa has ratified the following international treaties, about the right to free press: the ICCPR on 10 December 1998;³³² the ACHPR on 9 July 1996;³³³ the ACDEG on 24 December 2010;³³⁴ and the TSADC on 29 August 1994.³³⁵ All these treaties either explicitly or implicitly defend the right to free press.

3.4. Constitutional protection of the right to freedom of the press

In South Africa, the right to free press is protected as a type of free speech under the Bill of Rights.³³⁶ This protection, however, does not grant the press with special constitutional protection from the rest of the citizens. The courts have in many cases rejected a precise doctrine of 'press exceptionalism'. The fully fledged doctrine of 'press exceptionalism' requires that extraordinary or better protection must be provided to the press below the right to free press.³³⁷ However, the courts have constantly emphasised one of the important aspect of this doctrine, that the press is in a place of significance in safeguarding the right to freedom of the expression on behalf of the public.³³⁸

The constitutional guarantee of the right to free press is created to perform the interest of allowing uncontrolled flow of information to all citizens, which is only doable in an

³³⁰ The Constitution of the Republic of South Africa, 1996 (the Constitution).

³³¹ D Cornell & N Friedman 'In Defence of the Constitutional Court: Human Rights and the South African Common Law' (2011) 5 (1) *Malawi Law Journal* 25-30.

³³² International Covenant on Civil and Political Rights (adopted 16 December 1966), entry to force 23 March 1976, UNGA Res 2200A (XXI) (the ICCPR).

³³³ African Charter on Human and People's Rights (the 'Banjul Charter') (adopted 27 June 1981) OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (the ACHPR).

³³⁴ African Charter on Democracy, Elections and Governance, African Union, adopted on 30 January 2007, came into force in February 2012 (the ACDEG).

³³⁵ Treaty of the Southern African Development Community (adopted on 17 August 1992), Windhoek (the TSADC).

³³⁶ Section 16(1)(a) of the Constitution.

³³⁷ S Woolman & M Bishop *Constitutional Law of South Africa* 2nd ed (2013) 42-34.

³³⁸ Woolman & Bishop (n 337 above) 42-34 & 42-35.

environment where the press is free.³³⁹ The right which is closely associated with the right to free press is the right to access to information.³⁴⁰ The press cannot publish or broadcast without access to information and there cannot be free flow of information without the press.

The purposive scrutiny of section 16 of the Constitution, identifies the confidentiality of journalists sources as a feature of the right to free press. The right to hide the character of informants can be successful only if journalists are safeguarded from being secretly observed on, depending on severe conditions that require spying.³⁴¹ It is obvious that journalists, depending on specific restrictions, are not required to disclose the character of their informants. Free press is a foundation to democracy. Therefore, it is important in doing this societal obligation for the societal benefit, the identity of the sources of journalists must not be disclosed.³⁴² Especially, when the statements so disclosed, would not have been identified in public. This is an important and crucial function of the press. This role is further prominent in emerging South African democracy based on openness, where corruption has turn out to be a disease, that requires to be promoted rather than been removed.³⁴³

3.5. The role of the press on South African democracy

The fact that section 16(1)(a) of the Constitution specifically mention the right to free press, is an apparent sign of the acknowledgment by the Constitution of the important role that the press exercises in creating public view and making information available to the public concerning present occasions.³⁴⁴

The press has an unquestionable essential role in a democratic state. The press has a responsibility to make available information and a place for discussion of thoughts to citizens which is important to the enhancement of a democratic culture. It is a main

³³⁹ *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W).

³⁴⁰ Section 32 of the Constitution.

³⁴¹ *AmaBhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others; Minister of Police v AmaBhungane Centre for Investigative Journalism NPC and Others* [2021] ZACC 3, para 20.

³⁴² *Bosasa Operation (Pty) Ltd v Basson* 2013 (2) SA 570 (GSJ), para 38.

³⁴³ As above.

³⁴⁴ *Islamic Convention v Independent Broadcasting Authority and Others* (CCT36/01) [2002] ZACC 3, para 47.

agent of the distributions of information and thoughts, which made it a very influential organisation in a democracy and have an obligation in terms of the constitution to conduct itself with responsibility, integrity, courage and vigour.³⁴⁵

The press plays a vitally important function of making available to the society information and disapproval concerning all viewpoint of economic, social, political and public activity. It therefore, contributes to the development of public opinion.³⁴⁶ The press provides access to valuable and essential information concerning daily issues of the nation to its citizens. The press has become the agent of the public to communicate their issues to other citizens, to government and to administrative system.³⁴⁷

In the modern society, it is only a few number of individuals who can contribute straight in the debate and resolutions which influence the societal way of living of their community.³⁴⁸ Free press provides the society with one of the best ways of founding and shaping an opinion of the attitudes and thoughts of their political representatives. It provides the politicians with a chance to expose and analyse the distresses of societal view. Therefore, the press allows any individual to contribute in the uninhibited political discussion which is at the exact center of the conception of a democratic community.³⁴⁹

The way in which the press performs its constitutional obligation will have a major effect on the advancement of the democratic state of South Africa. If the press is careful and trustworthy in the carrying out of their constitutional duties, it will strengthen and support the young democracy of South Africa.³⁵⁰ If the press hesitates in carrying out their obligations, the constitutional objectives will be endangered. The Constitution therefore, emphasises and defends the press in the carrying out of its duties to the broader society, mainly in terms of sections 16.³⁵¹

³⁴⁵ *Khumalo and Others v Holomisa* (CCT53/01) [2002] ZACC 12, para 24.

³⁴⁶ *National Media Ltd and Others v Bongoshi* 1998 (4) SA 1196 (SCA), para 24.

³⁴⁷ As above.

³⁴⁸ *McCarton Turkington Breen (a firm) v Times Newspapers Ltd* [2000] UKHL 57.

³⁴⁹ *Castells v Spain* ECtHR Application No. 11798/85 (1992), para 43.

³⁵⁰ As above.

³⁵¹ As above.

3.5.1. The Impact of the Protection of State Information Bill

The Protection of State Information Bill (the Information Bill) is a very controversial Bill.³⁵² The Bill was returned back to Parliament by President Zuma in September 2013, for Parliament to amend its possible unconstitutional provisions.³⁵³ The amended Bill was referred to President Ramaphosa in June 2020, who refused to sign the Information Bill and returned it again to Parliament.³⁵⁴

The intention of the Information Bill is to safeguard the national safety of the country through empowerment of the national executive, different security services, comprising of the military and the police, and those institutions supervising the security services to categorise information into secret, confidential and top secret.³⁵⁵ The Minister of State Security is allowed to provide the power to categorise documents to any state institution or part of the state institution after approval by Parliament. However, this authority cannot be granted to municipalities.³⁵⁶

The Information Bill is based on protection of national security. However, the Information Bill defines national security in a way which is not exact and is too broad. National security comprise of, but not restricted to, intimidations against the Republic of South Africa founded on terrorism and disrupt and actions aimed at disrespecting the ability of the country to react to the exercise of, or the intimidation of the exercise of coercion and the performance of the duties of the country to any foreign state.³⁵⁷ This will probably create an impression to the organs of states in future, that they are empowered to suppress information based on the argument that they are protecting public safety.

³⁵² Bill B 6-2010.

³⁵³ D Smith 'South Africa Secrecy Law Surprise as Zuma Rejects Controversial Bill' (2013) *The Guardian*, available in <https://www.theguardian.com/world/2013/sep/12/south-africa-zuma-secrecy-bill> (accessed on 12 August 2021).

³⁵⁴ A de Klerk 'Ramaphosa Sends 'Secrecy Bill' Back to Parliament' (2020) *Times Live*, available in <https://www.timeslive.co.za/politics/2020-06-11-ramaphosa-sends-secrecy-bill-back-to-parliament/> (accessed on 12 August 2021).

³⁵⁵ Section 11 of the Protection of State Information Bill B 6-2010 (the Information Bill).

³⁵⁶ Section 3(1) of the Information Bill.

³⁵⁷ Section 1(1) of the Information Bill.

The publication or broadcasting of the information which is categorised is a commission of a crime, which is punished by a sentence of up to 25 years of imprisonment.³⁵⁸ This means that the press will not be able to publish or broadcast information related to the state freely because of the fear of imprisonment for a long time, if that information is categorised. Therefore, the provision will affect the role of the press to the South African democratic dispensation in a negative way.

Even though the Information Bill restricts its scope by stating that categorisation of state information must only be done when it is necessary³⁵⁹ and criminalises unlawful categorisation³⁶⁰, it still not clear how the Information Bill will be applied. The Bill also creates defence to those who will be alleged to have violated the Information Bill. They will be required to prove that the published or broadcasted categorised information disclose criminal acts.³⁶¹ It is not clear how they are going to prove that the categorised information contains criminal acts. The Information Bill also provides for a Review Panel to evaluate the categorisation of information which is elected by the Parliament.³⁶² The Panel could have a political influence as it is elected by the Parliament. Therefore its decision could be partial. The Information Bill has a possibility to create a situation like that of apartheid, where the state uses its legislative power to control the press as discussed earlier in this chapter.

3.6. Regulation of the press

3.6.1. Compulsory regulation of the press

3.6.1.1. Films and Publications Board

The Films and Publications Board (the FPB) was established as a juristic person and it carries out its functions, utilises its authorities and performs its obligations vested to it in accordance with the Films and Publications Act or any other law. The FPB must act

³⁵⁸ Section 32 of the Information Bill.

³⁵⁹ Section 8 of the Information Bill.

³⁶⁰ Section 45 of the Information Bill.

³⁶¹ Section 41 of the Information Bill.

³⁶² Section 22 of the Information Bill.

independently and carries out its functions without any influence.³⁶³ The FPB consists of the Chief Operating Officer and Officers. The Chief Operating Officer has a duty to all issues affecting the management and administration of the FPB. The Chief Operating Officer can elect administrative staff and compliance officers. The Chief Operating Officer must present financial statements and annual report. He or she can assign any authority vested in him or her.³⁶⁴

The FPB has three functions. The board must elect a Classification Committee. It must examine an exclusion application in relation to publication, films or games. Lastly, the FPB has a function to examine registration application of an exhibitor or distributor of publications, film or game.³⁶⁵

3.6.1.2. Independent Communications Authority of South Africa

The Constitution states that a national statute must create an independent authority to govern broadcasting in the interest of the public.³⁶⁶ The Independent Communications Authority of South Africa (the ICASA) is founded by section 3 of the Independent Communications Authority of South Africa Act (the ICASA Act).³⁶⁷ ICASA is comprised of seven councillors appointed by the President on the reference by the National Assembly.³⁶⁸

ICASA regulates the broadcasting industry in the interest of the public. It also provides licences to broadcasting service providers and enforces compliance with rules and regulations.³⁶⁹ ICASA protects consumers from unfair business practices and poor quality services. It hears and decides on complaints and disputes presented against licensees. ICASA manages and controls the effective use of radio frequency spectrum.³⁷⁰

³⁶³ Section 3 of the Films and Publications Act 65 of 1996 (the FPA).

³⁶⁴ Section 9A of the FPA.

³⁶⁵ Section 9A of the FPA.

³⁶⁶ Section 192 of the Constitution.

³⁶⁷ Act 13 of 2000.

³⁶⁸ Section 5 of the Independent Communication Authority of South Africa Act 13 of 2000 (the ICASA Act).

³⁶⁹ Section 4 of the Electronic Communication Act 36 of 2005 (the ECA).

³⁷⁰ As above.

3.6.2. Voluntary regulation of the press

In the past, media self-regulation has been created based on different reasons like defending of freedom of the press, professionalisation, legitimacy and credibility.³⁷¹ Media self-regulation is usually the answer to differences between freedom of media and demands of the public for a diverse and information-rich media landscape. Media self-regulation is often created by media organisations and supported by the state.³⁷²

3.6.2.1. The Press Council of South Africa

In South Africa there is a framework of a voluntary independent co-regulation called the Press Council of South Africa (the PCSA), which is created by the Constitution of the Press Council of South Africa (the Constitution of the Press Council).³⁷³ The purpose of a PCSA is to grant adjudication which is cost-effective, impartial and expedition to resolve issues among magazines and newspapers, and members of the community.³⁷⁴ The PCSA only have jurisdiction on the matters which affects those publications which were published by the members of PCSA.³⁷⁵

The PCSA has created complaint procedures which comprised of the Press Ombud, Public Advocate, the Panel of Adjudicators and the Chair of Appeals, which functions independently from the PCSA.³⁷⁶ The Public Advocate is responsible with the mandate of helping members of the public to create their complaints concerning journalistic ethic and conduct at subscriber publications and by subscriber members. The Public Advocate must try to solve the claims by mediating on behalf of the claimant.³⁷⁷ If the Public Advocate does not succeed in solving the complaints, the complaints must be referred to the Press Ombud.³⁷⁸ When the complaints are under the Press Ombud, the Public Advocate has a chance to represent a complainant. If one of the parties is not

³⁷¹ M Edstrom *et al Blurring the Lines: Market-Driven and Democracy-driven Freedom of Expression* (2016) 165.

³⁷² Edstrom *et al* (n 371 above) 165.

³⁷³ The preamble & section 1 of the Constitution of the Press Council of South Africa, 2020 (the Constitution of the Press Council).

³⁷⁴ Section 2 of the Constitution of the Press Council.

³⁷⁵ Section 6.1(a) & (b) of the Constitution of the Press Council.

³⁷⁶ Section 6.1(c) of the Constitution of the Press Council.

³⁷⁷ Section 6.4.1(a) of the Constitution of the Press Council.

³⁷⁸ Section 6.4(a) & 6.4.1(b) of the Constitution of the Press Council.

satisfied by the decision of the Press Ombud, the party can apply for an appeal on the Chair of Appeals.³⁷⁹ If the Chair of Appeals grants a leave to appeal, the Chair of Appeals will arrange an Appeal Panel which will hear the appeal.³⁸⁰

3.6.2.2. Broadcast Complaints Commission of South Africa

Section 54(3) of the Electronic Communication Act acknowledged the Broadcast Complaints Commission of South Africa (the BCCSA) as a formal tribunal.³⁸¹ The BCCSA was established by the Constitution of the Broadcast Complaints Commission of South Africa (the BCCSA Constitution).³⁸² The BCCSA is a voluntary association formed by members of the National Association of Broadcasters. The BCCSA is a self-regulatory body for broadcasters.³⁸³

The purpose of the BCCSA is to guarantee the compliance with high standards in broadcasting, and fast and cost effective settlement of claims against the member of the BCCSA. The BCCSA shall entertain the claim and take necessary measures, if the member of BCCSA and claimant failed to reach a settlement.³⁸⁴ The claims from the public are received by the Registrar, who in turn tries to settle the claims against the members of the BCCSA.³⁸⁵ If the claimant and a member of the BCCSA failed to reach settlement, then the claim is submitted to the BCCSA Tribunal. The BCCSA Tribunal has the power to examine an alleged violation of the Code of Conduct by a member of the BCCSA. The Tribunal can reject the claim; warn or fine any respondent who has been found guilty of a violation of the Code of Conduct; or direct the respondent to broadcast the synopsis and/or correction of the findings of a Tribunal.³⁸⁶ The decision of the Tribunal may be appealed on the Chair of Appeals who will hear the appeal with two

³⁷⁹ Section 6.6.1(a) of the Constitution of the Press Council.

³⁸⁰ Section 6.6.1(d) of the Constitution of the Press Council.

³⁸¹ The ECA.

³⁸² The Constitution of the Broadcast Complaints Commission of South Africa (the BCCSA Constitution), available at <https://www.bccsa.co.za/bccsa-constitution/> (accessed 19 January 2022).

³⁸³ Clause 1 of the BCCSA Constitution.

³⁸⁴ Clause 2 of the BCCSA Constitution.

³⁸⁵ Clause 6.3 of the BCCSA Constitution.

³⁸⁶ Clause 12 of the BCCSA Constitution.

other commissioners who did not seat at the Tribunal that hand down the findings that are being appealed.³⁸⁷

3.7. The right to freedom of the press and the court proceedings

The judiciary in determining publication or broadcasting of their proceedings is guided by the principle of open justice. This principle demands that courts should be open and accessible.³⁸⁸ This principle is essential because it upholds the right of the society to be knowledgeable regarding the way in which the judiciary functions.³⁸⁹ The logical obligation of openness in South Africa comes from the founding values of the Constitution.³⁹⁰ These values direct the country to create a democratic government below the influence of the supremacy of the constitution and the rule of law for the purpose of guarantying accountability, responsiveness and transparency in the manner which judiciary and entire institution of state operate.³⁹¹

In the notion of open justice runs the right of the press to have access to watch and publish or broadcast about the administration of justice and the right to have access to written submissions and papers which are an important element of court procedures in accordance with those restrictions as may be necessary depending on the type of the case, for the purpose of guarantying a trial which is fair.³⁹² The limitation positioned on public access to court proceedings is allowed as an extraordinary event because the group of rights that allows open justice can be limited. These rights can be restricted by law of general application given that the restriction is justifiable and rational.³⁹³

There may be events where the interest of justice in a court entertaining the matter, permits that *viva voce* evidence of classified data connected to police offence analysis techniques or of a minor or to national safety or of specific types of rape survivors be

³⁸⁷ Clause 13 of the BCCSA Constitution.

³⁸⁸ *South African Broadcasting Corporation Ltd v National Director of Public Prosecution and Others* (CCT58/06) [2006] ZACC 15, para 30.

³⁸⁹ As above.

³⁹⁰ *Independent Newspaper (Pty) Ltd v Minister for Intelligence Services (Freedom of Expression Institute as Amicus Curiae) In re: Masetha v President of the Republic of South Africa and Another* (CCT38/07) [2008] ZACC 6, para 39.

³⁹¹ As above.

³⁹² (n 390 above) para 40- 41.

³⁹³ (n 390 above) para 43- 44.

attended to in camera. In every matter, the court will have to examine the contending interests or rights cautiously with the observation to guarantees that the restrictions it positions on open justice is rightfully modified and balanced to the conclusion it needs to accomplish. In the conclusion, the forms of the rights in the Constitution are crafted by the reasonable restrictions that the framework submits and the law authorises.³⁹⁴

3.7.1. Divorce proceedings

Divorce proceeding are special court proceedings which requires a special attention. In terms of the Divorce Act, in divorce proceedings, no individual is allowed to publish information that appeared through the proceedings.³⁹⁵ Only names of the parties, the fact that they were getting divorce and the divorce court decision are permitted to be published. These are done to promote privacy and dignity of divorcing parties.³⁹⁶ The constitutionality of this provision was challenged. It was found that the provision was not under any exclusion contained in section 16(2) of the Constitution and that the section thus violated the right to free press. The violation did not meet the requirements of section 36.³⁹⁷

The reason for this finding is because the provision banned the publication of all information that appears through divorce proceedings, even if that information did not need to be safeguarded.³⁹⁸ The provision was against the open justice principle. The provision permitted the publication of the names of the divorcing parties and their children, this defeats its effort to protect dignity and privacy of divorcing parties. A more effective method to protect these rights was to ban the publication of their identities.³⁹⁹ The current position allows the publication of any information that will not reveal the identities of divorcing parties and their children. To publish their identities is now banned.⁴⁰⁰

³⁹⁴ (n 390 above) para 45.

³⁹⁵ Section 12 of the Divorce Act 70 of 1979.

³⁹⁶ As above.

³⁹⁷ *Johncom Media Investments Limited v M and Others* (CCT 08/08) [2009] ZACC 5, para 23.

³⁹⁸ (n 397 above) para 29.

³⁹⁹ (n 397 above) para 29- 30.

⁴⁰⁰ (n 397 above) para 42.

3.8. Instances where the press must have approval from regulatory institution before it can publish information or where the press may be prevented to publish certain information

Under the common-law, an individual may apply for an interdict to restrain the publication of matters which can be defamatory or information which can have effect on privacy of an individual or contempt of law.⁴⁰¹ This approach is called prior restraints. There have been various provisions that impose prior restraints to the press. One of these provisions is section 16(2)(a) of the Films and Publications Act (the FPA).⁴⁰² This provision provided that, apart from the publisher of a registered newspaper, all individuals who want to make, produce, publish or advertise a publication having sexual activities which infringed or displays disregard for the right to human dignity of any individual, comprises of incitement to cause harm, or humiliates an individual, had to present that publication to the FPB for categorisation before it was published.⁴⁰³

Based on the manner in which it was categorised by the FPB, a publication having sexual activity could be prohibited, published in terms of specific limitations or freely published.⁴⁰⁴ It is also stated that a publisher who is unable to present a publication having sexual activity to the FPB for categorisation prior to publishing it, without considering how it would have been categorised, committed a crime and could be granted a custodial sentence of up to 5 years or a fine or both.⁴⁰⁵

Section 16(2)(a) of the FPA is invalid because it created a method of 'administrative prior consent' for the publication of information on sexual activity. The prior limitation restricted the right to free press in a strict way.⁴⁰⁶ The method of 'administrative prior consent' crafted by this provision shifted the power to make decision to publish information from an individual in whom the right to free expression is vested to an

⁴⁰¹ GE Devinish 'Prior Judicial Restraint and Media Freedom in South Africa-Some Cause for Concern' (2011) (74) *THRHR* 12.

⁴⁰² Act 65 of 1996.

⁴⁰³ Section 16(2)(a) of the Films and Publications Act 65 of 1996 (the FPA).

⁴⁰⁴ Section 24A of the FPA.

⁴⁰⁵ As above.

⁴⁰⁶ *Print Media South Africa and Another v Minister of Home Affairs and Another* (CCT 133/11) [2012] ZACC 22, para 17 & 20.

administrative institution.⁴⁰⁷ The challenge with this kind of method is that administrative institutions are more probable to limit publications when they have to categorise them prior instead of when they have to acquire limitative or disciplinary act following publication.⁴⁰⁸ This kind of method usually results in delays which can inhibit essential information from going to the society or which can leads to information being unnecessary by the moment it is published.⁴⁰⁹ The method of ‘administrative prior consent’ would unavoidably inhibit or limit the flow of information that the public were legally permitted to obtain. This will contravene the right to free speech. This method can be replaced with other less limiting methods such as application for an interdict or presenting publication for categorisation by free will.⁴¹⁰

There instances where publication is banned at all. In terms of Regulation 13 of the Commission Act, publication of findings of any Commission is prohibited.⁴¹¹ In *Government of the Republic of South Africa v Sunday Times Newspaper*, the court found that the Regulation was unconstitutional because it creates prior restraint on the press. The court found that at the time when the Regulation was created it could not probably have been known what different types of the Commission reports would contain.⁴¹²

The prevention of the press from publishing certain information is an extreme intrusion with freedom of the press. However, it is rarely required in severe cases. It must only be allowed where there is a considerable danger of severe prejudice.⁴¹³ The prior restraint of the press may only be allowed, if the severe injustice of the publication might trigger is provable and considerable and there is actual danger that the injustice will happen if the publication happens, and also, that the shortcomings of limiting the uninhibited access of information overshadows its benefit.⁴¹⁴

⁴⁰⁷ As above.

⁴⁰⁸ (n 406 above) para 60.

⁴⁰⁹ (n 406 above) para 60.

⁴¹⁰ (n 406 above) para 55-56 & 98.

⁴¹¹ Act 8 of 1947.

⁴¹² 1995 2 BCLR 182 (T).

⁴¹³ *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* 2007 (5) SA 540 (SCA), para 15.

⁴¹⁴ (n 413 above) para 19.

The courts usually reject to award a prior restraint order, providing that if defamation were to happen, the wronged party must institute an action for damages.⁴¹⁵ However, this does not mean that the court cannot grant prior restraint orders. There are some cases which the court has grant prior restraint order. For instance, in the case of *Jamiat-Ul-Ulama of the Transvaal v Johnic Media Investments Ltd*,⁴¹⁶ the court granted an interdict to prevent the publication of any cartoons portraying Prophet Mohammed, following the publication of Danish cartoons showing the Prophet as a suicide bomber. The center of the court judgment was that portraying the Prophet as a terrorist demonstrates a deficient of human emotional response and it encourage stereotyping and hatred of Muslim on the ground of absolute distinctiveness.⁴¹⁷ In terms of the court, the publication of such kind of cartoons would degrade the dignity of a person whom the Muslim community held in the utmost respect.⁴¹⁸

3.9. Limitation of the right to freedom of the press

The right to free press as any other right is not unlimited. It can be restricted by rights of others and contending social wellbeing.⁴¹⁹

3.9.1. Does section 16 have internal limitation?

There has been a confusion regarding the nature of section 16 as to whether or not it has internal limitation. Section 16(2) of the Constitution presents three exclusions from the safeguard of the right to free expression. These include: 'propaganda for war'; provocation of forthcoming aggression; and support of hatred that is founded on religion, gender, ethnicity or race, and that comprises of provocation to trigger injury.⁴²⁰ The Constitutional Court has answered the question as to whether or not section 16 has internal limitation or not, in *Islamic Convention v Independent Broadcasting Authority and Others*. The court found that section 16(2) does not ban or control hate speech, it

⁴¹⁵ *Mandela v Felati* 1994 4 BCLR 1 (W) 8D, para 9D.

⁴¹⁶ [2006] ZAGPH 12.

⁴¹⁷ *Jamiat-Ul-Ulama of the Transvaal v Johnic Media Investments Ltd* (n 416 above) para 8.

⁴¹⁸ *Jamiat-Ul-Ulama of the Transvaal v Johnic Media Investments Ltd* (n 416 above) para 9.

⁴¹⁹ P de Vos & W Freedman (eds) *et al South African Constitutional law in Context* (2016) 349.

⁴²⁰ Section 16(2) of the Constitution.

only lists variety of expression that are not constitutionally safeguarded.⁴²¹ These expressions could be prohibited or regulated by the statute without violating the right to free speech in section 16(1). Section 16 is definitional.⁴²² Therefore, section 16 does not have internal limitation for the right to free press.

The government has a specific concern in controlling the categories of speech listed in section 16(2) due to the damage it may cause to the objective mandate of the Constitution to create a non-sexist and non-racial community founded on human dignity and the attainment of human dignity. Therefore, the Constitution allows the Parliament to prohibit hate speech.⁴²³ Any law of speech which is found under the classifications stated in section 16(2) would not be a restriction of the right in section 16.⁴²⁴ If the Parliament increase the subject of the law further than the speech stated under section 16(2), it invades on the boundary of safeguarded speech and can only succeeds in doing so, if that law complies with the justification measure under the general limitation clause of the Constitution.⁴²⁵

3.9.2. Limitation in accordance with the general limitation clause

The general limitation clause provides that the right to free press can be restricted in accordance with the ‘law of general application’ to the degree that the restriction is justifiable and reasonable in an open and democratic community founded on freedom, equality and human dignity, with all necessary criteria, comprising of the type of the right; the weight of the aim of the restriction; the type and the level of the restraint; the link among the restriction and its aim; and minimum limiting approach to attain the aim.⁴²⁶ The courts have developed different approaches of limitation, namely; the two-stage approach of limitation⁴²⁷ and the limitation criteria.⁴²⁸ These limitation approaches will be briefly discussed shortly.

⁴²¹ (CCT36/01) [2002] ZACC 3, para 32.

⁴²² *Islamic Convention v Independent Broadcasting Authority and Others* (n 421 above) para 32.

⁴²³ *Islamic Convention v Independent Broadcasting Authority and Others* (n 421 above) para 32-33.

⁴²⁴ *Islamic Convention v Independent Broadcasting Authority and Others* (n 421 above) para 33-34.

⁴²⁵ *Islamic Convention v Independent Broadcasting Authority and Others* (n 421 above) para 33-34.

⁴²⁶ Section 36(1) of the Constitution.

⁴²⁷ *Ex Parte Minister of Safety and Security and Others: In Re S v Walters and Another* (CCT28/01) [2002] ZACC 6, para 26- 27.

3.9.2.1. The two-stage approach of restriction of the right to freedom of the press

The first stage is the threshold enquiry, its purpose is to determine whether or not the provision in dispute comprises of a restriction on the right to free press.⁴²⁹ This includes investigating the subject matter and extent of the right to free press and the importance and consequence of the disputed provision to determine whether there is any constraint on the right to free press by any part of that provision.⁴³⁰ Section 39(1) and (2) of the Bill of Rights provide assistance on explanation of both the right to free press and the restricting section, by necessitating them to be explained in a manner that encourage the value approach of an open and democratic society established on equality, freedom and human dignity.⁴³¹ If ahead of such examination, there is no restriction discovered, then that is the last part of the issue. The constitutional dispute is rejected there and then.⁴³²

If there is certainly a restriction, the second stage will follow. The second stage is recognised as limitation exercise.⁴³³ This stage requires an estimation of the type and significance of the right to free press with other rights which are restricted jointly with the degree of the restriction as opposed to the significance and aim of the restricting provision.⁴³⁴ The limitation clause provides criteria that must be placed into the scales in creating a relative examination of the entire balanced rights and concerns included.⁴³⁵

The two-stage inquiry of limitation of rights is not always followed by courts. In some instances, the court has approach justification of the violation of rights involved by the provision, without examining whether they were violated.⁴³⁶ The court simply assumed

⁴²⁸ Section 36(1) of the Constitution.

⁴²⁹ (n 427 above) para 26.

⁴³⁰ (n 427 above) para 26.

⁴³¹ (n 427 above) para 26.

⁴³² (n 427 above) para 26.

⁴³³ (n 427 above) para 27.

⁴³⁴ (n 427 above) para 27.

⁴³⁵ (n 427 above) para 27.

⁴³⁶ *Christian Education South Africa v Minister of Education* (CCT13/98) [1998] ZACC 16, para 27.

without resolving that the necessary rights might have been violated. The court has sometimes unable to consider the second stage of the limitation examination entirely.⁴³⁷

3.9.2.1.1. The threshold enquiry

The threshold enquiry involves considering the subject matter and scale of the right to free press and the importance and consequence of the disputed provision to determine whether there is restriction of freedom of the press by the disputed provision.⁴³⁸

3.9.2.1.1.1. The subject matter and the scale of the right to freedom of the press

The analysis of the right to free press is governed by the interpretation clause in the Constitution.⁴³⁹ In terms the interpretation clause, the right to free press should be analysed in a method that encourage the value approach of an open and democratic community founded on equality, freedom and human dignity. The court may refer to international human rights law in interpretation of this right.⁴⁴⁰ The interpretation approach that must be used is contextual approach.⁴⁴¹

When interpreting the disputed provision, the interpretation which is in harmony with the Constitution must be accepted, against the interpretation which is in conflict with the value of the Constitution. However, the interpretation must not be improperly construed.⁴⁴² There must be a balance between an obligation of the court to interpret a piece of legislation in consistence with the Constitution as long as it is logically achievable, and an obligation of the Parliament to enact a piece of legislation that is reasonably precise and clear, allowing the society to be aware of what is required from them.⁴⁴³ The two-stage inquiry can allow for a wider analysis of a basic right on the second stage. Section 16(1) explicitly safeguards free speech in an approach that does

⁴³⁷ *Veldman v Director of Public Prosecutions (Witwatersrand Local Division)* (CCT19/05) [2005] ZACC 22.

⁴³⁸ (n 427 above) para 26.

⁴³⁹ Section 39 of the Constitution.

⁴⁴⁰ Section 39(1) of the Constitution.

⁴⁴¹ *Bernstein and Others v Bester No and Others* (CCT23/95) [1996] ZACC 2, para 79.

⁴⁴² *Investigating Directorate, Serious Economic Offices and Others v Hyundai Motor Distributors (Pty) Ltd and Others* 2000 (10) BCLR 1079 (CC), para 23- 24.

⁴⁴³ (n 442 above) para 23- 24.

not allow a confined reading. Any restraint ahead of a right under freedom of expression should assure the strict restriction examination.⁴⁴⁴

It must be noted that every right can be limited. This entails that from the start of analysis every right is constantly restricted by any other right belonging to another person.⁴⁴⁵ In the framework of freedom of the press, this right allows publication or broadcast of information freely. This right is constantly limited by the right to privacy and human dignity of other citizens. Free press is demonstrated as a broad right on the face value. However, as the journalists and editors starts to work their scope become limited by classified information, information which degrades the dignity of others and information which defame the character of other citizens. The right to free press also has three internal alters which prohibits particular types of expression, namely, encouragement of aggression, hate speech and propaganda for war, from the subject of the right.⁴⁴⁶ As discussed under the internal limitation of section 16, if an expression fall under these categories, the limitation will not concern the right to free press.

3.9.2.1.1.2. Is there an infringement of the right to freedom of the press?

To determine whether there is a violation of the right to free press or not, there must be a consideration of examining the importance and consequence of the disputed provision to find out whether it restricts the right to free press.⁴⁴⁷

3.9.2.1.2. The justification stage

The restraint of the right to free press must be in harmony with the 'law of general application', and should be justifiable and reasonable in an open and democratic community founded on freedom, human dignity and equality.⁴⁴⁸ The weighing up of various interests should still happen as required by the proportionality analysis. The process takes place by firstly considering the right violated; its character; its important in

⁴⁴⁴ *De Ruck v Director of Public Prosecutions (Witwatersrand Local Division) and Others* (CCT5/03) [2003] ZACC 19, para 48.

⁴⁴⁵ (n 441 above) para 67.

⁴⁴⁶ *Ex Parte Minister of Safety and Security and Others: In Re S v Walters and Another* (CCT28/01) [2002] ZACC 6, para 30.

⁴⁴⁷ (n 427 above) para 26.

⁴⁴⁸ Section 36(1) of the Constitution.

an open and democratic society established on equality, freedom and human dignity; and the type and degree of the restriction.⁴⁴⁹ The process also considers the significance of the aim of the restriction. In weighing up process and in examination of proportionality, there must be a consideration of the connection among the restriction and its aim as well as the availability of less limiting approach to attain the aim.⁴⁵⁰

The requirement of the 'law of general application' comes from the principle of rule of law.⁴⁵¹ The legislative provision must be available in order to prove that it is justifiable to restrict the right in accordance with the general limitation clause.⁴⁵² What suites to be law under the 'law of general application', include rules of court, domesticated international conventions, municipal by-laws, subordinate statutes, customary law, common law and statute.⁴⁵³ Not all provisions comply with the criteria of a law of general application, if the provision is too vague, it does not comply with the criteria of the 'law of general application'.⁴⁵⁴

3.9.2.2. The limitation criteria

The limitation criteria comprise of the type of the right, the weight of the aim of the restriction, the type and degree of the restriction, the link among the restriction and its aim and the minimum limiting approach to attain the aim.⁴⁵⁵ These criteria will be briefly discussed shortly.

3.9.2.2.1 The type of the right

The right to free press allows one's to publish or broadcast statements without restraint. The right to free press is one of the forms of the right to free speech.⁴⁵⁶ The right to free speech is essential in a democratic country because it permits individuals to communicate freely. The press performs important role in an operation of a democratic

⁴⁴⁹ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* [1998] ZACC 15, para 35.

⁴⁵⁰ As above.

⁴⁵¹ (n 444 above) para 57.

⁴⁵² *August v Electoral Commission & Others* 1999 (3) SA 1 (CC), para 23.

⁴⁵³ *de Vos & Freedman et al* (n 419 above) 361.

⁴⁵⁴ (n 452 above) para 57.

⁴⁵⁵ Section 36(1) of the Constitution.

⁴⁵⁶ Section 16(1) of the Constitution.

community. The press is a public guard. When the laws violate free press, they are infringing the right of the society to have a strong, unrestricted media.⁴⁵⁷

3.9.2.2.2. The significance of the aim of the restriction

It is not enough to prove the aim of the disputed provision by just providing the aim of the legislation, the center must be on the disputed provision itself.⁴⁵⁸ The purpose of the disputed provision must be determined in the provision.

3.9.2.2.3. The type and degree of the restriction

A commonly accepted rule is that, the more severe effect of the limiting provision to the right, the more compelling or convincing the rationalisation should be. In simple terms, it means that the restricting provision must have more advantages than harm.⁴⁵⁹ The disputed provision must be examined to determine its specific social and statutory background, discovering the approach which is practically accessible in South Africa at this level, taking into account the crucial values that must be protected.⁴⁶⁰

3.9.2.2.4. The connection among the restriction and its aim

In *Islamic Unity Convention v Independent Broadcasting Authority and Others*, the court invalidated the provision on the Act which bans the broadcasting of any information which can possibly damage connections among groups of the society.⁴⁶¹ The court found that the intrusion on the right to free expression created by the banning on which the claim is founded are widely very broad and overshadow the criteria taken to account by the Board as restoring their effect.⁴⁶² The restriction must be well balanced with the aim of the restricting provision.

⁴⁵⁷ *Print Media South Africa and Another v Minister of Home Affairs and Another* (CCT 133/11) [2012] ZACC 22, para 53-54.

⁴⁵⁸ (n 457 above) para 55.

⁴⁵⁹ *S v Manamela and Another (Director-General of Justice Intervening)* (CCT25/99) [2000] ZACC 5, para 32.

⁴⁶⁰ As above.

⁴⁶¹ (n 446 above) para 49.

⁴⁶² (n 446 above) para 49.

3.9.2.2.5. The minimum limiting approach to attain the aim

When the limitation clause states about less limiting approach it does not suggest an inaccessible standard of precision, it means a limiting restriction which has less harm than other approaches. The norm is reasonableness.⁴⁶³ And in any occasion, in the concept of minimum approach can approximately always be anticipated without essentially ruling out a finding of justification in terms of the provision. However, it is one of the specified factors which should be assessed in concurrence with one another, and with others that may be necessary.⁴⁶⁴ The limiting provision must have achieved its aim by imposing a restraint to the right to free press.⁴⁶⁵

3.10. Conclusion

This chapter started with a compressive discussion of the historical perspective of the right to freedom of the press in South Africa. Based on what was discussed above, the press was characterised with lots of restrictions from the apartheid state. Parliamentary supremacy played a big role in imposing this restriction as the courts did not have authority to perform judicial review. State of emergency was used as an excuse to put more Regulations to the press. The importance of the press is now visible after the end of apartheid under the Interim Constitution. Indeed, the press is the heart of a democratic state, this can be easily identified under the period of transition to democracy in South Africa.

The adoption of the 1996 Constitution provided explicit protection of the right to free press in South Africa. It has been determined that the role of the press in the South African democratic dispensation will determine the success of the South African democracy. South Africa has mandatory regulation of the press through ICASA and the FPB. South Africa also has voluntary independent regulation through the PCSA and the BCCSA. The publication of court proceedings as indicated above depends on the principle of open justice. Furthermore, the press can publish divorce court proceedings if the press does not reveal the identities of the divorcing parties and their kids.

⁴⁶³ (n 459 above) para 49.

⁴⁶⁴ (n 459 above) para 49.

⁴⁶⁵ *Johncom Media Investments Limited v M and Others* (CCT 08/08) [2009] ZACC 5, para 30.

Section 16(2)(a) of the FPA,⁴⁶⁶ which requires the press to have approval from the FPB before it can publish information concerning sexual activities is unconstitutional. This chapter also examines instances where the press may be prevented to publish certain information. Section 16 of the Constitution does not have internal limitation. It only excludes expressions which are not embraced by the Constitution. The right to free press, like any other constitutional right, can only be restricted in accordance with the general limitation clause.

Despite the protection guaranteed by the Constitution to the press, the press is still facing several challenges regarding its protection and promotion in the South African democratic dispensation. The next chapter focuses on the examination of the impacts of national state of disaster Regulations on the right to free press in South Africa.

⁴⁶⁶ Act 65 of 1996.

CHAPTER 4

The impacts of the national state of disaster Regulations on the right to freedom of the press

4.1. Introduction

The previous chapter concentrated on the right to freedom of the press under the South African legal framework. This chapter discusses the impacts of the national disaster Regulations on the right to freedom of the press. The chapter first introduces the declaration of corona virus as a pandemic by World Health Organisation (WHO). This is followed by international human rights law and the impacts of the corona virus pandemic on the right to freedom of the press. The chapter discusses the declaration of the corona virus pandemic as a national disaster in South Africa. It examines the national state of disaster relating to corona virus pandemic and the power of the Minister of Co-operative Governance and Traditional Affairs to promulgate the national state of disaster Regulations. The chapter answers the question of the constitutionality of national state of disaster Regulations. The national state of disaster Regulations and the right to freedom of the press are examined. The chapter ends with a conclusion.

4.2. The declaration of the corona virus as a pandemic by World Health Organisation

Historically, infectious diseases have triggered destructions to people's livelihoods among societies. Rising and re-emerging communicable illnesses are now happening at unmatched rate. During the previous two decades, the surfacing of the corona virus-connected diseases had caused worldwide problems to public health system.⁴⁶⁷ The novel corona virus (hereinafter referred to as the COVID-19) has revealed how a transmittable disease can brush off the world in few weeks and, in the duration of a few months, situating back sustainable development by years.⁴⁶⁸ In respect of the protection and promotion of the right to free press, the COVID-19 pandemic has regressed

⁴⁶⁷ AA Balkhair 'COVID-19 Pandemic: A New Chapter in the History of Infectious Diseases' (2020) 35 (2) *Oman Medical Journal* 1.

⁴⁶⁸ M Hopgood 'COVID-19: Make it the Last Pandemic' (2021), Report submitted to The Independent Panel for Pandemics Preparedness & Response 10.

freedom of movement and freedom to access information, which the press has progressively attained throughout the years.

The COVID-19 pandemic has begun in early December 2019 in Wuhan, China, and soon after spread through to other locations in China and to other countries around the world.⁴⁶⁹ The WHO declared the COVID-19 as a public health emergency of international concern on 30 January 2020,⁴⁷⁰ and later declared the COVID-19 outbreak as a 'global pandemic' on 11 March 2020.⁴⁷¹ The declaration came as results of the COVID-19 outbreak which started in China, the increased number of COVID-19 cases outside China, the increase of number of countries with COVID-19 cases, further estimated increase of COVID-19 cases in future and the rate of infection of COVID-19. WHO has called all states to take strict action immediately to contain COVID-19.⁴⁷²

4.3. International human rights law and the impacts of the corona virus pandemic on the right to freedom of the press

Most international treaties are against the arbitrary or vague restraint of the right to free press. These include the UDHR⁴⁷³ and the ICCPR⁴⁷⁴ which provide that any piece of legislation limiting the right to free press must abide by the test of legality, proportionality, and necessity. According to the ICCPR, restricting piece of legislation must be created with enough accuracy to allow peoples to control their actions appropriately.⁴⁷⁵ Restrictive piece of legislation must be created with a lawful purpose such as, protecting national safety; or the rights or status of others; of morals or health

⁴⁶⁹ F di Gennaro *et al* 'Coronavirus Diseases (COVID-19) Current Status and Future Perspectives: A Narrative Review' (2020) 2690 (17) *International Journal of Environmental Research and Public Health* 2.

⁴⁷⁰ Balkhair (n 467 above) 1.

⁴⁷¹ D Cucinotta & M Vanelli 'WHO Declares COVID-19 a Pandemic' (2020) *ACTA Bio Medical Society of Medicine and Natural Sciences of Parma*, available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7569573/#_ffn_sectitle (accessed 21 November 2021).

⁴⁷² As above.

⁴⁷³ Article 29 of the Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217A (III) (UDHR).

⁴⁷⁴ Article 19(3) of the International Covenant on Civil and Political Rights (adopted 16 December 1966), entry to force 23 March 1976, UNGA Res 2200A (XXI) (ICCPR).

⁴⁷⁵ Paragraph 25 of the General Comment No. 34 on "Article 19: Freedom of Opinion and Expression", UN Human Rights Committee, CCPR/C/GC/34, 2011 (General Comment No. 34).

of the society.⁴⁷⁶ The state must prove the specific feature of the risk, and the proportionality and necessity of the certain measure implemented.⁴⁷⁷

The 2017 Joint Declaration states that regional and international freedom of expression mandates have provided that broad bans on the distribution of statements founded on ambiguous and vague thoughts, including non-objective information or false news, are contrary to international values for limitations on the right to free speech.⁴⁷⁸

In the 2020 report to the Human Rights Council on the safeguard of free speech in relation to COVID-19, the Special Rapporteur on freedom of expression cautioned in opposition of unclear bans of fake news and called on countries that do not comply with international free speech values to abolish them as soon as possible.⁴⁷⁹ The report highlighted concerns that some international and national steps to contain COVID-19 may be unable to conform with international human rights values affecting the right to free speech. These measures include prohibition of fake news; arrests of journalists in duty by police; preventing movements of people; denying access to foreign journalists and non-disclosure of state information. The Special Rapporteur has also raised concerns on threats to journalists and the increase of surveillance devices during the COVID-19 period.⁴⁸⁰

Ever since the outbreak of the COVID-19 pandemic, most states have formulated laws intended at preventing fake news about the COVID-19 pandemic. Such laws must be proportionate, necessary, and subject to ordinary oversight by the legislature and national human rights organisations.⁴⁸¹ The laws intended to prevent fake news should by no means inhibit journalists and other media role players from conducting their duties

⁴⁷⁶ Paragraph 29 of the General Comment No. 34.

⁴⁷⁷ Paragraph 35 of the General Comment No. 34.

⁴⁷⁸ United Nations Human Rights: Office of the High Commissioner; Freedom of expression monitors issue joint declaration on 'fake news', disinformation and propaganda; available at <https://www.ohchr.org/en/NewsEvents/DisplayNews.aspx?NewsID=21287&LangID=E> (accessed 22 November 2021).

⁴⁷⁹ United Nations General Assembly, Human Rights Council, forty-fourth session, Agenda item 3, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development: Disease pandemics and the freedom of opinion and expression, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/44/49, Distr.: General, on 23 April 2020.

⁴⁸⁰ Paragraph 18 & 35-40 (n 479 above).

⁴⁸¹ Paragraph 48 (n 479 above).

or direct to blocking of publication or broadcasting of information. States which have adopted limitations that do not comply with these standards should abolish them as soon as possible.⁴⁸² Unclear bans of fake information actually give power to government officials with the capacity to decide on the accuracy or inaccuracy of information in the political and public sphere, against the requirement of proportionality and necessity in harmony with article 19(3) of the ICCPR.⁴⁸³

Since the beginning of the COVID-19 pandemic, there have been numerous reports from various countries around the globe showing an increasing number of arrests of journalists reporting about the COVID-19 pandemic by police and other types of oppression of media role players.⁴⁸⁴ In addition to this, most countries have continued to imprison journalists for performing their duties even though there is a risk that they may contract the COVID-19 in prison. It is important that countries that carry on to criminalise journalism do not initiate such cases under the period of the pandemic given the extra danger created by imprisonment.⁴⁸⁵ For a long-term solution, countries must abolish any law criminalising journalism.⁴⁸⁶

During the COVID-19 pandemic, states must allow media employees to continue with their duties by categorising them as essential employees. Media employees must receive necessary protective gear against the COVID-19. The press must be able to hold open press conferences and have access to public representatives and other information informants.⁴⁸⁷ The openness of the state to the press is in particular vital when public officials give conflicting, vague or confusing statements to the society. The aim in a public wellbeing emergency like the COVID-19 pandemic, should be for the state to give correct information, or information that is as correct as possible and structured properly as doubtful or developing, and accurate and truthful advice.⁴⁸⁸ The press offers an important instrument for the states to know the concerns of the society, and for the society to know how to control their concerns and panics. When states

⁴⁸² Paragraph 48 (n 479 above).

⁴⁸³ Paragraph 49 (n 479 above).

⁴⁸⁴ Paragraph 35 (n 479 above).

⁴⁸⁵ Paragraph 39 (n 479 above).

⁴⁸⁶ Paragraph 40 (n 479 above).

⁴⁸⁷ Paragraph 37 (n 479 above).

⁴⁸⁸ Paragraph 23 (n 479 above).

restrict access to information by the press, they are restricting this important aspect of information-sharing.⁴⁸⁹

The fact that COVID-19 is a global pandemic has favoured reporting that is accessible across countries. Therefore, governments must not implement measures to disturb the coverage from international press. Sadly, there have been numerous reported cases of aggression aimed by states at foreign press representatives.⁴⁹⁰ For example, Egypt has cancelled the credentials of a *Guardian* journalist who published information about COVID-19 pandemic infections in Egypt, stating that the publication did not comply with journalistic standards.⁴⁹¹

The Special Rapporteur on freedom of expression pleads with all countries to embrace the right to free press and withdraw from intrusion with the autonomous responsibility of the press of updating the public with information and holding public representatives liable for their conducts and statements.⁴⁹² The states must make sure that individuals have instruments to deal with and remedy fake information. The states must avoid implementing the types of measures that discouraged the distribution of important information at an occasion of disaster.⁴⁹³ There is no government which can utilise the COVID-19 pandemic for illegitimate aims outside of the subject of the health danger.⁴⁹⁴

4.4. The declaration of the corona virus pandemic as a national disaster in South Africa

The aim of the Disaster Management Act (the DMA) is to create an incorporated and organised disaster management policy that is centered on inhibiting or decreasing the danger of disasters; reducing the harshness of disasters; disaster awareness; fast and operational reaction to disasters and post-disaster renewal. The DMA created a municipal, provincial and national disaster management centers.⁴⁹⁵

⁴⁸⁹ As above.

⁴⁹⁰ Paragraph 38 (n 479 above).

⁴⁹¹ 'Egypt Revokes Credentials of Guardian Journalist', International Press Institute, 18 March 2020.

⁴⁹² Paragraph 63(c) (n 479 above).

⁴⁹³ Paragraph 63(d) (n 479 above).

⁴⁹⁴ Paragraph 63(f) (n 479 above).

⁴⁹⁵ Preamble of the Disaster Management Act 57 of 2002 (the DMA).

The national disaster in South Africa is a disaster categorised in accordance with section 23 of the DMA.⁴⁹⁶ When there is an occasion which can cause disaster or likely to cause disaster, the National Disaster Management Center (hereinafter referred to as the NDMC) should examine whether the occasion must be classified as a disaster according to the DMA. If the NDMC chooses to classify the occasion as a disaster, it must quickly examine the scale and harshness of the disaster and categorise it as a national, provincial or local disaster.⁴⁹⁷ The NDMC must keep records of approved details affecting the disaster in the approved register.⁴⁹⁸

When examining the scale and harshness or possible scale and harshness of a disaster, the NDMC should take into consideration statements and recommendations, if any, affecting the disaster obtained from a municipality or provincial disaster management center. The NDMC may allow the support of a private assessor to examine the disaster on the field.⁴⁹⁹ The NDMC may re-categorise a disaster categorised as national, provincial or local disaster at any period after discussions with the affected municipal or provincial disaster management centers, if the scale and harshness or possible scale and harshness of the disaster is smaller or bigger than the first examination.⁵⁰⁰ The disaster is a national disaster if it concerns more than a single province or a province is failing to handle it successfully.⁵⁰¹ Before the disaster is categorised, it is taken as a local disaster.⁵⁰²

After the NDMC examined the possible scale and harshness of the COVID-19 pandemic and that it has been declared as a global pandemic by the WHO, the NDMC categorised the pandemic as a national disaster in South Africa.⁵⁰³

⁴⁹⁶ Section 1 of the DMA.

⁴⁹⁷ Section 23(1) of the DMA.

⁴⁹⁸ Section 23(1)(c) of the DMA.

⁴⁹⁹ Section 23(2) of the DMA.

⁵⁰⁰ Section 23(3) of the DMA.

⁵⁰¹ Section 23(6) of the DMA.

⁵⁰² Section 23(7) of the DMA.

⁵⁰³ *De Beer and Others v Minister of Cooperative Governance and Traditional Affairs* (21542/2020) [2020] ZAGPPHC 184 (Unreported), para 4.4.

4.5. The national state of disaster relating to the corona virus pandemic and the power of the Minister of Co-operative Governance and Traditional Affairs to promulgate national state of disaster Regulations in South Africa

The President of the Republic of South Africa has the authority crucial to perform the functions that he is provided by the Constitution.⁵⁰⁴ The President has executive power of the Republic of South Africa. The President put into effects these executive power with other members of the Cabinet.⁵⁰⁵ The Cabinet is made up of the President, Deputy President and Ministers.⁵⁰⁶ The President has the power to appoint and dismiss Ministers.⁵⁰⁷

The categorisation of a disaster in accordance with section 23 of the DMA assigns main obligation to a certain level of government for the management and co-ordination of the disaster. However, an institution of the state in another level of government can support the level of government having main obligation to tackle with the disaster and its effects.⁵⁰⁸ The national executive is mainly vested with the authority to manage and co-ordinate national disasters regardless of whether a national state of disaster has been proclaimed in accordance with the DMA.⁵⁰⁹

Section 26(2) of the DMA allows the national executive to act in two different approaches in relation to national disaster. The first approach is available when there is no declaration of national state of disaster, the national disaster should be dealt with in accordance with the available statute and emergency arrangements.⁵¹⁰ The second approach is present when there is a declaration of national state of disaster, the national executive must manage the national disaster in accordance with the available piece of

⁵⁰⁴ I Currie & J De Waal *New Constitutional and Administrative Law Volume 1: Constitutional Law* (2001) 235-236.

⁵⁰⁵ G Quinot *et al Administrative Justice in South Africa: An Introduction* (2017) 29.

⁵⁰⁶ Section 91(1) of the Constitution, 1996 (the Constitution).

⁵⁰⁷ A Butler *Contemporary South Africa* (2004) 94-95.

⁵⁰⁸ Section 23(8) of the DMA.

⁵⁰⁹ Section 23(8) & 26(1) of the DMA.

⁵¹⁰ Section 26(2) of the DMA.

legislation and emergency arrangements as amplified by national state of disaster Directives or Regulations enacted in accordance with the DMA.⁵¹¹

The Minister of Co-operative Governance and Traditional Affairs (the MCGTA) was appointed by the President to govern the DMA.⁵¹² In order to enact national state of disaster Regulations, the MCGTA must first declare a national state of disaster in terms of a notice in the *Government Gazette*, in harmony with section 27(1) of the DMA. Section 27(1) of the DMA allows the declaration of national state of disaster only if available statute and emergency plans are not enough for the cabinet to tackle the disaster successfully, or other exceptional conditions necessitate the declaration of a national state of disaster.⁵¹³ The MCGTA is also allowed to enact any Regulation for successful implementation of the objects of the DMA in harmony with section 59(1)(a) of the DMA.⁵¹⁴ After the state of disaster has been declared, the MCGTA, in harmony with section 27(2) of the DMA, is allowed to publish Direction or create Regulations or permit the publication of Directions. These Regulations or Directions include Regulations which affect the distribution of information needed for handling the national disaster.⁵¹⁵ Regulations fall under the definition of law, but for Regulations to be effective, they must fall under a certain piece of legislation, which in this instance is the DMA.⁵¹⁶

However, the MCGTA, when enacting the national state of disaster in relation to the current national disaster, which is COVID-19, did not depend on criteria listed in section 27(1) of the DMA.⁵¹⁷ The Minister committed on the subsequent criteria: the scale and harshness of the COVID-19 'outbreak'; the declaration of the 'outbreak' as a pandemic by WHO; the categorisation thereof as a national disaster; the requirement to enhance the available approaches implemented by state authorities to tackle COVID-19

⁵¹¹ Section 26(2) of the DMA.

⁵¹² Section 3 of the DMA.

⁵¹³ The DMA.

⁵¹⁴ Section 23(8) & 26(1) of the DMA

⁵¹⁵ Section 27(2) of the DMA.

⁵¹⁶ C Botha *Statutory Interpretation: An Introduction for Students 5th ed* (2017) 16.

⁵¹⁷ (n 503 above) para 4.10.

pandemic; and the appreciation of the availability of unique situation deserving that declaration.⁵¹⁸

4.6. The constitutionality of national state of disaster Regulations

South Africa is a democratic country based on the supremacy of the Constitution.⁵¹⁹ In terms of section 2 of the Constitution, the supreme law of South Africa is the Constitution. Any law or conduct that does not abide by the Constitution is invalid, and the duties inflicted by the Constitution must be executed.⁵²⁰ The Constitution allows the restrictions of rights in the Constitution, only if the restriction is justifiable and reasonable in an open and democratic community.⁵²¹

There are different decisions which contradict each other regarding the constitutionality of declaration of national disaster and national state of disaster Regulations. The court in *Mohamed and Others v President of the Republic of South Africa*, concluded that the limitations enforced by the national state of disaster Regulations were reasonable and justifiable. The court rooted its judgment on what was happening around the world regarding COVID-19, and the efforts taken by the government to contain COVID-19 and to inhibit an already weak health facility from being overpowered.⁵²²

However, the court rejected this approach in an unreported decision of *De Beer and Others v Minister of Cooperative Governance and Traditional Affairs*. In this case, the court found that the declaration of national state of disaster was lawful. However, the national state of disaster Regulations in relation to Alert Levels 3 and 4, promulgated in accordance with section 27(2) of the DMA, was found to be unlawful.⁵²³ The limitation and infringement of constitutional rights, imposed by national state of disaster Regulations were found to be unreasonable in an open and democratic society founded

⁵¹⁸ (n 4503 above) para 4.10.

⁵¹⁹ Section 1(c) of the Constitution of the Republic of South Africa, 1996 (the Constitution).

⁵²⁰ The Constitution.

⁵²¹ Section 36 of the Constitution.

⁵²² [2020] ZAGPPHC 120, para 76 & 77.

⁵²³ (n 503 above) para 9.1- 9.2.

on equality, freedom and human dignity as stated by the general limitation clause of the Constitution.⁵²⁴

However, the court overturned this decision on appeal in *Minister of Cooperative Governance and Traditional Affairs v De Beer and Another*. The court concluded that the order of the court of first instance was unenforceable and unclear. The constitutional dispute formulated to the Regulations was overly disperse and poorly precise to create an argument for a violation of the Constitution.⁵²⁵ A broad concern that the national state of disaster Regulations violated freedom, lack consistency or might have been less limitedly crafted is not sufficient to warrant an order of invalidity. It was found that the court of first instance invalidated Regulations which were not disputed.⁵²⁶ Therefore, national state of disaster Regulations are still constitutional valid, because they have not been properly challenged in court.

4.7. National state of disaster Regulations and the right to freedom of the press

In accordance with Regulation 14(2) of the DMA, any individual who publishes any information in any form of media, with the aim of misleading any other individual in relation to COVID-19; the COVID-19 infection status of any individual; or any steps implemented by the state in response to COVID-19, perpetrates a crime punished by a fine, imprisonment of up to six months, or both such imprisonment and fine.⁵²⁷ This offence has a high threshold, the prosecution must prove that the individual publishing or broadcasting the information had the ‘intention to deceive’. This kind of fault means that the publisher or broadcaster must have published or broadcast false information with knowledge that it was false with the aim of misleading or deceiving other individuals about COVID-19.⁵²⁸ This kind of fault is subjective in nature, what might be regarded as the ‘intention to deceive’ may differ from one case to the other. This means that it will be left under the court’s discretion to decide whether there is an intention to deceive or not.

⁵²⁴ (n 503 above) para 9.4.

⁵²⁵ (Case no 538/2020) [2021] ZASCA 95, para 116.

⁵²⁶ *Minister of Cooperative Governance and Traditional Affairs v De Beer and Another* (n 512 above) para 116.

⁵²⁷ The DMA.

⁵²⁸ D Milo ‘Fake News About COVID-19 now a Criminal Offence’ (2020) *Webber Wentzel in alliance with Linklaters*, available at <https://www.webberwentzel.com/News/Pages/Fake-news-about-covid-19-now-a-criminal-offence.aspx> (accessed 22 November 2021).

The challenge with Regulation 14(2) of the DMA is that it has a negative impact on the right to free press because not every situation is clear cut. Some circumstances are complicated in nature. In relation to COVID-19, inaccuracy or falsity of statements might only become clear in time, with a progressed research and examination. For example, when COVID-19 started to emerge, the utilisation of face masks to prevent COVID-19 was not clinically regarded as compulsory to prevent the spread of COVID-19, but few months later the position changes.⁵²⁹ This means that if a newspaper had published that people who do not wear masks in public area have a high percentage of contracting COVID-19, before it is recommended to wear mask in public, the newspaper could be charged under Regulation 14(2) of the DMA for spreading fake news concerning COVID-19, only to discover that the information was accurate.

There had been arrest made under Regulation 14(2) of the DMA, but the circumstances of the cases were not related to the press. One of the cases was the arrest of a man who was distributing false news on social media about contaminated COVID-19 test kits. He released a video calling on all South Africans to reject COVID-19 testing because the COVID-19 test kits were used to 'spread the virus'. The man was latter charged under Regulation 14(2) of the DMA and appeared in court at Cape Town.⁵³⁰ Another case was that of a man who was arrested for refusing that COVID-19 exists in South Africa at a public gathering. Even though, the South African government had provided enough evidence that proved that COVID-19 exists.⁵³¹

In South Africa, the courts and other relevant institutions, when interpreting the section of Chapter 2 of the Constitution should consider the provision of international law.⁵³² The Constitution gave mandates to the courts to favour any rational analysis of the statute which is in harmony with international law over any different analysis of the

⁵²⁹ ARTICLE 19 'South Africa: Prohibitions of False COVID-19 Information must be Amended' (2021), available at <https://www.article19.org/resources/prohibition-of-false-covid-19-information-must-be-amended/> (accessed 21 November 2021).

⁵³⁰ R Grobler 'Man who Posted Fake 'Contaminated Covid-19 Test Kits' Video Arrested' *News24*, available at <https://www.news24.com/news24/SouthAfrica/News/man-who-posted-fake-contaminated-covid-19-test-kits-video-arrested-20200407> (accessed 22 November 2021).

⁵³¹ 'Cape Town Man Arrested for Spreading Fake News-Report' (2020) *News24*, available at <https://www.news24.com/news24/SouthAfrica/News/cape-town-man-arrested-for-spreading-fake-news-report-20200328> (accessed 22 November 2021).

⁵³² Section 39 of the Constitution.

statute that is against international law.⁵³³ Regulation 14(2) of the DMA does not conform with article 19(3) of the ICCPR. As discussed above the limitation of the right to free press imposed by Regulation 14(2) of the DMA must comply with the requirement of legality, necessity and proportionality. Regarding the test of legality, Regulation 14(2) of the DMA is too far-reaching. As a result, it does not meet the test of legality.⁵³⁴ It is hard to neutrally examine the 'intent to deceive', in relation to a rapid shifting public wellbeing crisis where statements can be accurate at first glance but differ after as discussed above. The falseness of information is not a justifiable basis for constraining the right to free press under the international human rights system.⁵³⁵ Therefore, prohibition and other legal limitations on the publication or broadcasting of fake information can be misused and can have a negative impact on democracy.⁵³⁶ Regulation 14(2) of the DMA does not only apply to the press but also applies to other types of media, and therefore, it is unlimited. The punishments of imprisonment and fine imposed by Regulation 14(2) of the DMA for the publication or broadcasting of fake information, are uneven limitations on the right to free press.⁵³⁷ Therefore, in terms of international human rights law, Regulation 14(2) of the DMA is invalid because it does not meet international values of limitation of the right to free press.

The South African Constitution permits the restrictions of rights in the Constitution, only if the restriction is justifiable and reasonable in an open and democratic society.⁵³⁸ It is apparent that the right to free press is vital in South African democratic dispensation and that Regulation 14(2) of the DMA imposes limitation on the right to free press. The consequence of the limitation imposed by Regulation 14(2) of the DMA is that the press is no longer free to publish or broadcast information relating to COVID-19 in fear of being imprisoned or fined for violating the Regulation. The restriction imposed by Regulation 14(2) of the DMA is very broad and is subjective in nature. The aim of preventing fake news relating to COVID-19 can be attained through less limiting approaches, such as continually providing correct information about COVID-19 by the

⁵³³ Section 233 of the Constitution.

⁵³⁴ n 478 above.

⁵³⁵ Paragraph 49 (n 479 above).

⁵³⁶ Paragraph 49 (n 47 above).

⁵³⁷ ARTICLE 19 (n 529 above).

⁵³⁸ Section 36 of the Constitution.

government.⁵³⁹ Therefore, the restriction of the right to free press by Regulation 14(2) of the DMA is not justifiable and reasonable in an open and democratic society. Regulation 14(2) of the DMA is technically unconstitutional and void as it is against the international human rights law and the South African Constitution but remains enforceable because it is not yet pronounced unconstitutional by any court of law. The law is a heavy object without a sharp edge to tackle disinformation concerning COVID-19.⁵⁴⁰ Subjecting all expressions to unbalanced examination is not a fair response to the problem of fake news about COVID-19. The Regulation can make more damage to public health than good by discouraging additional access to information.⁵⁴¹

Throughout the duration of national state of disaster, the South African government was also encouraging a 'report system' known as 'Real411'. The government encourages this system on its website by sharing pictures of the suspected fake information on its website with a big red 'fake' stamp. The system was invented to discourage the spread of fake news.⁵⁴² The users of the system convey fake information and hate speech through a dedicated WhatsApp number, website or a mobile app. The suspected parts of fake information are then published on the "Real411" website and referred to the Digital Complaints Committee. The Committee then categorises digital misinformation as untrue, incorrect or deceptive statements formulated, offered and advanced to deliberately trigger to hurt the public. However, the system is independent from the state.⁵⁴³

4.8. Conclusion

This chapter started with an examination of the declaration of COVID-19 outbreak as a global pandemic. The chapter went further and assessed international law and corona virus pandemic, where it was highlighted that some approaches which are adopted internationally and nationally violates the right to free press. Then followed a discussion on how the corona virus pandemic was categorised as a national disaster, where it was

⁵³⁹ *National Coalition for Gays and Lesbians Equality and Another v Minister of Justice and Others* [1998] ZACC 15, para 35.

⁵⁴⁰ D Milo (n 528 above).

⁵⁴¹ ARTICLE 19 (n 529 above).

⁵⁴² ARTICLE 19 (n 529 above).

⁵⁴³ ARTICLE 19 (n 529 above).

pointed out that the scale and harshness of the corona virus pandemic necessitates it to be categorised as a national disaster. The chapter also finds that the MCGTA was vested with the authority to declare the national state of disaster and to promulgate the national state of disaster Regulations in South Africa by the President. The court has not yet been presented with a good opportunity to deal with the constitutionality of the national state of disaster Regulations and for now they are still regarded as valid. The last part of the chapter dealt with the connection between the right to free press and national state of disaster Regulations.

This study recommends the repeal of Regulation 14(2) of the DMA and the implementation of less restrictive measures, such as teaching members of the society through schools, universities, and media dramas and advertisements, the ability to discern the reliability of the source of information. This chapter is important to the study as it introduces a new circumstance, the COVID-19 pandemic which has negatively affected the right to free press through the national state of disaster relating to the corona virus pandemic. It has been indicated that Regulation 14(2) of the DMA creates a 'chilling effect' on the press at the time where the uninhibited access of new information is of vital importance. Therefore, repealing Regulation 14(2) of the DMA would encourage a free flow of new information about COVID-19 and maintain a free and diverse press which will benefit the public.

As it has been indicated, the right to free press is important to the South African democratic dispensation. Restrictions imposed to the right to free press do not only affect the press, it also affects the public on their right to receive unhindered information. Therefore, making sure that the right to free press is not unreasonably restricted will be advantageous to the society and afford the chance to the young democracy of South Africa to grow successfully.

CHAPTER 5

Conclusions and Recommendation

5.1. Introduction

The previous chapter dealt with the impacts of the national state of disaster Regulations on the right to freedom of the press. This chapter concludes the study and makes recommendations. The study has been carried out with the aim of establishing how the right to freedom of the press in South Africa can be promoted and protected under the national state of disaster relating to the corona virus pandemic. This aim will be achieved through answering of the research questions, namely, whether international law protect the right to freedom of the press; Whether South Africa have the legal framework which promote and protect the right to freedom of the press; and whether there are impacts of the national state of disaster Regulations on the right to freedom of the press in South Africa. With regard to the abovementioned, the subsequent conclusions and recommendations are formulated in the study.

5.2. Conclusions

5.2.1. The protection of the right to freedom of the press under international law

The international human rights instruments protect the right to free press at the international level. Free press is important in every democratic state around the world. The right to free press is clearly and implicitly recognised, protected and promoted in South Africa by most international, regional and sub-regional human rights instruments. The UDHR⁵⁴⁴ and the ICCPR⁵⁴⁵ protect the right to freedom of the press under UN human rights system. Both of these instruments states that all individuals have the right to free speech, which includes the right to freedom to accept, obtain and communicate information and thoughts of entire types in print or writing, orally, in an art format, or in

⁵⁴⁴ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217A (III) (the UDHR).

⁵⁴⁵ International Covenant on Civil and Political Rights (adopted 16 December 1966), entry to force 23 March 1976, UNGA Res 2200A (XXI) (the ICCPR).

any media of their option.⁵⁴⁶ The state members are encouraged to promote a free and distinct media by the HRC.⁵⁴⁷ It is apparent from the provisions and statements stated above that UN human rights system protects the right to free press. South Africa as a state party has obligations to defend the right to free press.

The ACHPR does not clearly protect the right to free press. Article 9(2) of the above Charter provides that every individual has the right to freely express herself.⁵⁴⁸ Article 27(8) of the ACDEG states that state parties should advance free press and promote a professional media, for the purpose of promoting political, social and economic control.⁵⁴⁹ These two African human rights instruments impose an obligation to South Africa to embrace the right to free press. South African also has a legal responsibility to defend the right to free press in accordance with the sub-regional layer of obligation. Article 4(c) of the TSADC provides that the state parties must recognise the principles of the rule of law, human rights, and democracy.⁵⁵⁰

The study has proved that South Africa has ratified all these human rights instruments and that South Africa has a legal responsibility to defend the right to free press in accordance with international, regional and sub-regional human rights layers of obligation.

5.2.2. The protection and promotion of the right to freedom of the press under South African legal framework

The research study found that South Africa has a legal framework which protects and promotes the right to freedom of the press. In the past, the thread to limit the press started prior to the commencement of apartheid state of South Africa. The South African apartheid state further escalated the situation by enacting pieces of legislation which

⁵⁴⁶ Article 19 of the UNDHR & ICCPR.

⁵⁴⁷ Paragraph 13 of the General Comment No. 34 on “Article 19: Freedom of Opinion and Expression”, UN Human Rights Committee, CCPR/C/GC/34, 2011 (General Comment No. 34).

⁵⁴⁸ Organization of African Unity (OAU), African Charter on Human and People’s Rights (the ‘Banjul Charter’), 27 June 1981, CAB/LEG/67/3 REV. 5, 21 I.L.M. 58 (1982), Entry into force: 21 October 1986, (the ACHPR).

⁵⁴⁹ African Charter on Democracy, Elections and Governance, African Union, adopted on 30 January 2007, came into force in February 2012 (the ACDEG).

⁵⁵⁰ Treaty of the Southern African Development Community (adopted on 17 August 1992), Windhoek (the TSADC).

extremely restricts the right to free press, such as the Suppression of Communism Act,⁵⁵¹ the Criminal Law Amendment Act,⁵⁵² the Public Safety Act,⁵⁵³ the Criminal Procedure Act,⁵⁵⁴ the Official Secrets Act,⁵⁵⁵ the Riotous Assembly Act,⁵⁵⁶ the General Law Amendment Act,⁵⁵⁷ the Defence Amendment Act,⁵⁵⁸ the Prison Act,⁵⁵⁹ the Terrorism Act,⁵⁶⁰ the Newspaper and Imprint Registration Act,⁵⁶¹ and the Publication Act.⁵⁶² Events such as the declaration of state of emergency are some of the opportunities which were used by the apartheid government to further inhibit the right to free press. The press was rescued from these restrictions by the Interim Constitution, which was the first provision to defend the right to free press when the apartheid state falls.⁵⁶³

The current legal framework in South Africa concerning the protection and advancement of the right to free press is centered in the Constitution. The Constitution states that all individuals have the right to free press.⁵⁶⁴ The press carries out a vital role in the democratic South Africa. But if the Protection of State Information Bill⁵⁶⁵ becomes a law in that current state, its implementation will have a negative effect on the role of the press because the state will have more control on the type of state information that the press can publish or broadcast. This will create a situation of self-censorship to the press. South Africa has compulsory regulatory institutions for the press, comprised of

⁵⁵¹ Act 15 of 1950.

⁵⁵² Act 8 of 1953.

⁵⁵³ Act 3 of 1953.

⁵⁵⁴ Act 56 of 1955.

⁵⁵⁵ Act 16 of 1956.

⁵⁵⁶ Act 17 of 1956.

⁵⁵⁷ Act 76 of 1962.

⁵⁵⁸ Act 85 of 1967.

⁵⁵⁹ Act 8 of 1959.

⁵⁶⁰ Act 83 of 1967.

⁵⁶¹ Act 63 of 1971.

⁵⁶² Act 42 of 1974.

⁵⁶³ Section 15 (1) of the Constitution of the Republic of South Africa, 1993.

⁵⁶⁴ Section 16(1)(a) of the Constitution of the Republic of South Africa, 1996 (the Constitution).

⁵⁶⁵ Bill B 6-2010.

ICASA⁵⁶⁶ and the FPB.⁵⁶⁷ There are also voluntary independent regulatory bodies called the PCSA⁵⁶⁸ and the BCCSA.⁵⁶⁹

The press does not have a guaranteed right to publish or broadcast court proceedings. The court has the discretion to determine whether the proceeding can be published or broadcasted in terms of the principle of open justice. This study also finds that the press still faces situations where it can be prevented from publishing or broadcasting certain information, even though it is rare. Section 16 of the Constitution eliminates propaganda for war, hate speech and the encouragement of aggression from the shield of the right to free press.⁵⁷⁰ The right to free press can only be restricted in harmony with section 36 of the Constitution.⁵⁷¹

5.2.3. The impacts of national state of disaster Regulations on the right to freedom of the press and the repeal of Regulation 14(2) of the Disaster Management Act as a response to challenges faced by the press under national state of disaster relating to the corona virus pandemic

It is the finding of the research study that the implementation of Regulation 14(2) of the DMA⁵⁷² can potentially violates the right to free press under the national state of disaster relating to the corona virus pandemic in South Africa. COVID-19 was declared as global pandemic by WHO. Chapter four also examines the approach which was used to categorise COVID-19 pandemic as a national disaster in South Africa. The national executive when categorising the COVID-19 as national disaster, considered the scale and harshness of the COVID-19 and the fact that COVID-19 was categorised as global pandemic by WHO.⁵⁷³ The Minister of Co-operative Governance and Traditional Affairs is vested with the power to declare the national state of disaster and to promulgate

⁵⁶⁶ Section 5 of the Independent Communications Authority of South Africa Act 13 of 2000.

⁵⁶⁷ Section 3 of the Films and Publications Act 65 of 1996 (the FPA).

⁵⁶⁸ The Constitution of the Press Council of South Africa, 2020.

⁵⁶⁹ The Constitution of the Broadcast Complaints Commission of South Africa (the BCCSA Constitution), available at <https://www.bccsa.co.za/bccsa-constitution/> (accessed 19 January 2022).

⁵⁷⁰ Section 16(2) of the Constitution.

⁵⁷¹ The Constitution.

⁵⁷² Act 57 of 2002.

⁵⁷³ *De Beer and Others v Minister of Cooperative Governance and Traditional Affairs* (21542/2020) [2020] ZAGPPHC 184 (Unreported), para 4.10.

national state of disaster Regulations.⁵⁷⁴ In this study it has been discovered that the court has not yet received a claim to determine the constitutionality of national state of disaster Regulations. Regulation 14(2) of the DMA controversially criminalises fake news relating to the COVID-19 pandemic.⁵⁷⁵ It is the finding of the study that Regulation 14(2) of the DMA must be repealed to allow the press to function without fear of being arrested because of the chilling effects which are caused by the Regulation.

5.3. Recommendations

The recommendations below could function as steps that can be utilised to promote and protect the right to freedom of the press in South Africa under national state of disaster relating to the corona virus pandemic.

5.3.1. South Africa must fully stick to and abide by its duties to protect and promote the right to freedom of the press under the national state of disaster relating to the corona virus pandemic as imposed by the ratified international human rights instruments and the Constitution.

5.3.2. Section 27(2)(k) of the DMA must be amended to remove the power which allow the Minister of Co-operative Governance and Traditional Affairs to promulgate Regulations which govern the distribution of information during the state of disaster.

5.3.3. The Minister of Co-operative Governance and Traditional Affairs must repeal Regulation 14(2) of the DMA.

5.3.4. The South African government must refrain from promulgating Regulations which may affect the role of the press during national state of disaster or in any instance.

5.3.5. The South African government must support media pluralism and independence, and promote self-regulation of the press through the Press Council of South Africa and the Broadcast Complaints Commission of South Africa.

⁵⁷⁴ Section 3 & 27(1) of the DMA.

⁵⁷⁵ DMA.

5.3.6. The South African government must teach members of the society through schools, universities, and media dramas and advertisements, the ability to discern the reliability of the source of information.

5.3.7. The South African government must continue to provide the correct information about corona virus pandemic in order to avoid fake news

5.4. Concluding remarks

Human rights belong to everyone. The South African press has the right to freedom even if there is a national state of disaster relating to the corona virus pandemic. The research study has discovered that Regulation 14(2) of the DMA has the potential of creating self-censorship of the press during the national state of disaster relating to the corona virus pandemic by criminalising the publication or broadcasting of fake news concerning the corona virus pandemic in South Africa. The study recommends that Regulation 14(2) of the DMA must be repealed. In doing so, the South African government will be reducing the challenges which are faced by the press during national state of disaster relating to the corona virus pandemic.

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