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Disinformation and Democracy in Africa and South Africa

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12.1 INTRODUCTION AND THE AFRICAN CONTEXT

This chapter reviews the regulation of disinformation from an African human rights' law perspective, focusing on the right to freedom of expression and the right to vote. It provides an overview of the African regional law framework, specifically the African Charter on Human and Peoples Rights of 1981 (the African Charter)[1] and corresponding jurisprudence.[2] The chapter also analyses the way in which freedom of expression and disinformation laws have been applied in African countries, the aim being to contextualize and illustrate how African regional law plays out at the domestic level, but with an emphasis on the position in South Africa.

The African treatment of disinformation makes a valuable contribution to a book addressing the relationship between the regulation of freedom of expression, specifically disinformation, and the promotion of the democratic state. There are two key reasons. Firstly, most research on the impact of 'fake news' incidents on democracies has been conducted in the Global North, with few case studies considering the situation in countries positioned in the Global South. This is so, even though (a) disinformation as a concept has existed for years in the Global South and (b) credit was taken by former United States' president, Donald Trump, for coining the term 'fake news'.[3]

[1] [Banjul] Charter on Human and Peoples' Rights, adopted by the Assembly of Heads of State and Government (AHSG) of the Organization of African Union (OAU), now the African Union, at its meeting in Nairobi, Kenya on 26 June 1981.

[2] Whilst mention is made of sub-regional developments, it is not possible here to provide a detailed analysis of the regulation of freedom of expression, specifically disinformation, at the sub-regional level.

[3] Vincent Chenzi, 'Fake News, Social Media and Xenophobia in South Africa' (2021) 19(4) *African Identities* 502; 'Domestic Disinformation on the Rise in Africa', African Center for Strategic Studies, 2021, https://africacenter.org/spotlight/mapping-disinformation-in-africa; Martin Pengelly, 'Trump Accuses CNN of Fake News over Reported Celebrity Apprentice

Secondly, many African democracies are in a precarious position, with some governments implementing multifaceted strategies to silence their political opponents or critics, especially during elections. These include laws criminalizing the publication of false news, the filtering of online content and internet shutdowns.[4] The consequences of such strategies for democracies are dire: they undermine the rule of law, transparency, accountability, the right of citizens to receive information and the electoral processes.

Thirdly, and in juxtaposition to the use of censorship to undermine the spread of information, political campaigners in numerous African states have discovered how the freedom of the Internet can be used to create and disseminate false news and divisive digital content (through inter alia algorithms, bots, fake social media accounts, image manipulation and even the broadcast of fake information designed to appear as emanating from legitimate and reputable service broadcasters, such as the BBC).[5] Such disinformation is usually intended to distort political debate, silence opponents and win votes.[6]

The South African regulation of disinformation is also insightful. South Africa's political history makes for a fascinating country study, given its negotiated transition from a colonized and racist state, with strict censorship laws, to a constitutional democracy, based on human dignity, equality and freedom. The Bill of Rights in

Plans', *The Guardian*, 10 December 2016, www.theguardian.com/us-news/2016/dec/10/trump-celebrity-apprentice-cnn-fake-news.

[4] See Marystella A. Simiyu, 'Freedom of Expression and African Elections: Mitigating the Insidious Effect of Emerging Approaches to Addressing the False News Threat' (2022) 22(2) *African Human Rights Law Journal* 76; Herman Wasserman and Dani Madrid-Morales, 'An Exploratory Study of "Fake News" and Media Trust in Kenya, Nigeria and South Africa' (2019) 40(1) *African Journalism Studies* 107, at 109–10, quoting Anne Fleischmann and Viola Stefanello, 'African Governments Use Internet Shutdowns to Silence Opposition More and More', *Euronews*, 26 January 2019, www.euronews.com/2019/01/26/african-governments-use-internet-shutdowns-to-silence-opposition-more-and-more-what-can-pe.

[5] As occurred in Kenya in the 2017 presidential elections, and in Nigeria in 2015. See 'The Reality of Fake News in Kenya', *Portland Communications*, 2017, https://portland-communications.com/publications/reality-fake-news-kenya; Nanjira Sambuli, 'How Kenya Became the Latest Victim of Fake News', *Al Jazeera*, 17 August 2017, www.aljazeera.com/indepth/opinion/2017/08/kenya-latest-victim-fake-news-170816121455181.html; Brian Ekdale and Melissa Tully, 'African Elections as a Testing Ground: Comparing Coverage of Cambridge Analytica in Nigerian and Kenyan Newspapers' (2019) 40(4) *African Journalism Studies* 27.

[6] Kate Jones, 'Online Disinformation and Political Discourse: Applying a Human Rights Framework', Policy Commons, 6 November 2019, https://policycommons.net/artifacts/1423530/online-disinformation-and-political-discourse/2037807; Herman Wasserman, 'The State of South African Media: A Space to Contest Democracy' (2020) 65 *Publizistik* 451. Misinformation in African countries includes vitriolic speech that can incite violence and group-based hatred. Messages containing racist, misogynistic and xenophobic content are also common.

South Africa's Constitution[7] protects both the right to freedom of expression[8] and the right to access information.[9] Political rights are entrenched in Section 19 of the Constitution, giving every citizen the freedom to make political choices and the right to free, fair and regular elections. Section 19 should be read with Section 1 of the Constitution,[10] which provides that South Africa is 'one, sovereign, democratic state' founded upon listed constitutional values, with Section 1(d) recording that the constitutional democracy is based on 'universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness'.[11] This means that, in the South African context, where the spread of disinformation is often linked to political control, a delicate balancing of competing rights is required to ensure that the regulation of disinformation does not unjustifiably violate the right to freedom of expression.

The stability of the South African democracy and a concomitant free press and media, which have been instrumental in uncovering widespread state corruption,[12] have however been undermined by challenges aimed at stifling freedom of expression.[13] Examples include a state-proposed Media Appeals Tribunal,[14] stricter state control over the flow of information through a proposed Bill on the Protection of State Information,[15] the spreading of false information and propaganda whilst

[7] The Constitution of the Republic of South Africa, 1996.

[8] Section 16(1) of the Constitution protects freedom of expression. Four forms of expression are listed in the ambit of the right. These include freedom of the press and other media in s. 16(1)(a) and the right to receive information and ideas in s. 16(1)(b).

[9] Constitution, s. 32. The Promotion of Access to Information Act (PAIA), Act 3 of 2000, was enacted to give effect to the constitutional right of access to information. It provides a right to receive information from public and private bodies.

[10] This is the most entrenched provision in the Constitution.

[11] The Preamble to the Constitution is also important. It upholds democratic principles, stating that a government acquires legitimacy through 'the will of the people' and records that '[w]e, the people of South Africa, … through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to … [l]ay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law … [and b]uild a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations'.

[12] Helge Rønning, 'The Politics of Corruption and the Media in Africa' (2009) 1(1) *Journal of African Media Studies* 155.

[13] See *Print Media SA* v. *Films and Publications Board* 2012 (6) SA 443 (CC); S v. *Mamabolo (E-tv Intervening)* 2001 (3) SA 409 (CC).

[14] See Lianne van Leeuwen, 'The Recent Decline in Press Freedom in South Africa' 2012 6(1) *Global Media Journal Africa Edition* 67; Alicestine October, 'Report Raises Concern over Diminishing Press Freedom in SA', News 24, 30 April 2015, www.news24.com/SouthAfrica/News/Report-raises-concern-over-diminishing-press-freedom-in-SA-20150430. The African National Congress (ANC), the ruling party in South Africa, first introduced a Media Appeals Tribunal, with state officials presiding, to replace the self-regulation of the press in 2007. The plan has resurfaced regularly.

[15] B-6 [2010]. There were many objections to the Bill, which was never enacted into law.

electioneering,[16] and threats and attacks on journalists during election campaigns.[17] Additionally, incidents of extensive media censorship were exposed in the Judicial Commission of Inquiry into allegations of state capture, corruption and fraud in the public sector including organs of state (the 'Zondo Commission'), convened at huge state expense between 2018 and 2022.[18]

Even more intriguing is that one of the most prominent global examples of the spread of false information, the 'Bell Pottinger affair', occurred in South Africa in 2016.[19] It involved a British public relations firm in a 'large-scale fake news propaganda war',[20] designed as a clandestine campaign to perpetuate racial polarisation in South Africa. It was really aimed, however, at influencing public opinion and discrediting detractors of former South African President Jacob Zuma, threatening to expose his corrupt relationship with the Gupta family (the instigators of state capture).[21] Disinformation was spread through media outlets owned by the Guptas,[22] fake blogs and tweets (amplified by the use of bots which generated automated retweets),[23] catchphrase hashtags designed to undermine critics (such as #PravinMustGo and #WhiteMonopolyCapital),[24] and the manipulation of social media sites, including Facebook and Wikipedia. Journalists who exposed the

[16] Chenzi, 'Fake News' (n 3), at 504–5.

[17] Wasserman and Madrid-Morales, 'Exploratory Study' (n 4), at 111.

[18] The Judicial enquiry into State Capture in South Africa, the so-called Zondo Report, was published in 2022, see www.thepresidency.gov.za/report-type/judicial-commission-inquiry-state-capture-report. Raymond Zondo is the current Chief Justice and chaired the Commission.

[19] Albert Wöcke, Morris Mthombeni and Alvaro Cuervo-Cazurro, 'Reputations and Corruption: Bell Pottinger in South Africa' (2020) 10(4) *Emerald Emerging Markets Case Studies* 1.

[20] Julie Posetti and Alice Matthews, *A Short Guide to the History of 'Fake News' and Disinformation*, International Center for Journalists, 2018, www.icfj.org/sites/default/files/2018-07/A%20Short%20Guide%20to%20History%20of%20Fake%20News%20and%20Disinformation_ICFJ%20Final.pdf.

[21] The Gupta family arrived in South Africa in 1993. Initially small business owners, they grew a vast business empire, owning Sahara Computers and Oakbay Investments Pty (Ltd), consisting of subsidiaries in inter alia the mining, media, leisure, firearms and real estate sectors. They built strong networks in the African National Congress from the 1990s, and used their power to win tenders, influence the Treasury, engage in controversial business deals and create strategies to enable politicians to exploit the resources of state-owned entities, such as SAA, Eskom, Telkom and others. See Wöcke, Mthombeni and Cuervo-Cazurro, 'Reputations and Corruption', at 4–6.

[22] The *New Age Newspaper* and television channel ANN7.

[23] Sonja Verwey and Clarissa Muir, 'Bell Pottinger and the Dark Art of Public Relations: Ethics of Individuality *versus* Ethics of Communality' (2019) 38(1) *Communicare: Journal for Communication Sciences in Southern Africa* 96.

[24] Pravin Gordham was then minister of finance. He launched an application to confirm that he had no authority to intervene in banking relations between clients and their banks, as was alleged. This occurred after four prominent banks closed the Gupta family accounts. Gordham was later fired by Zuma, and replaced by a puppet minister of finance. See ibid. at 104–6.

corrupt relationship between Zuma and the Guptas were accused of being lackeys of 'white monopoly capital' and were repeatedly threatened.[25]

Having sketched this contextual background, the chapter commences with a brief description of the definitional terms used and then links the regulation of misinformation to the rationales for the protection of freedom of expression. Thereafter, the way in which African regional law protects freedom of expression and access to information is examined, including recent developments by institutions operating at the African regional level. This is followed by examples of reported incidents of the spread of disinformation and censorship in African countries, usually occurring during election time, and a description of the type of false news laws applying in Africa. Finally, the South African approach to the promotion of freedom of expression is analysed, focusing on disinformation, which is illustrated through the normative human rights lens of freedom of expression, free and fair elections, government accountability and the promotion of democratic values.

12.2 DEFINITIONAL CONCEPTS

Any chapter in a book dedicated to the protection of freedom of expression and disinformation should use the correct nomenclature. So, whilst the chapter refers occasionally to the catchphrases 'false news' and 'fake news', the term 'disinformation' is preferred. Disinformation is defined as information that is verifiably false or misleading and is created and disseminated with the intention of causing public harm.[26] In the African context, public harm constitutes mainly threats to democratic principles, the undermining of free and fair elections, plus political and policy-making processes.[27] It also includes the undermining of pluralism and

[25] Herman Wasserman, 'Fake News from Africa: Panics, Politics and Paradigm' (2020) (21)1 *Journalism* 3, at 4. For example, the editor of a prominent newspaper was targeted in a campaign of online harassment designed to silence her exposure of state capture. Other targets included journalists working for amaBhungane, an independent newsroom, at the forefront of investigative journalism in South Africa, who were subjected to harassment and intimidation. See Ferial Haffejee, *Days of Zondo: The Fight for Freedom from Corruption* (Cape Town: Vendor, 2022); and *Sole* v. *Black First Land First; In re: South African Editors Forum* v. *Black First Land First* (23897/2017) [2017] ZAGPJHC 299 (17 October 2017). The journalists were involved in the so-called Gupta leaks, see https://amabhungane.org/stories/special-report-the-guptaleaks-and-more-all-our-stories-on-state-capture-2.

[26] Claire Wardle and Hossein Derakhshan, 'Information Disorder: Toward an Interdisciplinary Framework for Research and Policymaking', Council of Europe Report, 2017, https://edoc.coe.int/en/module/ec_addformat/download?cle=5905aa3361a00b7d9356fa6cf222396d&k=1349852033253 43f5703e874bed476e2, at 5; 'Tackling Online Disinformation: A European Approach', European Commission, 2018 COM/2018/236, para 2.1.

[27] 'Tackling Online Disinformation' (n 26) para 2.1.

diversity in democratic societies, usually through the spread of vitriolic messages intended to exploit divisions in society and to subordinate vulnerable groups, based inter alia on race, ethnicity, social origin and religion.[28]

'Disinformation' does not include information that is false, but which was not created and distributed with the intention of causing harm. Instead, this type of information is usually labelled 'misinformation' and includes reporting errors or news and commentary that is identified as being partisan to a particular viewpoint or political party.[29] Although there is no consensus on the correct legal meaning of fake or false news,[30] the terms refer 'to false information that mimics news media content in order to deceive so as to influence various reactions from the public'.[31] The terms are broadly used and include hoaxes, the manipulation of photos, clickbait campaigns, deliberate political disinformation campaigns, propaganda and even genuine political satire and parodies.[32]

The discussion now moves to the traditional rationales justifying the protection of freedom of expression and whether they permit the regulation of 'false news' and/or disinformation. It will be shown that African countries tend to regulate the dissemination of false news in overly broad terms, including the media and misinformation within their ambit. These laws impact negatively on the protection of freedom of expression and democratic principles.

[28] Simiyu, 'Freedom of Expression', at 83; Wasserman, 'Fake News from Africa' (n 4), at 5–7.

[29] 'Tackling Online Disinformation' (n 26) para. 2.1.

[30] Wasserman and Madrid-Morales, 'Exploratory Study' (n 4), at 108, citing, among others, Santanu Chakrabarti, Claire Rooney and Minnie Kweo, 'Verification, Duty, Credibility: Fake News and Ordinary Citizens in Kenya and Nigeria', BBC News, 2018, https://downloads.bbc.co.uk/mediacentre/bbc-fake-news-research-paper-nigeria-kenya.pdf; Oliver Boyd-Barrett, 'Fake News and "RussiaGate" Discourses: Propaganda in the Post-Truth Era' (2019) 20(1) *Journalism* 87; Aljosha K. Schapals, 'Fake News: Australian and British Journalists' Role Perceptions in an Era of "Alternative Facts"' (2018) 12(8) *Journalism: Theory, Practice & Criticism* 108.

[31] Wasserman and Madrid-Morales, 'Exploratory Study' (n 4), at 108; Sandra L. Borden and Chad Tew, 'The Role of Journalist and the Performance of Journalism: Ethical Lessons From "Fake" News (Seriously)' (2007) 22(4) *Journal of Mass Media Ethics* 300; Edson C. Tandoc, Jr., Zheng W. Lim and Richard Ling, 'Defining "Fake News"' 2018 6(2) *Digital Journalism* 137.

[32] Note that in South Africa, the right to expression includes artistic creativity and is interpreted broadly at threshold level. The right can be limited using s. 36, the general limitation clause, which permits the justifiable and proportionate limitation of rights. See *Laugh It Off Promotions CC* v. *South African Breweries International* 2006 (1) SA 144 (CC), [85]–[88], dealing with commercial parody. The court *a quo* held that the racial parody printed on the Carling Black Label t-shirts (the 'Black Label' trademark was replaced with 'Black Labour' and the 'Carling Beer' mark was substituted with 'White Guilt') was unprotected speech. But the Constitutional Court (at [98]) did not agree, holding that the expression was protected – parody being a valuable form of speech.

12.3 THE RELATIONSHIP BETWEEN DISINFORMATION AND THE RATIONALES FOR FREEDOM OF EXPRESSION IN THE AFRICAN CONTEXT

The earlier contextual background confirmed that, in most African states, the public harm that disinformation causes is the spread of false information aimed at influencing public opinion during elections, silencing opposing views and undermining groups of persons perceived to have power (whether economic or political).[33] Often, the purpose of the dissemination is to gain or retain power and to control public revenues (which could potentially be misused through corruption).[34] The African context therefore demonstrates the strong connection between freedom of expression and its most commonly advanced rationale, namely that free speech is an integral component of the proper functioning of a democracy and helps to promote democratic self-government by the people. This is true both for the formation of a democracy and the strengthening of a developing or fragile democracy.[35]

The democratic rationale for freedom of expression, which has influenced the development of free speech jurisprudence worldwide (including in South Africa),[36] is based on the premise that speech enables people to participate in political and social debate, to have access to governmental policies and to make informed decisions about how they are governed.[37] In sum, free expression is vital in a democracy for three reasons. Firstly, in a democracy, the people are assumed to be sovereign and should play a significant role in decision-making. Freedom of expression ensures that they receive relevant information to enable the exercise of democratic self-governance and to ensure 'wise decisions by wise voters'.[38] Both censorship of information and the spread of disinformation can distort the thinking capacity of the community and undermine a democracy.[39] Those in power should

[33] 'Domestic Disinformation on the Rise in Africa' (n 3), at 1–8; Simiyu, 'Freedom of Expression' (n 4), at 79–80.

[34] Wasserman, 'Fake News from Africa' (n 25), at 7.

[35] Raymond Suttner, 'Freedom of Speech' (1990) 6 *South African Journal of Human Rights* 372, at 378.

[36] Eric Barendt, *Freedom of Speech* (Oxford: Oxford University Press, 2007) p. 20; Joanna Botha, 'Towards a South African Free Speech Model' (2017) 134(4) *South African Law Journal* 778.

[37] Derek Spitz, 'Eschewing Silence Coerced by Law: The Political Core and Periphery of Freedom of Expression' (1994) 10(3) *South African Journal of Human Rights* 301, at 306.

[38] Frederick Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge: Cambridge University Press, 1982) p. 38; Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (Oxford: Oxford University Press, 1960) p. 27; Robert Post, 'Participatory Democracy and Free Speech' (2011) 97(3) *Virginia law Review* 477, at 482.

[39] See Shauer, *Free Speech*, pp. 37–39; Richard Moon, *The Constitutional Protection of Freedom of Expression* (Toronto: University of Toronto Press, 2000) pp. 14–17; Steven Shiffrin, 'Dissent, Democratic Participation, and First Amendment Methodology' (2011) 97(3) *Virginia Law Review* 559, at 560–61.

thus not be able to manipulate the flow of public information and withhold public debate.[40]

Secondly, freedom of expression acts as a check and balance against the abuse of power and promotes governmental accountability and transparency. A democratic government should be regarded as the 'servant' of the people, entitling the latter to criticize their leaders, government officials and implemented policy, where necessary.[41] Here, the role of the media as public watchdog is critical.[42] So, any law that stifles a free media under the guise of false news regulation should be closely scrutinized to ensure that it does not encroach unduly upon freedom of expression.

Thirdly, free speech promotes social stability by allowing everyone to participate in public speech, resulting in the expression of diverse views and an informed and sovereign electorate.[43] Ironically, as has been shown, both disinformation and its regulation have the potential to undermine the democracy rationale. To ensure the integrity of freedom of expression, a balance must be struck between the two opposing interests so that only disinformation which causes public harm (as described earlier) is restricted.

For the regulation of disinformation, another three interconnected rationales – namely the truth rationale (the 'marketplace of ideas' metaphor),[44] the 'fear of government suppression' rationale and the 'checking valve' theory – are also important.[45] It is arguable that false information is incapable of advancing the truth, justifying the need for disinformation laws.[46] At face value this claim appears to have merit, but it fails to consider that the underlying basis of the rationale, as formulated by John Stuart Mill, is that views censored because of their supposed

[40] Meiklejohn, *Political Freedom*, p. 79 [n38]; Jeremy Waldron, *The Harm in Hate Speech* (Cambridge, MA: Harvard University Press, 2012) p. 4; Shiffrin, 'Consent, Democratic Participation', at 560–61; Stephen M. Feldman, 'Hate Speech and Democracy' (2013) 32(1) *Criminal Justice Ethics* 78, at 87; Robert Post, 'Hate Speech' in Ivan Hare and James Weinstein (eds.), *Extreme Speech and Democracy* (Oxford: Oxford University Press, 2011) 128, p. 287.

[41] Meiklejohn, *Political Freedom*, p. 79.

[42] See *Print Media SA* v. *Films and Publications Board*; *S* v. *Mamabolo (E-tv Intervening)*.

[43] James Weinstein, 'Extreme Speech, Public Order and Democracy: Lesson from the Masses' in Hare and Weinstein, *Extreme Speech*, p. 23; James Weinstein, 'An Overview of American Free Speech Doctrine and its Application to Extreme Speech' in Hare and Weinstein, *Extreme Speech* (n 40) p. 81.

[44] See generally Frederick Schauer, 'The First Amendment as Ideology' (1992) 33(3) *William and Mary Law Review* 853, at 866; Robert Post, 'Reconciling Theory and Doctrine in First Amendment Jurisprudence' (2000) 88(6) *California Law Review* 2353.

[45] Barendt, *Freedom of Speech*, p. 21 [n36]; Vincent Blasi, 'The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in *Whitney* v. *California*' (1988) 29(4) *William and Mary Law Review* 653, referred to with approval by Ngcobo J, in the South African case of *The Citizen 1978 (Pty) Ltd* v. *McBride* 2011 (4) SA 191 (CC), [142].

[46] Schauer, *Free Speech*, pp. 7–10 [n38]; *R* v. *Keegstra* 1990 3 SCR 697, [87] (untrue statements cast as hate speech are unlikely to further knowledge or 'lead to a better world', and cannot be justified by the truth rationale). In South Africa, see *Khumalo* v. *Holomisa* 2002 (5) SA 401 (CC), [35]; Judge Cameron, in *The Citizen 1978 (Pty) Ltd* v. *McBride* [78], holding that 'truth-telling' is a tenet of the transition from the injustices of the past to democracy.

falsity may in fact be true and that their elimination increases the possibility of 'exchanging error for truth'.[47] The public are more likely to learn the truth if exposed to varied views. Plus the suppression of information, even if potentially false, undermines the attainment of human knowledge, because censors are not infallible.[48] The banning of perceived false beliefs can be dangerous because it may suppress some true beliefs, impeding the search for the truth[49] and, in turn, permitting undue censorship.[50] This is especially problematic in the African context where false news laws are introduced to censor the media expressing views critical of those in power. The reality is that the impact is oppressive governments which usually retain power.[51]

The fear of government suppression theory adds weight to the argument. Its proponent, Frederick Schauer, explains that '[f]reedom of speech is based … on a distrust of the ability of government to make the necessary distinctions, a distrust of governmental determinations of truth and falsity, an appreciation of the fallibility of political leaders, and a somewhat deeper distrust of governmental power'.[52] Governments are considered 'particularly bad' at regulating speech, with ample historical evidence of censorship gone wrong.[53] Factually, censorship of public

[47] John Stuart Mill, *On Liberty* (London: John W. Parker & Son, 1859) p. 33. For a development of Mill's work, see Leonard W. Sumner, *The Hateful and the Obscene: Studies in the Limits of Free Expression* (Toronto: University of Toronto Press, 2004). In the South African context, see Joanna Botha, '"Swartman": Racial Descriptor or Racial Slur? *Rustenburg Platinum Mine* v. *SAEWA obo Bester* [2018] ZACC 13; 2018 (5) SA 78 (CC)' (2020) 10(1) *Constitutional Court Review* 353.

[48] Mill, *On Liberty* (n 47) pp. 33–34; Schauer, 'The First Amendment as Ideology' (n 44), at 866.

[49] A fair argument is that obviously false, irrational or objectionable opinions could be excluded from public discourse without impacting on the truth. For, as Post states, '[t]he creation of knowledge … depends upon practices that continually separate the true from the false, the better from the worse'. This, however, justifies tightly drafted disinformation laws only. See Robert Post, 'Participatory Democracy and Free Speech' (2011) 97(3) *Virginia Law Review* 477, at 479. See too *R* v. *Zundel* [1992] 2 SCR 73 – the Canadian Court declared the false news provision in the Criminal Code unconstitutional. The majority reasoned that even deliberate lies had value and serve a useful social purpose, promoting political participation and self-fulfilment. The Court thus held that false statements were a form of protected expression in terms of s. 2(b) of the Canadian Charter and that the false news provision, as a limitation thereto, had to be justified by s. 1 of the Charter. Ultimately, the provision was considered overly broad as an offence punishing the dissemination of false and mischievous statements.

[50] Barendt, *Freedom of Speech* (n 36) pp. 8–9.

[51] See generally, Agnès Callamard, 'Accountability, Transparency, and Freedom of Expression in Africa' (2010) 77(4) *Social Research: An International Quarterly* 1211, at 1244; Statement by the Special Rapporteur on Freedom of Expression and Access to Information in Africa on the Occasion of the International Day for Universal Access to Information, 28 September 2023, African Commission, https://achpr.au.int/index.php/en/news/press-releases/2023-09-28/statement-special-rapporteur-freedom-expression-and-access-infor.

[52] Schauer, *Free Speech* (n 38) p. 86 (noting that the theory is not conceived as a 'naïve conspiracy theory').

[53] He refers, for example, on p. 81, to the condemnation of Galileo, prosecutions for seditious libel and treason when persons publicly expressed views contrary to government policy in both the USA and the United Kingdom, and the banning of works of art and literature.

speech is usually entrusted to government officials, who are inclined to be biased and may suppress speech critical of government in order to retain power.[54] The African regional and sub-regional courts have regularly used this rationale to declare overly broad speech restrictions illegitimate.

The 'government suppression' rationale is closely linked to the 'checking valve' theory, proposed as a 'vital' supplement to the traditional free speech values.[55] Noting the abuse of government power as 'an especially serious evil', the claim is that free speech, in conjunction with a free press, provides an important check on government authority through exposure and deterrence.[56] The scrutiny and exposure of government activities by organized, well-financed and professional critics (the press) ensures that corrective action can be taken when an abuse of power occurs and, if aware of public scrutiny, officials are less likely 'to yield to the inevitable temptation presented to those with power to act in corrupt and arbitrary ways'.[57] The distrust of government censorship rationale resonates in South African jurisprudence, with the judgment in *S* v. *Mamabolo (E-tv Intervening)*[58] serving as the best example. Here, it was held that '[h]aving regard to our recent past of thought control, censorship and enforced conformity to governmental theories ... we should be particularly astute to outlaw any form of thought-control, however respectably dressed'.[59]

Insofar as the regulation of disinformation is concerned, care must be taken to ensure that robust (but fair) criticism of politicians and government officials is not misconstrued as false or fake news and suppressed as such. For African states, tightly drafted laws are crucial to ensure the promotion of accountability, transparency, good governance and democratic values and principles.[60] As noted by Robert Keohane: 'rulers generally dislike being held accountable. Yet they often have reasons to submit to accountability mechanisms. In a democratic ... system, accountability may be essential to maintaining public confidence ... But we can expect power holders to seek to avoid accountability when they can do so without jeopardizing other goals'.[61] When it comes to elections, accountability is even more pressing, because as Agnès Callamard has observed, state accountability is

[54] Schauer, *Free Speech* (n 38) pp. 81–82.

[55] Vincent Blasi, 'The Checking Value in First Amendment Theory' (1977) 2(3) *American Bar Foundation Research Journal* 521, at 527–28; Vincent Blasi, 'The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in *Whitney* v. *California*' (1988) 29(4) *William and Mary Law Review* 653, referred to with approval by Ngcobo J, in *The Citizen 1978 (Pty) Ltd* v. *McBride* [142].

[56] Blasi's article, 'The Checking Value in First Amendment Theory', written in 1977, refers to incidents like Watergate and the Vietnam War.

[57] Kent Greenawalt, 'Free Speech Justifications' (1989) 89(1) *Columbia Law Review* 119, at 142.

[58] *S* v. *Mamabolo (E-tv Intervening)*.

[59] Ibid. [37].

[60] Callamard, 'Accountability' (n 51), at 1212.

[61] Robert O. Keohane, 'Abuse of Power, Assessing Accountability in World Politics' 2005 (27) *Harvard International Review* 48–53, quoted by Callamard, 'Accountability' (n 51), at 1213.

impossible 'without a fully functioning parliament and free and fair elections, all of which require respect for freedom of … expression, transparency, [and] freedom of information'.[62] A free and robust media is an added safeguard for state accountability. False news laws which include the media in their ambit have a chilling effect on freedom of expression and the ability of the media to report and investigate freely and without fear of sanction. Similarly, they hamper the capacity of citizens to participate democratically, contribute to decision-making and enrich democratic pluralism.[63]

It is now necessary to move to African regional law, noting upfront that the African Commission on Human and Peoples Rights (the African Commission) has repeatedly stressed the importance of freedom of expression and the role of the media, both as a human right and to achieve state accountability. Indeed, it has also emphasized that freedom of expression and the right of access to information held by public bodies promotes public transparency, accountability, good governance and the strengthening of democracy.[64]

12.4 FREEDOM OF EXPRESSION AND DEMOCRATIC PRINCIPLES IN AFRICAN REGIONAL LAW

This section commences with an explanation of how the African Charter protects the free flow of information and freedom of expression. The textual limitations to the rights are also addressed. It then moves to the work done by the African Commission and the African Court on Human and Peoples' Rights (the African Court), including sub-regional courts, to advance the right to freedom of expression and a free media, focusing on the link between expression and the advancement of democratic governance.

12.4.1 *The African Charter*

Article 9(1) of the African Charter[65] provides that every individual has the right to receive information.[66] Article 9(2) goes on to provide every individual with the right

[62] Callamard, 'Accountability' (n 51), at 1214. See too, more recently, Agnès Callamard, 'Challenges to, and Manifesto for, Fact-Finding in a Time of Disinformation' (2020) 10(2) *Notre Dame Journal of International Comparative Law* 128; Wasserman, 'Fake News from Africa' (n 25), at 8–9.

[63] See, *Print Media SA* v. *Films and Publications Board* [23]; *S* v. *Mamabolo (E-tv Intervening)* [70]; *R* v. *Keegstra* [105], [293], [301] and [322] (a criminal sanction for hate speech would have a chilling effect on expression in Canada).

[64] The African Commission was established in terms of Article 30 of the African Charter. Its mandate is to promote human and peoples rights and to advance their protection in Africa. Complaints (or communications) may be submitted by individuals, NGOs or states parties to the Charter.

[65] South Africa ratified the Charter on 9 June 1996.

[66] The African Commission on Human and Peoples' Rights released a Model Law on Access to Information for Africa on 12 April 2013, https://achpr.au.int/en/node/873.

to express and disseminate opinions within the constraints of the law. Whilst Article 9(2) recognizes that the right to freedom of expression can be limited, the 'within the constraints of the law clause' has caused difficulty. It has, however, been interpreted to mean that only domestic restrictions consistent with state parties' international and Charter obligations are permissible.[67] This means that laws enacted to regulate disinformation must comply with the standard legitimacy and proportionality tests for limitations to freedom of expression in international law, both offline and on digital platforms.[68]

The African Charter, however, does not contain limitation clauses as in most international human rights law instruments.[69] Nevertheless, Article 9 of the Charter must be read with Article 27(2), which provides that all rights and freedoms are to be exercised with due regard for the 'rights of others, collective security, morality and common interest'. This is a general limitation clause.[70] Arguably, false news laws could be introduced to protect the rights of others, the collective security, morality and the common interest, although, as mentioned, any restrictions to Charter rights must also comply with binding international law.[71]

Article 29 of the African Charter, known as the 'duty clause', can also limit freedom of expression. Article 29(4) is the most relevant and places a duty on individuals to conserve and enforce national harmony. Article 29(3) imposes a duty on individuals not to compromise state security, and Article 29(7) provides that individuals should respect African cultural values in their interactions. The totality of these duties entails that individuals should contribute towards the integrity of society and respect diversity and tolerance. To the extent that the dissemination of false news does not further these goals, it could conceivably be prohibited by Article 29, but within the parameters of relevant international law.[72]

[67] Sometimes called the 'claw-back clause', see *Constitutional Rights Project and Civil Liberties Organisation* v. *Nigeria*, *African Commission on Human and Peoples' Rights* Comm. No. 102/93 (1998); *Article 19* v. *the State of Eritrea*, *African Commission on Human and Peoples' Rights* Comm No. 275/ 2003 (2007).

[68] See, generally, the law that has developed under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), adopted and opened for signature and ratification by UN General Assembly Resolution 2106 (XX) of 21 December 1965, entered into force in 1969 and the International Covenant on Civil and Political Rights (ICCPR), adopted by the UN General Assembly Resolution 2200A (XXI) of 6 December 1966 and entered into force in 1976.

[69] ICCPR, Arts. 19 and 20; ICERD, Art. 4.

[70] Christof Heyns, 'Civil and Political Rights in the African Charter' in Malcolm D. Evans and Rachel Murray (eds.), *The African Charter on Human and Peoples' Rights: The System in Practice, 1986–2000* (Cambridge: Cambridge University Press, 2004) p. 140.

[71] But see *Scanlen and Holderness* v. *Zimbabwe* Comm. 297/2005, African Court (3 April 2009) – a false news law was declared invalid. See the discussion in Section 12.4.3.

[72] Ibid. The ICCPR requires that restrictions must: (a) be 'provided by law'; (b) serve a narrow, specified list of 'legitimate aims' and (c) be proportionate and 'necessary'. The last requirement means that interferences with expression must be proportionate to the legitimate aim pursued and that there must be no less intrusive measure available.

12.4.2 *The Normative Framework Created by the African Commission*

Despite these potential limitations to freedom of expression in the Charter, the Commission has repeatedly emphasized that freedom of expression advances democratic principles. For example, in 1989, in one of its earliest Communications, the Commission stated that expression is a fundamental human right, vital for an individual's self-development, political consciousness and participation in public affairs.[73] In its 2002 Declaration of Principles on Freedom of Expression in Africa, which developed the scope and content of Article 9, the Commission affirmed that freedom of expression is a 'fundamental and inalienable human right and an indispensable component of a democracy', and that any interference with freedom of expression 'must not be arbitrary, must be provided for by law, must serve a legitimate interest and be necessary in a democratic society'.[74]

The Declaration treats press and media freedom as vital and recommends self-regulation as the best system for promoting high media standards (Principle IX). The broadcast media may be more strictly regulated than print media,[75] but such regulation must comply with the legitimate restrictions for freedom of expression in international law. Thus, Principle V of the Declaration stresses that '[s]tates shall encourage a diverse, independent private broadcasting sector. A State monopoly over broadcasting is not compatible with the right to freedom of expression'. Where self-regulation has been futile, Principle VII permits public authorities to exercise limited media regulation, if they do not operate in a quasi-judicial manner and remain independent of state control.[76]

In 2004, at its thirty-sixth Ordinary Session in Senegal, the Commission established a Special Rapporteur of Freedom of Expression in Africa.[77] The Commission has constantly renewed the mandate of the Special Rapporteur and extended it to include 'Access to Information'.[78] Since then, the Rapporteur has played a

[73] *Media Rights Agenda* v. *Nigeria* Comm. Nos. 105/93, 130/94, 128/94 and 152/96 (31 October 1998), [52].

[74] Declaration of Principles on Freedom of Expression in Africa, African Commission of Human and Peoples Rights, 32nd Session, 17–23 October 2002, Banjul, the Gambia, www1.umn.edu/humanrts/achpr/expressionfreedomdec.html. Freedom of expression and press freedom also features in the New Partnership for Africa's Development (NEPAD) Declaration on Democracy. Signed in Nigeria in 2003, the Declaration provides that African states must 'ensure responsible freedom of expression, inclusive of freedom of the press'.

[75] Given the limited available radio spectrums in Africa at the time.

[76] Callamard, 'Accountability' (n 51) at 1219.

[77] https://achpr.au.int/en/mechanisms/special-rapporteur-freedom-expression-and-access-information.

[78] At the 42nd Ordinary Session of the Commission. The mandate of the Special Rapporteur was extended in 2022; see African Commission Res. 528 (LXXIII) 2022.

prominent role in advancing the soft law normative standards for the protection of freedom of expression and access to information in Africa. For example, in 2012 and in 2016 the Commission modified the 2002 Declaration to address the right of access to information and freedom of expression in the digital age. It also adopted a Model Law on Access to Information for Africa, plus Guidelines on Access to Information and Elections in Africa, in 2013 and 2017, respectively.[79]

In 2019, again led by the Rapporteur, the Commission adopted a revised Declaration of Principles on Freedom of Expression and Access to Information in Africa.[80] The aim was to consolidate the developments on freedom of expression and access to information, guided by African and international human rights standards, including the jurisprudence of African judicial bodies.[81] The revised Declaration has five parts, which include general principles and specific principles on freedom of expression and access to information respectively. The Preamble notes that the protection of freedom of expression and the free flow of information and ideas, especially through print, broadcast media and the Internet, is directly linked to facilitating and strengthening democracy. In turn, a strong democracy fosters transparency and efficiency. States parties must also create a framework which promotes freedom of expression and the right of access to information. This includes reviewing criminal restrictions on expression so that they are justified and aligned with international human rights law standards by, inter alia, amending overly broad criminal laws on sedition, insult and the publication of false news. The Commission has also specifically called for the abolition of domestic criminal defamation laws,[82] especially those that target journalists and permit detention as a sanction.

12.4.3 *African Jurisprudence Addressing Speech Restrictions*

The legitimacy of domestic speech restrictions has been addressed head-on by the African Court on Human and Peoples' Rights (the African Court)[83] and the African

[79] Declaration of Principles on Freedom of Expression and Access to Information in Africa 2019, https://achpr.au.int/en/node/902; Model Law on Access to Information for Africa 2013, https://achpr.au.int/en/node/873; Guidelines on Access to Information and Elections in Africa, https://achpr.au.int/en/node/894.

[80] Declaration of Principles on Freedom of Expression and Access to Information in Africa 2019 (n 79).

[81] Simiyu, 'Freedom of Expression' (n 4), at 87.

[82] African Commission, Res. 169 (XLVIII) 2010, Resolution on Repealing Criminal Defamation Laws in Africa (24 November 2010).

[83] See, for example, *Kenneth Good* v. *the Republic of Botswana* 313/05 African Court (26 May 2010). The victim was expelled from Botswana after publishing an academic paper criticizing the respondent's government. The African Court confirmed the decision of the African Commission in *Amnesty International* v. *Zambia* (2000) AHRLR 325 (ACHPR 1999), [54] and the European Court of Human Rights in *Handyside* v. *United Kingdom* (1976) 1 EHRR 737, at 754, where it was held that freedom of expression is a fundamental human right and necessary for a democracy. The African Court held further that in an open and

Commission in two important cases, namely *Scanlen and Holderness* v. *Zimbabwe*[84] and *Konaté* v. *Burkina Faso*.[85] The complainants in *Scanlen* alleged that Zimbabwe's Access to Information and Protection of Privacy Act, 2003[86] infringed Article 9(2) of the African Charter, because it required the accreditation of journalists and created the offence of 'publication of falsehoods'. Referring to the 2002 Declaration, the African Court held that whilst freedom of expression may be limited by domestic laws aimed at protecting individuals and the public from journalistic practices deviating from legitimate interests in a democracy, such laws must conform to international law standards.[87] Zimbabwe's contention that the registration of journalists and the criminalization of falsehoods were justified on the grounds of public order, safety and the protection of the rights and reputation of others was rejected and held to be an unjustified restriction of freedom of expression.[88]

In *Konaté*,[89] the applicant, a newspaper editor, was charged with criminal defamation. The applicant had published articles in which he accused the Prosecutor of Burkina Faso of corruption and criminal activity. The applicant was convicted on all charges and sentenced to twelve months' imprisonment, plus a hefty fine.[90] After analysing Burkina Faso's criminal defamation laws, the African Court declared that the domestic law criminalizing defamation with a custodial sentence violated Article 9 of the Charter, Article 19 of the International Covenant on Civil and Political Rights (ICCPR) and Article 66(2) of the Revised Treaty of the Economic Community of West African States (ECOWAS).[91] The Court found that Burkina Faso had not demonstrated that imprisonment was a necessary limitation to freedom of expression to protect the reputation of legal officers. It also held that apart from 'serious and very exceptional circumstances' involving incitement to crimes or hate speech, 'violations of laws on freedom of speech and the press cannot be sanctioned by custodial sentences'.[92] Burkina Faso's legislation[93] thus constituted

democratic society, such as that in Botswana, dissenting and potential offensive views must be 'allowed to flourish'. Botswana had accordingly infringed Article 9(2), see [197]–[199].

[84] *Scanlen and Holderness* v. *Zimbabwe*.

[85] *Konaté* v. *Burkina Faso* Comm. 004/2013 African Court (5 December 2014). See also ACHPR Resolution 169 on Repealing Criminal Defamation Laws in Africa, adopted by the African Commission on Human and Peoples' Rights, 48th Session (10–24 November 2010) Banjul, the Gambia.

[86] Sections 79 and 80.

[87] *Scanlen and Holderness* v. *Zimbabwe* [107] and [116].

[88] Ibid. [117].

[89] *Konaté* v. *Burkina Faso* [164].

[90] Ibid. [3]–[8].

[91] Revised Treaty of the Economic Community of West African States, 24 July 1993, www.refworld.org/docid/492182d92.html.

[92] *Konaté* v. *Burkina Faso* [136]–[137].

[93] The Information Code of Burkina Faso of 1993; the Penal Code of Burkina Faso of 1996. See *Konaté* v. *Burkina Faso* [120].

a disproportionate interference with a journalist's right to freedom of expression.[94] This decision illustrates that criminal prosecution and imprisonment for alleged defamation of public officials is neither a 'necessary' nor 'proportionate' state interference with freedom of expression, because less intrusive measures are available for remedying injuries to individual reputation, namely civil defamation remedies.[95] The same principles apply to false news laws, as held in *Scanlen*.

More recently, in 2018, the Community Court of Justice of the Economic Community of West African States (the ECOWAS Court) decided *Federation of African Journalists* v. *The Gambia*.[96] The case was launched by the Federation (representing Gambian journalists broadly) and four Gambian journalists (forced into exile).[97] The journalists had been prosecuted and tortured whilst in custody for violating the Gambia's press laws, specifically speech criticizing the President and officials. The applicants asked for a declaration that the criminal offences of sedition, false news and defamation in the Gambian Criminal Code[98] violated the right to freedom of expression in Article 9 of the African Charter, Article 19 of the ICCPR and the rights of journalists under Article 66(2) of the Revised ECOWAS Treaty.[99] The basis of the journalists' complaint was that the Gambian laws had made it impossible for them to disseminate information in the public interest freely.[100] They claimed that the laws had a chilling effect on press freedom by creating a fear of potential arrest and prosecution for publishing information critiquing the government. Whilst acknowledging that limitations to freedom of expression are permissible, the journalists also argued that the laws were imprecise and overly

[94] *Konaté* v. *Burkina Faso* [136]–[137] and [164]. In 2010, the African Commission published a resolution that criminal defamation laws should be repealed. See Resolution 169: On Repealing Criminal Defamation Laws in Africa, adopted by the Commission at its 48th Session, November 2010, Banjul, the Gambia.

[95] See generally Hawley Johnson, 'Lohé Issa Konaté v. Burkina Faso: A Tipping Point for Decriminalization of Defamation in Africa' in Lee C. Bollinger and Agnès Callamard (eds.), *Regardless of Frontiers: Global Freedom of Expression in a Troubled World* (New York: Columbia University Press, 2021) 357.

[96] *Federation of African Journalists* v. *The Gambia* ECW/CCJ/JUD/04/18. See also *Hydara* v. *The Gambia* ECW/CCJ/APP/30/11 where the ECOWAS Court held that states must 'protect media practitioners including those critical of the regime', as freedom of expression includes criticism of the government.

[97] An international coalition comprising Amnesty International, Article 19 and others filed an intervention, as did the Redress Trust and the UN Special Rapporteur on the Freedom of Opinion and Expression.

[98] Gambian Criminal Code 2009, ss. 51, 52, 52A, 59, 173A, 179, 180, 181 and 181A.

[99] They also argued that the detention and torture they experienced infringed their right to liberty and security under Art. 6 of the African Charter and Art. 9 of the ICCPR. An order was sought order compelling the Gambia to repeal the impugned laws or to amend them to comply with its international obligations. The journalists also asked for reparations and relief for the torture experienced in custody.

[100] They also submitted that 'the fear of being re-arrested, prosecuted and tortured . . . forced them to remain in exile', *Federation of African Journalists* v. *The Gambia*, p. 32.

broad.[101] Regarding the false news offence specifically, the journalists accepted that journalistic errors can occur, but claimed that the imposition of criminal liability for such errors infringed the right to freedom of expression[102] and that the law did not serve a legitimate purpose.[103]

The ECOWAS Court analysed comparative international and foreign law on the right to freedom of expression and freedom of the press, stressing that vague criminal offences undermine the enjoyment of the right.[104] It used this jurisprudence to hold that narrowly drafted criminal offences were needed to regulate free speech because of the 'chilling effect' created by wide and vague censorship restrictions. Holding that erroneous statements are inevitable in free debate, the Court relied on *Konaté* to find that individuals in 'highly visible public roles must necessarily face a higher degree of criticism than private citizens; otherwise public debate may be stifled altogether'.[105] The Court concluded that the criminal laws of the Gambia, which included a false news offence, did not guarantee a free press in accordance with the African Charter and international law. The laws had a chilling effect, unduly restricted expression and the press and were disproportionate and unnecessary 'in a democratic society where freedom of speech is a guaranteed right'.[106] The Court thus ordered that the impugned laws be reviewed and decriminalized to conform with freedom of expression.[107]

The decisions in *Federation of African Journalists* and *Konaté* were confirmed in 2020 by the ECOWAS Court in *Incorporated Trustees of Laws and Rights Awareness*

[101] Specifically, sedition which assessed subjective reactions and the broad definition of defamatory material.

[102] See *Federation of African Journalists* v. *The Gambia*, pp. 33–34.

[103] The journalists pointed to the definitions of 'seditious intent' (s. 51), 'defamatory material' (s. 179), 'publication for purposes of criminal libel' (s. 180(2)) and 'false news publication' (s. 59) as being vague, too broad and illegitimate. See ibid. pp. 34 and 38–39.

[104] It referred to General Comment No. 34 published by the UNHRC, which describes a free and uncensored media as the 'bedrock of a democratic society'; *Ramlila Maidan Incident* v. *Home Secretary Union of India* (2012) S SCC 1, the Indian Court calling freedom of expression 'the mother of all liberties'; and the European Court of Human Rights decisions in *Castells* v. *Spain*, app. no. 11798/85 (1992); *Lingens* v. *Austria*, app. no. 9815/82 (1986); *Altuğ Taner Akçam* v. *Turkey*, app. no. 27520/07 (2011) and *Otegi Mondragon* v. *Spain*, app. no. 2034/07 (2018). Regard was also had to *New York Times* v. *Sullivan* 376 US 254, the Zimbabwean case of *Madanhire* v. *Attorney General* Judgment No. CCZ 2/14 (an overly broad criminal defamation offence, which stifled the free flow of information in the public domain) and the judgment in *Konaté*.

[105] *Federation of African Journalists* v. *The Gambia*, p. 46.

[106] Ibid. pp. 47–48.

[107] Ibid. p. 48. Note that UNESCO and the ECOWAS Court signed a Memorandum of Understanding to strengthen freedom of expression, press freedom and safety of journalists in West Africa in 2019. There have been ongoing attempts in the region to promote press freedom and democratic governance. See 'MFWA Engages ECOWAS on Press Freedom, Media Development in West Africa', www.mfwa.org/issues-in-focus/mfwa-engages-ecowas-on-press-freedom-media-development-in-west-africa.

Initiatives v. *The Federal Republic of Nigeria*.[108] Here, the Court held that a criminal sanction in the Nigerian Cybercrime Act 2015, penalizing expression offensive to 'honour', reputation and morals, violated the African Charter as being a disproportionate restriction to freedom of expression.[109]

12.4.4 *The Relationship between Freedom of Expression and Democratic Governance*

The most recent development emanating from the African Commission on the link between media freedom and democratic principles is a September 2023 statement by the Special Rapporteur that '[t]he right to access information is … a key component of democracy, … when people are able to access information about how their Government is performing, they can exercise their right to freedom of expression more meaningfully. Individuals need to have access to reliable sources … to form an accurate opinion'. The Rapporteur added that the information right is both a human right and an indispensable tool empowering citizens to participate publicly and demand state accountability. The role of the media is essential. Accordingly, the Rapporteur recommends that states adopt laws guaranteeing the right of every individual 'to receive information' as per the African Charter, because despite efforts to protect the expression and information rights, African domestic law does not facilitate such rights.[110]

Non-compliance at domestic level occurs even though Article 13 of the African Charter provides that every citizen shall have the right to participate freely in the government of their country, either directly or through freely chosen representatives in accordance with the law. Moreover, the African Charter on Democracy, Elections and Governance declares that regular, free and fair elections are the basis of a legitimate government.[111] The Democracy Charter specifically emphasises the link between the promotion of democracy, the rule of law and human rights, including free expression.[112] The rationale of the Guidelines on Access to

[108] *Incorporated Trustees of Laws and Rights Awareness Initiatives* v. *The Federal Republic of Nigeria* [2020] ECOWASCJ 6.

[109] Ibid. [163] and [164].

[110] See https://achpr.au.int/index.php/en/news/press-releases/2023-09-28/statement-special-rapporteur-freedom-expression-and-access-infor. See also African Union Convention on Cyber Security and Personal Data Protection, 27 June 2014 (Ex.CL/846(XXV), https://au.int/en/treaties/african-union-convention-cyber-security-and-personal-data-protection. Chapter 3 of the so-called Malabo Convention deals with cyber security and cybercrime. South Africa has not ratified the Convention because of clashes between it and the Protection of Personal Information Act; however, it implemented many of its aspects by regulating electronic communications and cybercrimes.

[111] See https://au.int/en/treaties/african-charter-democracy-elections-and-governance.

[112] Guarantees for freedom of expression are also provided in the African Democracy Charter. These call for the necessary conditions to ensure participation, transparency, access to information, freedom of the press and accountability in public affairs.

Information and Elections in Africa, published by the African Commission in 2017, states the need to ensure freedom of expression and access to information during elections.[113] Including within their ambit a wide range of public bodies, such as political parties, election observers, the media and internet intermediaries, the Guidelines record that disclosure of information enabling the public to participate actively in public affairs is needed, plus transparency and accountability.[114] The Preface notes the importance of 'access to accurate, credible and reliable information'. This is reinforced by Section 25 which provides that regulatory bodies must enact regulations to promote 'fair and balanced coverage of the electoral process', whether offline or in the digital space. Internet shutdowns are also addressed, with the Guidelines calling on states not to block the Internet or restrict media freedom during elections.[115] Should restrictions be needed, their legitimacy will be tested against the international standard of legality, legitimacy, necessity and proportionality for the limitations of rights.[116]

12.5 INSTANCES OF FALSE NEWS DISSEMINATION AND ITS REGULATION IN DOMESTIC AFRICAN STATES

Despite the strong normative framework for the protection of freedom of expression and the press at regional level, most African states continue to regulate false news, mainly through criminal sanctions. Internet shutdowns are also frequently implemented. Another reality is the repeated political manipulation of information, often with the assistance of powerful actors, aimed at retaining power and control of public finances.[117] These campaigns make it increasingly difficult for the public to discern the truth, which undermines the ability to make decisions (whether personally or in relation to public matters) and to participate in democratic processes in an informed manner.[118]

Research conducted by the African Centre for Strategic Studies from 2020 to 2022 has revealed a vast array of disinformation schemes in African states, especially on digital and social media platforms.[119] Those responsible for the dissemination of this 'information' include political parties, individual politicians and state and non-state

[113] Guidelines on Access to Information and Elections in Africa (n 79).
[114] Ibid. 'Objectives and Rationales'. See for detail, Simiyu, 'Freedom of Expression' (n 4), at 89.
[115] Guidelines on Access to Information and Elections in Africa (n 79) s. 26.
[116] Ibid. ss. 27 and 28.
[117] Jean-Claude Kouladoum, 'The Role of Freedom of Communication in Modulating the Effect of Political Participation on Electoral Outcome in Africa' (2023) 51(4) *Politics & Policy* 588.
[118] Scott Timcke, Liz Orembo and Hanani Hlomani, 'Information Disorders in Africa: An Annotated Bibliography of Selected Countries', Research ICT Africa, 2023, https://researchictafrica.net/publication/information-disorders-in-africa-an-annotated-bibliography-of-selected-countries.
[119] See 'Mapping Disinformation in Africa', African Centre for Strategic Studies, April 2022, https://africacenter.org/spotlight/mapping-disinformation-in-africa. See too Jan Rydzak, Moses Karanja and Nicholas Opiyo, 'Dissent Does Not Die in Darkness: Network Shutdowns and

actors from beyond Africa (who create, inter alia, fake social media accounts, hashtags and messages designed to boost the support of leaders sympathetic and amenable to the actor or state's particular cause).[120] This research and many other studies show that the target countries include Nigeria,[121] Kenya,[122] Ghana, Mali, Cameroon,[123] Tanzania, Ethiopia,[124] Guinea[125] and Sudan,[126] amongst others.[127]

It is therefore not surprising that many African states have either enacted false news laws or made use of the existing common law colonial-era crimes of

Collective Action in African Countries' (2020) 14 *International Journal of Communication* 4264; Tina Freyburg and Lisa Garbe, 'Blocking the Bottleneck: Internet Shutdowns and Ownership at Election Times in Sub-Saharan Africa' (2018) 12 *International Journal of Communication* 3896; Lisa Garbe, Lisa-Marie Selvik and Pauline Lemaire, 'How African Countries Respond to Fake News and Hate Speech' (2021) 26(1) *Information, Communication & Society* 86. The authors report that fake news and hate speech is highly regulated in African countries (forty-seven African countries were included in the study), and conclude that the state is the main driver of content creation.

[120] 'Mapping Disinformation in Africa' (n 119).

[121] Charles M. Fombad, 'Democracy and Fake News in Africa' (2022) 9(1) *Journal of International and Comparative Law* 131, at 142, stating that the British firm Cambridge Analytica has 'gained notoriety in Africa for their dubious campaign practices during elections using social media platforms in Kenya and Nigeria'.

[122] See Ekdale and Tully 'African Elections' (n 5). The study reveals interference by Cambridge Analytica in the Kenyan and Nigerian elections. Conclusions reached are that African elections create platforms for proxy wars between global interests and that whilst both countries have passed data protection laws, they do not regulate the interference of foreign actors in the elections. Re Kenya specifically, see Patrick Mutahi, 'Fake News and the 2017 Kenyan Elections' (2020) 46(4) *Communication: South African Journal of Communication Theory and Research* 31.

[123] See Kingsley Ngange and Moki S. Mokondo, 'Understanding Social Media's Role in Propagating Falsehood in Conflict Situations: Case of the Cameroon Anglophone Crisis' (2019) 7(2) *Studies in Media and Communication* 55. In 2017 the Cameroon government blamed social media for spreading false news, and aggravating tensions between different sections of the population. See also Christian Nounkeu, 'Facebook and Fake News in the "Anglophone Crisis" in Cameroon' (2020) 41(3) *African Journalism Studies* 20.

[124] Iginio Gagliardone, Nicole Stremlau and Gerawork Aynekulu, 'A Tale of Two Publics? Online Politics in Ethiopia's Elections' (2019) 13(1) *Journal of Eastern African Studies* 191; the authors monitored the 2005 and 2015 election cycles in Ethiopia, and tracked the role of digital networks and the authoritarian state's attempts to influence online public spaces. Professional election campaign consultants were used to enable bloggers, influencers and bots to shape public opinion.

[125] Rydzak, Karanja and Opiyo, 'Dissent Does Not Die'. Although Guinea's first shutdown was in 2007, the 2011 Arab Spring revolutions resulted in many state authorities implementing shutdowns. By June 2019, twenty-six countries had implemented shutdowns. The shutdown orders usually emanated from the highest government authorities.

[126] Siri Lamoureaux and Timm Sureau, 'Knowledge and Legitimacy: The Fragility of Digital Mobilization in Sudan' (2019) 13(1) *Journal of Eastern African Studies* 34. The Sudanese government used digital mechanisms, supplemented by a call to morality, to preserve national security and to silence critics.

[127] Re sub-Saharan African countries, see Freyburg and Garbe, 'Blocking the Bottleneck', reporting a strong connection between state ownership of internet service providers and internet shutdowns over thirty-three presidential and parliamentary elections in sub-Saharan Africa between 2014 and 2016.

defamation and libel to punish the dissemination of information considered misleading or false.[128] Unfortunately, African false news laws are also usually framed in broad terms and criminalize, inter alia, the spreading of false rumours, insults and complaints against government or public authorities; the fostering of dissent and unrest between sections of the community through the publication of false news; and the uttering of hate speech designed to incite hatred, violence or any type of disturbance on grounds such as race, religion and ethnicity.[129] Most of these laws are justified to protect national security and social harmony.

The irony of such regulation, however, is that the targets are usually journalists and those critical of authoritarian governments, the real aim being to silence opposition and to enable existing regimes to maintain political control. The consequence is a severe impact on democratic principles in African states,[130] which Charles Fombad has labelled the 'crisis of democracy in Africa'.[131] Fombad claims that

> Many recent elections ... have degenerated into little more than competitive authoritarianism. This is because democratic reforms and periodic elections of the past two decades have come to be increasingly used as a 'survival strategy' by Africa's autocratic rulers. Elections ... come in handy to keep opposition parties in the political game, lest the regimes lose their democratic façade while incumbents perpetuate their rule.[132]

There are some African states, however, which have adopted freedom of information laws that enhance expression, press freedom and democratic principles. These include Namibia, Botswana and Zambia.[133] But, as demonstrated in Section 12.6, South Africa is the outlier, with the Constitutional Court using the Bill of Rights in South Africa's Constitution, 1996, to protect and promote freedom of expression, political rights and democratic governance, even in the face of

[128] See generally Simiyu, 'Freedom of Expression' (n 4), at 76; Wasserman and Madrid-Morales, 'Exploratory Study' (n 4); Fombad, 'Democracy and Fake News in Africa' (n 121), at 145–47.

[129] The COVID-19 pandemic aggravated the situation, with many states using fake news laws to overcome the disquiet caused by vaccination rumourmongering, undermining the measures governments were taking to control the pandemic.

[130] See Max Grömping and Ferran Martínez i Coma, 'Electoral Integrity in Africa', Electoral Integrity Project, 2015, www.electoralintegrityproject.com/electoral-integrity-in-africa, reporting that the Electoral Integrity Project has conducted research which demonstrates that Africa scores very low on the Perception of Electoral Integrity index, well below the global average. Grömping has conducted ongoing research in this field. See also Nicholas Kerr and Anna Lührmann, 'Public Trust in Elections: The Role of Media Freedom and Election Management Autonomy', Afrobarometer, 2017, www.afrobarometer.org/wp-content/uploads/migrated/files/publications/Working%20papers/afropaperno170_public_trust_in_elections.pdf.

[131] Fombad, 'Democracy and Fake News in Africa' (n 121), at 133.

[132] Ibid. at 133–34.

[133] Namibia passed the Access to Information Bill into law in 2022. In December 2014, a Zambian High Court declared s. 67 of the Penal Code unconstitutional because it prohibited the publication of false news.

attempts to silence the press and state condemnation of the courts for interfering in executive matters.

12.6 THE SOUTH AFRICAN LAW

This section will address the way in which freedom of expression and the right to free and fair elections are protected in South African law. Starting with the constitutional framework setting the normative benchmarks for the relevant rights and their legitimate restriction, how South Africa regulates false news is then explained. It will be shown that despite many attempts by the state to stifle media freedom, the South African judiciary has consistently endorsed and promoted a free flow of information and debate (both generally and during elections). This approach is informed by the need to protect the status of the constitutional democracy and open and accountable governance, which underpins the Constitution, and stands in stark contrast to the apartheid approach, where state censorship was rife.

12.6.1 *The Constitutional Protection of Freedom of Expression*

Section 16 of the South African Constitution entrenches the right to freedom of expression. It provides:

16. Freedom of Expression

(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;
   d) academic freedom and freedom of scientific research.

(2) The right in sub-section (1) does not extend to –
   a) propaganda for war;
   b) incitement of imminent violence;
   c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

The South African courts have confirmed the value of freedom of expression in a democratic society on many occasions. For example, in *South African National Defence Force Union* v. *Minister of Defence*[134] Judge O'Regan held that expression plays a significant role as 'a guarantor of democracy' and facilitates the 'moral agency' of society, permitting individuals to form and express opinions and ideas.[135] Nevertheless, freedom of expression is not an absolute guarantee; nor is it a paramount value.[136] It is one of a 'web of mutually supporting

[134] *South African National Defence Force Union* v. *Minister of Defence* 1999 (4) SA 469 (CC), [7].
[135] See also *Print Media SA* v. *Films and Publications Board* [53].
[136] *S* v. *Mamabolo (E-tv Intervening)* [41]; *Khumalo* v. *Holomisa* [25].

rights',[137] and must be interpreted in accordance with constitutional values[138] and other constitutionally protected rights, including the rights to human dignity[139] and to participate in free and fair elections.[140] It should also be exercised with 'due deference' to 'the pursuit of national unity and reconciliation'.[141]

The ambit of Section 16(1) is broad. The word 'everyone' includes natural and juristic persons,[142] citizens and non-citizens.[143] 'Expression' is protected, which is a wider concept than 'speech'.[144] The Constitutional Court's approach to freedom of expression cases is to define expression widely at the threshold stage, deferring the adjudication of the value of the expressive act in question to the limitation analysis in terms of Section 36 of the Constitution.[145] Therefore, in *De Reuck* v. *Director of Public Prosecutions (WLD)*,[146] finding that child pornography was included within the ambit of expression, the Court held that the right 'does not warrant a narrow reading' and that any limitation 'must satisfy the rigours of the limitation analysis'.[147] Confirming *Handyside* v. *United Kingdom*,[148] the Court found that the right to express oneself and the corresponding right to receive information and ideas extends 'not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference but also to those that offend, shock or disturb'.[149] The wide interpretation of 'expression' means that the right has many components.[150] So, expressive acts such as flag burning, nude dancing,[151] the publication of photographs, the display of posters and works of art, dress[152] and

[137] *Case* v. *Minister of Safety and Security*; *Curtis* v. *Minister of Safety and Security* 1996 (3) SA 617 (CC), [27].
[138] Constitution, S1. South Africa is declared to be a sovereign and democratic state based on various founding values including human dignity, equality, non-racialism, non-sexism and the advancement of human rights and freedoms and the rule of law.
[139] Constitution, s. 10.
[140] Constitution s. 19.
[141] *The Citizen 1978 (Pty) Ltd* v. *McBride* 2011 (4) SA 191 (CC), [233]; *Qwelane* v. *SAHRC* 2021 (6) SA 579 (CC).
[142] *Ex Parte Chairperson of Constitutional Assembly: In re Certification of Constitution of the RSA* 1996 (4) SA 744 (CC), [57].
[143] *Khosa* v. *Minister of Social Development*; *Mahlaule* v. *Minister of Social Development* 2004 (6) SA 505 (CC), [47].
[144] Interim Constitution, s. 15(1), provided that every person had a right to 'freedom of speech and expression'.
[145] The General Limitation Clause.
[146] *De Reuck* v. *Director of Public Prosecutions (WLD)* 2004 (1) SA 406 (CC).
[147] Ibid. [48]–[50].
[148] *Handyside* v. *United Kingdom*.
[149] *De Reuck* v. *Director of Public Prosecutions (WLD)* [49], quoting *Handyside* v. *United Kingdom*.
[150] *Phillips* v. *Director of Public Prosecutions (WLD)* 2003 (3) SA 345 (CC), [23].
[151] Ibid. [15].
[152] *MEC for Education: KwaZulu-Natal* v. *Pillay* 2008 (1) SA 474 (CC), [94] – prohibition of a nose stud limited the right to express one's religion and culture.

symbolic gestures (such as salutes)[153] are included within expression and are prima facie worthy of constitutional protection.

It is only during the later proportionality enquiry that the value of the expression in issue is considered to determine the justifiable limitation of the right to free expression. Here, the Court must assess whether the expressive act promotes the rationales underpinning the right and distinguishes between expression that lies at the 'periphery' of the right as opposed to expression which unworthy of protection. In *De Reuck*, for example, the Court had no difficulty in holding that child pornography was 'expression of little value'.[154]

Section 16(1) enumerates four types of expression which are specifically listed. Whilst these are positioned at the core of the right (as opposed to its periphery), they should not be interpreted as being more valuable than other forms of unspecified expression. The listed categories simply expand upon the meaning of expression. They do not fix the scope of constitutionally protected expression. Other types of expression can also bear equal weight, even though not listed textually. The role played by political expression is clearly important given the emphasis on how free expression protects the democracy.

Freedom of the press and other media is specifically mentioned in Section 16(1)(a) because of the significant role that the media play in ensuring the promotion of a democracy. The South African courts have unfailingly confirmed the media's role in a democratic society.[155] As indicated earlier, in *Print Media* the Court linked press freedom to a functioning democracy. The Court also confirmed that laws limiting press freedom must be closely monitored so as not to undermine the public's right to a strong media. Similarly, in *Mail and Guardian Media Ltd* v. *MJ Chipu NO (Chairperson of the Refugee Appeal Board)*, the Court held that the media is a 'key facilitator' of freedom of expression.[156] There is thus no doubt that media and press freedom is positioned at the core of the right and that laws restricting it will face a stiff challenge in the limitation analysis.

The role of the press and the media, however, is two-dimensional – their right is protected by Section 16(1)(a), but they must also fulfil their duty to society. The Court addressed this in *Khumalo* v. *Holomisa*,[157] holding that the media should not only rely on freedom of expression, but must also 'foster' it, and that people's ability to function effectively in society depends on how the media fulfils its obligations. The media are thus both right bearers and 'bearers of constitutional obligations'.[158]

[153] *Afri-forum* v. *Malema* 2010 (5) SA 235 (GNP), [56] – gestures informed the meaning of the struggle song in issue.
[154] *De Reuck* v. *Director of Public Prosecutions (WLD)* [59].
[155] See *SABC* v. *NDPP* 2007 (1) SA 523 (CC); *Independent Newspapers (Pty) Ltd* v. *Minister for Intelligent Services* 2008 (5) SA 31 (CC).
[156] *Mail and Guardian Media Ltd* v. *MJ Chipu NO (Chairperson of the Refugee Appeal Board* 2013 (6) SA 367 (CC), [52].
[157] *Khumalo* v. *Holomisa*.
[158] Ibid. [22]. But see re the issue of false news reporting ibid. [35] and [108].

Section 16(1)(b) protects the right to receive and impart information and ideas – the dual aspect of expression.[159] This is an integral component of freedom of expression as the reception of information and ideas enables individuals to participate fully in public society, buttressing the constitutional values which envisage a responsive, accountable and open democratic state.[160] Accordingly, in *Islamic Unity Convention* v. *Independent Broadcasting Authority*,[161] the Court found that the Broadcasting Code in issue infringed not only the right of broadcasters to disseminate information, but also deprived the public of the right to receive diverse views.[162]

The distinction between ideas and information is interesting, especially in the context of false news laws. The types of expressive acts classified as 'information' must clearly be distinguished from 'ideas', which term is usually widely defined to include opinions, thoughts, plans, creative works and so on. In *The Citizen 1978 (Pty) Ltd* v. *McBride*,[163] the Court held that 'information' includes 'only factual statements', as opposed to opinions and comments,[164] but this conclusion is debatable, as discussed below. The textual inclusion of 'artistic creativity' as a form of protected expression in Section 16(1)(c) is a consequence of strict censorship during apartheid.[165] The same is true for academic freedom. All forms of art are protected, including music, books, paintings and theatre productions.[166]

An interesting question that the Court may have to determine when dealing with potential 'fake news' cases is whether manipulated photos and their ilk could be classed as artistic expression and thus be positioned at the core of the right. This is because the courts acknowledge that artists play a significant role in society by contributing to the existing dialogue and social debate, usually because their views can be controversial and are critical for the development of a vibrant culture in a

[159] Not to be confused with the right to access to information, protected by s. 32 of the Constitution.
[160] *SABC Ltd* v. *NDPP* [28].
[161] *Islamic Unity Convention* v. *Independent Broadcasting Authority* 2002 (4) SA 294 (CC).
[162] Ibid. [47] and [50].
[163] *The Citizen 1978 (Pty) Ltd* v. *McBride* 2011 (4) SA191 (CC).
[164] Information is usually defined as 'facts provided or learnt' about a 'situation, person or event' and is a 'constituent of knowledge'. See also *Democratic Alliance* v. *African National Congress* 2015 (2) SA 232 (CC), [114] – information means only factual statements and not comments or opinions.
[165] *Islamic Unity Convention* v. *Independent Broadcasting Authority*, [27] – expression was censored in the pre-constitutional era, which is incompatible with South Africa's commitment to the protection of human rights in an open and democratic society. Re academic freedom, see s. 25 of the Universities Act 1995, which permitted the state to impose conditions on the grant of university subsidies. A factor considered was how a university controlled revolutionary and political student activities. See *UCT* v. *Ministers of Education and Culture (House of Assemblies and House of Representatives)* 1988 (3) SA 203 (C), the Court later setting aside the regulations promulgated.
[166] *The Citizen 1978 (Pty) Ltd* v. *McBride*, 27.

democratic and functioning society.[167] Also, artists are often at risk of censorship, probably because their work is displayed in the public domain, engaging society and eliciting diverse reactions.[168]

Section 16(2) lists the types of freedom of expression which are not constitutionally protected, namely propaganda for war, incitement of imminent violence and hate speech (which is strictly defined). The boundaries of the categories of expression excluded from constitutional protection are important, because Section 16(2) is definitional, and the Court has held that legislative measures which restrict expression beyond the scope of constitutional exclusion must be justified in terms of the general limitation clause. However, limitations falling within the strict parameters of Section 16(2) will not limit freedom of expression.[169] Plus, all limitations must be restrictively interpreted.

None of the listed exclusions to protected expression in Section 16(2) include false news regulation. This means that any law enacted to restrict the dissemination of information, whether false or not, will be treated as limiting freedom of expression and require justification in terms of the limitation clause, which is introduced in Section 12.6.3, following an examination of the protection of political rights in the Constitution.

12.6.2 *Political Rights*

Section 19 of the Constitution, headed political rights, reads as follows:

(1) Every citizen is free to make political choices which includes:
   a) the right to form a political party;
   b) to participate in the activities of, or recruit members for, a political party; and
   c) to campaign for a political party or cause.
(2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.
(3) Every adult citizen has the right:
   a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and
   b) to stand for public office, and if elected, to hold office.

[167] Report of the Special Rapporteur in the Field of Cultural Rights: The Right to Freedom of Artistic Expression and Creativity, United Nations, 14 March 2013, www.ohchr.org/en/documents/thematic-reports/ahrc2334-report-right-freedom-artistic-expression-and-creation.

[168] The debacle concerned Brett Murray's painting, *The Spear*, exhibited at the Goodman Art Gallery in Johannesburg, depicting President Zuma with exposed genitals, as a satirical parody of the Soviet poster featuring Lenin. It is an excellent example of the role that art plays in the promotion of public debate and critical dialogue. See the Films and Publication Appeal Tribunal judgment in *Goodman Gallery and the Film and Publication Board* (case number 8/2012). For further discussion, see Jaco Barnard-Naude and Pierre De Vos, 'Die politiek van die estetiese in 'n postkoloniale konteks: menswaardigheid en vryheid van uitdrukking in die debat rondom Brett Murray se skildery *The Spear*: regte' (2012) 9(2) *LitNet Akademies* 176.

[169] *Islamic Unity Convention* v. *Independent Broadcasting Authority*, [33] and [34].

This section is complemented by Section 1(d) of the Constitution – which guarantees a multi-party system of democratic government, to ensure accountability, responsiveness and openness.[170] These values were stressed in *My Vote Counts NPC* v. *Minister of Justice and Correctional Services* (*My Vote Counts 11*),[171] and arise by virtue of South Africa's history under apartheid, where the majority of South Africans were denied the right to vote.[172]

The political right is cast in generous and unqualified terms. Thus, the Court in *Ramakatsa* v. *Magashule*[173] held that 'the section means what it says … It guarantees freedom to make political choices and … safeguards a member's participation in the activities of the [political] party concerned … It protects the exercise of the right not only against external interference but also against interference arising from within the party'. The right to vote thus upholds the democracy and is linked to human dignity – it is a 'badge of dignity and of personhood'.[174]

Section 19 must be applied and interpreted in its entirety. The Constitutional Court in *NNP* v. *Government of South Africa*[175] held that the right to vote will echo a hollow ring without the right to free, fair and regular elections. As to the meaning of free and fair elections, in *Kham* v. *Electoral Commission*,[176] the Court held that the 'free and fair' requirement is singular and not a conjunction of two disparate elements. The term includes 'both the freedom to participate in the electoral processes and the ability of the political parties and candidates, both aligned and non-aligned, to compete with one another on relatively equal terms'.[177]

In the main, elections in South Africa are contested by political parties – they occupy centre stage and play a vital role in facilitating citizens' political rights.[178] But although political parties have been described as 'the engine of democracy in South Africa', there is little regulation of their internal functioning. Nonetheless, as outlined in *Ramakatsa*, political parties must comply with the Constitution, their

[170] Democratic values are stressed through the Constitution, with even the traditional libertarian rights of equality and dignity labelled as 'democratic values'.

[171] *My Vote Counts NPC* v. *Minister of Justice and Correctional Services (My Vote Counts 11)* 2018 (5) SA 380 (CC), [31].

[172] *Minister of Home Affairs* v. *NICRO* 2005 (3) SA 280 (CC), [47].

[173] *Ramakatsa* v. *Magashule* 2013 (2) BCLR 202 (CC), [171].

[174] *August* v. *Electoral Commission* 1999 (3) SA 1 (CC), [17] – voting rights were extended to prisoners. Their disqualification from voting because they had been imprisoned without the option of a fine was declared unconstitutional. The Court held that '[i]n a country of great disparities of wealth and power … whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation'. See also *Ramakatsa* v. *Magashule*, [64] and [65].

[175] *NNP* v. *Government of South Africa* 2013 (2) BCLR 202 (CC), [12].

[176] *Kham* v. *Electoral Commission* 1999 (3) SA 191 (CC).

[177] Ibid. [34].

[178] But see *New Nation Movement* v. *President of the RSA* SA 2020 (6) 257 (CC), where the Court permitted an individual to stand as a candidate and declared the Electoral Act 1998 unconstitutional for permitting only political parties to contest elections.

own rules, the Electoral Code of Conduct[179] and the Electoral Commission Act.[180] Most importantly, rules of political parties must be consistent with the Constitution. As discussed in Section 12.6.6. , the Electoral Act regulates the dissemination of false news during elections, the legitimacy of which was raised in the important case of *Democratic Alliance* v. *African National Congress*.[181]

In *My Votes Counts NPC* v. *Minister of Justice and Correctional Services*,[182] the Court had to consider whether voters have a right to know who funds political parties and whether a right to vote includes an 'informed vote'. A related but key question was whether political parties and the state have a duty to record, preserve and disclose the sources of their private funding. This issue required an analysis of whether South Africa's Promotion of Access to Information Act (PAIA)[183] was unconstitutional because it failed to oblige political parties to record and disclose their private funding sources. The Court held that people are entitled to information held by political parties because such information is critical to the fulfilment of the political right, especially the right to vote. The Court gave three reasons. Firstly, citizens are entitled to make informed choices when voting so that their vote is an expression of their genuine will.[184] Secondly, the duty of disclosure helps to combat corruption and ensures that elected representatives serve the public interest, rather than the agendas of private entities or foreign governments.[185] Thirdly, this interpretation aligns with that in international law.[186] The Court added that it is not only voters who are entitled to disclosure but also the media and other agents that are obliged to educate the voting public.

The PAIA was thus declared unconstitutional to the extent that it excluded political parties from its ambit and did not require parties to preserve and record information about private funding and make it readily accessible to the public. Parliament was ordered to amend the PAIA or to enact new legislation to promote the effective exercise of the right to make political choices and to participate in elections. The PAIA has since been amended,[187] and the Political Party Funding Act[188] has been enacted to give effect to the Court's order. It is clear that the South African Constitutional Court has aligned the rights to freedom of expression, access

[179] Electoral Act, Sch. 1.
[180] Electoral Commission Act, Act 51 of 1996.
[181] *Democratic Alliance* v. *African National Congress* 2015 (2) SA 232 (CC). The African National Congress and the Democratic Alliance are both dominant political parties in South Africa and ironically, these are the two major players forming the Government of National Unity after the 2024 general election.
[182] *My Votes Counts NPC* v. *Minister of Justice and Correctional Services*.
[183] South Africa's Promotion of Access to Information Act, Act 2 of 2000, giving effect to s. 32 of the Constitution.
[184] *My Votes Counts NPC* v. *Minister of Justice and Correctional Services*, [32]–[34].
[185] Ibid. [40]–[48], which the Court linked to s. 1(d) of the Constitution.
[186] Ibid. [49]–[51].
[187] The PAIA Amendment Act, 2019.
[188] Political Party Funding Act, Act 6 of 2018.

to information and free and fair elections to the founding constitutional values of democracy, freedom, responsiveness, transparency and accountability.

12.6.3 *The General Limitation Clause*

Section 36(1) provides as follows:

36 Limitation of Rights

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including –
  (a) the nature of the right;
  (b) the importance of the purpose of the limitation;
  (c) the nature and extent of the limitation;
  (d) the relationship between the limitation and its purpose; and
  (e) less restrictive means to achieve the purpose.

Section 36(1) permits the justifiable infringement of a protected right if the limitation is both rational and proportional. The limitation must serve a 'compellingly important' purpose. A right can only be limited if the limitation will achieve its purpose and there is no other realistic way to achieve that purpose.[189]

A two-stage analysis is adopted when rights are limited. In the first stage, the ambit of the right in issue is determined by way of an interpretative process – the 'threshold stage'.[190] The right is usually interpreted generously, it being considered unnecessary 'to shape the contours of the right in order to accommodate pressing social interests'.[191] Should a law of general application violate the protected scope of the right; then a second-stage justification evaluation must be conducted. Here, a broad assessment utilizing the Section 36(1) factors is undertaken to determine whether the infringement of the right is justifiable in an open and democratic society, based on human dignity, equality and freedom. The party arguing for the limitation (usually the state) bears the onus to discharge the 'burden of justification' by demonstrating that the rights infringement is justifiable.[192]

To date, the South African courts have been very reluctant to permit the introduction of laws that limit press and media freedom. This is not only because of the impact of past censorship during the apartheid era[193] but also because the courts

[189] *S* v. *Manamela* 2000 (3) SA 1 (CC) [32].
[190] *Prinsloo* v. *Van der Linde* 1997 (3) SA 1012 (CC).
[191] Halton Cheadle, 'Limitation of Rights' in Halton Cheadle, Dennis Davis and Nicholas Haysom (eds.), *South African Constitutional Law: The Bill of Rights* (Durban: Butterworths, 2002) pp. 698–99.
[192] *S* v. *Makwanyane* 1995 (3) SA 391 (CC), [102].
[193] *Khumalo* v. *Holomisa*, [22].

have recognized the crucial role that the press play when it comes to protecting accountable and transparent governance, a key component of an open and democratic society based on human dignity, equality and freedom.[194] Laws that limit both freedom of expression and the right to vote will thus be strictly scrutinized by the courts during the Section 36 proportionality analysis.[195] The state will have to show that there is a legitimate need for any such law, with the law's purpose being rationally connected to the outcome it aims to achieve.

South Africa does not have a specifically enacted legislated false news restriction. However, the dissemination of disinformation could be regulated via the common law of defamation and other pieces of legislation regulating cybercrimes, films and publications and elections. Some of these laws and how they have been interpreted and applied by the courts are now briefly introduced.

12.6.4 *Defamation: The Common Law Civil Remedy and a Criminal Offence*

Most of South African defamation cases are civil in nature,[196] aimed at protecting the good name or reputation of both natural and juristic persons.[197] Very few cases of criminal defamation are reported and there have been many calls to repeal the common law crime of defamation.[198] Civil defamation is addressed first, followed by criminal defamation. It will be shown that neither remedy has been used to address false news types of cases and moreover that the courts have developed the law of

[194] In addition to the cases already cited, see *SABC* v. *NDPP*; *Independent Newspapers (Pty) Ltd* v. *Minister for Intelligence Services* 2008 (5) SA 31 (CC), [40]; *Government of the RSA* v. *Sunday Times* 1995 (2) SA 221 (T) at 227I–228A, holding that 'the press is in the frontline of the battle to maintain democracy'; *Midi Television (Pty)* v. *DPP* 2007 (5) SA 540 (SCA), [6]; *Johncom Media Investments Ltd* v. *M* 2009 (4) SA (CC), [28] and [29].

[195] *S* v. *Mamabolo (E-tv Intervening)*; *My Vote Counts NPC* v. *Minister of Justice and Correctional Services (My Vote Counts 11)*.

[196] Regulated as a delict (tort in English law).

[197] *O'Keefe* v. *Argus Printing and Publishing Company Ltd and Another* 1954 (3) SA 244 (C), but see *Reddell* v. *Mineral Sands Resources (Pty) Ltd* 2023 (2) SA 404 (CC), discussed below. This remedy should be compared to cases of *injuria*, which concern a claim for injuries to feelings, as opposed to an injury to one's reputation or *fama* (good name). *Injuria* is both civil and criminal in nature. There are many reported *crimen injuria* cases dealing with issues such as the use of racial slurs, hate speech and the like. This is because South Africa does not have a legislated hate speech offence. Note though that the President signed the Prevention and Combating of Hate Speech Crimes Bill in May 2024. The date of promulgation is yet to be confirmed. see Joanna Botha, 'A Hate-Crime Model for the South African Context' in Hennie Strydom and Joanna Botha (eds.), *Select Essays on Governance and Accountability Issues in Public Law* (Stellenbosch: African Sun Media, 2020).

[198] The last prominent reported case of criminal defamation is *S* v. *Hoho* 2009 (1) SACR 276 (SCA), where the accused was acquitted. Here, an issue was whether the crime had fallen into disuse and thus no longer existed. See generally Shannon Hoctor, 'The Crime of Defamation – Still Defensible in a Modern Constitutional Democracy?' (2013) 34(1) *Obiter* 125.

defamation to balance freedom of expression (of the media particularly) and the right to human dignity.

12.6.4.1 Defamation

A person whose reputation has been damaged by the publication of an intentional and unlawful (or wrongful) defamatory statement may claim damages from the wrongdoer, alternatively a so-called take-down order, often coupled with an order that the wrongdoer retract the statement and/or apologize.[199] Once the plaintiff proves that there has been publication of a defamatory statement,[200] the elements of wrongfulness and intention are presumed to have been met. The defendant must then prove a ground of justification (a defence) to rebut the presumptions.[201]

In the constitutional era, the courts have taken active steps to develop the law of defamation, by balancing the rights to freedom of expression and human dignity.[202] Media freedom has benefited especially,[203] with the courts creating special grounds of justification for the media. So, in *Holomisa* v. *Argus Newspapers*,[204] the Court held that 'a defamatory statement which relates to free and fair political activity is constitutionally protected, even if false, unless the plaintiff shows that, in all the circumstances of its publication, it was unreasonably made'. This created an exception to the rule that the defence of truth and public interest could be used only where a statement is factually true. Known as the reasonableness defence, the exception was introduced to protect press freedom to create leeway for false statements around free and fair political activity.

The defence was confirmed in *National Media Ltd* v. *Bogoshi*.[205] The Supreme Court of Appeal[206] held that a publisher could avoid liability for defamation where, even if it could not prove that the statement was true, it could establish that publication was reasonable. The Court held that: '[T]he publication in the press of false defamatory allegations of fact will not be regarded as unlawful if, upon a consideration of all the circumstances of the case, it is found to have been reasonable to publish the particular facts in the particular way and at the particular time.'[207] Relevant factors include: whether the statement related to political discussion; the tone in which the report was written; the nature of the information on which the allegations were based; the reliability of their source; and steps taken to

[199] *Dikoko* v. *Mokhatla* 2006 (6) SA 235 (CC) [62]; *Khumalo* v. *Holomisa*, [26].
[200] A publication is defamatory if it has the tendency or is calculated to undermine the status, good name or reputation of the plaintiff.
[201] *Khumalo* v. *Holomisa*, [18].
[202] Constitution, s. 10.
[203] In terms of s. 39(2) of the Constitution, the courts are obliged to develop all law to ensure that it is aligned with the values which the Constitution enshrines.
[204] *Holomisa* v. *Argus Newspapers* 1996 (2) SA 588 (W).
[205] *National Media Ltd* v. *Bogoshi* 1998 (4) SA 1196 (SCA).
[206] The previous apex court, but now lower in hierarchy than the Constitutional Court.
[207] *National Media Ltd* v. *Bogoshi*, at 1212 F – 1212 G.

verify the information. The defence of reasonable publication was confirmed in *Khumalo*, where the Constitutional Court stressed that the mass media play a significant role in the protection of freedom of expression to enable individuals to receive and impart information and ideas.[208]

The *Khumalo* court did, however, warn that 'while a person cannot claim a strong constitutional interest in protecting their reputation against the publication of truthful but damaging statements, neither do publishers have a strong constitutional speech interest in the publication of false material'.[209] As shown below, this caution did not deter the Court from refusing to enforce a ban on the publication of false information during elections.

Most recently, in 2022, in *Reddell* v. *Mineral Sands Resources (Pty) Ltd*[210] the Constitutional Court took further steps to protect freedom of expression, but in relation to whether trading companies could sue environmental activists for reputational loss.[211] The statements in issue (distributed on multiple platforms, including YouTube, as an e-book and on online news sites) accused the plaintiff mining companies of harming the environment. The environmentalists (as defendants) challenged the constitutionality of the common law defamation rule permitting trading companies to sue for non-patrimonial damages for reputational loss. They claimed that the existing law undermined their right to freedom of expression and that the companies, as juristic persons, could not rely on the right to inherent human dignity to justify a claim for reputational damage.[212]

The majority of the Court agreed, holding that a claim for general damages 'to a trading corporation for harm to its reputation infringes the … right to freedom of speech, specifically in relation to speech which is of public importance or which requires public debate and participation'.[213] The Court confirmed that the speech in issue was in the public interest (environmental harm) and was of considerable value in an open and democratic society. The Court stressed that the activists created a platform for public participation about environmental compliance by large mining companies and that such speech 'warrant[s] a high standard of protection'.[214] It added that 'discourse about matters that affect all or many of us are of grave public concern … must be encouraged and not stifled in a vibrant democracy like ours'.[215] This did not mean that the companies had no alternative relief: if necessary,

[208] *Khumalo* v. *Holomisa*, [18], [19], [28], [33], [42], [43] [48], [49].
[209] Ibid. [201].
[210] *Reddell* v. *Mineral Sands Resources (Pty) Ltd*. To be distinguished from a judgment delivered on the same day, involving the same parties, and considering the constitutionality of SLAPP suits. See *Mineral Sands Resources (Pty) Ltd* v. *Reddell* 2023 (2) SA 68 (CC).
[211] To be distinguished from trading losses caused by injurious falsehoods, an unlawful competition claim.
[212] *Reddell* v. *Mineral Sands Resources (Pty) Ltd*, [37] and [94].
[213] Ibid. [100].
[214] Ibid. [105].
[215] Ibid. [112].

they could apply for an interdict (in the form of a takedown order),[216] a declarator, a retraction or an apology.

The minority in *Reddell*, however, was not prepared to develop the common law of defamation to this extent. Whilst the minority's focus was on the interpretation of the right to human dignity, it echoed *Khumalo*'s warning about the limited value of false information, especially in the digital age, given the reach of social media platforms.[217] It added that '[p]ublic discourse is speech that takes place in public. Social media is the town square writ large. It is pre-eminently the platform of public discourse. Issues of legitimate debate is a concept of bountiful elasticity. But a subject may be one of legitimate debate and yet what is said may be false, even hateful, and reputationally ruinous.'[218] Thus, the extent to which freedom of expression can be relied upon in defamation cases must consider 'what speech is used, how it is used, and with what consequences'. Where a defamatory statement is a 'blatant falsehood that does great reputational harm', expression should not prevail.[219] It is noteworthy, of course, that the majority disagreed and protected critical expression where public participation is crucial.

It is thus clear that whilst the South African courts have not had to deal directly with a 'false news' type of case under the realm of defamation, the courts are aware that such a case would require careful consideration given the value placed on freedom of expression. Whatever the future outcome, it is certainly highly unlikely that the courts would permit a criminal sanction for defamatory speech, as is now demonstrated.

12.6.4.2 Criminal Defamation

The crime of defamation is defined as the unlawful and intentional publication of a matter concerning another person which tends to injure their reputation. In 2008 in *Hoho* v. *S*[220] the Supreme Court of Appeal had to consider whether the crime of defamation still exists in South African law and whether it is constitutionally legitimate. The accused, Luzuko Hoho, had been convicted of twenty-two counts of criminal defamation and was sentenced to three years' imprisonment suspended for five years and, in addition, to three years' correctional supervision. Hoho was a researcher employed by a Provincial Legislature and had published various leaflets in which he defamed the Premier, the Speaker and various other politicians.

[216] Note that the South African courts are reluctant to grant prior restraint orders. See *Midi Television (Pty)* v. *DPP*.

[217] *Reddell* v. *Mineral Sands Resources (Pty) Ltd* [195]. The Court stressed that the defences to wrongfulness include truth and the public interest and fair comment (which requires that the statement upon which the comment is based be true).

[218] Ibid. [202].

[219] Ibid. [205].

[220] *Hoho* v. *S* [2009] 1 All SA 103 (SCA).

He accused them of corruption, bribery, financial embezzlement, sexual impropriety, illegal abortion and fraud.

Hoho raised various defences, including that the crime of defamation no longer existed in South African law and that, even if it did, it was unconstitutional. The Supreme Court of Appeal disagreed. It held that the crime had not been abrogated by disuse and that it did not unjustifiably infringe the right to freedom of expression.[221] The Court reasoned that whilst a criminal sanction is a drastic measure, the limitation to freedom of expression was balanced by the onerous burden of proof borne by the state in criminal cases, the parallel between the need to protect physical integrity (assault) and injury to reputation, and the fact that there was still a need for a criminal sanction to protect a person's reputation.[222]

Despite this, it is anticipated that legislation may be passed soon to decriminalize defamation in South Africa. Indeed, as far back as September 2015, the state announced that it would introduce legislation to decriminalize defamation on the grounds that it unjustifiably infringes the right to freedom of expression.[223] Whilst the legislation is yet to be tabled, it is highly likely that the current Constitutional Court would have no difficulty in declaring criminal defamation unconstitutional, especially given the calls by the African Commission to decriminalize defamation and the added protection the Court has given to freedom of expression in civil defamation cases.

12.6.5 *The Cybercrimes Act 2020*

The Cybercrimes Act, which criminalizes unlawful activities in cyberspace, commenced on 1 December 2021.[224] The Act was introduced because it was recognized that the existing common law crimes were incapable of regulating criminal conduct committed online.[225] Advances in digital technology amplified the need for the Act,

[221] Ibid. [32] and [33] – the Court rejected the views of academics that the crime should be declared unconstitutional.

[222] Ibid. [33]–[35] – the Court held that the need for a criminal offence was illustrated by the facts of the case. Furthermore, the paucity of prosecutions may be evidence that the existence of the offence serves as deterrence. See also Hoctor, 'The Crime of Defamation' (n 198), at 131, who reviews the arguments concerning the need to retain the crime of defamation when an effective civil remedy is available.

[223] See 'The Case against Criminal Defamation', *Mail and Guardian*, 23 September 2015, http://mg.co.za/article/2015-09-23-the-case-against-criminal-defamation.

[224] There was partial implementation of the Act. Part IV of Chapter 2 is still to be implemented.

[225] The Electronic Communications and Transactions Act 2000 (the ECTA) focused on the regulation of the commercial aspects of online transactions and only created a few cybercrimes. Other laws regulated organized crime (the Prevention of Organised Crimes Act, Act 121 of 1998, and the Financial Intelligence Centre Act, Act 38 of 2001). Only ss. 85–90 of the ECTA created criminal offences: unauthorized access to data; interception of, or interference with data or denial of a service attack; computer-related extortion, fraud and forgery; and attempt, aiding and abetting a cybercrime. For the application of cyber law to a common law crime, see S

aggravated by the ease with which cybercrimes such as fraud, extortion, forgery, child pornography[226] and hacking could be committed. As these crimes became more prevalent, it was obvious that legislated criminal offences, with a specifically adapted procedural framework, were needed to regulate unlawful conduct committed online.[227]

The long title to the Act states that it was enacted to create and penalize cybercrimes.[228] Chapter 2 of the Act contains five substantive criminal law segments. Part I regulates cybercrimes recodified from existing common law crimes,[229] and adds new offences. These include disclosure of an electronic data message that causes damage to property or violence against a person or group of persons,[230] the unlawful and intentional disclosure of a data message of an intimate image of a person[231] and the so-called malicious communication crimes.[232] Part III creates offences in the context of various cybercrime activities, such as attempting, aiding, inducing, inciting or instigating a person to commit a specified offence. Part IV deals with competent verdicts and Part V permits the grant of court orders to protect complainants from the harmful effects of malicious communications. Provisions are also created to regulate the obligations of electronic communications service providers and financial institutions to report cybercrime offences and to preserve information relevant to an investigation.

From a disinformation perspective, it is interesting that the Act does not contain a specific provision criminalizing the dissemination of false data (or news) intended to cause harm. Instead, such conduct would have to be addressed in terms of either cyber fraud[233] or cyber forgery and uttering

v. *Howard* unreported case No. 41/258/02, Johannesburg Regional Magistrates' Court (malicious code loaded onto an employer's network).

[226] Child pornography was criminalized in terms of the Films and Publications Act, Act 65 of 1996.

[227] See generally Sizwe Snail ka Mtuze and Melody Musoni, 'An Overview of Cybercrime Law in South Africa' (2023) 4(3) *International Cybersecurity Law Review* 299.

[228] The Act does not define cybercrimes. An acceptable definition is 'the commission of a crime using a computer, a computer network or a networked device'. A computer would be the 'object' of a crime when theft of hardware or software occurs. It is more likely though to be used as an instrument to commit crimes such as fraud, theft, identity theft, cyberbullying or cyber defamation. See generally Nombulelo Q. Mabeka and Fawzia Cassim, 'Interpreting the Provisions of the Cybercrimes Act 19 of 2020 in the Context of Civil Procedure: A Future Journey' (2023) 44(1) *Obiter* 19.

[229] The existing common law crimes, such as *crimen injuria*, or malicious damage to property, where a perpetrator disseminates a virus into another's computer system.

[230] This conduct is criminalized based on a person's intention to incite the causing of damage or violence, but also includes a threat to cause such damage or violence; or the unlawful and intentional conduct in attempting or conspiring to aid, instigate or instruct another person to commit an offence in terms of the Act.

[231] Section 16.

[232] Sections 13–16.

[233] Section 8. To address cases such as phishing, spoofing and banking scams. See too Murdoch Watney, 'The Evolution of Internet Legal Regulation in Addressing Crime and Terrorism' (2007) 2(2) *Journal of Digital Forensics, Security and Law* 41, at 49; Fawzia Cassim, 'Addressing

offences,[234] which criminalize, inter alia, the unlawful use/passing off of false data or a misrepresentation with the intention of defrauding another person to cause harm, or the malicious communications provisions. The latter offences are intended to capture within their ambit the electronic communication of data messages which are published with the intention of inciting damage to persons or their property based on identifiable group characteristics.[235] It is thus clear that the Cybercrimes Act was not enacted to regulate false news or disinformation, a conclusion which is supported by the fact that such a purpose is not included in the Act's objectives.[236]

12.6.6 *The Electoral Act 78 of 1993*

The Electoral Act is the domestic legislation that regulates and gives normative content to the right to free and fair elections and the right to vote. The Act contains various provisions which prohibit certain types of conduct by political parties and other actors during elections. The aim is to ensure the achievement of free and fair elections. There are seven main prohibitions. One of these is Section 89(2)(c) of the Act which prohibits the publication of intentionally false statements, with the intention of influencing the conduct or outcome of an election. Any person who contravenes the section is guilty of a criminal offence and may be fined or imprisoned for up to ten years.

Schedule 1 to the Electoral Act contains the Electoral Code of Conduct.[237] Like the Act, it prohibits certain types of conduct to promote '(a) tolerance of democratic political activity, and (b) free political campaigning and open public debate'. Item 9 of the Electoral Code of Conduct provides that no registered party or candidate may publish false or defamatory allegations in connection with an election. This part of the Code must be read with Item 4 thereof, which records that freedom of political expression is a core component of a free and fair election.

These provisions were interpreted by the Constitutional Court in *Democratic Alliance* v. *African National Congress*.[238] The case concerned an SMS sent by the

the Challenges Posed by Cybercrime: A South African Perspective' (2010) (3) *Journal of International Commercial Law and Technology* 118.

[234] Section 9.

[235] See ss. 13–16.

[236] As listed in the Act's long title. It does not have a preamble or objectives section. The Act aims to address money laundering, fraud, harassment and hate speech, committed online.

[237] Section 99(1) of the Act provides that the Code of Conduct requires that all registered political parties and candidates must be subscribed to contest an election. Section 94 of the Act provides that all political parties and candidates are bound by the Act's provisions, including the Code of Conduct.

[238] *Democratic Alliance* v. *African National Congress* 2015 (2) SA 232 (CC). For an excellent analysis of this case, see Gautam Bhatia, 'Autonomy, Fairness, Pragmatism, and False Electoral Speech: An Analysis of *Democratic Alliance v. African National Congress*' (2016) 8(1) *Constitutional Court Review* 23.

Democratic Alliance (DA)[239] to 1,593,682 persons in the Gauteng province, approximately six weeks before the date set for the 2014 national elections. The SMS read: 'The Nkandla report shows how Zuma stole your money to build his R246m[240] home. Vote DA on 7 May to beat corruption. Together for change.' The SMS was based on the Nkandla Report, penned by the Public Protector,[241] released a day before the SMS was sent and reporting that President Zuma had improperly used public finances for security upgrades to his private residence (Nkandla). The African National Congress (the ANC – and Zuma's party) launched an application asking for a declaration that the SMS violated the Electoral Act and the Code. The ANC requested an order restraining the DA from re-disseminating the message and a retraction. The ANC argued that the SMS alleged that the Nkandla Report stated that President Zuma had committed theft, but that this was not the case, and that the SMS therefore contained false information published with the intention of influencing an election in breach of the Electoral Act.

In response, whilst accepting the constitutional validity of the Electoral Act provisions, the DA denied that the SMS was false. It argued that the SMS meant that the Nkandla Report merely demonstrated how Zuma had misused public funds and that 'read in light of the Nkandla Report, the SMS express[ed] an opinion that a fair person might honestly and genuinely hold in light of the facts in the Report, and the Report must be understood and read in its totality'.[242] A key issue therefore was whether the SMS amounted to an expression of comment or opinion as opposed to a statement of fact.

To address this question, the Court had to interpret Section 89(2)(c) of the Act, as read with the Code. The Court opted for a restrictive interpretation because of the principle that legislation limiting a right (here freedom of expression) should not be interpreted broadly, especially when cast as a criminal sanction.[243] Recognizing that freedom of expression serves many purposes, including individual autonomy and the promotion of a vibrant democracy, the Court stressed the need for active participation by informed voters during elections. Linking the right to the apartheid struggle and the censorship that existed then, the Court held that '[i]n celebrating the democracy we have created, we rejoice as much in the right to vote as in the freedom to speak that makes that right meaningful. An election without as much freedom to speak as is constitutionally permissible would be stunted and inefficient'.[244]

[239] The official opposition party to the African National Congress.
[240] Two hundred and forty-six million Rand. In today's money this would be approximately €123,000.
[241] At that time, Prof. Thuli Madonsela.
[242] *Democratic Alliance* v. *African National Congress*, [16].
[243] Ibid. [129].
[244] Ibid. [124].

Another important factor was that the right to freedom of expression underpins many of the other constitutionally protected rights, which together:

> protect the rights of . . . like-minded people to foster and propagate their views. They confirm the importance, both for a democracy and the individuals who comprise it, of being able to form and express opinions – particularly controversial or unpopular views, or those that inconvenience the powerful. The corollary is tolerance. We have to put up with views we don't like . . . It means the public airing of disagreements. And it means refusing to silence unpopular views.[245]

In the electoral context, public debate is especially valuable because it contributes to 'opinion-forming and holds public office-bearers and candidates for public office accountable'.[246] Importantly, for open and transparent governance, the Court added that:

> Political life in democratic South Africa has seldom been polite, orderly and restrained. It has always been loud, rowdy and fractious. That is no bad thing. Within the boundaries the Constitution sets, it is good for democracy, good for social life and good for individuals to permit as much open and vigorous discussion of public affairs as possible.[247]

Having reached this conclusion, the next question was 'what kinds of 'information' and 'allegations' were included in the prohibition in Section 89(2)'. In other words, were both factually incorrect statements and expressions of opinion prohibited or only the former?[248] The answer, according to the majority, was that only false statements or information were prohibited,[249] and that the SMS was clearly an opinion, alternatively a comment, as it appeared in the Report, to which it directly referred for its authority. Thus, the DA had not violated the Act.[250] This decision, whilst controversial at the time, demonstrates that the South African courts take their constitutional mandate in Section 165 of the Constitution seriously – that is, the duty to uphold the Constitution and to apply it, without fear or favour. The consequence is that laws regulating false news or information, especially when cast as penal measures, are unlikely to be condoned by the courts.

12.6.7 *COVID Regulations under the Disaster Management Act 2002*

The first false news laws in South Africa were prompted by the COVID-19 pandemic, under the Disaster Management Act 2002 (DMA), giving the

[245] Ibid. [125]–[126].
[246] Ibid. [132].
[247] Ibid. [135].
[248] Ibid. [119]–[120].
[249] Ibid. [139]–[141].
[250] The minority, on the other hand, held that the SMS alleged that the Report had made a finding that President Zuma had stolen taxpayers' money to build his home. This was a statement of fact, and not a comment, because it was made 'without reference . . . to other antecedent or surrounding circumstances notorious to the speaker'.

executive extensive powers, including the power to implement legislation forthwith and without consultation. South Africa declared a national state of disaster[251] in terms of the DMA in March 2020 in response to the pandemic.[252] A mandatory twenty-one-day lockdown commenced on 25 March 2020.[253] This resulted in the closure of schools, universities, churches and businesses, with freedom of movement being severely restricted.[254] The lockdown was extended repeatedly through regulations authorized by the DMA and operated at different levels, depending on the rise in the number of COVID-19 cases,[255] but officially ended on 4 April 2022.[256]

Disasters in terms of the DMA are classified according to whether they are local, provincial or national. A disaster is treated as a national disaster if it affects more than one province (Section 26(1)), which was clearly the case during the pandemic. The consequence was that the national executive became primarily responsible for the coordination and management of the crisis. A minister designated by the President was given the power to make regulations or issue directions concerning a wide range of matters,[257] including, inter alia, 'other steps that may be necessary to prevent an escalation of the disaster, or to alleviate, contain and minimize the effects of the disaster'. Whilst there were numerous challenges to the constitutionality of the Act and the regulations issued thereunder, most of these challenges were ineffective, the courts deferring to the state's prerogative to manage the pandemic and justifying the

[251] Sections 27(1)(a) and 27(1)(b). See generally, Geo Quinot, 'Justification, Integration, and Expertise: South Africa's Regulatory Response to Covid-19' (2020) 73(1) *Administrative Law Review* 105.

[252] GN 318 in GG 43107 of 2020-03-18. A state of disaster is not a state of emergency. The distinction was explained in *Freedom Front Plus* v. *President of the Republic of South Africa* [2020] 3 All SA 762 (GP). A state of emergency, regulated by s. 37 of the Constitution, may only be declared when the 'life of the nation' is under threat or in cases such as 'armed conflicts, civil wars, insurrections, severe economic shocks, natural disasters, and similar threats'. Another significant difference between a state of disaster and a state of emergency is that rights may only be derogated during a state of emergency, as opposed to the less severe limitation of rights under a state of disaster. See also Pierre De Vos, 'South Africa Is in a State and There Is an Emergency, but Declaring a State of Emergency Is not the Magic Bullet', *Daily Maverick*, 14 July 2021, www.dailymaverick.co.za/article/2021-07-14-south-africa-is-in-a-state-and-there-is-an-emergency-but-declaring-a-state-of-emergency-is-not-the-magic-bullet.

[253] GN 398 in GG 43148 of 25 2020-03-25.

[254] Later all public gatherings were banned, plus all forms of physical commercial activity, except for the sale of food and medicine, and interprovincial travel.

[255] A national disaster lapses three months after it has been declared, but may be extended for one month at a time. The lockdown was extended on numerous occasions.

[256] Coronavirus COVID-19 Alert Level 1, South African Government, www.gov.za/covid-19/about/coronavirus-covid-19-alert-level-1.

[257] In terms of s. 27(2) of the Act. See *Helen Suzman Foundation* v. *Speaker of the National Assembly and Others* (32858/2020) [2020] ZAGPPHC 700 (4 December 2020). This was the minister for cooperative governance and traditional affairs.

restriction of rights on the basis that the lockdown regulations were a legitimate and rational response to both a national and international crisis.[258]

From a freedom of expression perspective, of particular concern was a regulation which made it an offence to 'publish a statement through any medium with the intention to deceive about a narrow range of information related to the transmission of the virus, personal infection status and government measures to address the pandemic'. As a criminal sanction, if convicted, an accused could be penalized by a fine or imprisonment for six months (or both).[259] This prohibition was introduced as soon as the lockdown was announced and was intended to protect public health and prevent the spread of rumours about the virus, the impact of vaccines and so on. The regulation was in fact implemented, with arrests reported (an accused was alleged to have disseminated false news about test kits) and the government operating a reporting system, which it named Real411.[260] People were encouraged to report 'disinformation' via a mobile app, website or a WhatsApp number, and alleged false news incidents were then published on the government website, while awaiting verification by a Digital Complaints Committee, run by a non-governmental organization called Media Monitoring Africa.[261] Whilst monitoring independent of government was welcomed, the regulation attracted extensive critique, particularly because the government actively encouraged whistleblowing.[262]

When the lockdown ended in April 2022 the regulations issued under the DMA were set aside and no longer applied. It is a serious worry, however, that the government has since attempted to use the DMA as a tool to manage other national emergencies, including Eskom loadshedding. The problem with this approach is that it permits governmental overreach, does not provide for parliamentary oversight

[258] Ibid.; *Freedom Front Plus* v. *President of the Republic of South Africa*; *South African Breweries Proprietary Limited* v. *President of the Republic of South Africa* [2022] ZAWCHC 102; *Esau* v. *Minister of Co-Operative Governance and Traditional Affairs* 2021 (3) SA 593 (SCA); *Democratic Alliance* v. *Minister of Co-operative Governance and Traditional Affairs* (22311/2020) [2021] ZAGPPHC 168 (24 March 2021); *British American Tobacco South Africa (Pty) Ltd* v. *Minister of Co-operative Governance and Traditional Affairs* 2021 (7) BCLR 735 (WCC).

[259] Regulation 11(5), issued in terms of s. 27(2) of the Act. See also Fake News – Coronavirus COVID-19, South African Government, www.gov.za/covid-19/resources/fake-news-coronavirus-covid-19.

[260] Ibid. The website remained active as of October 2023.

[261] See 'South Africa: Prohibitions of False COVID-19 Information Must Be Amended', Article 19, 23 April 2021, www.article19.org/resources/prohibitions-of-false-covid-information-must-be-amended.

[262] Ntokozo Sobikwa and Moses R. Phooko, 'An Assessment of the Constitutionality of the COVID-19 Regulations against the Requirement to Facilitate Public Participation in the Law-Making and/or Administrative Processes in South Africa' (2022) 25(1) *Law, Democracy & Development* 309; Bernard K. Sebak and Joseph Mudau, 'Revisiting Whistleblowing Amid COVID-19 Pandemic in South Africa: An *ad nauseam* Problem' (2020) 55(3–1) *Journal of Public Administration* 490.

and results in the introduction of legislation without following the ordinary constitutional rules for law-making.[263]

12.7 CONCLUSION

The aim of this chapter was to present an analysis of the regulation of disinformation in Africa, focusing on African regional law and domestic false news laws in various African states, but with an emphasis on the South African law. The chapter revealed the tension between the need to protect freedom of expression and the right to free and fair elections in the context of a continent which is regularly subjected to disinformation campaigns aimed at undermining public participation in democratic governance and extending political control. Despite commendable efforts at the regional and sub-regional levels to promote the importance of a free press and media for the advancement of accountable and transparent governance in the digital age, the reality is that the dissemination of fake news in African states remains prevalent and poses a severe risk to democracy, especially as digital technology becomes more sophisticated. The harm caused by disinformation cannot be ignored given the fragile state of democracy in most African states. The commitment of the South African courts to the balancing of freedom of expression with the right to an informed vote, as a component of democratic governance, provides some hope, but a more sustained and globally integrated effort encompassing regulatory reform and promotional measures, including international partnerships, is needed if Africa is to withstand the threat of disinformation.

[263] *Helen Suzman Foundation* v. *Speaker of the National Assembly and Others*, [103]. The Court held that the minister acted within her powers. The applicants had argued that the disaster should have been a short-term measure and that new legislation should have been drafted to deal with the COVID-19 situation, as opposed to the continuous reliance on regulations passed by the minister. This gives the executive the power to legislate disasters perpetually and undermines the low hierarchy of delegated legislation. See also *Freedom Front Plus* v. *President of the Republic of South Africa*, [64].