

The right to freedom of expression in South Africa

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1. Introduction

South Africa comes from a sorry history of censorship and repression. Literature and films that were critical of

the regime were routinely banned, and the media were subjected to tough restrictions. Art that offended Christian Nationalist ideology was also dealt with harshly. The apartheid regime kept the then-state broadcaster, the

South African Broadcasting Corporation (SABC) on a tight leash, and controlled the licensing of other broadcasters to ensure that the SABC dominated the airwaves relatively unchallenged. The regime also developed and implemented a complex web of censorship laws in an attempt to keep South Africans in the dark about what was happening in their own country, and when these were not enough to contain dissent, used harsh State of Emergency regulations. The regime stretched the concept of national security to the point where any opposition could be put down on the basis that it threatened national security. The security cluster became increasingly influential under the PW Botha regime from the late 1970s to the late 1980s, which elevated the State Security Council to a level where it became the main policy-making instrument on security matters, and even overrode politicians on key decisions affecting the direction of the country. Staffed by high-ranking military personnel and using the 'total strategy' doctrine, it ensured that all levels of the state responded in an integrated fashion to rising opposition against apartheid and capitalism, both internally and externally.

In recognition of the need to break with this censorious past, democratic South Africa made freedom of expression a fundamental right in the South African Constitution to ensure that such abuses would not occur again. Parliamentary supremacy was replaced by Constitutional supremacy and many of the apartheid-era censorship laws were repealed or amended to bring them in line with the new Constitutional guarantee of freedom of expression. The SABC was transformed from a state broadcaster into a public broadcaster with a legislated mandate to serve the universal interest, and not just a sectional interest. A new independent regulator for broadcasting was also set up, which liberalised the airwaves and presided over the creation of a whole new tier of broadcasting – community broadcasting. Freedom of expression-friendly policies were developed through consultative public processes. These are no small achievements for a democracy that is twenty years young.

Yet there are signs of trouble, too, with respect to freedom of expression. At the onset of democracy, international press freedom organisation Reporters Without

Borders ranked South Africa 26th in the world (in 2002), but since then it has dropped to 42nd in the world overall.¹ Several non-governmental organisations (NGOs) inside the country have also raised concerns about the extent of media freedom specifically and freedom of expression more generally, although to different extents.²

This paper analyses the state of freedom of expression in South Africa twenty years into democracy. It reviews the legal and policy framework underpinning the right, and then uses a rights-based analysis to identify fault lines in its conceptualisation and implementation. It adopts a broad approach to freedom of expression, as covering media freedom (including Internet freedom), as well as other forms of expressive conduct. It analyses the right as both a negative as well as a positive right: that is, the extent of freedom from censorship and other forms of official restraint, as well as the extent to which government and other power-holders contribute to ensuring access to the means of communication.

2. Legal, policy and functional frameworks

2.1 International and regional law

The United Nations (UN) Universal Declaration of Human Rights guarantees freedom of expression under Article 19, which states that:

Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers.³

South Africa is an active participant in the UN system. There are two international covenants that impact on freedom of expression, the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of all forms of Racial Discrimination (ICERD), which require hate speech and racism to be prohibited by law. South Africa signed the ICCPR and ICERD in October 1994, shortly after the country's first democratic elections in April, but only rat-

ified them in 1998.⁴ Article 20(2) of the ICCPR declares that:

Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence should be prohibited by law.⁵

Furthermore the ICCPR lays down conditions that any restriction on freedom of expression must meet, including that these restrictions must be provided by law and be necessary for the respect of rights of reputations of others, for the protection of national security or for public order, health or morals.⁶ These provisions have been controversial on freedom of expression grounds, as freedom of expression advocates consider them to be over-broad and liable to be abused to unduly restrict freedom of expression.⁷

ICERD has also been criticised for over-broad formulations that compromise freedom of expression unduly. It places an obligation to create offences for dissemination of ideas based on racial superiority and hatred, incitement to racial discrimination, acts of racially motivated violence and incitement to such acts, and the provision of assistance, including of a financial nature, to racist activities.⁸

As a result, several countries have entered reservations to the clauses, which have led to their own norms and standards applying to these issues, but South Africa did not do so, which means that the provisions of these conventions apply.

Over the course of time, a three-part test has been developed in civil society organisations such as Article 19, and by legal professionals, and has come to be accepted as providing the basis for legitimate restrictions of freedom of expression, which is as follows:

- The restriction must be provided for in law, and the law is accessible and formulated with sufficient precision to enable a citizen to hold a government to account for its conduct;
- The restriction must pursue a legitimate aim;
- The restriction must be necessary to secure one of these legitimate aims. In other words, there must be a pressing social need for the restriction. The reasons

given by the state must be sufficient to justify the restriction and the restriction must be proportionate to the aim pursued.⁹

The UN system also includes a Universal Periodic Review (UPR), and South Africa has presented two reports so far on the Review, one in 2008 and one in 2012. At the presentation of its 2012 report, South Africa was questioned about its lack of progress in implementing measures to counter racism, racial discrimination and xenophobia, as well as the extent of its commitment to freedom of expression, given that the government had introduced a highly controversial Protection of State Information Bill, which appeared to threaten freedom of expression. Parties present at the Working Group meeting of the UPR called on South Africa to implement measures to counter racism, while at the same time ensure that the Bill incorporated human rights principles and introduce further measures to enhance freedom of expression and freedom of the press.¹⁰

The South African apartheid state signed the African Charter on Human and Peoples' Rights as far back as 1986, the year it was entered into force, but only ratified it in June 1996.¹¹ The Charter is upheld by the African Commission on Human and Peoples' Rights, which has a Special Rapporteur on Freedom of Expression and Access to Information, a South African, Pansy Tlakula, who was also the chief executive officer of the Independent Electoral Commission (IEC). The Charter is enforced by a special court, which has only begun operating and which heard its first freedom of expression case in March 2014, involving an alleged violation of the right in Burkina Faso.¹² The Charter states that: 'Every individual shall have the right to express and disseminate his opinions within the law.'¹³

2.2. South African law

The Constitution of the Republic of South Africa (1996) includes an express guarantee of the right to freedom of expression, which is as follows:

16. (1) Everyone has the right to freedom of expression, which includes –
- a. freedom of the press and other media;

- b. freedom to receive or impart information or ideas;
 - c. freedom of artistic creativity; and
 - d. academic freedom and freedom of scientific research.
- (2) The right in subsection (1) does not extend to –
- a. propaganda for war;
 - b. incitement of imminent violence; or
 - c. advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

It should be noted that, unlike the United States' First Amendment, the right protects expression and not just speech. This means that a broader range of expressive activity receives protection under the right, which potentially includes actions that have expressive content. Mandla Seleokane has argued that this means that the right is more likely to be limited. If speech only was protected, then it would be easier to adopt a 'practically anything goes' approach, but this argument is possible only if a strict separation is kept between words and deeds, as the latter are more likely to be injurious than the former, and therefore in greater need of limitation.¹⁴

There has been considerable debate about the significance of the fact that this section makes express mention of four specific forms of freedom of expression. It would appear that the intention of the drafters was to ensure that legislators and the courts appreciated that these activities relied heavily on freedom of expression for their existence, which means that their protection should lie at the core of the right. As a result, legislators should be the least hasty about limiting these forms of expression. Furthermore, if these rights are limited, then the expressive rights of the community as a whole stand to be limited, as artists, journalists, academics and scientists often disseminate information, not just for themselves, but to give a voice to more general community concerns.¹⁵

Controversially, the Constitutional Assembly decided to include an internal qualifier in the right, which means that the right to freedom of expression does not protect the forms of expression listed in section 16(2). This decision was controversial because the right

is already subjected to a general limitations clause that needs to be reasonable and justifiable and may only be made with good cause. In addition, legislators need to take into account the nature of the right, the importance of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and whether there are less restrictive means to achieve this purpose. It is not entirely clear why the Assembly chose to include the internal qualifier when the right can already be limited using the general limitations clause.

It is not clear whether the right includes a proactive element which places an obligation on the government not only to refrain from censorship, but to provide access to the means of communications. In a country with an apartheid legacy of skewed media and communications networks, it makes sense for the broader approach to apply, otherwise freedom of expression risks becoming a freedom that is practised largely by the owners of the means of media production rather than the broader citizenry, who themselves may want to start their own media but may face prohibitive barriers to entry. To this end, legislators passed the Media Development and Diversity Agency (MDDA) Act, which established the MDDA, a statutory body with a mandate to create an enabling environment for media development and diversity in South Africa.¹⁶ The MDDA has since been shifted from the presidency to the Ministry of Communications.

Although South Africa has not adopted a law that criminalises hate speech in line with ICERD, the Promotion of Equality Act and Prevention of Unfair Discrimination Act does prevent and prohibit hate speech.¹⁷ The Act defines hate speech as words 'that could reasonably be construed to demonstrate a clear intention to be hurtful, cause harm or promote hatred on the basis of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language or birth'. This definition is broader than the definition provided for in the Constitution in that it includes both hurtful and harmful speech, as well as speech that could have this intention, introducing a speculative element to the definition.¹⁸ This element could well be used to limit freedom of expression in dangerously broad ways, and even to shield whites from criticism about the continued existence of

racism and inequality in South Africa. A case in point was the-then ANC Youth League leader Julius Malema being found guilty of hate speech for having chanted the struggle song *Shoot the Boer*. The South Gauteng High Court found the chant, in certain contexts, to be hate speech and also interdicted Malema and the ANC from singing it in public or, bizarrely, even in private meetings. According to Judge Colin Lamont, it was necessary to shield racial 'minorities' from being hurt by such speech and feeling fearful.¹⁹

South Africa does not have a press law similar to that of Sweden, as the press is self-regulating. However, broadcasting and telecommunications are regulated by law. The Constitution provides for the establishment of an independent regulator for (communications) broadcasting (and postal services), the Independent Communications Authority of South Africa (Icasa), which is meant to regulate the sector for fairness, freedom of expression and a diversity of views. The rationales for regulating the broadcasting media but not the press is that the former are more pervasive than the latter and they make use of a finite, public resource (the frequency spectrum) to purvey their message, whereas the latter do not.

Various laws govern the broadcasting and telecommunications landscape, and these are in the process of being reviewed in the context of an Information and Communications Technology (ICT) policy review, which intends to promote convergence between the two sectors. The Broadcasting Act sets out a charter for the public broadcaster, the SABC, grants it creative, programming and journalistic independence and sets out its powers and functions. The legal framework for broadcasting also makes provision for three tiers of broadcasting: public, commercial and community, and limits cross-media ownership and foreign ownership of broadcasting. On the telecommunications side, the legal framework makes provision for universal service and access to telecommunications and fair competition in the sector.

The Film and Publications Act of 1996 established the Film and Publications Board, a statutory body falling under the Ministry of Home Affairs. Internet content falls within the regulatory framework of the Film and Publications Board, which was set up to replace the apartheid-era Publications Control Board. The Board is

a portfolio organisation of the Ministry of Home Affairs. The essential difference between the old Board and the new one is that while the old Board acted as a censorship board, particularly of political content that challenged the legitimacy of the apartheid regime, the new Board is meant to confine its role to content classification, with a very narrow range of content being restricted or even prohibited. Suggestions have been made on various regulatory platforms of all media regulatory institutions developing a common code for all media content, given the realities of convergence, but these discussions are at an early stage.

Communications services are regulated by Icasa. Icasa has been set up according to section 192 of the Constitution, which states:

National legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society.

The founding statute for Icasa is the Icasa Act (2000). The Act provided for the merger of the then regulators for broadcasting, the Independent Broadcasting Authority, and telecommunications, the South African Telecommunications Regulatory Authority (SATRA), into a single converged communications regulator. The Act also set out the powers and functions of the regulator, procedures for the appointment and removal of councillors and matters relating to the financing of Icasa. There has been some confusion about whether the Constitutional provision applies only to the broadcasting aspects of Icasa or the regulator as a whole, but given the realities of convergence of broadcasting and telecommunications, it has become increasingly difficult to separate the two. In time, a Constitutional amendment may be needed to clarify that communications independence is protected, not just broadcasting independence.

Icasa regulates the communications sector according to the Electronic Communications Act (ECA), which was promulgated in 2005 to facilitate convergence. The ECA incorporates a semi-layered approach to licensing, with three layers having been identified: Electronic Commu-

nications Services (ECS), Electronic Communication Network Services (ECNS) and broadcasting. The Act also draws a distinction between individual and class licences, where the former are considered to have a significant socio-economic impact on the country and are therefore regulated more heavily than those services that do not. Class licences are generic licences that are given to a particular category of broadcasting, such as community radio stations, and that do not include individually-tailored conditions of broadcast. The Act envisages ECNS providing any communications service, including Internet, phone or broadcasting, facilitated by the use of a common platform, Internet protocol (IP).²⁰ Internet Service Providers (ISPs) are classified as ECSs and therefore require a licence from Icasa; however the Act does not give Icasa jurisdiction over the content of ECSs.

Electronic transactions are regulated according to a separate Act, the Electronic Communications and Transactions (ECT) Act of 2002. It requires the Minister of Communications to develop a national e-strategy, an electronic transactions policy, gives legal recognition to data messages and electronic signatures, encryption of information, consumer protection online, limitation of liability of service providers, protection of critical databases, the establishment and ownership of the .za domain name, and other matters relating to electronic transactions. Importantly for ISPs, the Act provides for the limitation of liability for service providers, providing they are members of an industry representative body recognised by the Department of Communications.²¹

The Act also criminalises a range of online crimes (such as hacking and spamming and email bombing) and creates cyber-policing in the form of cyber-inspectors, employed by the Department of Communications, who are given wide-ranging powers to monitor and inspect any website or information system and search premises for evidence of cyber-crime on reasonable cause shown, provided they are in possession of a warrant. Their powers have been criticised as over-broad, creating potential for infringements of the right to privacy, and the system remains open to abuse particularly because South Africa lacks a dedicated law on privacy.²²

South Africa does not have a law protecting journalistic sources. However, section 205 of the Criminal Pro-

cedures Act does require a person who has been subpoenaed to give evidence in a criminal case to give evidence, and section 189 makes it a criminal offence not to do so, unless s/he can show just cause as to why s/he should not. It has been argued that this can be used by journalists to argue that revealing their confidential sources of journalistic information may compromise their freedom of expression, as the public will come to see them as extensions of the police. Furthermore, journalists are ethically obliged to protect their confidential sources.²³

South Africa also has a number of apartheid-era laws that remain on the statute books, which impinge on freedom of expression and which have been invoked on occasion. The most notable is the National Key Points Act of 1980, which allows installations that the government considers to be important to the maintenance of national security to be declared national key points. This status requires these key points to secure their premises and maintain the highest levels of secrecy about them. The Act was used under apartheid to protect key installations from attacks by the armed wings of the liberation movement, and is therefore geared towards excessive secrecy. The Police Act has also been used on occasion to prevent photographs being taken of police actions. These Acts need to be amended.

Most cases involving the right to reputation are dealt with through the common law. The current position in the common law is that defamation can be shown if a statement is published that would make a reasonable person of ordinary intelligence think less of the person referred to in the statement, there was an intention to injure the person's reputation and the publication of the statement was unlawful. However, the person making the defamatory statement, including the media, have access to defences if they can show that the statement was true, in the public interest, was not intended to defame, was fair comment in the case of commentary and was reasonable.²⁴ Criminal defamation charges, however, have also been invoked against people, including journalists.²⁵

South Africa also has a number of laws that limit various rights on the grounds of national security, including freedom of expression. National security is well recognised internationally as a legitimate basis for limiting

derogable rights. In the wake of the September 11 terrorist attacks on the United States in 2001, the South African Government introduced a package of laws designed to contribute to the global fight against terrorism. These included the Regulation of Interception of Communications and Provision of Communications Related Information Act (RICA), the Protection of Constitutional Democracy against Terrorist and Related Activities Act (POCDATARA) and the Financial Intelligence Centre Act (FICA). All these Acts were controversial at deliberation stage in Parliament, on the grounds that they threatened the rights to privacy and freedom of expression, and while many controversial clauses were amended, they were not completely cured of deficiencies.

2.3 South African policy

There is no explicit national policy on freedom of expression; however, there are several policies that implicate the right. The MDDA was established after the Government Communication and Information System (GCIS) developed a policy on media development and diversity, which set out the framework for the MDDA's founding Act. It conceptualised the MDDA as a partnership between the government, the private sector and civil society to support community media through subsidies, with the first two funding the development of the sector.²⁶ The MDDA was meant to be reviewed, but this review has still to take place. The government has indicated that it is considering a Green Paper on media development and diversity, which presumably will include this review, as well as a broader analysis of the extent of media diversity in South Africa.²⁷ Community media have complained about not receiving much government advertising, especially at provincial and local levels where such advertising could make the difference between survival and closure. In response, the MDDA and GCIS have engaged in discussions to consider allocating a percentage of government advertising to community media; at the time of writing, these discussions had not been concluded.²⁸

The White Paper on Broadcasting Policy was released in 1998 following a public consultation process, and sets out the basic principles for the post-apartheid broadcasting sector.²⁹ It called for corrective measures to address

what it characterised as the 'two worlds of broadcasting', the one mainly white and wealthy, and the other mainly poor and black, and recognised the need for three tiers of broadcasting (public, private and commercial). The paper stated that the SABC should be governed by a statutory charter, setting out the mandate of the broadcaster; the White Paper also required the SABC to become financially self-sufficient, with the public commercial services cross-subsidising the public services, thereby freeing the government from the obligation of having to fund the broadcaster into perpetuity. While commercial broadcasters are to be subjected to less regulation, they are nevertheless required to contribute to public interest content. They are also subjected to limitations on foreign ownership, as well as cross-media ownership. While community radio is meant to provide a distinct service focusing on community issues, the White Paper recognised the fact that they should derive income from a variety of sources, including advertising. The White Paper also came out against the then broadcasting regulator, the IBA, retaining the powers to make policy, as it was not considered best practice for a regulator to make policy and regulate at the same time; as a result, the Paper made it clear that the Department of Communications was responsible for policy-making.³⁰

Telecommunications also has a policy governing the activities of the sector in the form of a White Paper on Telecommunications Policy. The policy aimed to balance the need for universal service in telecommunications with the establishment of high-speed, globally competitive networks. Universality of communications has continued to be a central feature of communications policy, law and regulation, and as a result universal service and access obligations have been placed on electronic communications network operators in the form of meeting roll-out targets as well as contributing financially to universality. A separate agency was established in terms of the 1996 Telecommunications Act, and subsequently the ECA, to promote universal service and access to ICTs in South Africa, called the Universal Service and Access Agency of South Africa (USAASA). The Agency manages the Universal Service and Access Fund, which is funded from a levy on licensees, and is meant to provide subsidies for needy people to assist them to access ICTs,

finance construction of electronic communications networks in under-serviced areas, and facilitate access of ICTs by schools and other public centres.³¹

The Act also makes provision for the licensing of under-serviced area licensees to promote access to information and communication technologies (ICTs) in areas with a teledensity of five per cent or less. The Act also prescribed the establishment of an independent regulator for the sector, Satra. The White Paper also required the fixed-line incumbent, Telkom, to be protected from competition and to be given a period of exclusivity to roll out the fixed-line network to under-serviced areas. At the time of writing, both the broadcasting and the telecommunications policies were being reviewed in the context of the ICT Policy Review, and they will be replaced by a converged ICT policy in 2015.³²

Currently, there is no policy that relates to the press. The press is self-regulating, and in fact the press undertook a series of reforms to the system of self-regulation, embodied in the Press Council of South Africa (PCSA), to strengthen it in the wake of criticism by the ruling African National Congress (ANC). The ANC argued that the system was self-serving, inherently biased towards the press and deprived the public of access to justice as complainants were required to sign a waiver stating that they waived their right to take their complaint to court if they were unhappy with the PCSA's ruling. The party advocated for the establishment of an independent statutory Media Appeals Tribunal (MAT) to hear complaints from the ombudsman's office: a proposal that was opposed vigorously by the press and civil society on the grounds that it threatened press freedom.³³ The PCSA defended its track record vigorously, arguing that its judgments, including on ANC complaints, demonstrated its independence.

However, the PCSA did initiate its own investigation into its structures and code in 2010, which was followed by an investigation by an industry-initiated body, the Press Freedom Commission (PFC). These investigations led to numerous changes to the system. The level of press representation relative to public representation was changed, giving the public slightly greater representation, and effectively turning the system into one of press-public co-representation. Furthermore, the PCSA

now accepts limited third party complaints as a matter of course, which was not the case in the past. The range of sanctions has also been broadened to include space fines for errant newspapers, and even expulsion for repeat offenders. Complainants are also not required to sign a waiver any longer.³⁴ The ANC has expressed satisfaction with these reforms,³⁵ and appears to have backed off from its initial proposal of a Media Tribunal, but this is likely to be settled in an upcoming Parliamentary hearing into the adequacy of the reforms to the system of press regulation.

2.4 South African functional and financial arrangements

As mentioned above, the Constitutional right to freedom of expression is enacted by several institutions, and these institutions need to be mindful of the right and its limitation. While the lawfulness of media content is obviously adjudicated by the courts, the appropriateness of media content is also adjudicated by various administrative bodies. It is not unusual for the media to set codes of conduct that restrict freedom of expression more tightly than the Constitution, as they reason that they need to set themselves high standards of media conduct: higher than even the Constitution allows for. A case in point is the Press Code, which cautions the press against using discriminatory or denigratory references to race, gender or other characteristics, except where it is strictly relevant to a matter reported on;³⁶ yet ordinarily, such speech would receive constitutional protection.

In the case of the press, complaints about press content are adjudicated according to a Press Code, and the ultimate custodian of this code is the PCSA. Various media institutions may also have their own codes for various ethical matters, such as for accepting gifts. Furthermore, media institutions may handle complaints internally in the first instance, and if a complaint is considered to have merit, then a correction and even an apology may be published. The *Mail & Guardian* has its own public ombudsman, who represents the interests of the public. However, these institutional arrangements do not undercut the power of the Press Council to decide on ethical breaches, but complements its work by making it possible to settle complaints even before they are escalated to

the level of the Press Council. The press themselves pay for the Press Council through an annual financial contribution made by the industry representative body, Print and Digital Media South Africa.

In the case of broadcasting, broadcasters have an option to subscribe to the code of the voluntary Broadcasting Complaints Commission of South Africa (BCCSA). If they do not, then they automatically fall under the jurisdiction of Icasa and its complaints body, the Complaints and Compliance Committee (CCC). Icasa is funded from the fiscus through a budget vote of the Department of Communications, while the funding for the BCCSA comes from the industry representative body for broadcasting, the National Association of Broadcasters (NAB).

Internet content is dealt with on a self-regulatory basis. The Internet Service Providers' Association (ISPA) is the industry representative body for ISPs recognised by the Department of Communications as such in terms of the ECT Act. This means that ISPA members have the right to self-regulate, according to a code of conduct adopted in 2008. ISPA makes representations on behalf of its members, and provides advice and support. It also enforces a Code of Conduct, which requires members to meet certain standards in terms of privacy, consumer protection, spam and the protection of minors.³⁷ In order to qualify for immunity from liability in terms of the ECT Act, ISPs that are members of an industry representative body must include a process for handling take-down notifications of content that violates the code. According to the code, members must respect the constitutional right to freedom of expression, as well as the privacy of their communications.³⁸ However, Internet users can send a take-down notice to ISPA, requesting that material users considered unlawful to be removed. If the user requesting a take-down knowingly misrepresents the facts then s/he is liable for damages for wrongful take-down.³⁹ The Wireless Applications Service Providers' Association (WASPA) is the industry body for mobile based value-added service providers. It too has a code of conduct which provides a framework for adult content, and sets in place procedures to protect children from harmful content.⁴⁰ The Digital Media and Marketing Association (DMMA) is the industry body for digital

publishers, and also has a code of conduct that sets the expected standards of professional practice of its members.⁴¹

2.5 South African jurisprudence

The law of defamation has changed considerably since the apartheid era, when the onus to prove that a statement was not defamatory rested with the defendant; this made it extremely easy for litigants to win defamation cases and constrain freedom of expression in the process. However, since then, several cases have been heard by the courts that have developed defamation law in a direction more friendly to freedom of expression. While the fact that the government cannot sue for defamation had been established as far back as 1945, it remained clear that individual government officials could still do so. But it was only in 1996 that Cameron J established a new defence, whereby a defamatory statement which relates to 'free and fair political activity' is constitutionally protected, even if false, unless the plaintiff can show that the publisher acted unreasonably.⁴²

After that, defamation law in South Africa took a more conservative turn. A 1998 judgment (*Bogoshi v National Media Limited and Others*) contradicted the findings of Cameron J by finding that the right to reputation takes precedence over the right to freedom of expression, and this contradiction resulted in an uncomfortable compromise made by Hefer J, when he stated that the publication of false defamatory facts in the media would not be unlawful, even if they were false, provided it could be proved that publication of these facts were reasonable. However, on the question of fault, the media would be held liable unless they were not negligent, but the burden of proving reasonableness or absence of negligence would lay with the defendant.⁴³ Then in a Constitutional Court appeal in the case *Khumalo v Holomisa*,⁴⁴ O'Regan J, in a unanimous judgment, rejected the argument that the plaintiff should prove falsity, which meant that the defendant still needed to prove truthfulness, but O'Regan reasoned that this burden was lessened by the fact that defendants now had access to the defence of reasonableness if their statements turned out to be false.⁴⁵

The question of whether political figures should be able to sue for defamation has also been the source of

judicial disagreement. Initially, in *Sanki Mthembu-Mahanyele v Mail & Guardian*,⁴⁶ Joffe J found that a cabinet minister cannot sue for defamation when the statement at issue related to the performance of his or her work. However, this approach was overturned on appeal by Lewis AJA, who argued that freedom of expression should not be elevated above dignity, and that they are entitled to reasonable and justifiable treatment by the media too. Then the *Ritchie* case established in 2005 that the government can fund defamation cases: a decision that has been criticised as counter-productive for freedom of expression involving criticisms of government.⁴⁷ These decisions gradually whittled down the categorical defence of freedom of expression articulated by Cameron J, and saw South African jurisprudence veering away from US jurisprudence, which has made it practically impossible for a public figure to sue for defamation, except if actual malice on the part of the defendant can be proved, and the plaintiff needs to prove actual damage to his or her reputation. It also created more space for politicians to use the courts to threaten critics.

Criminal defamation has also reared its head in post-apartheid South Africa. In 2008, a researcher for the Eastern Cape legislature, Luzuko Kerr Hoho, published a series of pamphlets in which he defamed various political leaders, and was sentenced to three years imprisonment, suspended for five years, and to three years correctional supervision. On hearing his appeal, the Supreme Court of Appeal declared defamation, both criminal and civil, to be justifiable limitations on the right to freedom of expression.⁴⁸ This ruling failed to recognise the potentially chilling effect of sentencing a person to prison for something that they said, as this could deter others from engaging in robust speech out of fear of being imprisoned. There are sufficient remedies on civil law to make criminal defamation an overzealous and entirely unwarranted limitation on freedom of expression. However, in 2013, a *Sowetan* journalist, Cecil Motsepe, was found guilty of this crime, for an article alleging racist conduct by a magistrate, but which was based on inaccurate information. He was sentenced to a fine of R10 000 or ten months' imprisonment, suspended for five years.⁴⁹ On appeal, the Pretoria Division High Court found criminal defamation to be constitutional, which set the struggle to decrimi-

nalise freedom of expression back even further, and may well see a Constitutional Court case to settle the matter once and for all.⁵⁰

The courts have also recognised other limitations on freedom of expression, such as with regards to child pornography, which is defined in the Film and Publications Act. A Constitutional Court case, *De Reuck v Director of Public Prosecutions*,⁵¹ considered the case of an independent film-maker, Tascoe de Reuck, who was arrested for possession of child pornography, which he claimed he had for documentary purposes. Free speech advocates were unable to win a blanket exemption for art in relation to child pornography in the De Reuck case; so the compromise that was arrived at was that journalists and documentary film-makers who needed to possess child porn on public interest grounds, would have to apply to the Board for an exemption to do so: a difficult compromise as it amounts to a form of prior restraint. But in spite of this difficulty, the Court actually dealt with the collision between artistic freedom on the one hand and the need to prevent child abuse on the other, very cleverly. In considering whether a particular form of expression was child pornography, it first considered whether it was pornography at all. In this regard, it introduced a distinction between forms of expression that arouse aesthetic feelings and those that arouse erotic feelings: while it acknowledged that the line between the two was often grey, if the expression veered towards the former, it was not even considered to be pornography at all. This distinction meant that the Court introduced an artistic exemption from child pornography by sleight of hand.

Hate speech has proved to be a controversial area of jurisprudence. The Constitutional Court has considered a case involving a community radio station, Radio 786, which was accused of hate speech when it broadcast an interview with Yakub Zaki, a holocaust denialist. The South African Jewish Board of Deputies then took the case to the IBA on the basis that the broadcast constituted hate speech against Jews. The case was adjudicated on the basis of the IBA's code of conduct, which still contained formulations that were not in step with the new constitutional order; one of these was a section that prohibited broadcasts that 'are likely to prejudice relations between sections of the population'. Before the IBA could

deal with the complaint, the Islamic Unity Convention, which owns Radio 786, approached the High Court to challenge the validity of holding the hearing, and the constitutionality of the above section on the basis that it violated freedom of expression. The High Court declined to consider the constitutional issue, which was then dealt with by the Constitutional Court, and the Court declared the section constitutionally invalid.⁵² Sixteen years on, in April 2014, the case was finally settled between the opposing parties, who agreed to put it behind them. Icasa has since adopted a code of conduct for broadcasters that is much more in keeping with the Constitution.

Another significant judgment for freedom of expression involved the collision between satire and commercial speech. This case involved Laugh it Off Productions, which produced a satirical T-shirt based on the logo of the SA Breweries beer Carling Black Label, which read 'Black Labour, White Guilt'. SA Breweries sued for trademark dilution, using section 34(1)(c) of the Trade Marks Act. The Supreme Court of Appeal held Laugh it Off responsible for tarnishing the liquor company's trade mark, but this decision was overturned by the Constitutional Court, which held in *Laugh it Off Promotions CC v South African Breweries International (Finance) b.v. t/a Sabmark International*⁵³ that this section of the Act did not deprive Laugh it Off of the right to lampoon any trade mark and associated brand, as this would stifle the free flow of ideas, and that freedom of expression extended to expressive acts in public.

The tension between privacy and freedom of expression has also been tested in court. In *Sandi Majali and Imvume Management Pty (Ltd) v Mail & Guardian Media Ltd, the Mail & Guardian*⁵⁴, a case was heard involving a report where the paper alleged that Imvume had diverted state oil finds to the ANC to boost its election drive ahead of the 2004 elections, and that Majali's Iraqi oil business was partly meant to fund the ANC. The newspaper pursued the story by accessing Majali's bank accounts, which prompted a complaint that his privacy had been violated. Soni J granted an interim order restraining publication of information, arguing that ordinary citizens cannot have their dignity and privacy violated in this way, and condemned the paper's conduct.⁵⁵

Since then, the lawfulness of pre-publication interdicts has also been entertained by the courts in other cases. In *Midi Television Pty (Ltd) t/a e.tv v Director of Public Prosecutions*,⁵⁶ the Supreme Court of Appeal set out a strict test for prior restraint, namely that the prejudice the publication might cause must be demonstrable and substantial, and there will be a real risk of the prejudice occurring if the publication went ahead. Furthermore, the disadvantages of curtailing freedom of expression must clearly outweigh the advantages. This decision effectively closed the door on the kind of pre-publication interdict that was instituted against the Danish cartoons by Jajbhay J in *Jumiat al-Ulama of the Transvaal v Johnnic Media Investment Limited and Others*, when the judge granted an interdict because the cartoons were demeaning and advocated hatred and stereotyping of Muslims.⁵⁷

The Constitutional Court has also not been partial to legislative prior restraints. A 2009 amendment to the Film and Publications Act allowed anyone to request classification of a publication and also required any publication, with the exception of broadcasters or newspaper publishers recognised by the Press Ombudsman's office, to submit for classification publications if they contained the following material: sexual conduct which violates or shows disrespect for the right to human dignity of any person, degrades a person or constitutes incitement to cause harm; advocates propaganda for war; incites violence; or advocates hatred based on any identifiable group characteristic and that constitutes incitement to cause harm.⁵⁸ Failure to comply with this section would have attracted criminal penalties of a fine or up to five years' imprisonment, or both. In the case of hate speech and sexual conduct, the provisions were broader than the Constitutional limitations on freedom of expression, which made them unjustifiably censorious. The section of the Act that dealt with sexual content was challenged in the Constitutional Court by Print Media South Africa (PMSA, to become Print and Digital Media South Africa) and the South African National Editors' Forum (Sanef), and was struck down as being unconstitutional on the basis that prior restraint violated the right to freedom of expression.⁵⁹

The law has also been developed in relation to the broadcasting of judicial and quasi-judicial proceedings,

with recent jurisprudence leaning towards open courts where media coverage is allowed. The courts have largely recognised that open justice is in the best interests of the public, where the public have access to court proceedings through the media, and thereby gain a better understanding of how court decisions are taken. Broadcast coverage of trials and inquiries has often been controversial because the broadcast media are generally considered to be more invasive, which may alter witness behaviour and, as a result, interfere with court proceedings.

While the right of broadcasters to broadcast proceedings via radio have been recognised, television has been a slightly different matter, given the more intrusive nature of the medium and the temptation of individuals in court proceedings to 'play to the camera'. In 2002, the SABC and e.tv failed to have overturned a decision disallowing them from providing radio and television coverage of an inquiry into allegations of impropriety in the controversial arms procurement package, concluded in the late 1990s. E.tv's attempt to televise the trial of President Jacob Zuma's former financial advisor, Schabir Shaik, for corruption in the arms deal also failed. However, a later case involving the trial of Mark Thatcher made it clear that if broadcasters sought to televise prosecution and defence statements, as well as the judgment, the case for broadcast was stronger than when they sought to broadcast witness testimony. However, on the broader issues, the Constitutional Court has failed to provide direction, although in a dissenting judgment on a decision taken by the Supreme Court of Appeal on such a matter,⁶⁰ Moseneke J affirmed the right of the public to be informed by the most popular and accessible forms of media in the country, and that speculative infringement of the right to a fair trial was not sufficient grounds to limit the public's right to know.⁶¹

Then, in 2009, an attempt by the Judicial Services Commission to hold a preliminary hearing into allegations of misconduct by Western Cape Judge President John Hlophe behind closed doors, was defeated in the South Gauteng High Court.⁶² More recently, Mlambo J granted permission to the media to broadcast live the trial of athlete Oscar Pistorius, who at the time of writing was accused of murdering his girlfriend, Reeva Steenkamp. However, the judge ruled that the defen-

dant's and his witnesses' testimony could not be shown, but could be transmitted by radio, and restrictions could be placed on other witness testimonies if needs be.⁶³ In making this ruling, Mlambo J reaffirmed the principle of open justice.

Freedom of expression has also received attention when it has come into conflict with national security-related matters. Possibly the most significant case in this regard involved Independent Newspapers,⁶⁴ which sought to gain access to the written argument lodged by the parties in a Constitutional Court hearing on the dismissal of the head of the civilian intelligence service, the National Intelligence Agency (NIA), Billy Masetlha, as well as to certain documents in the record of proceedings which had been removed from the Court's website on this case by the Registrar on the instruction of the judges. The Minister of Intelligence Services joined the proceedings and opposed the release of the in-camera affidavit provided by Masetlha, including a report compiled by the Inspector General of Intelligence on the legality of a certain surveillance operation conducted by NIA agents. The case affirmed the ability of the courts to review classifications decisions by the executive, while preferring to adopt a balancing of rights in cases involving requests to publish classified documents, rather than requiring the court to apply a limitations analysis, including government having to justify restrictions on the right to publish.⁶⁵

Freedom of expression in the military has also been affirmed, in one of the first judgments by the Constitutional Court. On the eve of democracy, in 1993, the old South African Defence Force (SADF) rushed through amendments to the Defence Act to forbid unions in the military, but downsizing coupled with discontent with declining working conditions forced the issue back onto the table, leading to the South African National Defence Union (SANDU), which was already in existence, petitioning the Constitutional Court in 1999 to have that section of the Act declared unconstitutional. SANDU won the case, and with it recognition that military personnel have a right to organise into trade unions, and engage in acts of public protest. According to Constitutional Court Judge Albie Sachs's, '...[a blindly] obedient soldier represents a greater threat to the Constitutional order and the

peace of the realm, than one who regards him or herself as a citizen in uniform, sensitive to his or her responsibilities and rights under the Constitution. [Important] though a communal *esprit de corps* may be for the armed forces, the mystique that any military force requires cannot take away the need for soldiers to be able to speak in their own distinctive voices on mundane but meaningful questions of service.⁶⁶

The freedom of whistle-blowers to speak to the media has also received judicial scrutiny. In 2003, Mike Tshishonga blew the whistle on what he maintained was a corrupt relationship between the then Minister of Justice Penuell Maduna and the liquidator Enver Motala (or Dawood), and Tshishonga went public on the accusations. Tshishonga was employed in the Department and was suspended for his disclosure. He won several times, including in the Labour Court, which ordered his reinstatement. In this case involving the Protected Disclosures Act – which provides legislative protections (albeit inadequate) for whistleblowing – the Labour Court provided guidelines to be followed before a disclosure to the media would be protected. These include that the disclosure is made in good faith, that the person who made the disclosure should have a reasonable belief that the disclosure was substantially true, and that it may not result in personal gain. The disclosure must meet one of the conditions of the Act, it must have been reasonable to have made the disclosure and in the public interest, and it will only be protected if prior disclosure to another body tasked with investigating the allegations failed to do so.⁶⁷

3 Human rights-related analysis

3.1 Systemic human rights-related problems

3.1.1 Media and ICT access, participation and information

Arguably, given the historical disparities in access to the means of communication in South Africa, the right to freedom of expression should be read as protecting and promoting both negative and positive freedom. So while the right clearly places an obligation on the state to stop censorship, positive obligations must be put on the state

to level the playing field when it comes to access to the means of communication.

There are indications that the government does take the right of access to the means of communication seriously; as mentioned earlier, it has required the telecommunications sector to achieve universality of communications, and in the case of broadcasting, the regulator Icasa is also required to achieve universality and diversity of broadcasting, with the SABC being a particularly important player in achieving these objectives, while the MDDA has been established to promote media diversity, especially the sustainability of community and small commercial media.

The still fairly elite nature of the public sphere that the media constitute, constrains their ability to play a public service role and to act as widely accessible platforms for freedom of expression: while television reached 91.7 per cent of the population and, according to the 2011 census, 75 per cent of households had access to a television set and 68 per cent to a radio set,⁶⁸ only about 50 per cent of the country's population are newspaper readers, and newspaper circulation is declining after a period of sustained growth in the 2000s.⁶⁹ Internet penetration has increased markedly in the past few years, but still has some way to go before it could be considered an accessible medium: according to the census, 35.2 per cent of South Africans had access to the Internet.⁷⁰

While the South African media could be said to have moderate pluralism of media outlets, this has not necessarily translated into a diversity of content, as many media groups offer 'more of the same' rather than genuine alternatives to the dominant sources of information, news and entertainment. However, a greater diversity of news and information sources is also becoming apparent in the online media space, with initiatives such as *Groundup, Africa is a Country* and the *South African Civil Society Information Service* providing more grassroots-orientated news and analysis, although much of their content still remains metropolitan-focused, which means that the rural poor still lack significant platforms for expression. Upper income audiences are well served by a plurality of media, while lower income earners still remain poorly served by the media. All income groups lack a truly diverse media.

According to the South African Advertising Research Authority's (Saarf) Living Standards Measurement (LSM), LSM 1 and 2 – which according to the SA Advertising Research Foundation comprise 9.3 per cent of the population – rely largely on SABC radio. LSM 3 and 4, which comprise 21.7 per cent of the population, rely on SABC radio and television, with some relying on the private television station e.tv (although e.tv's target market is LSM 5.5). It is only LSM 5 and 6, which comprise 36.1 per cent of the population, that begin to enjoy a range of media products, including SABC, e.tv, daily and weekly newspapers, magazines and outdoor media. LSM 7 and above, which comprise 27.5 per cent of the population, command the lion's share of media. In fact, most commercial media (including the tabloids) tend not to identify LSM 4 and below, or 36.4 per cent of the population, as being part of their target audiences. While radio tends to have the largest penetration, television and print media (including the tabloids) tend to prioritise LSM 5 and above, which together account for 69.1 per cent of the population.⁷¹

It should be noted that the number of people in the lowest LSMs has diminished over time, partly as a result of social grants. However, it should be noted that Saarf's estimation of media access is probably overstated, as the LSM is a consumption-based measurement of wealth and poverty, and given that such definitions also include credit-funded consumption, it is likely that the migration of South Africans towards the higher LSM's has been overestimated. This means that the distribution of media goods is biased towards upper-income earners, which skews South Africa's public sphere towards elite world views, reproducing and reinforcing the society's key race, class and gender fault lines, and undermining the ability of many poor and working class South Africans to make themselves heard in the public sphere.

The MDDA's impact on the extent of media diversity has not been assessed. However, it should be noted that the eventual mandate of the MDDA was reduced from what was originally envisaged at the outset of discussions about the body. The community media sector argued that what was then called the Media Development Agency (MDA) should have regulatory powers to intervene to break up media monopolies, contain monop-

olistic tendencies, and remove obstacles to diversity. The sector also argued for a statutory levy on corporate media to subsidise community media through the MDDA. These proposals were dismissed by the GCIS, which was tasked with bringing the body into being. The MDDA was also under-resourced. At the outset, the GCIS estimated that R500 million would be needed to make a substantial difference to the media landscape. However, the funding proposal was revised downwards to R256 million over five years.⁷² This means that the body that was eventually established was a shadow of what was initially envisaged, and so was unlikely to make a truly significant difference to the media diversity landscape. In addition to MDDA support, the Department of Communications has also provided infrastructure support for community broadcasters, but the impact of this support remains unclear as it has not been evaluated. Signs have emerged, though, of the Department systematically underspending its budget and lacking systems in the allocation of funds. These problems have made the allocation of infrastructure support susceptible to political manipulation, which is hardly surprising as funding is allocated directly from a government department and not through an independent agency.⁷³

Community radio is meant to serve as local-level media for South Africans, thereby providing popular and accessible platforms for local debates. Certainly the sector has grown in leaps and bounds: in fact, community radio listenership has doubled since 2004. Community television has also grown, after an initial slow start. While the community radio sector has, to an extent, enjoyed the protection of Icasa, the community and small commercial print sector have struggled to remain sustainable in the face of competitive pressures from the corporate press. Unlike the community radio sector, which received some attention in the White Paper on Broadcasting Policy of 1997, and various policy documents of Icasa, the community print sector has not received nearly as much attention. In fact, it seems fair to say that the government has adopted a hands-off approach towards the sector, promoted a policy environment that focuses on subsidy as the main method of achieving diversity, while leaving the basic market structure intact. This approach has also assumed that anti-

competitive practices will be checked by the competition authorities (that is, the Competition Commission, which investigates complaints, and the Competition Tribunal, which hears complaints).

The sector's growth could also be attributed to a legislative change in the ECA, which redefined community broadcasting licences as class licences rather than individual licences: this meant that they could be offered much more quickly as they did not involve a time-consuming 'beauty contest' like individual licences did. This change allowed Icasa to clear the licensing backlogs in the sector; but they also led to stations being licensed on a first-come, first-serve basis, which gave more well-resourced and organised communities a greater advantage. Icasa maintains that it does not have the legislative mandate to turn down applications, which has increased the problem.⁷⁴ As a result, the sector has come to be skewed towards wealthier communities, and particularly in the case of community television, stations that are really commercial in nature have been licensed as community stations, which has defeated a key policy objective of the sector, namely to provide an accessible voice for the voiceless.

The SABC has a legislative mandate to reflect a diversity of views in South Africa. However, the extent to which it does so is open to question. The broadcaster relies overwhelmingly on commercial sources of funding, notably advertising, which tends to skew its programming towards upper-income brackets. English, and to a lesser extent Afrikaans, remain dominant on SABC television, as advertisers consider them to be the languages of economic power. However, the SABC has also introduced news and current affairs programmes in African languages. Recent financial crises have led to a massive scaling back of commissioned programmes, and an increase in reliance on repeats of old material, making much of the broadcaster's programming stale, though local and foreign soaps remain a staple.

Since the advent of democracy, the South African local content industry has experienced major growth, and South Africans have developed a strong appetite for local content. The success of many locally produced educational, drama programmes and soaps such as *Generations*, *Muvhango*, *Sevende Laan* and *Yizo*, as well as the

growth of the local music industry, have demonstrated that these quotas have been successful in stimulating demand for local content, and furthermore that South Africans are passionate about watching and listening to their own stories. However, as argued in the ANC's discussion document on communications, compared to other countries such as Canada, Australia and Nigeria, South Africa has one of the lowest local content quotas in the world. Furthermore, a number of the most popular soaps have adopted more commercial formats, shifting over time to position themselves for more middle class audiences, leading to some of the grittier themes that characterised much of the early local content being downplayed. In an attempt to boost ratings, and to increase competition with e.tv, the broadcaster has also phased out older actors and populated soaps with more 'eye candy', leading to these soaps becoming more about consumerist aspirations and less about the stories of ordinary South Africans.⁷⁵

From 2005, when a consumer boom drove the growth of the middle class, the four largest press groups (Media24, Caxton, Independent Newspapers and Times Media Limited) became more aggressive about establishing their presence in the community newspaper market. Realising that national newspapers would struggle for advertising in future, and that the shift globally towards hyperlocal media could be capitalised on in South Africa, they began establishing new 'community' newspapers or revamping existing newspapers in small towns and townships with a sufficiently large advertising base. Caxton and Media24 were particularly aggressive in this regard, although the former had been active in the community newspaper market for many years, leading to local-level wars between these groups and small commercial and community newspapers.⁷⁶ The community press have alleged anti-competitive practices by the larger companies, including buying out competitors in the community press, and if they do not relent, dropping advertising prices below cost to drive their competitors out of business.

The Competition Commission and Tribunal are acting on allegations of anti-competitive behaviour in the press. Between 2004 and 2012, the Commission initiated thirteen investigations into the media sector, involving

six cartels and seven abuses of dominance cases,⁷⁷ but has declined to refer most of the cases to the Tribunal for a hearing after screening. Possibly the most significant case that was under consideration by the Tribunal, at the time of writing, involved a Free State-based community newspaper, *Gold-Net News*. The paper alleged that Media24 engaged in predatory pricing, making it impossible for the former to survive.⁷⁸ The Commission has also identified behaviour by the large press groups that concerns them, including exclusionary behaviour through the abuse of dominance, predatory pricing, exclusions of the community press from using the mainstream group's presses during the 'golden hour', and bundling of products, making it more difficult for independent community press groups to operate. The Commission has expressed concern that the concentration and conglomeration of the sector creates barriers for new entrants and the expansion of emerging enterprises. However, much of this concentration happens, not through large buy-outs of one press group by another, but through creeping acquisitions which usually fall below the Competition authorities' threshold for notifiable acquisitions.⁷⁹ This creeping concentration raises barriers to entry for independent newspapers, making it harder to survive and threatening the diversity of print offerings, especially outside the major metropolitan areas.

However, competition law has been criticised in media policy circles for not being effective in addressing social concerns about media concentration, such as the negative effects of a group being able to dominate public opinion and the adverse impact on the democratic process;⁸⁰ this is because competition rules apply economic criteria in the main to assessing the negative effects of dominance, rather than social criteria.⁸¹ Edwin Baker has critiqued the relevance of the underlying assumptions of competition policy for the media, and the ways in which it tends to equate media diversity with efficient competition. He has argued strongly for a media-specific anti-concentration law, which aims to promote a democratic communications order. The development of such a law, though, is not without its challenges, as it would need to define what constitutes unacceptably high levels of concentration in the media,

to the point where source and viewpoint diversity are undermined. This law should move beyond traditional antitrust concerns with companies raising prices above competitive levels, but should speak to democratic concerns, such as the question of how media ownership should be structured to distribute speech opportunities more fairly and how communicative power should be redistributed to further a democratic society.⁸²

The press is not the only media sector to experience transformation challenges, including creeping concentration and conglomeration. According to OMD South Africa, the number of television stations has increased from seven to 100 between 1991 and 2010, and the number of radio stations from 34 to 138. However, reflecting global trends, the number of daily newspapers has declined from 22 to 21 and the number of major weeklies has increased from 25 to 26.⁸³ Owing to the relatively cheap nature of the medium, diversification efforts in radio have been more successful than in television. While the broadcasting sector recognises three tiers of broadcasting in policy, in reality in the television sector, the commercial tier dominates and the two other tiers remain subsidiary elements of the sector. Inadequate funding for the two lesser tiers is the main problem: the SABC has received scant public funding, leading to it becoming dependent mainly on commercial sources of revenue for its income. The community television sector faces similar challenges, although it has access to some MDDA funding.

The most significant transformation efforts in broadcasting took place in the first decade of democracy. However, since then, growth in the free to air commercial television sector has stalled since the licensing of Midi TV, which established e.tv, the SABC has reverted to elements of a state broadcaster (to be dealt with in more detail below), and the community broadcasting sector remains vulnerable to political and commercial control. The subscription television market has also lacked viable competition, leading to the dominance of the Naspers-controlled Multichoice/DSTV dominating the market. This dominance has been possible, in part, due to the fact that Icasa has not been willing to apply cross-media restrictions to subscription broadcasters, allowing Naspers to retain its dominance both of the subscription

television market and the newspaper market. Icasa has also been relatively ineffective in monitoring compliance with broadcasting regulations, especially local content and independent production quotas. While competition has been introduced in the regional commercial radio market, a national commercial radio station still has not been licensed. All these problems have stymied broadcasting transformation in the second decade of democracy, which has also limited the ability of the most popular and accessible medium in the country to provide platforms for mass participation.⁸⁴

With respect to telecommunications access, South Africa has achieved near universal service for mobile coverage; however, fixed-line coverage has shrunk. In fact, when Telkom was partly privatised in the late 1990s, the company rolled out many lines to under-serviced areas, but many of these were disconnected as people could not afford the service as costs increased. From 1999 to 2002, the cost of local calls, which the poor used more, increased by 35 per cent.⁸⁵ Forty per cent of the new phone lines that Telkom delivered from 1997 to 2001 were subsequently disconnected,⁸⁶ largely because of the profit-taking of the foreign investors, who sold off their shares in the early 2000s after having extracted massive profits. Since then, the fixed-line market has not really recovered, and mobile coverage has taken over as the most popular form of connectivity. This model of achieving universality in telecommunications has implications for Internet access, as most users are forced to access the Internet through 2G/3G connections, which are unstable and which lead to spectrum congestion. However, the cost of 3G-enabled smartphones still remains prohibitively expensive, which limits the ability of many South Africans to access mobile broadband services. Broadband ADSL connections, using fibre connections linked to the fixed-line backbone network, on the other hand, offer faster and more stable Internet connections, but few users can access such connections and they are also expensive (though less expensive than mobile Internet). By 2011, South Africa's fixed broadband penetration rate was a mere 1.5 per cent: significantly lower than the Organisation for Economic Co-operation and Development (OECD)'s average broadband penetration rate compared with OECD countries.⁸⁷ Many areas of the

country receive the 2G signal, and according to USAASA, commercial operators should be able to reach a large number of the areas that do not receive the signal yet. 3G coverage is also improving; however, public broadband access to the Internet remains a significant gap that needs to be addressed.⁸⁸

Affordability remains a significant barrier to telecommunications access, both to voice and data services. The Parliamentary Portfolio Committee on Communications has attributed the high costs in the mobile market to excessive profit-taking by the cellphone companies, reflected in the excessively high mobile termination (or interconnection) rate. In the initial interconnection agreement between the two largest mobile network operators, Vodacom and MTN, the rate was set at 20 cents per minute. When the third cellular network Cell C was introduced in 2001, both cellphone companies increased the interconnection rate by 500 per cent to R1.23 (a 515 per cent increase since 1994), which effectively secured Vodacom and MTN's dominance as a duopoly (the two largest cellphone companies).⁸⁹ The three smaller companies, Cell C, Telkom Mobile and Virgin Mobile, have not been particularly effective in pressurising the larger companies to drop their prices significantly, although there are signs that MTN is responding with price reductions after considerable public and governmental pressure. Data bundle prices have also been the source of considerable controversy in South Africa.

Poor subscribers are the worst affected by the excessively high prices of prepaid or pay-as-you-go rates, including out-of-bundle costs, as the poor were more likely to access the Internet on an out-of-bundle basis. It is expected that data prices will drop by between ten and twenty per cent in the next few years, given that new undersea cables are landing on the African continent, but these reductions will still place South Africa's broadband costs among the highest in the world. The launching of the Seacom cable led to a 700 per cent increase in bandwidth supply according to the company, which had exercised downward pressure on prices, but opinion is divided on whether the landing of other cables on South Africa's shores will lead to further decreases.⁹⁰

There are several factors that have led to the access problems described above. The Department of Commu-

nications has attempted to balance the conflicting policy objectives of universality of communications with private sector-led communications expansion, but this framework has allowed excessive profit-taking at the expense of universal service. In the case of Telkom, the Department of Communications, which is also the custodian of Telkom's shares, has protected the parastatal from competition to enable it to meet universal service targets. However, largely it failed to meet these targets because the company sought to extend the network on commercial principles, which led to massive churn as users could not afford the rising costs of the service. Cellphone network operators have been largely unregulated by policy, which has allowed them to entrench their dominance relatively unchallenged. Furthermore, Icasa has been weakened by the Department of Communications through a variety of measures, including underfunding and an erosion of its administrative and institutional independence. The regulator's weakness has meant that it cannot hold the network operators to account sufficiently, which has exacerbated the problems mentioned above. USAASA has also lacked independence and has been plagued by ineffective management. The Universal Service and Access Fund has also been massively under-utilised, and the performance of the telecentres it has funded has been largely suboptimal.⁹¹

Policy processes in relation to media and ICTs are generally consultative. The White Papers on Broadcasting and Telecommunications followed extensive consultative processes, including a Green Paper/White Paper process. Both processes became controversial, however, for canvassing opinions on issues when decisions had already been taken, such as the decision to merge the IBA and SATRA into Icasa. These problems raised questions about the depth of consultation. Ensuing legislation also went through consultative processes through the Parliamentary Portfolio Committee on Communications. Icasa also engages in consultation about its policy documents. The Department of Communications was, at the time of writing, pursuing an exemplary process of consultation for the ICT Policy, including a Framing Paper canvassing views on the principles that should underpin the ICT sector, a Green Paper that canvassed the public on the strengths and weaknesses of media and ICT trans-

formation, a national colloquium, and regional consultative meetings. Icasa also undertook a similar process reviewing its regulatory framework. However, often too little time is given for substantial inputs to these processes, which tends to advantage more well-resourced organisations, leading to industry and parastatal dominance of policy processes. Draft policies and laws are gazetted with little effort being made to translate these documents into official languages or to simplify the often-highly technical jargon contained in these documents, which limits popular participation substantially. Civil society has limited capacity to participate, although there are coalitions such as SOS: Support Public Broadcasting Coalition and the Right2Know Campaign that participate on a regular basis. Overall, though, policy processes still tend to be dominated by government and industry, which disposes these processes to government and industry capture.

3.1.2 Compliance by government at different spheres

This section will address government's compliance with the right to freedom of expression as it relates to freedom from censorship, as government performance on the access questions has been addressed above. It will also extend its analysis to compliance by various statutory institutions.

The SABC is granted editorial and programming independence, and there have been no signs of direct governmental interference in the editorial content of the broadcaster through censorship. However, the broadcaster lacks administrative, institutional and financial independence. In terms of the SABC's Articles of Association, which are agreed between the Department of Communications and the SABC, the three top management positions, the Group Chief Executive Officer (GCEO), Chief Operating Officer (COO) and Chief Financial Officer (CFO), are appointed by the Minister of Communications. This arrangement is almost certainly unlawful as it violates the requirement in the Broadcasting Act for the Board to control the SABC's affairs. This means that the Minister of Communications controls indirectly the editorial content of the SABC: an arrangement that is most likely unconstitutional as well, as it violates the SABC's right to freedom of expression. The

Articles of Association need to be amended to make it clear that the Board appoints the GCEO, COO and CFO, and not the Minister.

There are also many examples of inappropriate editorial decision-making that suggests political bias. These examples contradict the SABC's core editorial value of editorial independence, and flies in the face of the broadcaster's declaration in its editorial code that 'we do not allow advertising, commercial, political or personal considerations to influence our editorial decisions'. The SABC's editorial decision-making problem dates back many years, and includes the non-screening of a documentary on former president Thabo Mbeki when it was scheduled for broadcast (the documentary was eventually broadcast after public controversy), the blacklisting of commentators that were considered critical of the government, the pulling of the 'Big Debate' series on spurious grounds, the call by COO Hlaudi Motsoeneng for a 70 per cent good news quota, and most recently the censorship of the booing of current President Jacob Zuma at the late Nelson Mandela's commemorative service.⁹²

The SABC's day-to-day editorial decision-making is guided by its Editorial Policies, which were developed in 2004 and which were undergoing review at the time of writing. According to the section on editorial responsibility, the onus is on individual journalists and executive producers to make sound ethical journalism judgements. If anyone is in doubt about whether to broadcast something, s/he should consult with their supervisor for guidance voluntarily: a process known as upward referral. However, the policies also state that an editor or producer should report programmes that are controversial or likely to have extraordinary impact before they are broadcast, and they will be 'held responsible' if they do not. This caveat effectively turns a voluntary arrangement into a mandatory one. The person who is ultimately responsible for editorial decision-making is the GCEO, but this role appears to have been delegated to the COO.

However, the SABC's policies identify certain subjects that trigger an obligation on journalists to consult with their relevant Head of Programming as a matter of course. While this list is meant to cover exceptional situations only – such as broadcasting stories that involve

payment for information – it also extends to stories on national security matters, or instances where journalists need to gather information the public normally does not have access to. These categories are over-broad, which means that the mandatory upward referral process may apply to a large number of stories, rather than exceptional situations only. The upward referral system bureaucratizes decision-making by adding additional layers of management to the decision-making system. Also, the GCEO and COO are management positions – and management should not be making editorial decisions at all, as non-interference of management in editorial decision-making is a well-recognised principle of media organisations worldwide, and there is no reason why the SABC should be the exception to the rule.

The tension between national security and freedom of expression is another major fault line that requires attention. These tensions are especially apparent in the law governing communications surveillance, RICA. In spite of the fact that its drafters attempted to strike the correct balance between the interests of justice and national security on the one hand, and civil liberties on the other, it ignores many of the most basic human rights protections set out in the International Principles on the Application of Human Rights to Communications Surveillance (otherwise known as the 'Necessary and Proportionate Principles').⁹³

The lack of protections means that several rights on communications networks are compromised, notably freedom of expression, access to information, freedom of association and privacy. The implication for freedom of expression is that people who wish to discuss sensitive matters that would otherwise receive constitutional protection, will refrain from doing so out of fear that their communications may be intercepted. This possibility is not far-fetched. In 2005, the state's mass surveillance capacity was misused to spy on perceived opponents of the then contender for the Presidency, Jacob Zuma. *Sunday Times* journalist Mzilikazi wa Afrika had his communications intercepted to track his journalistic activities, and both he and fellow journalist Stefan Hofstatter have had their communications intercepted. In their particular case, it emerged that the police had duped the designated judge into issuing an interception direction.⁹⁴

At the time of writing, they were waiting for a case to be heard against the police for abuses of RICA. Several politicians and activists have alleged that their communications are being surveilled, although it is difficult to say whether this is the case. The *Mail & Guardian* has quoted sources inside the police and State Security Agency alleging that security personnel often do not even bother obtaining directions to intercept communications.⁹⁵

One of the problems with RICA is that no one is even informed that their communications have been surveilled, even after the investigation is complete. No information is available on the number of interceptions that actually result in arrests and convictions. The grounds for the issuing of interception directions are too vague, as they do not require probable cause or a similar level of finding. Influenced by the US's Communications Assistance for Law Enforcement Act, the South African Act forbids the provision of communications networks that are not capable of being surveilled, which threatens the rights to privacy and freedom of expression. By architecting security backdoors into communications systems, governments are creating vulnerabilities that can be exploited by intelligence agencies and criminals alike, and South Africa is no exception to the rule. An added problem is that foreign signals intelligence is completely unregulated by law, which is probably unconstitutional. The country's bulk monitoring capacity resides in the interception centre that undertakes foreign signals intelligence gathering; in other words, the state surveillance agency that has the greatest potential for mass surveillance is the one that is least regulated by law.

South Africa's Anti-terrorism Act, POCTDATARA, has been praised for not containing some of the more odious provisions seen in other laws, such as racial, ethnic or religious profiling, preventive detention and the use of special courts or introduction of modified criminal procedures in terrorism-related cases.⁹⁶ Furthermore, while most of the concerns for freedom of expression that were raised by POCTDATARA were dealt with during Parliamentary deliberations after a protracted and often very fractious engagement between government and civil society, the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism expressed

concern about the over-broadness of the definition of terrorism, which includes acts which by their level of harm could be justifiably considered as terrorist acts. The Act also sets out a reporting duty for the public in respect of all crimes covered by the Act, which according to the Special Rapporteur created potential problems for freedom of expression, and specifically for the ability of journalists to protect their confidential sources of information.⁹⁷

Activists have also complained about being harassed by intelligence agents, which could potentially deter them from being vocal about issues. In 2002, in the run up to the UN's World Summit on Sustainable Development (WSSD), evidence emerged of the NIA surveillance of activists feared of disrupting the Summit. During a 'Week of the Landless', which was held by the Landless Peoples' Movement (LPM), the entire leadership of the LPM was systematically harassed by the NIA. Activists were warned against participating in the week's activities, and their movements were tracked. Some received visits from the NIA, whose operatives also attended LPM meetings to monitor discussions. The Anti-privatisation Forum has also complained of its activists being placed under surveillance and being offered money to spy on the organisation. The Crime Intelligence Division of the police have also been deployed to monitor activists organising protests, including in the run up to the COP 17 conference in Durban in 2011.⁹⁸

Another area of government activity that limits freedom of expression, and that therefore requires attention, relates to the classification of films and publications by the Film and Publications Board. The Act governing the Board's activities has been amended several times since its promulgation in 1996, and a number of these amendments have led to worrying erosions of the right to freedom of expression. In a nutshell, the amendments broadened the scope for classification and prohibition of material, and the type of material covered by the Act, and reduced the independence of the Board and the transparency of its appointment process.

In the 1996 Act, a publication was defined as printed or duplicated matter, pictures and sculptures, recordings for reproduction (with the exception of a film soundtrack), and computer software.⁹⁹ This meant that Inter-

net content was covered only once it was downloaded or printed out. However, in 1999, the Act was amended to broaden the definition of publication to include ‘... any message or communication, including a visual presentation, placed on any distributed network including, but not confined to, the Internet’¹⁰⁰: an amendment which effectively gave the Board jurisdiction over Internet content.¹⁰¹ The definition of ‘distribute’ was also broadened to include failure to take reasonable steps to prevent access by a person under eighteen to classified publications.¹⁰²

In the 1996 Act, films were subject to pre-classification, but publications were classified only if complaints were received about them and they were found to fall into a classifiable category. However, the 2009 amendment mentioned earlier allowed anyone to request classification of a publication and further placed the onus on the publisher (except newspaper publishers) to submit for classification controversial material. These categories of publications could then be classified as ‘refused publications’, which appears to ban a publication for possession and distribution (its meaning is not defined in the Act). These 2009 amendments proved to be controversial and were the subject of Constitutional litigation by SANEF and PMSA. The Court struck down the section dealing with sexual content as being unconstitutional on the basis that prior restraint violated the right to freedom of expression.¹⁰³ Presumably, the Court was not asked to deal with the other grounds for pre-publication classification as they do not receive constitutional protection: as a result, the over-broad clause on hate speech was not challenged and therefore remains in effect for all publications other than magazines and newspapers that are members of PMSA.

With respect to the Board’s independence, according to the 1996 Act, the Board was appointed by the President of South Africa, on advice of an advisory panel set up by the President. The advisory panel was obliged to invite public nominations and ensure transparency in the appointment process. Nominees could not have a direct or indirect financial interest in the film or publication industry, or hold ‘an office of profit’ in the service of the state.¹⁰⁴ The 1999 amendment changed these arrangements, to ensure that the Minister of Home Affairs

appoints Board members.¹⁰⁵ The Minister was no longer obliged to invite nominations for the Board, but may do so. The amendments also broadened the grounds for removal of Board members and gave the Minister powers of removal.¹⁰⁶ This amendment also made it clear that the Minister could lodge complaints against publications.¹⁰⁷ While the Board (whose governance structure was renamed the Film and Publications Council) can issue directives of general application, such as classification guidelines, it can do so only in consultation with the Minister, which further undermines its independence.¹⁰⁸

Several Board judgments have raised freedom of expression concerns, including a decision to use a section in the Act to classify disturbing or harmful or age-inappropriate material for children, to ban a controversial painting by Brett Murray, entitled ‘The Spear’, for children under sixteen years of age. The classification decision applied to online versions of the painting, including an online version published by *City Press* newspaper. According to the Board’s judgment on applications for classification of the painting, ‘younger people and sensitive people may find the themes [in the exhibition] complex and troubling.’¹⁰⁹ The restriction was overturned on appeal. Then, in 2013, the Board refused classification for the film ‘Of Good Report’ on the grounds of child pornography. The ban was, once again, overturned on appeal, on the basis that the Board ignored the distinction between art and pornography set out in the *De Reuck* judgment. While the Board clearly has a very good appeal structure, it nevertheless remains of concern that it erred in favour of censorship on both occasions.

In addition to the Film and Publication Board’s reactions to ‘The Spear’ and ‘Of Good Report’, there have been other signs of artistic freedom of expression being under pressure. In 2009, Arts and Culture Minister Lulu Xingwana stormed out of an art exhibition containing the work of photographer Zanele Muholi, depicting women embracing, and branded the work immoral for its lesbian content.¹¹⁰ Then, in 2013, the Johannesburg Art Fair withdrew the work of artist Ayanda Mabulu, claiming that the work ‘will offend sponsors and important people’. The painting in question, called ‘Yakhal’inkomo – Black Man’s Cry’, is themed around the Marikana shooting and depicts a kneeling miner with horns on his

head, metaphorically representing a dying bull, which is attacked by Zuma's dog, representing the police. Zuma is depicted stepping on another dying miner's head.¹¹¹ The exhibition organisers relented and re-hung the work after a storm of public controversy. These incidents suggest that artistic freedom is not well understood, including by arts administrators, and that more needs to be done to raise consciousness about the importance of this freedom.

Academic freedom of expression has also received some focus in the past few years, especially at the University of KwaZulu-Natal (UKZN). The university administration on several occasions has sought to discipline staff and students for criticising them in the public domain, accusing them of bringing the institution into disrepute. The most well-publicised case took place in 2008, and involved two professors, Nithaya Chetty and John van der Bergh, who, in a series of articles, accused the Vice-Chancellor of the University, Malekgapuru William Makgoba, of authoritarian behaviour.¹¹² More recently, four students were threatened with disciplinary action for criticising the university in an open letter to the Vice Chancellor, although the disciplinary action was dropped after public controversy.¹¹³ While UKZN may be the most extreme case of academic free speech being under pressure, other universities that have corporatised and that are run along managerial lines may also be tempted to act against critics to prevent reputational damage, to the detriment of open debate about the sector and its challenges. It should also be noted that no incidents have arisen that raise concerns about the freedom of the university's core functions of teaching and research being compromised, and academics appear to be free to pursue these functions unhindered by external or even internal interference. But the main fault line appears to be when academics criticise the conditions for academic work: an aspect of academic freedom that is nevertheless still important to protect.

Media freedom also remains a contested area. While the ANC appears to have backed down on its calls for the establishment of a statutory MAT, the conduct of government and state officials at times does not become a country with an express commitment to freedom of expression. There have also been numerous incidents of

journalists being frustrated in their work, too many to be enumerated here. For instance, before the 2014 national election, the police are alleged to have taken a camera from an ENCA journalist and deleted photographs of ANC T-shirts being dispensed from a police vehicle, suggesting political partisanship on the part of the police. The South African National Editors' Forum (Sanef) has been engaging with the South African Police Service (SAPS) to address this and other issues that impede journalistic reporting on police matters. Sanef has also called for a probe into the killing of freelance photographer, Michael Tsele, allegedly by the police, during a service delivery protest in Motloutlung in the North West in January 2014, as it was unclear whether his killing was because of his photography at the protest, although according to eyewitness testimony, he was unarmed when he was killed.¹¹⁴

The National Key Points Act, which impedes the rights of access to information and the right to protest, and by extension, freedom of expression, is dealt with in another paper, as is the controversial Protection of State Information Bill, otherwise known as the 'Secrecy Bill'.

One concern that has remained about freedom of expression has been the potential for creeping control of the media by the government, state entities and the ANC. Until recently, the government has preferred to promote media diversity by establishing and funding the MDDA, but more recently, the government and the ANC have expressed growing frustration with what they perceive to be the anti-government, anti-ANC nature of much of the media, especially the press. In 2011, the GCIS announced plans to transform its existing publication, *Vukuzenzele*, into a tabloid newspaper and publish it every month instead of every second month. With a print run of 1.7 million copies, it is the largest newspaper in the country. In making this announcement, the GCIS appeared to be concerned about the lack of accessibility of existing newspapers, and intended to reach audiences not traditionally reached by commercial newspapers.¹¹⁵ The growth of government media contradicts a key decision taken about the nature of government communication at the outset of the transition to democracy. In 1996, a task group on government communications, Comtask, rejected a statist approach to government information,

including the setting up of a state news agency and a Ministry of Information. The group felt that a centralised information service had no place in a democracy, as it would be perceived widely as a propaganda outfit. Instead, Comtask proposed a more dialogic approach towards communications, while providing citizens with the informational tools for self-empowerment through the MDDA and USAASA. Comtask also argued that the GCIS should act as a service provider to government departments, and also empower departments and other government agencies to communicate, rather than becoming a communication arm in its own right.¹¹⁶

However, since the Comtask report, it has become increasingly apparent that a more statist vision for communications has become influential in government communications thinking. The argument for government communication has been put succinctly by the former deputy Chief Executive Officer of the GCIS, Vusi Mona, when he argued, 'Citizens only have access to information to the extent that the commercial media are willing to act as the purveyor of government information, or willing to reach every nook and cranny of the country and all segments of the population. But this is not always the case as there are a number of limiting factors, both structural and editorial, faced by the commercial media'.¹¹⁷

While there can be no argument about the limited access of the press, it does not automatically follow that the establishment of government media is the best way of addressing the problem, as this may well lead to the establishment of the very kind of propaganda machine that Comtask has opposed in the 1990s. Rather, it would make sense to enable the rights to freedom of expression and access to information by facilitating independent media that serviced areas and constituencies that are underserved by commercial media; as has been noted above, government efforts to create and support such media initiatives have been inadequate. The GCIS has also been investigating ways of streamlining the government's advertising spend, which includes centralising decision-making in the GCIS rather than leaving decision-making to individual Departments. While this move may well save costs, care must be taken to ensure that centralisation does not lead to government and paras-

tatal advertising being dispensed to advantage sections of the media that are considered to be more government-friendly, while starving critical media of this crucial income stream.

After the 2014 national elections, the Department of Communications was split into two: the Department of Communications, responsible for content services, and the Department of Telecommunications and Postal Services, responsible for communications infrastructure. At the time of writing, the government had provided no coherent public justification for the split. Civil society and opposition parties have speculated that the government made this change to enable the Department of Communications to bring under one roof a range of content services that would form the basis of an undeclared Ministry of Information or Ministry of Propaganda.¹¹⁸

The press boasts considerable investigative journalism capacity, with the top investigative teams being based at the *Mail & Guardian* (in the form of the not-for-profit entity amaBhungane Centre for Investigative Journalism) Media24 (Media24 Investigations), the *Sunday Times* and Independent Newspapers. The online news service *The Daily Maverick* has some investigative capacity, but focuses mainly on news commentary. These investigative teams have been responsible for some of the most important investigative stories of recent times, such as impropriety in the lease deal concluded by the SAPS, and that ultimately led to the demise of the then Police Commissioner Bheki Cele,¹¹⁹ and gross overspending on President Zuma's residence Nkandla. These stories have aroused considerable ire with the ANC and the government, leading to often-hostile relations between themselves and the press. The press's investigative capacity is a major source of strength in South African journalism, which is often characterised by shallow 'churnalism', and it is important to ensure that the spaces for such journalism are protected.

However, the press has also been criticised by the ANC for lack of transformation, and not entirely without justification. A team set up by PDMSA, the Print and Digital Media Transformation Task Team, found in 2013 that the press was insufficiently transformed, both in terms of race and gender representivity, and that this situation was unsustainable and needed to change. To

that end, the team proposed transformation targets that the press should commit itself to, to correct the situation.¹²⁰ However, these efforts at industry self-transformation have run parallel to other developments that have changed the face of the press, and also suggested a more ANC-friendly press. A new newspaper, *The New Age*, reputed to be more aligned to the ANC than the rest of the press, was launched in 2010. The paper is owned by TNA media, which in turn is owned by the Zuma-supporting Gupta family. The paper quickly became controversial for receiving state subsidies through the back door, in the form of parastatal funding to a series of SABC-sponsored business breakfasts.¹²¹

Then, in 2013, Independent Newspapers was sold to Sekunjalo Independent Media, widely considered to be close to the ANC and consisting of a consortium of organisations, including the investment companies of Congress of South African Trade Unions (COSATU) members. While there is no doubt that the press needs to transform – as a press that is out of step demographically with the rest of society will lack legitimacy, no matter how relevant its offerings are – there is a danger that the manner in which transformation is being pursued may lead to the independence of the press being compromised, and new coalitions being established between the ANC government and sections of ‘patriotic capital’ that are pro-government in character.

While the higher courts have generally been supportive of freedom of expression, a number of quasi-judicial administrative bodies have adopted a fairly conservative approach to the right. The BCCSA, for instance, has been quick to penalise speech that is racist, sexist, homophobic or offensive, and has adopted an approach towards harm that has, at times, included speech that is merely hurtful. It has also been known to condemn speech on the grounds of dignity, which suggests that the body is adopting an over-broad approach to limiting freedom of expression.¹²²

Icasa is tasked with ensuring fairness of coverage for political parties during the electoral period; to that end, it promulgates regulations before elections after public hearings, to ensure that there is clarity on the electoral broadcasting ground rules. Ahead of the 2014 national elections, the regulator confirmed the SABC’s rejection

of two party election advertisements. The advertisements were by the Economic Freedom Fighters (EFF) and the Democratic Alliance (DA). According to the regulation, party election broadcasts and party advertisements must not contain any material ‘... that is calculated ... to provoke or incite any unlawful, illegal or criminal acts, or that may be perceived as condoning or lending support to any such act.’¹²³ This provision is overly broad, as the Constitution does not extend protection of freedom of expression to a much narrower range of speech, namely to incitement to imminent violence. In other words, the speech needs to call for violence actively and the speaker should have this intention. Also, there needs to be a strong likelihood of violence occurring from the speech, and the speaker needs to know that. This means that the context in which the speech is made is all-important. Icasa’s regulations, and their recent application, demonstrate that the broadcasting framework is not really designed to facilitate electoral competition: if it was, then it would be much more accommodative of the kind of ‘cut and thrust’ speech that is usually the stuff of competitive elections.

Hate speech is another contested area that requires vigilance to ensure that the constitutional exclusion is not interpreted too broadly by government, state agencies and administrative bodies, and by the courts. As stated earlier, the hate speech provision in the Equality Act is over-broad, and it has already been used to find former journalist and South Africa’s ambassador to Uganda, John Qwelane, and EFF leader Julius Malema guilty of hate speech. In the case of Qwelane, he was found guilty of hate speech in 2011, for a 2008 column he wrote in which he denounced gay people. At the time of writing, Qwelane was challenging the ruling on constitutional grounds, on the basis that the hate speech clause was over-broad.¹²⁴ The Department of Justice has signalled its intention to develop a hate crimes Bill, which is likely to include measures to criminalise hate speech.¹²⁵ If this Bill is pursued, then care must be taken to ensure that it does not include the over-broad definitions found in the Equality Act and ICERD, as these could well lead to subjective interpretations of what constitutes hate speech, and the temptation to pursue selective prosecu-

tions of political critics of the current administration will be great.

Another freedom of expression fault line concerns the free expression right of political activists engaging in advocacy on social and economic justice. Many cases have been reported of state harassment of activists, beyond what is necessary to ensure public peace. Abuses of the right to protest through the manipulation of the Regulation of Gatherings Act (RGA) will not be dealt with here, as they are dealt with in the freedom of assembly paper; but needless to say, violations of the right to protest impact on freedom of expression in addition to freedom of assembly, as protests are often the most popular and unmediated forms of expression for workers and the unemployed who may not have easy access to the media. There are also many cases of activists being arrested on illegal gathering or public violence charges, only for the cases to be dropped for lack of evidence months or even years later.

Other practices that restrict freedom of expression of activists have also become apparent. For instance, in Grahamstown in 2011, after a protest that resulted in community members digging up a road in Phaphamani, Unemployed Peoples' Movement (UPM) and Womens' Social Forum activists were given bail conditions that effectively banned them from political activity, including organising or even participating in marches. The charges against the activists were dropped a year later.¹²⁶ Bail may also be refused on spurious grounds. In the same year, Thembelihle activist Bayi-Bayi Miya was arrested on charges of public violence and intimidation for leading protests in the area, in spite of the fact that Miya had in fact attempted to stop the violence. The state opposed Miya's bail successfully in the Magistrate's Court, and the police kept him in 'preventative detention' to stop him from organising any more protests. The Socio-Economic Rights Institute (SERI), representing Miya in the South Gauteng High Court, challenged successfully the magistrate's decision to allow the detention and deny bail, but only after Miya had spent a month behind bars. Last year, the case against the other residents was struck from the roll for lack of evidence after seven months and nine postponements, leading SERI to conclude that the case against their clients was, in fact, political.¹²⁷

Other weak cases have been prosecuted, only for them to be thrown out for lack of evidence. In 2009, members of the social movement Abahlali baseMjondolo were arrested on murder charges following an armed attack on members in Kennedy Road informal settlement. The charges were eventually dismissed after the judge found contradictions in the state's case. Several of the witnesses were unsatisfactory, and the judge questioned their truthfulness after it emerged in testimony that witnesses had been coached to point out members of an Abahlali-affiliated dance group, rather than just the perpetrators.¹²⁸ These practices suggest prosecutions of activists on weak grounds, to harass political critics of the ruling administration, which can deter activists from speaking out and lead to self-censorship.

The deficiencies of whistle-blowing protection, including in the Protected Disclosures Act, are dealt with in the access to information paper, but needless to say strong protections for whistle-blowers are needed to ensure their freedom of expression. However, since 2010, several whistle-blowers have been assassinated in different parts of the country, but especially in Mpumalanga and KwaZulu-Natal. These whistle-blowers have alleged corruption and mismanagement in relation to a variety of issues, including the building of the Mbombela stadium ahead of the 2010 World Cup. However, only one killing has resulted in a successful conviction, which was overturned on appeal.¹²⁹ In 2009, ANC councillor and trade unionist Moss Phakoe was shot dead outside his home in Rustenburg, after he had found evidence of fraud in the province's drought relief projects. As the people alleged to have been responsible for the killing were released on appeal, his killers still remain at large. Inadequate protections for whistle-blowers are bound to deter other potential whistle-blowers in future.

3.1.3 Gender and age analysis

Access to the means of communications is gendered. This is because the largest number of unemployed people falls within the 15–34 age group, and unemployed women outnumber unemployed men, which means that women are much more vulnerable economically than men.¹³⁰ According to Research ICT Africa, by 2007/8 more women than men owned cellphones, although for every

one woman that accessed the Internet, two men accessed it. While monthly mobile expenditure constituted 29.3 per cent of monthly disposable income, women spent more of their disposable income than men. Women tended to use cellphones largely to receive calls or to send missed calls, as buying airtime impacted on household budgets.¹³¹ More recently, and drawing on MyBroadband statistics, the Internet Society of South Africa has stated that 69 per cent of Internet users are male and 31 per cent female.¹³² The cost of connectivity limits access to the means of communications, which affects the freedom of expression of poor users, with women and the youth being affected disproportionately.

Women also remain under-represented as news sources. According to a Media Tenor report produced to coincide with Womens' Month in 2013, and focusing mainly on television, the report found that women accounted for a mere 14 per cent of coverage in South Africa, and women remain under-represented in most regions of the world, so the problem is not a peculiarly South African one.

The PDMTTT also found poor representation of women in ownership and management structures of the press. According to their report, the press has placed greater emphasis on attracting black and female editors than they have black and female managers, with the exception of Media24, where white women were represented disproportionately in their editorial staff. To correct this problem, the PDMTTT recommended that at least half of all board members are black and at least half of these are women. Very few newspapers were published in African languages, which affected women disproportionately, as women were more likely to be reliant on African languages as media for communication rather than English. Furthermore, women were almost completely absent at ownership levels. As a result, the PDMTTT argued for specific gender representation targets, skills development for women and a strategy for the promotion of women to senior management positions.¹³³

Youth representation in the media is a source of concern, especially given the bottom-heavy nature of South African society. According to a report produced by several researchers, including Media Tenor, and led by Rhodes University over an eighteen month period, few

issues that mattered to young people were included in media coverage. Little media content targeted the youth. With the exception of education, youth input on issues of importance was minimal, with practically no youth input on crime. Coverage was largely negative and provided young people with few positive role models. Young men were more prominent in the coverage than young women. The young people surveyed (close to 1000 in four provinces) rated the media's credibility as being low, and lamented the lack of in-depth coverage that was relevant to them. Largely, the media failed to be a resource for young peoples' developing civic and political identities, with radio and television being rated more highly than newspapers and magazines. Yet in spite of this, respondents had high levels of trust in the media, in contrast to levels of trust in public institutions and political parties, which were low. Media policies were also largely silent on promotion of youth voices, reinforcing their marginal status in the media. The National Youth Policy document addressed some of the issues related to technology, where it proposed access to ICTs as one of the ways in which opportunities for young people can be enhanced.¹³⁴

4. Conclusion

South Africa has travelled a remarkable path in relation to freedom of expression in the past twenty years, and there is no doubt that the country has enjoyed levels of freedom that have been unprecedented in recent history. Censorship does occur, but it is vigorously resisted by robust sections of civil society. The media have also proved to be strong watchdogs of the right to media freedom and have organised themselves into associations to protect the right and promote ethical standards in the media. The courts have also developed the law on freedom of expression and some strong precedents have been set that have made censorship more difficult through, for instance, the imposition of prior restraints on media reportage, or over-broad interpretations of concepts like sexual conduct or child pornography. After a shaky start, the courts have swung towards supporting the principle of open justice, which has allowed more

court proceedings to be broadcast, thereby demystifying the workings of the law for many people.

However, it should be noted that the law has not been developed in relation to some key issues; hate speech, for instance, has not been given legal content through case law, yet, especially the vexing question of whether incitement to cause harm refers to physical harm only or extends to psychological harm. Legal guidance on the definition of hate speech is important because any attempt by the Department of Justice to develop hate crime legislation will need to be guided by a proper definition of hate speech. Incitement to imminent violence and propaganda for war have also not been tested legally. There are signs of these constitutional exclusions being given extremely generous interpretations and then being used to limit freedom of expression, and the danger is these exclusions can be stretched to censor political critics of the ruling administration. National security should not be used to restrict freedom of expression unduly, and there are signs that this has happened in the wake of the September 11 attacks on the US.

While media freedom has strong champions, and is therefore well defended, freedom of expression more broadly is in need of vigorous defence too. Activists who act as change agents in their constituencies are vulnerable to harassment and censorship, and generally lack access to resources of know-how to defend their rights. NGOs like SERI, the Freedom of Expression Institute (FXI) and the Right2Know Campaign (R2K) have played important roles in extending access to justice on freedom of expression issues, but the need in relation to these issues is great and cannot be borne by these organisations alone. None of these organisations operate a tracking system of freedom of expression violations, as Reporters without Borders does for media freedom violations, which means that trends cannot be identified very easily as accounts tend to rely on anecdotal evidence rather than quantifiable data.

With respect to increasing access to the means of communications, there have been significant developments over the past twenty years, but transformation in broadcasting was most pronounced in the first decade of democracy and has stagnated somewhat since then. Communications access has been extended massively, to

the point where cellphones are practically ubiquitous, but this extension has happened largely in spite of, not because of, government policy. This policy sought to extend landline access across the country, but because it sought to meet conflicting objectives – attempting to achieve universality using a largely market-driven approach with limited public service top-ups – the policy failed. As a result, connectivity options for Internet-users are reduced, which limits their ability to use the Internet as a gateway to knowledge and democratic participation.

Similar weaknesses can be seen in the media as well. The democratic government can be credited with a media system that is characterised by far higher levels of plurality than existed twenty years ago, but this has not necessarily translated into a diversity of viewpoints. Because of the overly market-driven nature of media transformation, South Africa's media system remains fairly elite, which limits the ability of the media to constitute a public sphere where the most important issues of the day can be discussed and problems resolved. The most popular and accessible medium, the SABC, is subjected to worrying levels of governmental control. The investigative press have been a major success story of South Africa's media transformation, although it tends to be at its strongest when investigating abuses of power by the political (and to a lesser extent the economic) leadership, rather than exposing abuses at grassroots level. Care should be taken not to allow this success to be thwarted by censorious measures such as statutory regulation of the press, which has no place in a democracy.

Nevertheless, the press needs to transform and unless the press is willing to take this problem more seriously and implement the targets as recommended by the PDMTTT, then a transformation charter for the sector needs to be pursued. Insufficient thinking has gone into how to respond to the excessively high levels of media concentration in South Africa; policy has been too timid on this issue and accommodative of market forces. Furthermore, the competition authorities have been slow to respond to anti-competitive behaviour that limits media pluralism. However, questions of how to respond to media concentration must be researched thoroughly to ensure that any measures taken to limit concentration are well-considered and serve a legitimate public pur-

pose, rather than being used to cow an already-brow-beaten press.

With these concluding points in mind, this paper recommends further investigation of the following aspects of *policy* relating to freedom of expression:

- Conducting an audit of all apartheid-era laws that remain on the statute books, and repealing and/or amending them to bring them into line with the Constitution.
- Defining hate speech according to the Constitutional definition of hate speech, and revising all laws and policies that are broader than this definition, including the Equality Act.
- Revising policies and laws impacting on national security, so that they satisfy the limitations analysis mentioned earlier, including POSIB (which at the time of writing had not yet been signed into law, in spite of the Bill having been with the president for over a year).
- Revising media and ICT policy to ensure a strong public service component, not compromised by market imperatives.
- Upgrading the independence of the SABC and Icasa to ensure that both have the capability to discharge their mandates effectively, including constituting common viewing and listening spaces for deliberative debate unhindered by censorship, limiting profiteering in the communications sector and promoting universality of communications, including availability, accessibility and affordability of communications. Consideration should be given to making the SABC a Chapter Nine institution, and making it clear in the Constitution that communications regulation as a whole is protected, and not just broadcasting;
- Strengthening policies to promote media diversity, including limiting excessive media concentration and anti-competitive practices and promoting media that encourage women and the youth to become active participants in shaping democracy.

- Strengthening policies that promote public accountability of the press, while rejecting state accountability models.
- Strengthening the ability of dissenting voices in the political terrain to speak and be heard free of censorship and harassment.

This paper recommends further investigation of the following aspects of *practice* relating to freedom of expression:

- Encouraging civil society to develop monitoring mechanisms for freedom of expression violations, to track the extent of censorship, form of censorship and whether censorship is growing or declining.
- Discouraging quasi-judicial and administrative bodies from limiting freedom of expression unduly.
- Ensuring that the conduct of the security cluster is subjected through more thorough public scrutiny by, for instance, ensuring that the recommendations of the 2008 Ministerial Review Commission on Intelligence entitled 'Intelligence in a Constitutional Democracy' are implemented. This will ensure a greater flow of information about the work of the State Security Agency (SSA).

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<i>Holomisa v Argus Newspapers</i>	1996 (2) SA 588 (W)
<i>Holomisa v Khumalo</i>	2002 (3) SA 38 (T)
<i>Independent Newspapers (Pty) Ltd v Minister for Intelligence Services (Freedom of Expression Institute as Amicus Curiae) In re: Masetlha v President of the Republic of South Africa and Another (Independent)</i>	[2008] ZACC 6; 2008 (5) SA 31 (CC); 2008 (8) BCLR 771 (CC) (22 May 2008)
<i>Jamiat-Ul-Ulama of Transvaal v Johncom Media Investment Limited</i>	(SAHC, 03 February 2006)
<i>Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another</i>	(CCT42/04) [2005] ZACC 7; 2006 (1) SA 144 (CC); 2005 (8) BCLR 743 (CC) (27 May 2005)
<i>Mthembi-Mahanyele v Mail & Guardian LTD and Another</i>	2004 (6). SA 329 (SCA)
<i>National Media Ltd. and Others v Bogoshi</i>	(579/96) [1998] ZASCA 94; 1998 (4) SA 1196 (SCA); [1998] 4 All SA 347 (A) (29 September 1998)
<i>Print Media South Africa and Another v Minister of Home Affairs and Another</i>	(CCT 113/11) [2012] ZACC 22; 2012 (6) SA 443 (CC); 2012 (12) BCLR 1346 (CC) (28 September 2012)

CASE NAME	SALR
<i>Ritchie v Government of the Northern Cape Province</i>	(2004) 2 SA 524 (NC)
<i>South African Broadcasting Corporation Limited v National Director of Public Prosecutions and Others</i>	(CCT58/06) [2006] ZACC 15; 2007 (1) SA 523 (CC); 2007 (2) BCLR 167 (CC); [2006] JOL 18339 (CC) (21 September 2006).
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<i>State v Liphani and 11 others</i>	
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<i>The Public Protector v Mail & Guardian Ltd and Others</i>	(2011 (4) SA 420 (SCA)) [2011] ZASCA 108; 422/10 (1 June 2011)
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- Promotion of Equality and Prevention of Unfair Discrimination Act (2000):

http://www.justice.gov.za/legislation/acts/2000-004.pdf	CALS	Centre for Applied Legal Studies
Regulations on party election broadcasts, political advertisements, the equitable treatment of political parties by broadcasting licencees and related matters, <i>Government Gazette</i> 37350 (17 February 2014) 14–16	CCC	Complaints and Compliance Committee
	CCL	Centre for Child Law
	CDE	Centre for Development and Enterprise
	CEDAW	Convention on the Elimination of all forms of Discrimination Against Women
	CESCR	(United Nations) Committee on Economic, Social and Cultural Rights
Policies		
Department of Communications, White Paper on Broadcasting Policy (1998): http://www.polity.org.za/polity/govdocs/white_papers/broadcastingwp.html#Summary	CFO	chief financial officer
Department of Communications, White Paper on Telecommunications Policy (1996): http://www.polity.org.za/polity/govdocs/white_papers/telewp.html	CoGTA	Department of Co-operative Governance and Traditional Affairs (previously DPLG)
Department of Communications, National Integrated ICT Policy Green Paper (2014): http://www.doc.gov.za/documents-publications/category/22-national-integrated-ict-policy-green-paper.html	Comtask	Communications Task Group
Media Development and Diversity Agency Position Paper (2001): http://www.gcis.gov.za/content/resource-centre/public-entities/mdda-legislation/positionpaper	COO	chief operating officer
	COSATU	Congress of South African Trade Unions
	CRC	Convention on the Rights of the Child
	CSIR	Council for Scientific and Industrial Research
	CSSR	Centre for Social Science Research
	DA	Democratic Alliance
	DBE	National Department of Basic Education
	DHS	Department of Human Settlements (previously National Department of Housing or NDoH)
	DMA	Disaster Management Act 57 of 2002
	DMMA	Digital Media and Marketing Association
ACCESS	DORA	Division of Revenue Act (renewed annually)
ACHPR	DPLG	Department of Provincial and Local Government (now CoGTA)
ADSL	DPME	Department of Planning, Monitoring and Evaluation
ANC	DWA	Department of Water Affairs (previously DWAF)
ARV	DWAF	Department of Water Affairs and Forestry (now DWA)
ASIDI	ECA	Electronic Communications Act
BCCSA		
BNG		

ECDoE	Eastern Cape Department of Education	IP	Internet protocol
ECS	electronic communications service	IPTV	Internet protocol television
ECT	electronic communications and transactions	IRDP	Integrated Residential Development Programme
EEA	Employment of Educators Act 76 of 1998	ISP	Internet service provider
EFF	Economic Freedom Fighters	ISPA	Internet Service Providers' Association
EHP	Emergency Housing Programme	LDoE	Limpopo Department of Education
ES	equitable share	LRC	Legal Resources Centre
ESTA	Extension of Security of Tenure Act 62 of 1997	LSM	Living Standards Measurement
FBSan	free basic sanitation	LTSM	Learning and Teaching Support Materials
FBW	free basic water	MAT	Media Appeals Tribunal
FICA	Financial Intelligence Centre Act 38 of 2001	MDDA	Media Development and Diversity Agency
FHR	Foundation for Human Rights	MEC	Member of the Executive Council (provincial 'cabinet minister')
FLISP	Finance Linked Individual Subsidy Programme	MIG	Municipal Infrastructure Grant
FXI	Freedom of Expression Institute	NDoH	National Department of Housing (now called Department of Human Settlements or DHS)
GCEO	group chief executive officer	NDP	National Development Plan
GCIS	Government Communication and Information System	NERSA	National Energy Regulator of South Africa
GDE	Gauteng Department of Education	NGO	non-governmental organisation
GEC	General Education Certificate	NHFC	National Housing Finance Corporation
GG	Government Gazette	NHSDB	National Housing Subsidy Database
HDA	Housing Development Agency	NHSS	National Housing Subsidy Scheme
HOD	head of department	NIA	National Intelligence Agency
HSDG	Human Settlements Development Grant	NPC	National Planning Commission
IBA	Independent Broadcasting Authority	NSC	National Senior Certificate
ICASA	Independent Communications Authority of South Africa	Nurcha	National Urban Reconstruction and Housing Agency
ICCPR	International Covenant on Civil and Political Rights	NUSP	National Upgrading Support Programme
ICERD	International Convention on the Elimination of all forms of Racial Discrimination	NWSRS	National Water Services Regulation Strategy
ICESCR	International Covenant on Economic, Social and Cultural Rights	OBE	Outcomes Based Education
ICTs	information and communications technologies	OECD	Organisation for Economic Co-operation and Development
IDP	Integrated Development Plan	PAJA	Promotion of Administrative Justice Act 3 of 2000
IEC	Independent Electoral Commission	PCSA	Press Council of South Africa
		PDMSA	Print and Digital Media South Africa

PDMTTT	Print and Digital Media Transformation Task Team	SCOPA	Standing Committee on Public Accounts
PED	Provincial Education Department	SERI	Socio-Economic Rights Institute of South Africa
PIE	Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998	SERs	social and economic rights
PMSA	Print Media South Africa	SGB	school governing body
POCDATARA	Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004	SHF	Social Housing Foundation
R2K	Right to Know Campaign	SHI	Social Housing Institution
RDP	Reconstruction and Development Programme	SHP	Social Housing Programme
RGA	Regulation of Gatherings Act 205 of 1993	SHRA	Social Housing Regulatory Authority
RHIG	Rural Household Infrastructure Grant	SIU	Special Investigating Unit
RHLF	Rural Housing Loan Fund	SSA	State Security Agency
RICA	Regulation of Interception of Communications and Provision of Communications Related Information Act	TIMSS	Trends in International Mathematics and Science Study
SA	South Africa	TRU	temporary residential unit
Saarf	South African Advertising Research Foundation	TV	television
SABC	South African Broadcasting Corporation	UISP	Upgrading of Informal Settlements Programme
SACMEQ	Southern and Eastern Africa Consortium for Monitoring Educational Quality	UKZN	University of KwaZulu-Natal
SADF	South African Defence Force	UN	United Nations
SADTU	South African Democratic Teachers' Union	UPM	Unemployed Peoples' Movement
SAHRC	South African Human Rights Commission	UPR	Universal Periodic Review
SAICE	South African Institution of Civil Engineering	USAASA	Universal Service and Access Agency of South Africa
SANDU	South African National Defence Union	USDG	Urban Settlements Development Grant
Sanef	South African National Editors' Forum	VIP	ventilated improved pit latrine
SAPS	South African Police Service	Waspa	Wireless Applications Service Providers' Association
SASA	South African Schools Act 84 of 1996	WSA	water services authority
SATRA	South African Telecommunications Regulatory Authority	WSDP	water services development plan
SCA	Supreme Court of Appeal	WSP	water services provider

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