



# **A NATIONAL ASSESSMENT OF THE ENABLING ENVIRONMENT FOR CIVIL SOCIETY ORGANISATIONS IN SOUTH AFRICA**



Johannesburg, September 2016

The Enabling Environment National Assessment (EENA) is part of the Civic Space Initiative, implemented by CIVICUS: World Alliance for Citizen Participation and the International Center for Not-for-Profit Law (ICNL), in partnership with ARTICLE 19 and the World Movement for Democracy, with support of the Government of Sweden.

This report is wholly financed by the Government of Sweden. The Government of Sweden does not necessarily share the opinions here within expressed. The author bears the sole responsibility for the content.

## **ACKNOWLEDGEMENTS**

We wish to thank a number of individuals whose support has been vital for the successful completion of this project. We would like to start by thanking the 147 participants who were so generous in contributing to this study. At the same time, we wish to thank the individuals and organisations who made the time to attend and participate in the reach out workshops conducted in Kimberly, Upington in Northern Cape Province, Nelspruit in Mpumalanga Province, Durban in Kwazulu Natal Province and Braamfontein-Johannesburg in Gauteng Province. These individuals and organisations including the representatives from the Department of Agriculture and Forestry Evron Mokaba, Commission for Gender Equality Sixolile Ngcobo, South African Human Rights Commission, Lawyers for Human Rights Christy Blouws, Radio Riverside, Godfrey Friedburgh, Nelspruit Taxi Association Berry Qulu, Ward Committee, Selby Mlombo, Sihlangeni Youth Development Nonhlanhla Malinga, Nelspruit Civil Society, Lilly Palmer, Childline Northern Cape Province, Kelebogile Thibogang and Right to Know. . Data of participants from all workshops held in four areas is captured.

The research team under the capable leadership of Kimani Ndungu with the able support of Mpiwa Mangwiro, Funeka Manzi and Tshepo Legodi from Human Rights Institute of South Africa did a wonderful job of collecting the data, analysing it and compiling the research study. The Provincial Focal Points namely provided technical support on the ground in identifying participants, venues, resource persons, without them we would not have achieved the objectives of the study. Godfrey Phiri of the Right to Know who passed on one week after playing a significant role in the coordination and facilitation of the Braamfontein- Johannesburg Workshop Gauteng Province. Thabang Tseshla of Safihro- based in Kimberly and Margeret Basson from Radio Riverside in Upington in Northern Cape Province. Makhoba Gwamanda from Greater Molweni Community Resource Centre, Kwazulu Natal Province, Nelisiwe Mlombo from Nsikazi Advice Office in Mpumalanga Province.

Lastly, we would like to express our sincerest gratitude to International Centre for Non-Profit Law, in particular, Emerson Hakes and Racheal Alldian for the confidence espoused on HURISA to undertake this important project. Their kindness and understanding throughout implementation of this project is acknowledged. We are grateful to the opportunity they provided to us raising HURISA capacity and prominence in this area of human rights work in South Africa.

Funding for this project was generously provided by the Government of Sweden who we wish to thank unreservedly.

All the errors and weaknesses that may be contained in this report remain the sole responsibility of the Hunan Rights Institute of South Africa (HURISA).

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September, 2016

# **A BASELINE SURVEY OF LAWS THAT IMPACT ON FREEDOM OF EXPRESSION IN SOUTH AFRICA<sup>1</sup>**

**Johannesburg**

**1 September 2016**

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<sup>1</sup> Hurisa gratefully appreciates the efforts of Mpiwa Mangwiro who researched and wrote this report.

## Contents

1. Introduction .....	5
2. An analysis of select laws that impact on freedom of expression in South Africa .....	7
2.1. Protection of Constitutional Democracy against Terrorist and Related Activities Act .....	7
2.2. National Conventional Arms Control Act.....	10
2.3. Defence Act.....	11
2.4. Regulation of Interception of Communications Act .....	13
2.5. Journalistic Privilege and the Protection of Journalists’ Sources: Section 205 of the Criminal Procedure Act .....	20
2.6. Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act.....	33
2.7. Promotion of Equality and Prevention of Unfair Discrimination Act .....	36
2.8. Protection of State Information Bill.....	38
2.9. The Regulation of Gatherings Act .....	40
3. Current Developments.....	43
4. Conclusion.....	44

## 1. Introduction

Civil Society plays a fundamental role in the promotion of human rights, sustainable development, democracy and the rule of law. In this regard it is essential that states create and maintain laws and a regulatory framework in which civil society organisations and the public can operate freely, without any fear or unnecessary constraints. The rights to freedom of assembly and freedom of expression are internationally recognised and protected. South Africa is a signatory to and has ratified international treaties that recognise fundamental rights such as the International Covenant on Civil and Political Rights (ICCPR),<sup>2</sup> which commits parties to respect the civil and political rights of individuals, including the right to freedom of expression. South Africa has also ratified the African Charter on Human and People's Rights, which also recognises the right to freedom of expression in Article 9.<sup>3</sup>

Section 16 of The Constitution of the Republic of South Africa, 1996 expressly provides for the right to freedom of expression. It states that:

“(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*

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<sup>2</sup> Adopted by General Assembly through resolution 2200A (XXI) on 16 December 1966. It entered into force about 10 years later on 23 March 1976. Available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

<sup>3</sup> Adopted in Nairobi in June 27, 1981, and entered into force on 21 October 1986. <http://www.achpr.org/instruments/achpr/>.

*(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.”*

However much as the highest authority in the land, the Constitutional Court, safe guards this right, which is highly essentially for individuals and civil society organisations whose space is mainly in the realm of freedom of assembly and freedom of expression, the reality is that some laws and policies in the country infringe on these rights. This research seeks to establish and highlight those laws and policies that pose a challenge to the right to freedom of expression in South Africa.

### **Why is freedom of expression so important?**

Freedom of expression is a fundamental human right, which is a cornerstone in the functioning of democracy.

In ***South African National Defence Union v Minister of Defence***<sup>4</sup> the Court stated that

*“Freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters.”*

In ***Case and another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and others***<sup>5</sup> the Court stated that:

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<sup>4</sup> 1999 (4) SA 469 (CC) at paras 7-8.

<sup>5</sup> 1996 (3) SA 617 (CC) at para 27.

*“Freedom of expression is one of a ‘web of mutually supporting rights’ in the Constitution. It is closely related to freedom of religion, belief and opinion (section 15)...These rights taken together protect the rights of individuals not only individually to form and express opinions, but to establish associations and groups of like-minded people to foster and propagate such opinions.*

*The rights implicitly recognise the importance, both for a democratic society and for individuals personally, of the ability to form and express opinions, whether individually or collectively, even where those views are controversial. The corollary of the freedom of expression and its related rights is tolerance by society of different views. Tolerance, of course, does not require approbation of a particular view. In essence, it requires the acceptance of the public airing of disagreements and the refusal to silence unpopular views.”*

In this regard it is therefore important to be vigilant and safeguard the promotion and protection of this fundamental right.

## **2. An analysis of select laws that impact on freedom of expression in South Africa**

### **2.1. Protection of Constitutional Democracy against Terrorist and Related Activities Act**

The Protection of Constitutional Democracy against Terrorist and Related Activities Act (33 of 2004) (“Anti-terrorism Act”, “the Act”) inter alia seeks to provide measures to prevent and combat terrorist and related activities in the country. It must be understood that there is no universally accepted definition of terrorism. As Lumina (2007) states, the ‘definitional knot’ is because terrorism is a controversial and elusive concept which evokes strong emotional and contradictory responses. It is an offence in which ‘one man’s terrorist can be another man’s liberator’.



The current ruling party in South Africa, the African National Congress, was for many years considered a 'terrorist' organisation. It is therefore essential that while the state has a responsibility to protect citizens and ought to take necessary steps in protecting such citizens, the law should not be used to infringe on citizens fundamental human rights to advance the interests of certain privileged groups under the guise of ensuring the safety of the public. Terrorism should not include most of the vigorous, direct and effective tactics of political activism common in the country and which could be addressed using existing legislation.

### **Definition of terrorism**

The definition of terrorist activities is quite broad such that it encompasses other criminal offences that fall within the ambit of common law crimes such as attempted murder, arson etc. This poses a challenge where intention is concerned as someone who may not have intended to engage in terrorist activities may find himself or herself guilty under the Anti-terrorism Act. Section (XXV) (vii) of Chapter 1 of the Act for instance states that any activity that "may cause any major economic loss or extensive destabilization of an economic system or substantial devastation of the national economy of a country" is a terrorist activity. Such a definition begs the question, could general industrial strikes by trade unions that hurt the economy of the country be defined as terrorism?

Also, section (XXV) (v) of Chapter 1 of the Act defines as a terrorist activity, any conduct that "causes the destruction of, or substantial damage to, any property, natural resource, or the environmental or cultural heritage, whether public or private." This also begs the question as to whether the general protests that have rocked the South African townships and caused damage to private and public properties can be defined as terrorist activities. Such challenges in the definition of terrorism have resulted in unnecessary arrests and detention of people who committed crimes that had no association with terrorist organisations, or activities during municipal service delivery protests and in labour industrial strikes.<sup>6</sup> Such arrests also increase the number of detentions by police unnecessarily as was the case with the torture of Somali nationals and the disappearance of a Pakistan national, Khalid Rashid.<sup>7</sup>

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<sup>6</sup> Amtaika A and Meyiwa T. 'The Impact of the Implementation of Security Acts on Physical and General Psychological Well-being of Travellers within South African Borders', J Soc Sci, 34(3) : 229-239 (2013) Pg 234.

<sup>7</sup> Ibid.

Thus the definition does not provide for conduct which is indicative of a specific frame of mind, namely to engage in terrorist activities or to bring about a specific consequence. A real act of terrorism is committed when the intent is to bring about a specific social and political end. Acts of terrorism must be distinguished by way of the consequences brought about and the specific intent with which they are committed.<sup>8</sup>

The Act however does make room in section 1(3)(4) for advocacy, industrial action and self-determination activities, which are essential particularly in safeguarding fundamental freedoms such as freedom of expression and freedom of assembly. It is however the broad definition of the offence and the lack of a specific frame of mind regarding terrorist activities that can still create confusion, ambiguity and lead to certain activities motivated by self-determination, industrial action or advocacy falling within the realm of terrorism.

### **Duty to report**

Section 12 of the Act places a duty on members of the public to report the presence of persons suspected of intending to commit or having committed a terrorist offence and failure to do so is in itself an offence. The problem with this position is that a person or individuals could be arrested and detained for crimes they did not intend to commit or for being in the vicinity of a crime scene. Also, while it is understandable why the duty to report exists, this becomes problematic where it involves persons like journalists. In practice the knowledge of such information is often linked to the identity of the provider of such information. It is therefore unclear how the identity of such informers be it domestic or foreign is protected and can be withheld from the police.

Furthermore, the Act imposes a reverse onus concerning a person suspected of aiding or funding terrorist activities where they have to disprove that they did not engage in such activities. This adversely affects the principle of innocent until proven guilty as enshrined in the Constitution. Section 18 of the

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<sup>8</sup> Ester Steyn, SACJ (2001)(14).

Act therefore also violates Sections 35 (b)(i) of the Constitution which guarantees the right to remain silent, and section 35(1)(c) of the Constitution, which guarantees the right “not to be compelled to make any confession or admission that could be used in evidence against that person.”

## 2.2. National Conventional Arms Control Act

The National Conventional Arms Control Act (41 of 2002) regulates the arms industry in South Africa.

Section 20 makes provision for search and seizure processes without a warrant. It states that an inspector of the Inspectorate may without warrant exercise any power referred to in section 19 if:

*“(a) the person who is competent to do so consents; or*

*(b) there are reasonable grounds to believe that a warrant would be issued in terms of section 19(3) and that the delay in obtaining the warrant would defeat the object of the warrant.”*

Without sufficient checks and balances, this process is prone to arbitrary use and abuse and can be used as a means to stifle the ability of citizens to express themselves. In ***Ntoyakhe v Minister of safety and Security***<sup>9</sup>, the court stated that the word ‘seize’ encompasses not only the act of taking possession of an article, but also the subsequent detention thereof.

Section 23 as amended in 2008 relates to disclosure and non-disclosure of information by the National Conventional Arms Control Committee (“the committee”). Section 23 (5) states that:

*“Information concerning the technical specifications of controlled items may be omitted from a report contemplated in this section in order to protect military and commercial secrets.”*

The challenge with this provision relates to the notion of ‘commercial interests’, which is a vague concept that can be too broad. As such, it may not safely be employed as a threshold to judge misconduct. Commercial interest is so broad a term that it could be argued to mean anything that has a (negative) influence on a share price or profits. It is also not clear why businesses in this industry need

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<sup>9</sup> 2000(1) SA 257 (ECD).

special protection and preference over and above the right to freedom of expression.

Section 23(6) states that no person may disclose any information concerning the business of the committee except:

*“(a) with the permission of a competent authority;*

*(b) as required in terms of the Promotion of Access to Information Act (2 of 2000);*

*(c) to a person who needs the information for performance of official functions; or*

*(d) to execute the decisions of the Committee.”*

This provision directly affects the public, media and watchdogs who are prohibited from releasing information without permission even though this might be in the public interest, thus placing a limitation on the right to freedom of expression. Such limitation however ought to be weighed against constitutional limitations on the right to freedom of expression to ensure that it complies with the safeguards laid down in section 36 of the Constitution.<sup>10</sup> This is essential considering that a heavy penalty is imposed on those who breach the provisions of this legislation.

### **2.3. Defence Act**

The Defence Act (42 of 2002) provides for the defence of the Republic of South Africa. This Act repealed its predecessor, the Defence Force Act of 1957, which had some of its sections declared unconstitutional by the courts. The Constitutional Court in the case of ***South African National Defence Union v Minister of Defence & Another***<sup>11</sup> declared section 126B(2) as read with section 126B(4) of the earlier Act to be a violation of section 16 of the Constitution and therefore unconstitutional.

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<sup>10</sup> Section 36 of the Constitution which is titled: “Limitation of Rights” provides that all rights in the Bill of Rights may be limited providing, inter alia, such limitation “is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom...”

2. Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

<sup>11</sup> 1999 (4) SA 469.

These sections prohibited members of the South African National Defence Force from joining or participating in any trade union activities or any protest action.

In the current Act, section 50(4) states that:

*“To the extent necessary for military discipline, the right of members of the regular force, serving members of the Reserve Force and members of any auxiliary services to peaceful and unarmed assembly, demonstration, picketing and petition, maybe subject to restrictions as may be prescribed.”*

Section 50(6) states that:

*“To the extent necessary for national security and maintaining the Defence Force as a structured and disciplined military force, the rights of members of the Regular Force, serving members of the Reserve Force and members of any auxiliary force to join and participate in activities of trade unions and other organisations may be subjected to restrictions as may be prescribed.”*

While it is understandable that the unique nature of the defence forces may limit some of the rights of its members, such limitations should be justifiable and should not amount to a violation of the Constitution.

Section 50 (3) states that to the extent necessary for protection and security, defence force members maybe be restricted from communicating any kind of information and in some instances prohibited from communication of information altogether. While it may be necessary to limit communication of information by military personnel, there should be a balance between protecting military information and promoting freedom of expression. In this regard, the Act needs to make it clear under what circumstances such prohibition or restriction of communication should occur rather than leaving it very broad.

Section 104(7) states that subject to the Promotion of Access to information Act (PAIA), it is an offence for any person to disclose or publish any information that has been classified in terms of the Act. Any person guilty of such an offence is liable on conviction to a fine or imprisonment for a period not exceeding five years. This provision is problematic particularly for journalists and researchers who may for instance disclose classified information exposing corruption or some other state irregularities in the interests of the public. Such journalists are likely to find themselves facing a possible 5-year term of

imprisonment. This then forces the media to exercise caution and restraint in what they report.

Also, while this provision is subject to PAIA which provides guidelines on how the public may access information held by public or private bodies, such processes may prove cumbersome for instance for journalists, who work with certain deadlines and may need to publish the story timeously. Also PAIA processes may prove time consuming as the state and any other body to which a request for information has been made, has 30 days to respond to requests for information. As such PAIA cannot be deemed to be adequate to address some of the challenges manifested by the Defence Act.

#### **2.4. Regulation of Interception of Communications Act**

Passed by parliament in 2002, the Regulation of Interception of Communications Act (70 of 2002) (“RICA”) is a piece of legislation which regulates the method of interception of communications in South Africa. While the Constitution protects fundamental freedoms such as freedom of expression and the right to privacy, RICA essentially establishes grounds for limiting the enjoyment of such rights, particularly the right to privacy, as the Act gives the state power to access communication to and from any person within the republic.

The right to privacy is protected by section 14 of the Constitution. Certainly, this right is not absolute as it is subject to the general limitations clause of the Constitution (section 36), a fact emphasized by the court in the case of *Bernstein v Bester NO*.<sup>12</sup> It has to be demarcated with reference to the rights of others and the interests of the community, subject to lawful conduct and can be limited in terms of lawful justification.

The Court in *Bernstein* held breaches of privacy to encompass a wide range of things including entry into private premises, the reading of private communications/documents, listening into private communications, the shadowing of a person and the wire-tapping or bugging of private communications. Thus, there are many ways in which one’s privacy can be interfered with.

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<sup>12</sup> 1996 (2) SA 751 (CC).

Section 2 of RICA states that:

*“Subject to this Act, no person may intentionally intercept or attempt to intercept, or authorise or procure any other person to intercept or attempt to intercept, at any place in the Republic, any communication in the course of its occurrence or transmission.”*

This is in line with the right to privacy as guaranteed by the Constitution. However, while this is the general rule, the following sections are of concern.

### **Exceptions to the rule**

Section 3 states that-

*“Subject to this Act, any-*

*(a) authorised person who executes an interception direction or assists with the execution thereof, may intercept any communication; and*

*(b) postal service provider to whom an interception direction is addressed, may intercept any indirect communication, to which that interception direction relates.”*

This section arms the state with extensive powers to interfere with the right to privacy as law enforcement agents are empowered to intercept any communication in the course of its occurrence within the republic. Section 7 permits a law enforcement officer to intercept communication to prevent bodily harm where such officer has reasonable grounds to believe that serious bodily harm may be caused, is of the opinion that there is urgency to intercept the communication, and that it is not reasonably practical to apply for an interception directive or an oral interception directive.

Section 8 also permits a law enforcement agent to intercept communication for the purposes of determining location in case of emergency. This they can do without an interception directive if they are of the opinion that determining the location of the sender is likely to be of assistance in dealing with the emergency. The telecommunication service provider who receives such request should intercept the communication or use any other manner they deem appropriate to determine the location of the person in question.

There are insufficient checks and balances as discretion is left on the law enforcement agents who can use their own opinion with regards to the urgency of the matter. The assessment becomes a subjective

one dependent on the personal view of the law enforcement agent.

Section 7 (4) states that:

*“The law enforcement officer who intercepts a communication under subsection (1) or (2) must, as soon as practicable after the interception of the communication concerned, submit to a designated judge-*

*(a) a copy of the written confirmation referred to in subsection (3);*

*(b) an affidavit setting forth the results and information obtained from that interception; and*

*(c) any recording of the communication that has been obtained by means of that interception, any full or partial transcript of the recording and any notes made by that law enforcement officer of the communication if nothing in the communication suggests that bodily harm, attempted bodily harm or threatened bodily harm has been caused or is likely to be caused.”*

Section 7(5) states that:

*“A telecommunication service provider who, in terms of subsection (2), has routed duplicate signals of indirect communications to the designated interception centre must, as soon as practicable thereafter, submit an affidavit to a designated judge setting forth the steps taken by that telecommunication service provider in giving effect to the request concerned and the results obtained from such steps.”*

Section 8(4) states that:

*“The law enforcement officer who made a request under subsection (1)(i) or (2) must-*

*(a) as soon as practicable after making that request, furnish the telecommunication service provider concerned with a written confirmation of the request which sets out the information given by that law enforcement officer to that telecommunication*



*service provider in connection with the request;*

*(b) as soon as practicable after making that request, furnish a designated judge with a copy of such written confirmation; and*

*(c) if the location of the sender and any other information has been provided to him or her in terms of subsection (3), as soon as possible after receipt thereof, submit to a designated judge an affidavit setting forth the results and information obtained from that interception.”*

It is of note that no specific time frame is set for the law enforcement officer who intercepts communication without an interception directive to furnish the judge with an affidavit setting forward the results and information obtained from the interception. Essentially it is up to the law enforcement officer to decide for how long they can intercept communication without a warrant, a position which is not only unfair to the person whose privacy has been violated but also compromises the checks and balances designed to ensure that such process does not unlawfully violate the right to privacy.

The telecommunication service provider is also not given a specific time frame within which to submit an affidavit to the judge detailing the steps taken by that telecommunication service provider in giving effect to the request of the law enforcement agent thus meaning one's privacy may be violated for a certain period of time without proper accountability mechanisms being observed.

It must be borne in mind that a violation of the right to privacy will have a bearing on other rights such as the right to freedom of expression. When citizens are cognisant of the fact that their communication is prone to be intercepted by the state at any given point in time, this may affect their freedom and ability to freely communicate and express their views and opinions. This is more so where the law does not provide sufficient checks and balances in how such communication is intercepted and made use of.

### **Issuing of interception directive and search warrant**

When granting an application for an interception directive, the designated judge must among other things be satisfied that from the facts alleged on the application:

*“(a) there are reasonable grounds to believe that-*

*(i) a serious offence has been or is being or will probably be committed;*

*(ii) the gathering of information concerning an actual threat to the public health or safety, national security or compelling national economic interests of the Republic is necessary;*

*(iii) the gathering of information concerning a potential threat to the public health or safety or national security of the Republic is necessary.”*

The process is therefore considered by a judicial officer who will exercise due diligence in considering the application and consider if there are reasonable grounds for granting such an application. This seems to be in line with the Constitution and principles of the law.

However a challenge lies with the issue of the designated judge. According to the Act, a designated judge is defined as-

*“Any judge of a High Court discharged from active service under section 3 (2) of the Judges' Remuneration and Conditions of Employment Act, 2001 (Act 47 of 2001), or any retired judge, who is designated by the Minister to perform the functions of a designated judge for purposes of this Act.”*

The question is whether this designated judge is /or will be perceived by a reasonable person to be an independent authority, which does not seem to be the case. Judges are appointed through procedures involving the Judicial Service Commission (section 174(6) of the Constitution). The composition of the Judicial Service Commission includes a Constitutional Court judge, High Court judges, lawyers in private practice, members of the National Assembly, members of the opposition and an academic.

Judicial officers are required to act independently and impartially and at an institutional level, it requires structures to protect courts and judicial officers against external interference. Judicial independence thus connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status of relationship to others, particularly to the executive branch of government, that rests on

objective conditions or guarantees.<sup>13</sup>

The Constitutional Court has also observed that the functioning of a judicial officer in an independent court is necessary. It has pointed out that the material requirement for an independent judiciary (and thus a 'judge') is an independent organisation that is responsible for the appointment and removal of judicial officers and security of tenure.<sup>14</sup>

RICA does not provide for such bodies or process of appointment and discharge of the 'designated judge' nor is there a provision that the designated judge will be part of the ordinary judiciary. Referring to the person providing oversight to law enforcement agents as the 'designated judge' is misleading as the term 'judge' relates to one's employment and not to this person being part of an independent institution or structure or existing in any sort of relationship to the executive that may be described as truly judicial.

Being a judge requires more than perceptions of an individual's integrity. The ability of the judge to be perceived as neutral and impartial rests on numerous structural factors such as the fact that he or she is part of a collective bench, is selected as part of a process in which the legislature, the profession and academia also have a say and has his or her tenure secured in a manner which limits his or her exposure to fear or favour.

All of these aspects are absent in respect of the designated judge. The supposed check to executive misuse of the need for a level of interception and monitoring in society is completely vitiated by the fact that the designated judge is, purely and simply, a ministerial appointee. Since this person is appointed under the authority given to the Minister in terms of RICA and since there are no provisions for the dismissal of a designated judge, it is to be assumed that such a 'designated judge' ceases to be one when Ministerial authority is withdrawn. While it may be that the Minister him or herself will not replace a "designated judge" because rulings are not going the executive's way, the absence of any structural safeguards to prevent this, will create in any reasonable person the perception of partiality.

While more than one 'judge' may be designated, structurally, there is the capacity of the executive to pick their judge; something that is prevented by the independence of the real judiciary which is vested

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<sup>13</sup> De Lange v Smuts NO and Others (CCT26/97) [1998] ZACC 6; 1998 (3) SA 785; 1998 (7) BCLR 779 (28 May 1998), at para 71.

<sup>14</sup> Van Rooyen & others v S and others, 2002 (8) BCLR 810 (CC), at para 19.

in the Judge Presidents' prerogative to enroll matters and assign judges.

Also while checks and balances seem to have been put in place in terms of the process the judge has to follow and the considerations he or she has to take into account when dealing with applications for interception directives and warrants, this is watered down by the fact that law enforcement officers have the power to intercept communications without obtaining such order from the judge under sections 7 and 8 discussed above. Such decision is based on the law enforcement's discretion, thus taking away the objectivity test.

Also section 16(7) of the Act makes provision for an application and an interception directive to be granted without notice to the person to whom such application applies and without hearing their side which compromises their right to be heard. Section 21 empowers the state to compel anyone to decrypt encrypted information. Encryption of confidential information is necessary particularly in e-commerce and the fact that anyone who has a decryption key can be compelled to disclose such information gives the state unfettered power to access such information, which violates the right to privacy and in turn affects freedom of expression as diligent individuals and institutions who are cognizant of such provisions may exercise extra caution.

Section 30 requires telecommunication services to at their own cost:

*“(a) provide a telecommunication service which has the capability to be intercepted;*

*and*

*(b) store communication-related information.”*

This provision creates a responsibility for telecommunications companies to enable the state to have access to communication that happens within the republic at their own cost. This greatly compromises the right to privacy and freedom of expression, as astute citizens will exercise great caution in their telecommunications bearing in mind that such communication is being stored where it could be accessible to the state should it deem it necessary to do. Also, placing the responsibility on telecommunications companies to ensure their services are capable of interception diminishes the confidence people have in the use of telecommunications services as a secure way of communication. Failure by telecommunications services to abide by these requirements is an offence, which attracts a

penalty of up to R100 000.00.

Section 40 of the Act as amended by the 2008 Amendment Act (48 of 2008) requires telecommunication service providers to at their own cost record and store details relating to the full names, addresses, identification numbers and registration details of all their clients or customers. Such information must be furnished to law enforcement officials in the event of an interception directive to do so. This also has adverse effects on the right to privacy and freedom of expression as not only can communication be stored as provided for by section 30 of the Act, but also personal details and particulars of every citizen who makes use of such communication. This can also be prone to abuse.

There is therefore need to review some of the provisions of RICA as discussed above to ensure that adequate checks and balances are put in place with a view to protecting the individual right to privacy.

## **2.5. Journalistic Privilege and the Protection of Journalists' Sources: Section 205 of the Criminal Procedure Act**

*"In a system of democracy dedicated to openness and accountability, as ours is, the especially important role of the media, both publicly and privately owned, must in my view be recognised. The success of our constitutional venture depends upon robust criticism of the exercise of power. This requires alert and critical citizens. But strong and independent newspapers, journals and broadcast media are needed also, if those criticisms are to be effectively voiced, and if they are to be informed with the factual content and critical perspectives that investigative journalism may provide. ... It is for this very reason that the Constitution recognises the especial importance and role of the media in nurturing and strengthening our democracy."<sup>15</sup>*

The statement above is an indication of the value the courts place on the right to freedom of expression as enshrined in section 16(1) of the Constitution. While the Constitution guarantees freedom of expression and the courts also uphold it, this right is not absolute in its application. It has to be weighed against competing interests and other rights such as the right to dignity, privacy and fair trial. Also as

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<sup>15</sup> *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W) at 608G - 609D.

discussed above, section 36 of the Constitution provides limitations to the applicability of the rights enshrined in the Bill of Rights.

The discussion below focuses on the implications of section 205 of the Criminal Procedure Act (51 of 1977) on journalistic privilege and the protection of journalists' sources of information. This section states that:

*“A judge of the High Court or a magistrate may, subject to the provisions of subsection 4, upon the request of an attorney –general (“AG”) or a public prosecutor authorised thereto in writing by the AG, require the attendance before him or any other judge, regional court magistrate or magistrate, for examination by the AG, of any person who is likely to give material or relevant information as to any alleged offence, whether or not it is known by whom the offence was committed: Provided that if such person furnishes that information to the satisfaction of the AG or public prosecutor concerned prior to the date on which he is required to appear before a judge or magistrate, he shall be under no further obligation to appear before a judge or magistrate.*

*(4) Any person required in terms of subsection (1) to appear before a judge or magistrate for examination, and who refuses or fails to give the information contemplated in subsection (1), shall not be sentenced to imprisonment as contemplated in s189 unless the judge or magistrate concerned, as the case may be, is also of the opinion that the furnishing of such information is necessary for the administration of justice or the maintenance of law and order.”*

From the above provisions journalists can be subpoenaed to disclose information relating to their sources and it is section 189 where a recalcitrant witness can be in contempt of court which poses a greater challenge. More so, where journalists are called upon to disclose the identity of their sources. It is generally accepted that there is an obligation to protect sources that have been promised confidentiality although the most controversial issue is if such obligation needs to be recognized by the law. According to Kruger, the duty to protect confidential sources of information “is a basic tenet of

journalistic ethics.”<sup>16</sup> It is a near-universal feature of journalism ethics codes in South Africa<sup>17</sup>, Europe<sup>18</sup> and the United States. There have been varying approaches to this question with countries such as Mozambique and Sweden guaranteeing journalistic privilege while in countries like South Africa and most states of the United States, such privilege does not exist.<sup>19</sup>

### **Why is journalistic privilege important?**

Journalists play a fundamental role in the promotion of democracy. As Judge O’regan observed in *Khumalo & Others v Holomisa*:<sup>20</sup>

*“In a democratic society, then, the mass media play a role of undeniable importance. They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas, which is crucial to the development of a democratic culture. As primary agents of the dissemination of information and ideas, they are, inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility.*

*The manner in which the media carry out their constitutional mandate will have a significant impact on the development of our democratic society. If the media are scrupulous and reliable in the performance of their constitutional obligations, they will invigorate and strengthen our fledgling democracy. If they vacillate in the performance of their duties, the constitutional goals will be imperilled. The Constitution thus asserts and protects the media in the performance of their obligations to the broader society, principally through the provisions of s 16.”<sup>21</sup>*

As the media is key in upholding the values of democracy and in promoting freedom of expression and freedom of the press and other media, it is essential that there is an environment which enables

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<sup>16</sup> Kruger, F. 2004. *Black, white and grey. Ethics in South African journalism*. Cape Town: Double Storey Books p190

<sup>17</sup> Retief, J. 2002. *Media Ethics: an Introduction to Responsible Journalism*. Oxford: Oxford University Press.

<sup>18</sup> Ronning, H. & Kasoma, F. 2002. *Media ethics. An introduction and overview*, Johannesburg: Juta, Nordic Journalism Centre.

<sup>19</sup> Between privilege and subpoena: The protection of journalists’ confidential sources: *Ecquid Novi African Media Studies* 2006 27 (2): 111 – 134. <https://robertbrand.wordpress.com/2009/09/06/between-privilege-and-subpoena-the-protection-of-journalists%E2%80%99-confidential-sources/S>.

<sup>20</sup> (CCT53/01) [2002] ZACC 12; 2002 (5) SA 401; 2002 (8) BCLR 771 (14 June 2002).

<sup>21</sup> At para 24.

journalists to freely gather and disseminate information as freedom to receive and impart information and ideas is part of freedom of expression.

The news media also acts as 'a market place of ideas'.<sup>22</sup> In a modern society the media is a forum for public discourse and debate on important issues and stifling this by limiting the flow of information to the public could have adverse effects particularly for a country like South Africa, which has recovered from a history of censorship and repression of freedom of speech. In *S v Mamabolo*<sup>23</sup> the Constitutional Court recognized that:

*"The public interest in the open marketplace of ideas is all the more important to us in this country because our democracy is not yet firmly established and must feel its way. Therefore, we should be particularly astute to outlaw any form of thought control, however respectably dressed."*<sup>24</sup>

The media also play the role of watchdog to uncover abuses, corruption and betrayals of public trust. As the court stated in the case of *Khumalo & Others v Holomisa*<sup>25</sup> "it is the function of the press to ferret out corruption, dishonesty and graft wherever it may occur and to expose the perpetrators."<sup>26</sup> Most often, the assumption people have is that such corruption and lies are perpetrated by the state yet they can also occur in any other space and sphere of life.

To achieve the above, journalists often make use of information provided by sources who may not want to be disclosed. Investigative journalism in particular depends on relationships with sources that have access to information and are many a time willing to release such information on condition of anonymity, thus making it essential to protect their identity. According to Retief:<sup>27</sup>

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<sup>22</sup> *S v Mamabolo*, 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) (11 April 2001), at para 34.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*, at para 37.

<sup>25</sup> See note 15 above.

<sup>26</sup> *Ibid.*, at para 23 (quoting Joffe J in the case of *Government of the Republic of South Africa v "Sunday Times" Newspaper and Another* 1995 (2) SA 221 (T) at 227H - 228A).

<sup>27</sup> See, note 17 at 118.



*“(w)ell-informed sources are the basis, the bread and butter, of any journalist’s success. It goes without saying that the protection of these sources is a vital part of that success. (...) The amount of attention that most ethical codes give to this matter testifies to this fact.”*

Overholzer<sup>28</sup> states the principle even more forcefully:

*“It’s a cardinal rule of journalism: do not disclose the identity of someone who gives you information in confidence. (...) The benefits flowing to the public from this pact of confidentiality are invaluable ... it is incontestable that some information vital to a democratic public will reach it only through the protection of confidentiality.”*

The use of anonymous sources, according to Retief,<sup>29</sup> is justified when publication of the information is clearly in the public interest; the information cannot be obtained by any other means; and the trustworthiness of the source or information is beyond doubt. In necessary circumstances it becomes imperative for public interests and for journalists to be able to afford their sources protection for information given in confidence. Failure to do so may have some of the following consequences:

(1). Detering would be sources –the court in the case of ***Bosasa Operation (Pty) Ltd v Basson and Another***<sup>30</sup> quoted with approval Lord Denning in the case of ***British Steel Corporation v Granada Television Ltd*** [1981] AC 1096 where he stated that:

*“If they [newspapers] were compelled to disclose their sources, they would soon be bereft of information which they ought to have. Their sources would dry up. Wrongdoing would not be disclosed. Charlatans would not be exposed. Unfairness would go un-remedied. Misdeeds in the corridors of power-in companies or government departments - would never be known.”*

Unless potential informers and news sources are confident of their identity not being disclosed, they are bound to be reluctant to share information. This in turn will place a tall order on the ability of journalists to gather information, and play their role as watchdogs and the torchbearers of the right to

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<sup>28</sup> Overholzer, G. 2004. The journalist and the whistle-blower. *The New York Times*. February 6, 2004.

<sup>29</sup> See note 17 above.

<sup>30</sup> (09/29700) [2012] ZAGPJHC 71; 2013 (2) SA 570 (GSJ).

freedom of expression.

Commenting on the likely effect on the newspaper if the *Mail & Guardian* newspaper was forced to disclose the identity of confidential sources, its then editor Ferial Haffejee argued that:

*“If sources are frightened of exposure and reprisal, they are unlikely to tell journalists what they know. (...) If (our journalists) are compelled to disclose the names of sources to whom they promised confidentiality, their credibility as investigative journalists will be irredeemably damaged. They will no longer be trusted by the public and by potential sources...”<sup>31</sup>*

(2) Burden on time and resources- this is especially so for smaller media houses who do not have the resources to defend themselves in court. Hence if a journalist has to respond to a subpoena, testify at a trial, or meet with lawyers, their duties maybe neglected which could lead to the closing down of their newspaper. Also, pressure to reveal sources especially in small towns is not always applied through the courts.<sup>32</sup> Faced with such pressure, cash strapped community stations tend to apply self-censorship as they cannot afford the cost of going to court both in terms of time and finances. As a result, the very real contributions that small community newspapers or radio stations can make to their communities are not realised when editors favour ‘safer’ stories and adverts.<sup>33</sup>

(3) Loss of Independence- when litigants have access to reporters’ information and source materials, the public may view the media as investigative tools of the litigants rather than being independent entities and this affects public confidence in the media and their willingness to share information<sup>34</sup>. In the case of *S v Cornelissen; Cornelissen v Zeelie NO en andere*,<sup>35</sup> Justice Schabort noted that the media have a duty to gather information and to publish it, and that the ability to perform this task is dependent

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<sup>31</sup> Haffejee, F. 2005. Affidavit in the matter between *Imvume Management (Pty) Ltd. and Mail & Guardian Media Ltd. And Others*. In the High Court of South Africa (Witwatersrand Local Division) 05/16077.

<sup>32</sup> Media Law Hand Book pg 2.

<sup>33</sup> Ibid.

<sup>34</sup> See note 17 above.

<sup>35</sup> 1994 (2) SACR 41.

on a relationship of trust between reporters and the public.

### **The South African position**

As discussed earlier, section 16 of the Constitution recognises the right to freedom of expression by the media. Various decisions of our courts<sup>36</sup> have also affirmed the cardinal role that freedom of expression plays in our democracy. However with regards to the issue of privilege of communication between journalists and sources, there is no statutory privilege as is the case between attorney and client meaning that in terms of section 205 of the Criminal Procedure Act, reporters can be subpoenaed to disclose their sources of information. This has happened from time to time. Concerns have however been raised by media institutions and other progressive organisations regarding the challenges that section 205 poses for journalists. Since the dawn of democracy in South Africa, there have been negotiations between the state and the South African National Editors Forum regarding amending section 205.

The Truth and Reconciliation Commission in its final report called for the repeal of Section 205 as there was the possibility that it could be used, as it had been in the past, to force journalists to reveal their sources.<sup>37</sup>The Constitutional Court, however, ruled in *Nel v Le Roux NO and Others*<sup>38</sup> that section 205 inquiries are not unconstitutional *per se* and that other countries have similar provisions. The ruling did not examine the use of Section 205 to compel journalists to disclose information.

While the Court in *Holomisa v Argus Newspapers*<sup>39</sup> recognised the importance of media and press freedom in a democracy, Cameron J did not accept the concept of “press exceptionalism”. In his view, journalists should not enjoy constitutional immunity beyond that granted to ordinary citizens.

However there have been some changes to the approach towards journalistic privilege to give journalists some form of protection against a subpoena to testify or produce information. In 1993, section 205 was amended to the effect that a person who refuses to give information under subpoena

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<sup>36</sup> *South African National Defence Union v Minister of Defence and Another* (see footnote 9 above); *S v Mamabolo* (see footnote 22 above).

<sup>37</sup> See note 16 above.

<sup>38</sup> 1996 (3) SA 562 (CC).

<sup>39</sup> 1996 6 BCLR 836 (W).

may not be jailed unless the court is of the opinion that the information sought is “necessary for the administration of justice or the maintenance of law and order”. The effect of the amendment is that imprisonment for refusal to disclose the identity of a source will be “the exception rather than the rule”.<sup>40</sup>

Another important change from a journalist perspective is the shift in what constitutes the meaning of ‘just excuse’. Raising a ‘just excuse’ to the requirement to provide information has been recognised by the courts as legitimate grounds for escaping imprisonment in the case of a section 205 subpoena<sup>41</sup>. However, courts have held that a journalist’s duty to protect a confidential source does not constitute a “just excuse”.<sup>42</sup>

It is now accepted that journalists may in certain circumstances have a just excuse to refuse to give information under a subpoena. In the case of **S v Cornelissen**<sup>43</sup> where disclosure of sources was granted in the magistrates’ court, the matter was taken on appeal to the High Court which overturned the decision of the lower court on the basis that the relevant magistrate had not properly exercised his discretion. The High Court confirmed the principle that there was no general privilege in terms of which journalists could have immunity from the compulsory giving of evidence on information, which they had obtained in the course of their work. However, the court weighed up the public advantage that would be gained from questioning the journalist against the public prejudice this would occasion, and concluded that there was indeed a just excuse for Cornelissen not to testify<sup>44</sup>.

In **South African Broadcasting Corporation v Avusa Ltd and Another**,<sup>45</sup> the Court at stated as follows:

*“The court accepts that one of the most valuable assets of a journalist is his or her source. Sources enable journalists to provide accurate and reliable information. Sources are often in possession of sensitive facts, which they would be unwilling to*

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<sup>40</sup> Burns, Y. 2001. Communications law. Durban: Butterworths.

<sup>41</sup> See note 19 above.

<sup>42</sup> *S v Pogrand* 1961 (3) SA 868 (T); *S v Matisonn* 1981 (3) SA 302 (A)

<sup>43</sup> See note 33 above.

<sup>44</sup> See note 19 above.

<sup>45</sup> 2010 (1) SA 280 (GSJ).

*disclose without a guarantee that their identities will not be revealed. The protection of journalists' sources is therefore fundamental to the protection of press freedom."*

In ***Bosasa Operation (Pty) Ltd v Basson and Another***<sup>46</sup> the court also affirmed the importance of protecting journalistic sources of information:

*"...it is apparent that journalists, subject to certain limitations, are not expected to reveal the identity of their sources. If indeed freedom of the press is fundamental and sine qua non for democracy, it is essential that in carrying out this public duty for the public good, the identity of their sources should not be revealed, particularly, when the information so revealed, would not have been publicly known. This essential and critical role of the media, which is more pronounced in our nascent democracy, founded on openness, where corruption has become cancerous, needs to be fostered rather than denuded."*

The identity of the sources was found to be peripheral to the actual and real dispute of the parties and hence the application to compel Mail & Guardian to disclose its sources was dismissed.

### **Record of Understanding between journalists and the South African Government**

State authorities have also demonstrated sensitivity to the special position of the media. In February 1999, the Minister of Justice, the Minister of Safety and Security and the South African National Editors' Forum (SANEF) signed a Record of Understanding about the implementation of existing laws that relate to the duty to testify and the protection of journalists' sources of information. It was accepted that there was "a need to balance the interests of the maintenance of law and order and the administration of justice on the one hand with the right of freedom to expression and specifically freedom of the press and other media."

The parties agreed to investigate the possibility of amending section 205 in order to accommodate the concerns of the representatives of the press. The government, through the Minister of Justice, affirmed that the protection of confidential sources is a prerequisite for media freedom.<sup>47</sup> In his answering

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<sup>46</sup> (09/29700) [2012] ZAGPJHC 71; 2013 (2) SA 570 (GSJ) (26 April 2012).

<sup>47</sup> See note 19 above.

affidavit in the case of *Munusamy v Hefer NO and Others*<sup>48</sup>, the Minister of Justice reiterated that the protection of journalistic sources “is one of the basi[c] conditions for press freedom” and that without it “sources may be deterred from assisting the press in informing the public on matters of public interest”. As a result, “the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected.”

While the law does not provide for a ‘journalist’s privilege’, the above developments reflect that there is an understanding by the state particularly the Department of Justice that journalists’ ethical obligations, including the obligation to protect confidential sources, should be recognised and accommodated to some extent in our law.

The South African media fraternity also takes their obligation to protect their sources seriously. The Press Code of Professional Practice of the Press Ombudsman of South Africa, which applies to print media, states in Section 6 that “(a) newspaper has an obligation to protect confidential sources of information”.<sup>49</sup> In addition, the Code of Conduct of the South African Union of Journalists states that “(a) journalist shall protect confidential sources of information.”<sup>50</sup> SANEF’s *Guidelines on confidential briefings and sources*, adopted by its council in 2004, provide that “whatever commitment a journalist has given a source (in relation to confidentiality) should ethically bind that journalist.”<sup>51</sup> Many South African media companies have adopted ethics codes that contain similar injunctions to protect the confidentiality of courses.<sup>52</sup> The South African Broadcasting Corporation’s Editorial Code of Ethics provides that “(we) shall not disclose confidential sources of information.”<sup>53</sup>

This position is widely accepted in other parts of the continent. The Botswana Code of Ethics provides that “(w)hen sources are promised confidentiality, that promise shall be honoured, unless released by

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<sup>48</sup> 2004 (5) SA 112 (O).

<sup>49</sup> Available at <http://www.presscouncil.org.za/>.

<sup>50</sup> See note 19 above.

<sup>51</sup> <http://www.journalism.co.za/blog/sanef-guidelines-on-confidential-briefings-and-sources/>.

<sup>52</sup> [www.robertbrand.wordpress.com](http://www.robertbrand.wordpress.com).

<sup>53</sup> [www.sabc.co.za/.../Editorial+Policy+Booklet](http://www.sabc.co.za/.../Editorial+Policy+Booklet).

the source.”<sup>54</sup> The Code of Conduct of the Media Council of Zambia provides that “(j)ournalists should respect the confidentiality of sources to whom they have pledged anonymity.” Similar pledges to uphold the confidentiality of sources appear in professional codes of journalistic ethics in Angola, Malawi, the Democratic Republic of Congo, Ghana, Kenya and Tanzania.<sup>55</sup>

### **What is the position in other jurisdictions?**

Within the European Union, a number of countries such as Portugal, Austria, France, Germany, the Netherlands, Norway and Sweden – recognise some form of journalistic privilege to protect the confidentiality of sources.<sup>56</sup>In Sweden the Freedom of the Press Act, which has constitutional status, binds journalists to respect the confidentiality of sources who wish to remain anonymous.<sup>57</sup> Journalists who reveal the identity of a source without consent may be prosecuted at the source’s behest.<sup>58</sup> Portugal has also given constitutional recognition to the “reporter’s privilege” to protect confidential sources.<sup>59</sup>

In America, journalistic privilege is recognised under the First Amendment and American jurisprudence, but the privilege is not absolute. Therefore under certain circumstances journalists can be forced to reveal information. The United States Supreme Court in *Brazenburg v Hayes*<sup>60</sup> held that the state must prove that: -

- (1) There is reason to believe that the reporter has knowledge of information relevant to the case;
- (2) There is no other means of obtaining the information which would infringe on the freedom of the press to a lesser degree; and

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<sup>54</sup> See note 19 above.

<sup>55</sup> Ibid.

<sup>56</sup> See note 19 above.

<sup>57</sup> Ibid.

<sup>58</sup> Mitchell, K. B. 2005. Shielding sources around the world. *The News Media & the Law*. Winter 2005: 9

<sup>59</sup> Ibid.

<sup>60</sup> 408 U.S 665 (1972).

(3) That there is a compelling and overriding interest in the information.

The court further held that there should be a balancing of interests and there must be very compelling interests proved by the state for disclosure.

Article (74) (3) of the Mozambican Constitution states that “freedom of the press shall include (...) protection of professional independence and confidentiality.” Journalists working in Mozambique have therefore been accorded the right to professional secrecy concerning the origins of the information they publish or transmit, and their silence may not lead to any form of punishment.

In Zimbabwe in *Nathan Shamuyarira v Zimbabwe Newspapers t/a The Chronicle and Geoffrey Nyarota*<sup>61</sup>, the court found that journalists do not have absolute immunity but in that case it upheld the journalist’s right to protect his sources of information, and laid down certain principles to be considered in weighing whether a journalist might be required to disclose his sources under certain circumstances.

#### **Arguments against journalist privilege**

One of the arguments against granting full privilege to communication between journalists and their sources has been the public interest in the administration of justice and the maintenance of law and order, as well as the rights of others, such as the rights to privacy, dignity, access to information and due process. The prosecutor who seeks disclosure of a journalist’s source, and the journalist who refuses to comply, both claim to serve the public interest.<sup>62</sup> On a similar note, a civil litigant who asks a court to order a journalist to reveal the identity of a source, and the journalist who opposes the application, both claim to be exercising a fundamental right. But no right is absolute: all rights are limited by the rights of others and by the interests of society.<sup>63</sup>

Bates argues that traditional profession-based privilege not to testify, granted to legal and medical professions are not suited to the media for a number of reasons including deciding who qualifies as a

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<sup>61</sup> 1994 (1) ZLR 445 (H).

<sup>62</sup> See note 19 above.

<sup>63</sup> Ibid.



journalist and should be afforded a “reporter’s privilege”.<sup>64</sup> Further, traditional privileges, are governed by “elaborate ethical canons, statutes and case law” while Journalistic ethics codes, set broad guidelines which journalists interpret and apply subjectively and *ad hoc*.<sup>65</sup>

### **Way forward**

It has been established that the need to protect sources is vital for the ability of journalists to exercise freedom of expression and in many instances in the interests of the public to do so. Yet as the courts have ruled, section 205 of the Criminal Procedure Act is not unconstitutional and is part and parcel of the administration of justice. Also the Constitution of South Africa does not provide for absolute rights and all rights are subject to the general limitation provided for in section 36 of the Constitution. How then should the law be embodied to cater for the interest of journalists and the necessary limitations to this right? Should there be absolute protection regardless of the circumstances or should this protection be qualified?

It is highly unlikely that the South African legal system would tolerate an absolute right. Absolute privilege is unknown in South Africa and is very rare in other jurisdictions. Were journalists to push for an absolute privilege against testifying, they would be asking for something not ordinarily accorded to the professions.<sup>66</sup>

An alternative is an amendment to extend the ‘just cause’ defense against a subpoena in terms of section 205 to cover the confidentiality of sources. Such an amendment would amount to a qualified privilege, dependent upon two conditions: that disclosure is necessary for the administration of justice or the maintenance of law and order; and that the administration of justice or maintenance of law and order cannot be served by other means.

The effect of the proposed clause would be similar to the Stewart Principles. A court would compel a journalist to reveal the identity of a confidential source only if the information sought is relevant to a legal proceeding about a specific, probable violation of law; that the information is essential to establishing key issues; and that the information cannot be obtained elsewhere. This would inevitably

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<sup>64</sup> Bates, S. 2000. The reporter’s privilege, then and now. Research paper R-23, April 2000. Cambridge, MA: The Joan Shorenstein Center on the Press, Politics and Public Policy, John F. Kennedy School of Government, Harvard University pg 10-13.

<sup>65</sup> Ibid.

<sup>66</sup>See note 19 above.

lead the court to weigh up, as the High Court did in the *Cornelissen* case, the various competing public interests as envisaged in the Record of Understanding between SANEF and the government.<sup>67</sup> This provision can be tailored to also cover civil suits.

Another option is to look at the constitutional provision of the right to freedom of expression to establish a journalist's privilege in both criminal and civil investigations. In this view, forcing a journalist under subpoena to disclose the identity of a source would be an unconstitutional infringement on the rights to freedom of expression and the media.<sup>68</sup> Interpretation of sections 205 and 189 of the Criminal Procedure Act would have to take into account those rights, with the result that the 'just excuse' would apply to the protection of confidential sources. The same type of defence could also be raised in civil litigation. Such an interpretation would bring South Africa's judiciary in line with the European Court of Human Rights in the *Goodwin* decision cited above, which found forced disclosure of a confidential source to be incompatible with freedom of expression and the media unless justified by an overriding public interest in the disclosure.

The advantage of such an approach is that it would amount to a qualified privilege rooted in the constitutional right to freedom of expression and cover both criminal investigations and civil litigation processes.<sup>69</sup> There would be no need for legislative amendments, which could be costly and time consuming.

## **2.6. Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act**

Passed in 2004 as Act number 4 of 2004, this law defines and describes the powers, privileges and immunities of parliament, provincial legislatures, members of the National Assembly, delegates to the National Council of Provinces and members of the provincial legislatures.

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<sup>67</sup> Ibid.

<sup>68</sup> Delaney, S. 2005. Comparative jurisprudence on protection of journalists' sources.

<sup>69</sup> See note 19 above.

## The Constitution and case law

Section 58(1)(a) of the Constitution provides that cabinet members and members of the National Assembly have freedom of speech in the assembly and in its committees, subject to its rules and orders. In terms of section 58(1)(b), the said members are not liable to civil or criminal proceedings, arrest, imprisonment or damages for anything they have said in, produced before, or submitted to the assembly or any of its committees; or anything revealed as a result of anything that they have said in, produced before or submitted to the assembly or any of its committees.

Section 6 of the Act provides for freedom of speech in joint sittings. It states that:

*“The President and members have the same privileges and immunities in a joint sitting of the National Assembly and the National Council of Provinces as they have before the Assembly or the Council.”*

It is section 11 of the Act which the courts have had to grapple with in light of the right to freedom of expression. In 2015, the Democratic Alliance (DA) filed an application in the Western Cape High Court challenging the constitutional validity of section 11 on the ground that it was incompatible with the constitutional privilege granted to members of parliament for freedom of speech and immunity from arrest. Section 11 of the Act states that:

*“A person who creates or takes part in any disturbance in the precincts while Parliament or a House or committee is meeting, may be arrested and removed from the precincts, on the order of the Speaker or the Chairperson or a person designated by the Speaker or Chairperson, by a staff member or a member of the security services.”*

In the case of the ***Democratic Alliance v Speaker of National Assembly and Others***<sup>70</sup>, the DA asked the court to read in words that would exclude members of parliament from being liable to arrest and removal in terms of section 11. This would mean that section 11 would apply only to people who are not members of parliament. In the alternative the DA sought the excision of the words ‘arrest’ and ‘security forces’ from s11. The effect would be that there could be a removal but not arrest of members and such removal would be by persons other than members of the security forces. As a second

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<sup>70</sup> Available at: <http://www.saflii.org/za/cases/ZAWCHC/2015/60.pdf>.

alternative the DA sought a notional severance in order to prevent the application of section 11 to any exercise of the parliamentary privilege of freedom of speech. In a further alternative, the party sought an order declaring that, as a matter of interpretation, section 11 is not applicable to the exercise of parliamentary privilege.

This immediate background to the DA application was the incident on 12 February 2015 during the State of the Nation Address by President Jacob Zuma, when members of the Economic Freedom Fighters (EFF) were forcefully ejected from the assembly on the instructions of the Speaker of Parliament (“the Speaker”).

The Court held that it was reasonable to construe the word “person” in section 11 to include a member of parliament. It also concluded that “disturbance”, as it appears in the section, was so impermissibly wide as to encompass the robust debate and controversial speech that are characteristic of parliamentary discourse. It held that this wide definition detracted from the members’ parliamentary privilege of free speech. It also held that section 11 was constitutionally invalid to the extent that it permitted a member to be arrested for conduct that was protected by the immunity against arrest and the privilege protecting free speech entrenched in sections 58(1) and 71(1) Of the Constitution.

The Court stated as follows:

*“More pertinently, sections 58(1)(a) and 71(1)(a) of the Constitution make freedom of speech in the two Houses subject to “the rules and orders” envisaged in sections 57 and 70. That must mean rules and orders may – within bounds that do not denude the privilege of its essential content – limit parliamentary free speech. The Democratic Alliance contends that section 11 is not a rule or order of the National Assembly or National Council of Provinces.*

*The argument continues that the section is constitutionally invalid because – in terms of sections 58(1)(a) and 71(1)(a) of the Constitution – parliamentary free speech is subject to the rules of the National Assembly and National Council of Provinces, and not an Act of Parliament. This raises the question whether an instrument other than rules and orders may be employed to limit free speech. This arises in relation to the*

*impugned section 11, which undoubtedly does limit parliamentary free speech."*

The court found that section 11 is invalid to the extent that it applies to members with the consequence being that members could be deprived of further participation in parliamentary proceedings, thereby limiting their constitutionally guaranteed privilege of free speech in parliament. It went on to propose the curing of the constitutional defect by reading in the words 'other than a member' after the word 'person'. This ensures that the section does not apply to members of Parliament. Thus formulated, the section continues to apply to non-members and it is constitutionally compliant. The judgment also acknowledged that the limitation of members' free speech may be constitutionally permissible as otherwise Parliament might be incapacitated by unruly members. But the limitation of the members' privilege of free speech by means of an Act of Parliament was constitutionally impermissible.

The court did not rule on whether section 11 violated the principle of the separation of powers. It ordered a 'notional severance' of the section to bring the provision within constitutional bounds, subjecting it to a condition such that it would no longer permit violations of the immunity against arrest. It suspended the order of invalidity for a period of 12 months to allow parliament to remedy the defect.

## **2.7. Promotion of Equality and Prevention of Unfair Discrimination Act**

The Promotion of Equality and Prevention of Unfair Discrimination Act (4 of 2000) ("PEPUDA") was enacted to give effect to section 9 of the Constitution so as to prevent and prohibit unfair discrimination and harassment, to promote equality, to eliminate unfair discrimination, and to prevent and prohibit hate speech.

It is section 10 of the Act that needs further scrutiny. This section relates to prohibition of hate speech and states that:

*"(1) Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to-*

*(a) be hurtful;*

*(b) be harmful or to incite harm;*

*(c) promote or propagate hatred.*

*(2) Without prejudice to any remedies of a civil nature under this Act, the court may, in accordance with section 21(2)(n) and where appropriate, refer any case dealing with the publication, advocacy, propagation or communication of hate speech as contemplated in subsection (1), to the Director of Public Prosecutions having jurisdiction for the institution of criminal proceedings in terms of the common law or relevant legislation.”*

Interestingly while this section addresses hate speech, it does not define what hate speech is. A major challenge relates to s10(a) of the Act which prohibits publication or communication of words that may be ‘hurtful’. There is no clear definition on what is hurtful, a word whose definition can be very broad as to infringe on freedom of expression. In essence a publisher can contravene this law without the subjective intention to be hurtful, harmful, or promote hatred. A publisher may often find it difficult to predict whether a report will be hurtful, because what may offend one member of group may amuse another. In its bid to protect citizens from speech that may offend them, section 10 is so wide as to take away the objective limitations to freedom of expression provided for in section 16 (2) of the Constitution. It introduces an element of subjectivity, as even within a group of individuals what could be hurtful to one person may not be hurtful to another. Further, such exception is not provided for by section 16 of the Constitution. There is therefore need to review this section and delete words such as ‘hurtful’ which are problematic, so as to ensure that the provision does not violate the right to freedom of expression

At the same time, there is need to pay attention to section 12 of the Act which states that:

*“No person may-*

*(a) disseminate or broadcast any information;*

*(b) publish or display any advertisement or notice, that could reasonably be construed or reasonably be understood to demonstrate a clear intention to unfairly discriminate against any person: Provided that bona fide engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public*

*interest or publication of any information, advertisement or notice in accordance with section 16 of the Constitution, is not precluded by this section.”*

Section 12 is very wide as its prohibition includes speech in instances where the communicator may not have subjective intention to discriminate. While the section is aimed partly at discriminatory adverts such as where only a specific gender can only benefit or apply, a closer look at the provision shows that the ambit is wider than this and could inhibit freedom of expression. However, the proviso in section 12 provides a defenses to those who may be accused of unfair discrimination, or hate speech or of having communicated words that incited hatred. This should be read in light of section 13, which shifts the burden of proof where a complainant makes a prima facie case that he or she has been discriminated against. The respondent has the responsibility to demonstrate that their conduct was not discriminatory or that it did not discriminate unfairly.

The exception provided for under section 12 means that in a specific case, a media house can argue that the particular expression does not contravene sections 10 and 12 because the journalist was engaged in ‘bona fide fair and accurate reporting in the public interest’. <sup>71</sup> It is however not clear what qualifies as communication in accordance with Section 16 of the Constitution but this could be interpreted to make available the constitutional defenses. <sup>72</sup>

## **2.8. Protection of State Information Bill**

The Protection of State Information Bill, 2010 (“Secrecy Bill”, “the Bill”), seeks to protect sensitive state information as well as regulate the classification of state information. Earlier drafts caused an outcry from the media, civil society and opposition political parties because of provisions that undermined the right of access to information and freedom of expression. The draft has been amended several times to try and address these concerns. While the current version has improved, it still has some grey areas which could infringe on fundamental human rights, including the right to freedom of expression.

The definition of ‘national security’ is still very wide and open-ended to include undefined economic

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<sup>71</sup> Delaney S. 2007. The Media and the Law: A handbook for community journalists. The Freedom of Expression Institute, p36.

<sup>72</sup> Ibid, p37.

and technological secrets. This could lead to over classification of information thus stifling the right of access to information. This in turn affects the right to freedom of expression.

According to section 12 of the Bill, while the classification powers are vested in the head of an organ of the state and security services, such powers can be delegated to other staff members at sufficiently senior levels. This could lead to over classification of information where such staff members have vested interests in the classification of information, which may not necessarily be a threat to national interests. Also, classification decisions need not be made public, and with less transparency in the process, this creates room for over classification. This minimizes the information and issues the public is able to engage with.

Section 41 makes the leaking of classified information a crime. It is also a crime to possess classified information and it does not matter that such information is already in the public domain. It is still a crime to possess it. While section 41(c) which was inserted after critics called for amendments to protect journalists and others acting in public interest states that one is not guilty of an offence where such disclosure or possession reveals criminal activity, it is uncertain what would happen where such information does not reveal criminal activity but is an effort that promotes transparency and accountability. There is no certainty that protection will be afforded to whistle blowers and journalists who expose sensitive issues such as corruption. They are likely to find themselves in prison. This could limit the matters the media is able to report on.

Sections 34 and 35, which deal with espionage charges and receiving information unlawfully, are so widely drafted that researchers, activists, whistleblowers and journalists who disclose classified information in the public interest could be punished. The sentence for such offences is also a harsh one of up to 25 years. While the state has legitimate reasons for seeking to protect information in the interests of national security, such protection needs to be balanced with other interests and need not violate fundamental rights such as freedom of expression and access to information. The Bill in its current form still violates some of these fundamental rights.

The Secrecy Bill remains a clear threat to the right of everyone in South Africa to access information. After its passage by the National Assembly in April 2013, the Bill was submitted to President Jacob Zuma for assent but he instead sent it back to the National Assembly for reconsideration in September of the



same year. It has been lying with parliament ever since.

## 2.9. The Regulation of Gatherings Act

The Regulation of Gatherings Act (205 of 1993) seeks to regulate the holding of public gatherings and demonstrations. Section 17 of the Constitution provides that every person has the right to assemble, demonstrate, picket and present petitions provided this is done peacefully and participants are unarmed. The Preamble of the Gatherings Act acknowledges this right.

While the Act recognizes the constitutional right to peaceful assembly, it is imperative to scrutinize some of its provisions as they may infringe both the right to freedom of expression as well as the right to peaceful assembly.

According to Section 1(vi) of the Act, a gathering means:

*“Any assembly, concourse or procession of more than 15 persons in or on any public road as defined in the Road Traffic Act, 25 1989 (Act No. 29 of 1989), or any other public place or premises wholly or partly open to the air-*

*(a) at which the principles, policy, actions or failure to act of any government, political party or political organization, whether or not that party or organization is registered in terms of any applicable law, are discussed, attacked, criticized, promoted or propagated; or*

*(b) held to form pressure groups, to hand over petitions to any person, or to mobilize or demonstrate support for or opposition to the views, principles, policy, actions or omissions of any person or body of persons or institution; including any government, administration or governmental institution.”*

This provision essentially proscribes groupings of more than 15 people outside court buildings regardless of the reasons for which they have gathered and proscribes all political demonstrations outside of courts, unless such individuals and groups have obtained prior written consent from the magistrate. This is due to the fact that the definition of a gathering includes ‘any assembly, concourse

or procession'.<sup>73</sup> As such should the media form a gathering outside of the Johannesburg or Pretoria magistrates' court in which more than 15 persons are acting in concert they fall foul of the provisions of the Act.<sup>74</sup> It is however unlikely that prosecution of this nature would ever take place. Demonstrations should not fall within the ambit of this Act.

Section 2 of the Act requires any organization intending to hold a gathering to appoint a person who will be responsible for the arrangements for the gathering, to give notice according to section 3 and act on its behalf in terms of section 4. Section 3 requires that the convener give notice of the gathering in writing no less than seven days before the gathering is held. Should this not be reasonably possible, the convener shall give notice at the earliest opportunity provided that this is not less than 48 hours from the date of the gathering. Where the convener gives less than 48 hours' notice, the responsible officer (local authority) may prohibit that gathering.<sup>75</sup>

In the case of *Garvis and Others v South African Transport and Allied Workers Union and Another*<sup>76</sup>, the Supreme Court of Appeal made it clear that what is in place is a notification process whereby the convener of a gathering informs the relevant local authority of the intention to hold a gathering. It is not a permission seeking exercise. Various municipalities have been accused of coming up with by-laws and checklists that are not in line with the Constitution and which violate freedom of expression and assembly.

It is essential that organisers abide by the requirements of sections 2 , 3 and 4 of the Act as according to section 12, failure to do so is an offence and the convener may be liable for a fine not exceeding R20 000 or imprisonment not exceeding a period of one year, or both. A key question to ask is whether such limitation is reasonable and justifiable in a democratic society based on our Constitution. It does not appear to be reasonable to impose criminal sanctions for failure to comply with a notification procedure

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<sup>73</sup> Hjul P. 2013. Restricting freedom of speech or regulating gathering? De Jure (Pretoria) vol . 46 n.2 Pretoria, Feb, 2013. Available at [www.scielo.org.za/scielo.php?script=sci\\_arttext&pid=S2225-71602013000200006](http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S2225-71602013000200006).

<sup>74</sup> Ibid.

<sup>75</sup> Section 3(2) of the Act.

<sup>76</sup> (007/11) [2011] ZASCA 152.

established by the Act.<sup>77</sup> The convener plays a fundamental role, as s/he has to give notice of the gathering and participate in the engagement between the local authorities and the participants to the gathering, and ensuring the peaceful progress of the march. With the threat of such stringent sanctions, individuals may be deterred from taking up the role of ‘convener’.

Section 11 of the Act is of particular concern as it states that:

*“(1) If any riot damage occurs as a result of-*

*(a) a gathering, every organization on behalf of or under the auspices of which that gathering was held, or, if not so held, the convener;*

*(b) a demonstration, every person participating in such demonstration,*

*shall, subject to subsection (2), be jointly and severally liable for that riot damage as a joint wrongdoer contemplated in Chapter II of the Apportionment of Damages Act, 1956 (Act No. 34 of 1956), together with any other person who unlawfully caused or contributed to such riot damage and any other organization or person who is liable therefor in terms of this subsection.”*

This provision seeks to hold organisers of a gathering and the convener equally liable with those responsible for any damage caused during the gathering, thus putting a heavy responsibility and burden on the convener and the organisers who may not have contributed to the damage. When the **Garvis** case went to the Constitutional Court (**South African Transport and Allied Workers Union and Another v Garvas and Others**<sup>78</sup>) the court found that while section 11(2) of the Act limited the right to freedom of assembly, it did not do so ‘impermissibly’. It is therefore not unconstitutional.<sup>79</sup>

Again the question to ask is if it is reasonable in a democracy like ours to seek to hold people accountable for acts they are not responsible for and which may be beyond their control. Also, with such a huge responsibility, organisations and individuals may shy away from organising gatherings so as to avoid carrying this burden and running the risk of getting into trouble with the law. Resultantly,

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<sup>77</sup> [www.legalcity.net/index.cfm?fuseaction=magazine.article&ArticleID=4493411](http://www.legalcity.net/index.cfm?fuseaction=magazine.article&ArticleID=4493411).

<sup>78</sup> 2012 (8) BCLR 840 (CC); [2012] 10 BLLR 959 (CC); (2012) 33 ILJ 1593 (CC); 2013 (1) SA 83 (CC) (13 June 2012).

<sup>79</sup> Ibid, at paras 83-84.

this has a negative impact on people's right to assembly and freedom of expression when they have to be extra cautious in organising and participating in gatherings.

### **3. Current Developments**

This research was undertaken at a time when there was serious violations of the right to freedom of expression by the national broadcaster, the South African Broadcasting Corporation (SABC). It was also undertaken at a time when political parties were campaigning in the run up to the local government elections which took place on 3 August 2016. Violent civic protests and demonstrations by various communities around the country have taken place as communities and individuals have vented their frustration at the lack of service delivery, corruption and the manipulation of candidate lists. The merger of Vuyani into Malamulele municipality in Limpopo province ignited protests in the local community which left over 20 primary schools burnt down. These protests painted the ruling African National Congress (ANC) negatively and led to the imposition of a censorship policy by the SABC which declared in early June that it would no longer feature video footage of violent protests.

While the SABC defended its new policy on the basis that it was doing so in order to stop communities around the country from imitating acts of destruction, many organisations and individuals pointed out, correctly, that the public broadcaster introduced this policy in order to protect the image of the government. Civil society organisations, journalists, organised labour, human rights defenders, opposition political parties and even some leaders within the ANC strongly criticised the SABC for this policy.

In May, Media Monitoring Africa, the SOS Support Public Broadcasting Coalition and the Freedom of Expression Institute lodged a complaint with the Independent Communications Authority of South Africa (ICASA). ICASA is the national regulator of the broadcasting and telecommunications sectors in the country, and also an institution established in terms of chapter nine of the Constitution of South Africa to support constitutional democracy. On 7 July, ICASA ruled that the SABC policy amounted to

ensorship and must be reversed. SABC management initially threatened to ignore the ruling until the Helen Suzman Foundation approached the High Court in Pretoria asking that the broadcaster be compelled to rescind its decision. Due to massive public pressure, the SABC relented and agreed in mid-July to abide by ICASA's ruling.

In August, eight journalists who came to be popularly known as "the SABC 8" were dismissed by the broadcaster for opposing its censorship policy. The Labour Court in a case brought by four of the eight journalists ruled that their dismissals were unlawful and that they should be reinstated to their positions with immediate effect. The court also ordered that no further disciplinary action could be taken against the four journalists in respect of that matter.

Gravely concerned by the deteriorating climate of freedom of expression in the country, HURISA joined other human rights organisations and issued a joint statement which among others, recommended that commissioner Med Kaggwa, who is the South Africa African Country Rapporteur at the African Commission on Human and People's Rights (ACHPR), together with commissioner Pansy Tlakula, the chairperson of the ACHPR as well as the Special Rapporteur on Freedom of Expression and Access to Information in Africa, address the current situation in South Africa as a matter of urgency.

#### **4. Conclusion**

Freedom of expression is a *sine qua non* for democratic existence. It is also an important enabler for citizen participation in social and political discourse. South Africa's Constitution protects the right to freedom of expression as one of the core rights in the Bill of Rights, and the courts have emphasised that the right to freedom of expression lies at the heart of our country's new democratic project.<sup>80</sup> Be that as it may, there are still laws in our statute book that limit the right to freedom of expression in an impermissible manner.

No right is absolute under South African law a fact that is understandable since human society and all its complexity mean that rights have to be limited to a certain extent to facilitate their enjoyment by

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<sup>80</sup> *SANDU v Minister of Defence and Another* (see footnote 36 above).

everyone. Section 36 of the Constitution tries to strike a careful balance between the enjoyment of rights on the one hand, and their limitation by providing guidelines for the manner in which these rights may be limited, on the other. The first threshold that must be met is that the limitation must be “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.” The second threshold is that such limitation must take into account all relevant factors including:

- i. the nature of the right;
- ii. the importance of the purpose of the limitation;
- iii. the nature and extent of the limitation;
- iv. the relation between the limitation and its purpose; and
- v. less restrictive means to achieve the purpose.

The laws discussed in this report cannot be said to meet the above stringent criteria as laid out in section 36 of the Constitution. It is therefore necessary for civil society to challenge these laws as their very existence compromises our democratic edifice. It is also essential that civil society remains vigilant so that the executive and the legislature do not enact laws that whittle the rights and freedoms protected by the Constitution. The fact that laws such as the Secrecy Bill are pending presidential assent despite rigorous opposition from virtually all sectors of the South Africa society, is a timely warning that we dare not let our guard down.