

**An analysis of press regulation and the
proposed Media Appeals Tribunal in line with the
constitutional imperative of a free and
independent press**

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PREFACE

I was inspired to conduct this study following my LLB mini-dissertation on the same subject, awarded *cum laude*. Through the LLB module, I was introduced to the major arguments of this study; however, many matters were left unaddressed. A research LLM enabled me to engage more deeply with the issues at hand, particularly to determine if and how the Media Appeals Tribunal could serve a role towards greater media accountability, by envisaging it as a constitutional institution. I also had the opportunity to engage more deeply with existing literature and different sources of law about the desirability of self-regulation compared to statutory regulation.

"Everything we hate about the media today was present at its creation: its corrupt or craven practitioners, its easy manipulation by the powerful, its capacity for propagating lies, its penchant for amplifying rage. Also present was everything we admire and require: factual information, penetrating analysis, probing investigation, truth spoken to power."

— Brooke Gladstone

"For journalists, the obligation to accept scrutiny is special, for scrutiny is the sanction which journalists hold over others."

– Jens Linde

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ABSTRACT

This study provides a critical analysis of press regulation in South Africa, in light of calls for a Media Appeals Tribunal (MAT), an institution that would, if created, be mandated with statutory regulation of the press. Statutory regulation is compared to self-regulation of the press, the last of which is conducted by the Press Council of South Africa (PCSA). The study is divided into six chapters. The first chapter serves as the introduction and inspects the calls for an MAT. The second chapter is devoted to determining the constitutionally entrenched rights and limitations to freedom of the press and other media. It is studied how the law regulates what the press may and may not publish, in part through the laws of defamation and privacy. The legal framework in which the PCSA as self-regulatory body functions is studied. The mandates of the Film and Publications Board, as well as the Media Development and Diversity Agency, are also studied insofar it relates to the calls for an MAT and press regulation. It is also discussed how convergence and declining trust in the media affect press regulation. The third chapter studies how both the South African press and broadcast media are regulated. The PCSA's formation and functioning are determined, and its efficacy studied through available sources. Additionally, the PCSA's strengths and weaknesses are analysed through an array of considerations. It is then studied how the broadcast media is regulated through both the Broadcasting Complaints Commission of South Africa and the Independent Communications Authority of South Africa. Cognisance is also taken of how the Advertising Regulatory Board regulates advertisements appearing in the media. Chapter four looks at models and benchmarks of press regulation. As much is done by studying international principles and agreements that may influence the South African position. International trends in media regulation are also studied in order to place the research question in a broader context. Critique of a statutory regulator of the press is studied in light of calls for an MAT. Norms, best practice and the common functioning of press councils are also studied, noting how "best practice" is to be

determined and implemented. The fifth chapter engages with the premise that the MAT could be instituted as a constitutional body, thus framing it as a chapter nine institution. Accordingly, it is studied how the independence of such an institution is tested. In line with the calls for an MAT, the independence of the Independent Communications Authority of South Africa, an institution which is constitutionally required, is studied to envisage the desirability of an MAT as chapter nine institution. In conclusion, the sixth chapter ties together and makes recommendations for further development of press regulation in South Africa, in line with the constitutional imperative of a free and independent press. Press self-regulation in South Africa is found wanting, whereas statutory regulation is found to be undesirable.

KEYWORDS

Press regulation, self-regulation, media regulation, Media Appeals Tribunal, Press Council of South Africa, statutory regulation, press freedom, media freedom

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LIST OF ABBREVIATIONS

| | |
|-------|--|
| ACHPR | African Commission on Human and Peoples' Rights |
| ANC | African National Congress |
| BCCSA | Broadcasting Complaints Commission of South Africa |
| CC | Constitutional Court |
| CCC | Complaints and Compliance Committee |
| FPA | Films and Publications Act |
| GCIS | Government Communication and Information System |
| GG | Government Gazette |
| GN | Government Notice |
| HRC | Human Rights Committee |
| ICASA | Independent Communications Authority of South Africa |
| ICCPR | International Covenant on Civil and Political Rights |
| IEC | Independent Electoral Commission |
| MAT | Media Appeals Tribunal |
| MDDA | Media Development and Diversity Agency |
| MISA | Media Institute of Southern Africa |
| NQHR | Netherlands Quarterly of Human Rights |
| PAJA | Promotion of Administrative Justice Act |
| PCSA | Press Council of South Africa |

| | |
|----------|--|
| PDMSA | Print and Digital Media South Africa |
| PER/PELJ | Potchefstroomse Elektroniese Regsblad / Potchefstroom Electronic Law Journal |
| PFB | Film and Publications Board |
| PFC | Press Freedom Commission |
| PMSA | Print Media South Africa |
| POPI Act | Protection of Personal Information Act |
| SABC | South African Broadcasting Corporation |
| SADC | South African Development Community |
| SAFREA | South African Freelancers' Association |
| SAJHR | South African Journal of Human Rights |
| SALJ | The South African Law Journal |
| SANEF | South African National Editors Forum |
| SCA | Supreme Court of Appeal |
| SMC | Social Media Council |
| UN | United Nations |
| UNESCO | United Nations Educational, Scientific and Cultural Organization |
| UNGA | United Nations General Assembly |
| UNTS | United Nations Treaty Series |

CHAPTER 1: INTRODUCTION

1.1 *Problem statement*

1.1.1 *Background to the study*

The system of South African press regulation has been scrutinised over the past years by academics, legislators, media practitioners, politicians and members of the public alike. This follows continued calls by the African National Congress (hereafter referred to as the ANC) for the institution of a body referred to as the Media Appeals Tribunal (hereafter referred to as the MAT), that would, if instituted, regulate the press at a statutory level.¹ Some proponents of a MAT, including members of the ANC, argue that the South African press regulatory system does not function as it should and that it is biased in favour of the media industry.² Counter-arguments suggest that the current system is, in fact, functioning well in comparison with national and international standards,³ and that the motivation provided by the ANC for a MAT does not adequately deepen the debate about media accountability as well as systemic problems in media coverage.⁴

The mass media hold a great deal of power with their ability to disseminate information and ideas to the greater public. It is especially news and current affairs media, although not excluding others, that perform a watchdog role to inform the public about misuses of power, whether it be political, economic or social. But who should check the influence of the media,

¹ ANC "52nd National Conference Resolutions" paras 126, 129; ANC "Media Transformation, Ownership and Diversity" 7-13; see 1.9.1 below.

² Berger 2010 *Communicatio* 296-300.

³ Reid 2015 <http://www.dailymaverick.co.za/opinionista/2015-12-07-is-the-anc-right-about-press-regulation-research-says-no>; Reid and Isaacs "Press regulation in South Africa" 11-18.

⁴ Duncan 2011 *Ecquid Novi: African Media Studies* 100-102.

ensuring that the press remains free and independent, yet accountable? The press as gatekeeper to the public discourse, orchestrating the debate in post-apartheid South Africa, plays a key part in the functioning of current day South African society.⁵ It is argued that any power can be abused and needs checks and balances. If the media are the watchdogs of other centres of power in society, who is tasked with keeping an eye on them?⁶

The caveat is that the current regulatory system of the press, that of the Press Council of South Africa (hereafter referred to as the PCSA), has very little coercive power through the power of law. Its membership is voluntary, and there are no legal stipulations requiring a publication to subscribe to the authority of the PCSA. As it will be seen, this is one of the most prominent characteristics that defines the press regulatory system, upon which many of the discussions about its efficacy and desirability are based.⁷

The South African broadcast media is regulated by a different system than that of the press, being through the voluntary Broadcasting Complaints Commission of South Africa (hereafter referred to as the BCCSA) as well as the mandatory and statutory Independent Communications Authority of South Africa (hereafter referred to as the ICASA). It serves as a local example of how voluntary regulation can co-exist with statutory regulation.⁸

1.2 Research question

What is the regulatory framework of press regulation in South Africa, analysed in light of the calls for the statutory Media Appeals Tribunal and

⁵ Cowling and Hamilton "The Public Life of Reason: Orchestrating Debate in Post-Apartheid South Africa" 4-5.

⁶ Krüger "Media Courts of Honour" 12.

⁷ See 3.1 and chapter 4 below.

⁸ See 3.2 and chapter 5 below.

the larger media regulatory system, and how is the constitutional imperative of a free and independent press best realised?

1.3 Aim and objectives of the study

The aim of this study was to determine what form of regulation is most conducive towards promoting and safeguarding a free and independent press in South Africa. The study was conducted to the ends of being able to offer insight and recommendations of possible development within the field of media law.

In order to establish the foundational principle of the necessity of a free and independent press, the rights that the press may make claims to as well as the accompanying responsibilities to these rights were studied according to relevant constitutional provisions and legal precedent. It was also studied to what extent the law already regulates the media in its different forms.

Another objective is to critically engage with the calls for a statutory Media Appeals Tribunal throughout the study, as well as the criticism levelled against the current regulatory framework of the press, in order to determine the veracity of the allegations made. Systemic challenges that the press face, some of which are included in the calls for a MAT, should also be evaluated to determine whether these issues can be considered to form part of the regulatory mandate of the PCSA or not, as this also relates to determining whether the criticism against the PCSA is well founded.

It is not only necessary to conduct an analysis of the functioning of the overall media regulatory system in South Africa, looking for solutions within the integrated whole, but also to look at international norms, agreements and best-practice with regard to press regulation that have, could or should inform the South African position.

Another objective is envisaging how the proposed MAT could be instituted as a constitutional institution, by looking at the model and drawing from the insight that the South African broadcast media's regulatory system provides. It is also to be determined what constitutional tests are used to judge the independence of such institutions, upon which preliminary findings about the desirability of an MAT could possibly be made.

1.4 Point of departure, assumptions, and hypothesis

1.4.1 Point of departure

A free and independent press is vital for a healthy and functioning constitutional democracy in South Africa.

1.4.2 Assumption

It is assumed that the power the media holds needs checking, and as such, the media needs to be regulated to ensure it is kept to account.

1.4.3 Hypothesis

Although further development of the press regulatory system in South Africa is needed, the Media Appeals Tribunal, if instituted, could likely encroach on the freedom and independence of the press.

1.5 Methodology

The calls for an MAT that would have the press regulated at a statutory level, serves as the *raison d'être* of this study. As the calls for a MAT have not yet been followed by a formalised conception of how the MAT would function or incorporated in law, only the substance and interpretation of the calls can be evaluated as contained in policy documents of the ANC. It has, however, been clear that the MAT would be instituted as a *statutory* body, which makes it possible to envisage the MAT structurally through

comparative examples of other statutory institutions that are meant to safeguard and advance constitutionally protected rights and responsibilities, i.e. constitutional and chapter nine institutions.

Both sources of law and media studies find resonance in the study, with a wide range of sources being drawn from including South African textbooks on media law, legislation, legal precedent, academic articles, opinion pieces by industry specialists, academic and committee reports as well as policies and procedures of media regulatory bodies. Other studies indicating international norms and best practice have also been drawn from, as well as international agreements to which South Africa is a party.

The broadcast media's regulatory system, comprising of both statutory and voluntary regulation, is used as a local comparative model to that of the current framework of press regulation in South Africa. This is done for two reasons: one, the calls for the MAT were based on such a comparison; and two, it is the closest example that can be drawn from, offering valuable insight and analysis in terms of the South African position.

1.6 Relevance to research unit

The research falls under the research unit Law, Justice and Sustainability. The unit endeavours to address a wide range of developmental and legal challenges in South Africa and beyond, by utilising juridical science and the law to find innovative solutions for challenges of justice. The relationship between press freedom and regulation is one such an issue, spanning across both the public and private sector, falling within the ambit of law and relating to promoting a just society. Also relevant to the unit is that the study relates to that of constitutional interpretation, questioning how fundamental constitutional rights should and can best be balanced and protected. Similarly, the research unit strives to promote justice by finding theoretical

and practical solutions in the widest sense for the realisation of constitutional rights and values.

1.7 Definitions and terms

1.7.1 On the classification of the terms 'media' and 'press'

The concept of whom and what constitutes "the media" is developing and changing at a rapid pace as the internet has democratised access to publishing in a variety of forms. The divide between old and new media is becoming increasingly vague, with traditional forms of media (such as newspapers, radio and television) adapting and migrating to the online and digital sphere as "new media". The converged sphere, which includes social media and blogging, is much less exclusive than that of traditional media. For the first time in history, the individual can potentially reach a mass audience, previously only destined to traditional media. Who can then be considered as "the media"?

Justice O'Regan⁹ stated that this is no simple question nor does easy answers arise. She did, however, seek to differentiate the media from the non-media by stating that "those who disseminate information for professional and commercial purposes" should be regarded as press and/or the media. This remains a matter to be determined on a case-to-case basis.

Throughout the discussion where reference is made to "the press" as well as "the media", either in singular or plural, it is to be understood that neither the press nor the media are homogenous bodies, but are made up of a diverse range of companies, publications and editorial practices. In this

⁹ *NM v Smith* 2007 (7) BCLR 751 (CC) para 180.

study, the press and/or media is sometimes referred to collectively in so far it is relevant to the matter of the media's overall regulation.

The use of the term "the press" refers to all written media, both in print and that which appears online. Unless otherwise stated, it means to identify South African newspapers, magazines, and their online counterparts, as well as internet-based publications – often with an editorial focus on news and current affairs, though not excluding other types of editorial content.

When making use of the term "the media", it is meant as a broader inclusion of both the press (as defined above), together with broadcast media (television, radio and their online counterparts). The implications of new media, blurring the traditional distinction between the press and broadcast media, are addressed later.¹⁰

1.7.2 On the classification of the term 'self-regulation'

"Self-regulation" is a widely used keyword in media studies, referring to the media adopting a code of ethics to which they voluntarily submit themselves, without the direct influence of government. Self-regulation can take different forms, but is mostly to be understood in the media sphere as regulation by independent industry bodies such as press councils or complaints commissions, comprising of members of the media, and sometimes members of the public, who rule upon and enforce a code of ethics. The media subscribes to self-regulatory bodies not due to the force of law, but to enhance their credibility, professionalism and their readers' or audiences' trust in them.¹¹

¹⁰ See 2.9 below.

¹¹ MISA Swaziland date unknown <https://misaswaziland.com/self-regulation/>.

1.8 Format

The calls for the Media Appeals Tribunal are studied as part of chapter one, following this section about the dissertation's format. At the time of this study's conclusion there had been calls made by the South African National Editors' Forum, a body comprising of South African press editors and senior journalists, for submissions to an inquiry about South African media ethics and credibility, including that of the press' regulatory system. Due to its relevance to this study, these calls are also addressed.

In the second chapter, the constitutional protection of a free press and other media is discussed as cornerstone of a study on the topic of South African media law. Case law that interprets and voices the constitutional imperative of a free and independent press is discussed. Limitations on the right to freedom of expression and the media are outlined. The chapter also looks at how the media is already regulated through the law, primarily through the laws of defamation and privacy. The legal framework of mediation and arbitration, within which self-regulation functions, is discussed. The Film and Publications Board's legal mandate is also studied. Lastly, diversity, transformation and access with regard to the media are assessed, specifically seeing as these issues are emphasised in the ANC's calls for a MAT and can be seen to fall within the larger scope of media regulation. In this light, the Media Development and Diversity Agency's mandate, a statutory organisation tasked with promoting media diversity and transformation, is discussed. The impact of convergence and the effects of new media on press regulation are addressed, as well as the widespread phenomenon of declining trust and de-legitimisation of the media. These matters are accordingly tested against the mandate of the Press Council of South Africa.

The third chapter studies the current regulatory system of the South African media at large. Firstly, the structure and history of the PCSA is examined,

as regulator of the printed and online press, followed by looking at the findings of studies that were conducted about the PCSA's efficacy. The voluntary nature of subscribing to the authority of the PCSA is assessed by looking at the withdrawal of one of South Africa's largest media companies from the PCSA. Secondly, the regulatory system of the broadcast media sector is also studied, by looking at the BCCSA's incorporation in relation to the statutory formation of ICASA's Complaints and Compliance Commission. In third, the regulation of advertisements by the Advertising Regulatory Board, a voluntary organisation, is briefly discussed, in so far it is relevant to the overview of media regulation in South Africa.

The fourth chapter studies the existence of norms and best practice related to press regulation, and also looks at international principles and agreements to which South Africa is a party. In light of these benchmarks, critique of a statutory model compared to the best functioning of self-regulation is explored.

The fifth chapter engages with how a MAT could be instituted in law, most likely as a constitutional institution. This discussion is conducted in light of ICASA's somewhat contested status as a so-called chapter nine institution. Constitutional tests to determine the independence of a chapter nine institution are highlighted. In addition, a parliamentary study on the independence of ICASA is used as a means of critically engaging with the notion of a MAT being instituted as a similar institution.

The sixth chapter in conclusion makes findings on the current press regulatory system and the calls for its reform, to the ends of offering recommendations on the development within the field of media law.

1.9 The Media Appeals Tribunal

It is required to inspect the calls made for an MAT from the get-go in order to determine the criticism levelled against the current press regulatory

system. The calls by the ANC have not progressed further than that of party resolutions and policy documents, and as such, these documents are the most indicative of what is envisioned to be the role of the so-called MAT.

1.9.1 Policy framework for the Media Appeals Tribunal

It has been said that this study investigated the current press regulatory system in South Africa, as well as the regulation of the broadcasting media sector, in light of the calls for a so-called Media Appeals Tribunal. These calls were made by the ruling party of South Africa, the African National Congress, which has since 1994 secured the majority of votes in South Africa's democratic elections. It was during the ANC policy conference in 2007, in Polokwane, where mention was first made of the MAT. The ANC resolution stated the following:

ON THE ESTABLISHMENT OF A MEDIA APPEALS TRIBUNAL (MAT)

126. Conference adopts the recommendation of the Policy conference that the establishment of a MAT be investigated. It accordingly endorses that such investigation be directed at examining the principle of a MAT and the associated modalities for implementation. Conference notes that the creation of a MAT would strengthen, complement and support the current self-regulatory institutions (Press Ombudsman/Press Council) in the public interest...

129. The investigation should consider the desirability that such a MAT be a statutory institution, established through an open, public and transparent process, and be made accountable to Parliament. The investigation should further consider the mandate of the Tribunal and its powers to adjudicate over matters or complaints expressed by citizens against print media, in terms of decisions and rulings made by the existing self-regulatory institutions [...].¹²

Jacob Zuma, then president of the ANC, released the following statement shortly following the policy conference in Polokwane where the initial calls for an MAT were made:

¹² ANC "52nd National Conference Resolutions" paras 126, 129.

Every day brings fresh instances of a media that, in general terms, is politically and ideologically out of sync with the society in which it exists. [...] They indicate a general trend within most mainstream media institutions to adopt positions, cloaked as sober and impartial observation, that are antagonistic to the democratic movement and its agenda for fundamental social, political and economic transformation. To understand why this is the case, we need to consider the role of the media in society in general and the specific circumstances of the media in South Africa, both past and present. [...] At times, the media functions as if they are an opposition party.¹³

The call was reiterated over the following years and various discussions have circled around the forming of such a body. In 2010, the ANC discussion document titled "Media Transformation, Ownership and Diversity", issued as part of its national general council meeting in Durban, gave the following reasons, amongst others, why the Media Appeals Tribunal should be pursued by parliament (a liberal amount of selected extracts are quoted due to their relevance, with pertinent points marked by own emphasis):

[The Polokwane conference] recognised that while there had been much progress in engagement with the media much still needs to be done as *some fractions [sic] of the media continue to adopt an anti-transformation, anti-development and anti-ANC stance* [own emphasis].¹⁴

Media and communications are contested terrains and therefore not neutral, but reflect the *ideological battle and power relations based on race, class and gender* in our society [own emphasis].¹⁵

Our objectives therefore are to *vigorously communicate the ANC's outlook and values* (developmental state, collective rights, values of caring and sharing community, solidarity, ubuntu, non sexism [sic], working together) *versus the current mainstream media's ideological outlook* (neo-liberalism, a weak and passive state, and overemphasis on individual rights, market fundamentalism, etc.) [own emphasis]¹⁶

It would be to relegate the media to a status of social irrelevance to demand that journalists should have absolute freedom - only the inconsequential in social processes have a semblance of absolute freedom. Media as an

¹³ Zuma 2008 <http://www.sowetanlive.co.za/sowetan/archive/2008/01/22/wayward-media>.

¹⁴ ANC "Media Transformation, Ownership and Diversity" para 10.

¹⁵ ANC "Media Transformation, Ownership and Diversity" para 12

¹⁶ ANC "Media Transformation, Ownership and Diversity" para 50

institution is not a victim waiting to be abused. It is a repository of immense ideological, economic, social and political power.¹⁷

Cursory scan on the print media reveals an *astonishing degree of dishonesty, lack of professional integrity and lack of independence*. Editorials distancing the paper from these acts and apologies which are never given due prominence and mostly which has to be forced through the press ombudsman are not sufficient in dealing with this [own emphasis].¹⁸

However, positing media freedom only in constitutional and legal terms is inadequate. We need to examine other, and perhaps more fundamental, expressions of media freedom. One of these is the *issue of ownership and control* [own emphasis].¹⁹

Freedom of expression means that we should all try to ensure diversity: diversity of content, diversity of sources of information, diversity of ownership and diversity of outlook and responses in our *advertising industry* [own emphasis].²⁰

The question of 'self-regulation' by the media and the necessity for an independent 'media tribunal' is a matter that should be brought back onto the agenda!²¹

The ANC having regard to concerns raised by a number of citizens and complaints from a number of people who have been victims of unfairness and unsatisfactory decisions of self-regulatory body resolved to investigate a possibility of establishing a Media Appeals Tribunal (MAT) at its 52nd Conference in Polokwane.²²

The mere fact that the press ombudsman is from the media ranks, a former journalist, and is not an independent person who looks at the media from the layman's perspective poses an *inherent bias towards the media* with all interpretations favourable to the institution and the other party just have to understand and accept the media way which is grossly unfair and unjust [own emphasis].²³

On reading and interpreting the Polokwane Resolutions the media has not been lacking in bravery behind the armour of collective self-defence. Its reaction has shown hypersensitivity to criticism and misses the point that

¹⁷ ANC "Media Transformation, Ownership and Diversity" para 55.

¹⁸ ANC "Media Transformation, Ownership and Diversity" para 58.

¹⁹ ANC "Media Transformation, Ownership and Diversity" para 64.

²⁰ ANC "Media Transformation, Ownership and Diversity" para 68.

²¹ ANC "Media Transformation, Ownership and Diversity" para 84.

²² ANC "Media Transformation, Ownership and Diversity" para 88.

²³ ANC "Media Transformation, Ownership and Diversity" para 98.

people need recourse when media freedom trampled their *rights to dignity and privacy* [own emphasis].²⁴

Parliament should be seized with this matter to consider *the desirability whether MAT be a statutory independent institution*, established through an open, public and transparent process, and be made *accountable to parliament* [own emphasis].²⁵

Parliament should consider the mandate of the media appeals tribunal and its powers to adjudicate over matters or complaints expressed by citizens *against print media*, in terms of decisions and rulings made by the existing self-regulatory institutions, *in the same way as it happens in the case of broadcasting through the Complaints and Compliance Committee of ICASA* [own emphasis].²⁶

A more recent call for the MAT was made in 2015 at the ANC's National General Council (NGC) where it stated pertinently that "a parliamentary inquiry be set up into the feasibility of the media tribunal."²⁷ One of the most recent calls for an MAT to be appointed by parliament was made during the ANC's policy conference in July 2017, by the then ANC Chief Whip Jackson Mthembu.²⁸

1.9.2 *Following the calls, a period of introspection*

Following the above calls and statements, various media bodies, as well as freedom of expression organisations, expressed their concern about and opposition towards the concept of an MAT. The South African National Editors Forum (hereafter referred to as SANEF) issued a statement expressing their perturbation after 2015's renewed call for such a body.²⁹

²⁴ ANC "Media Transformation, Ownership and Diversity" para 99.

²⁵ ANC "Media Transformation, Ownership and Diversity" para 107.

²⁶ ANC "Media Transformation, Ownership and Diversity" para 108.

²⁷ *Mail & Guardian* 2015 <http://mg.co.za/article/2015-10-11-the-resolutions-adopted-by-the-anc>.

²⁸ Mokone 2017 <https://www.timeslive.co.za/politics/2017-07-05-parliament-should-appoint-print-media-regulatory-body-anc-delegates/>.

²⁹ Monare 2015

http://www.sanef.org.za/news/entry/sanef_statement_on_anc_ngc_resolution_on_the_media_appeals_tribunal-15_octo/.

Apart from what has largely been perceived as threats of government control over the press, there has been no official parliamentary action taken on the calls made. There has, however, been ample discussion about how an MAT might be instituted as an independent body, answerable to parliament, likely taking form as a constitutional institution.³⁰

The claims made by the ANC against the press and its current regulatory system led to an in-depth assessment of the claims by academics and industry commentators.³¹ It also led to comprehensive studies into the regulation of the press, making suggestions for the regulatory system's reform.³² It is stated that:

Partly in response to the ANC's call for a parliamentary enquiry into the establishment of a Media Appeals Tribunal (MAT) to which the Press Council would be subservient, and amid rising fears in the academic, civil society and media spheres that an MAT would impede the freedom of the press, the Press Council conducted a review of its own processes from late-2010 to mid-2011.³³

These studies proved to be an important period of introspection for the press and its regulatory system, giving it the chance to evaluate its efficacy and positioning. It is stated that the review process, albeit having been necessitated politically, "amounted to a critical shift in thinking about the core nature of the Press Council."³⁴

The period of the review did not, however, stave off the calls for an MAT as it and the regulation of the media have remained a continuous point of contestation. It is necessary to note that the tension between the ANC and the media appears to be based on differing ideological underpinnings and

³⁰ See chapters 4 and 5 below.

³¹ See 4.4 below.

³² See 3.1.5 below.

³³ Reid and Isaacs "Press regulation in South Africa" 6.

³⁴ Reid and Isaacs "Press regulation in South Africa" 7.

worldviews, although this legal study does not aim to make a value judgement on contesting ideologies. From the ANC's comments as quoted above,³⁵ it is stated that the mainstream press's outlook, described by the party as neoliberal and based on market fundamentalism, is seen as contrary to the ANC's more socialist outlook, using the terms developmental state, collective rights, values of caring and sharing community, solidarity, ubuntu, non-sexism, and working together. McDonald³⁶ positions the ideological contestation as follows:

For the dominant voices in this debate, then, the battle-lines are clear and deeply ideological: on the one hand, we have the national and international press claiming that the latest interventions on the part of the ANC government threaten to undermine the constitution, marking a return to apartheid-era censorship; on the other, we have the ANC-led alliance arguing that the information bill and the MAT are vital to the future survival of the democratic state and to South Africa's emergence from the nightmare of the apartheid past.³⁷

This study takes a legal perspective on the calls for an MAT, in light of the constitutionally guaranteed right for a free and independent media.³⁸ The ideological "battle of ideas" was not philosophically evaluated, but it is acknowledged in so far it is relevant to the discussion at hand. The underpinning of this study is that of transformative constitutionalism in the South African context, conducted within South Africa's framework of constitutional democracy.³⁹ Klare's⁴⁰ seminal article describes transformative constitutionalism as follows:

³⁵ See 1.9.1 above.

³⁶ McDonald 2011 *Ecquid Novi: African Journalism Studies*.

³⁷ McDonald 2011 *Ecquid Novi: African Journalism Studies* 130; The so-called Information Bill presents a potentially great threat to South African constitutional democracy, although it is not within the explorative ambit of this study.

³⁸ See 2.1 below.

³⁹ See 4.6 and 5.3 below.

⁴⁰ Klare 1998 *SAJHR*.

[...] a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.⁴¹

Klare further argues that South Africa has adopted a postliberal constitution, noting that "postliberal" is used as an ambiguous phrase.⁴² It is argued that such a legal reading is the best, although not the only interpretation.⁴³ Other labels such as "social democratic" encompass some constitutional aspirations such as equality, redistribution and social security, but according to the writer fail to capture other essential features of the South African experiment such as multiculturalism, a focus on gender and sexual identity, emphasis on participation and governmental transparency, environmentalism and the extension of democratic ideals into the private sphere – the latter of which would include the media.⁴⁴ A postliberal reading, it can be said, takes into account a multiplicity of views.

1.9.3 Current inquiries into press accountability and regulation

The conclusion of this study comes at a time when SANEF has called for the launch of the so-called Media Ethics And Credibility Inquiry, that is meant to culminate into a report on or before the 30th of April 2020.⁴⁵ This inquiry was instituted due to the fact that, according to SANEF, "there have recently been allegations of ethical breaches in journalistic practice including of state and corporate capture of journalists."⁴⁶ It is expressed that

⁴¹ Klare 1998 *SAJHR* 150.

⁴² Klare 1998 *SAJHR* 151.

⁴³ Klare 1998 *SAJHR* 152.

⁴⁴ Klare 1998 *SAJHR* 151-152.

⁴⁵ SANEF 2019 <https://sanef.org.za/terms-of-reference-for-media-ethics-and-credibility-inquiry/>.

⁴⁶ SANEF 2019 <https://sanef.org.za/terms-of-reference-for-media-ethics-and-credibility-inquiry/>.

the recent allegations of dishonest, unaccountable and ineffective reporting have a potentially detrimental effect of the role of the media in advancing constitutional democracy in South Africa. To determine the veracity of the allegations against the media, an investigative panel has been appointed, that consists of senior journalists and a retired judge of the South African High Court, Kathleen Satchwell. The scope of the inquiry will include the print and online media as well as broadcast media of both commercial and community nature, excluding the South African Broadcasting Corporation seeing as it was recently within the purview of its own commission of inquiry.⁴⁷

The purpose and terms of reference of the inquiry are stated as to investigate the allegations made of ethical breaches on the part of the media industry in South Africa, as well as to determine which obstacles are hindering the credibility and accountability of the media in the country. Individual cases of ethical breaches will be studied by the inquiry to determine how these contribute to the allegations and perception of an unethical and unaccountable media. There will also be consultations with media companies and owners; political parties and national, provincial and local government; corporate and small businesses; advertisers and sponsors; civil society and community organisations, non-governmental organisations and members of the public; as well as editors and journalists and purveyors of online information.⁴⁸

The inquiry will specifically look at the content and implementation of "relevant Codes of Professional Ethics and best practice, both nationally

⁴⁷ SANEF 2019 <https://sanef.org.za/terms-of-reference-for-media-ethics-and-credibility-inquiry/>.

⁴⁸ SANEF 2019 <https://sanef.org.za/terms-of-reference-for-media-ethics-and-credibility-inquiry/>.

and internationally, in contributing to professional and ethical journalistic practice locally and abroad."⁴⁹ Through this SANEF aims to strengthen adherence to such ethical codes and how they are applied within the media industry, but also to enhance public confidence in the practice of journalism in South Africa and to "secure the role of accountable, trustworthy, informative media free from manipulation by partisan or secret interests in this developing democracy".⁵⁰

This inquiry is specifically relevant as it aims to answer many of the same questions that this study took into consideration. However, as this study preceded the planned publication of the SANEF inquiry report, it could possibly serve as an additional resource on which its findings can be based.

⁴⁹ SANEF 2019 <https://sanef.org.za/terms-of-reference-for-media-ethics-and-credibility-inquiry/>.

⁵⁰ SANEF 2019 <https://sanef.org.za/terms-of-reference-for-media-ethics-and-credibility-inquiry/>.

CHAPTER 2: THE RIGHT TO A FREE PRESS AND REGULATION BY THE LAW

2.1 Introduction

Section 16 of the *Constitution of the Republic of South Africa, 1996* (hereafter referred to as the *Constitution*) offers explicit protection to freedom of the press and other media. Section 16 also stipulates the right of every person to freedom of expression and the right to receive or impart information or ideas. These rights can only be limited by the limitations as set out in section 16(2), as well as the general limitations clause of the *Constitution*,⁵¹ as addressed later on. In favour of freedom of the press, matters that are in the public interest – when it comes to publication by the media – are known to sometimes override the rights of privacy and dignity.⁵²

An array of judgments by the courts have outlined the necessity of a free press as a vital part of South Africa's constitutional democracy. The dual nature of the press being bearers of rights, but also of obligations, is pointed out by Justice O'Regan in *Khumalo v Holomisa*:⁵³

The print, broadcast and electronic media have a particular role in the protection of freedom of expression in our society. Every citizen has the right to freedom of the press and the media and the right to receive information and ideas. The media are key agents in ensuring that these aspects of the right to freedom of information are respected. The ability of each citizen to be a responsible and effective member of our society depends upon the manner in which the media carry out their constitutional mandate... The media thus rely on freedom of expression and must foster it. In this sense they are both

⁵¹ Section 36.

⁵² Milo and Stein *A Practical Guide to Media Law* 14; See 2.4.1 and 2.4.2 below for the discussion about the laws of defamation and privacy in relation to the media.

⁵³ *Khumalo v Holomisa* 2002 (8) BCLR 771 (CC) (hereafter referred to as the *Khumalo v Holomisa* case).

bearers of rights and bearers of constitutional obligations in relation to freedom of expression.⁵⁴

This chapter discusses the current regulatory system of the South African media at large, with reference to statutory provisions and legal precedent for the case of a free and independent press.

2.2 The constitutional rationale for freedom of expression

Freedom of expression is constitutionally protected under section 16 of the *Constitution*. A guarantee of the freedom of the press is given in sub-section 1, listed under the right to freedom of expression, together with the guarantees of the free trade of information, artistic freedom and academic freedom. Sub-section 2 contains specific exclusions to the right of freedom of expression. Section 16, which serves as the cornerstone for a study into press freedom in South Africa, reads as follows:

- (1) Everyone has the right to freedom of expression, which includes –
 - (a) *freedom of the press and other media* [own emphasis];
 - (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 subsection (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.

Milo et al.⁵⁵ state that freedom of expression is important for three dominant reasons, being the proper functioning of democracy, the search for truth and for achieving individual self-fulfilment and autonomy. According to De Waal et al.,⁵⁶ the reasons of giving constitutional protection to freedom of

⁵⁴ *Khumalo v Holomisa* case para 22.

⁵⁵ Milo, Penfold and Stein "Freedom of Expression" 42–16, 42–21, 42–25.

⁵⁶ De Waal, Currie and Erasmus *The Bill of Rights Handbook* 235; Brand *Media Law in South Africa* 35.

expression include: firstly, scientific and cultural progress would not be possible if it was not for the free flow of ideas and information; secondly, expression is a basic and essential human activity; and thirdly, it is essential for the proper functioning of a democratic state as people need to make informed political choices.

In the *South African National Defence Union* case⁵⁷ the Constitutional Court elaborated on the importance of freedom of expression in society by stating that:

Freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters.⁵⁸

It can be said that freedom of expression extends to the very core of a person's being and plays a central role in an individual's identity – being an interconnection of one's thoughts, beliefs, actions, potential and growth. This is supported by the court's decision in *Minister of Safety and Security*⁵⁹ where Justice Mokgoro stated that:

The most commonly stated rationale [for freedom of expression] is that the search for truth is best facilitated in a free 'marketplace of ideas ... But of more relevance here ... is the consideration that freedom of speech is a *sine quo non* for every person's right to realise her or his full potential as a human being, free of the imposition of heteronomous power.⁶⁰

⁵⁷ *South African National Defence Union v Minister of Defence* 1999 (6) BCLR 615 (CC) (hereafter referred to as the *South African National Defence Union* case).

⁵⁸ *South African National Defence Union* case para 7.

⁵⁹ *Case v Minister of Safety and Security, Curtis v Minister of Safety and Security* 1996 (5) BCLR 609 (CC) (referred to hereafter as the *Minister of Safety and Security* case).

⁶⁰ *Minister of Safety and Security* case para 26.

It is important for freedom of expression to be placed within the larger constitutional context, as this right functions together with other constitutional provisions towards achieving the values of human dignity, freedom and equality. Justice Mokgoro stated:

We must understand the right embodied in [the freedom of expression clause] not in isolation, but as part of a web of mutually supporting rights enumerated in the Constitution, including the right to freedom of conscience religion, thought, belief and opinion, the right to privacy, and the right to dignity. Ultimately, all of these rights together may be conceived as underpinning an entitlement to participate in an ongoing process of communicative interaction that is of both instrumental and intrinsic value.⁶¹

The right to freedom of expression should thus always be read together with the other rights in the *Constitution*, as the right to freedom of expression is not superior, but rather part of the other constitutional values as an inseparable and interconnected whole, a web of mutually supporting rights. On this, Justice Mokgoro continues:

[...] "the right to freedom of speech and expression" "shall include freedom of the press and other media, and the freedom of artistic creativity and scientific research." One may well ask what effective utility freedom of the press and other media would have if that freedom did not include as a corollary the right of persons to actually obtain and read newspapers, and to be exposed to other media. By the same token, the freedom of artistic creativity would be seriously undermined if it did not encompass the right of individuals to unhampered access to sources of artistic and intellectual inspiration, including (or, one might say, especially), those expressions which convey sentiments that are threatened with suppression by the state or with marginalisation in civil society, because they are deemed dangerous, offensive, subversive, or irrelevant.⁶²

The press and media play a crucial part in the dissemination of information and ideas, often critical, and have the means to reach a large mass and a broad range of people. The wielding of this potential may very much lead to resistance, especially from those who wish to prevent the scrutiny of the

⁶¹ *Minister of Safety and Security* case para 27.

⁶² *Minister of Safety and Security* case para 28.

media. Freedom of expression is nevertheless inextricably linked to an independent press – which is an intrinsic part of a healthy and functioning democracy.

2.2.1 The importance and protection of a free press and other media

Considering South Africa's history of state sanctioned censorship during apartheid, it is understandable why freedom of the press and other media was so pertinently included under section 16 of the *Constitution*. In the *Khumalo v Holomisa* case, Justice O'Regan spoke for a unanimous bench on the role which the media should and continues to play. O'Regan states why the media is specifically afforded protection under the right to freedom of expression in the *Constitution*:

In a democratic society, then, the mass media play a role of undeniable importance. They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture. As primary agents of the dissemination of information and ideas, they have a constitutional duty to act with vigour, courage, integrity and responsibility. The manner in which the media carry out their constitutional mandate will have a significant impact on the development of our democratic society. If the media are scrupulous and reliable in the performance of their constitutional obligations, they will invigorate and strengthen our fledgling democracy. If they vacillate in the performance of their duties, the constitutional goals will be imperilled. The Constitution thus asserts and protects the media in the performance of their obligations to the broader society, principally through the provisions of Section 16.⁶³

The courts have acknowledged the importance of public participation in the activities of the state, whether it is the judicial, legislative or executive branch of government. Such public participation is made possible, in large part, by access to the media which in turn needs to be free and independent. As much was evident in the case where the South African Broadcasting Corporation (hereafter referred to as the SABC) applied to broadcast on

⁶³ *Khumalo v Holomisa* case para 24.

radio and television proceedings brought before the Supreme Court of Appeal with regard to the former South African President's financial adviser, Schabir Shaik's corruption trial:

The need for public information and awareness flows from the nature of our democracy. Public participation on a continuous basis provides vitality to democracy... A vibrant and independent media encourages citizens to be actively involved in public affairs, to identify themselves with public institutions and to derive the benefits that flow from living in a constitutional democracy. Access to information and the facilitation of learning and understanding are essential for meaningful involvement of ordinary citizens in public life. This corresponds to the vision in the Pre-amble to the Constitution of laying the foundations for a democratic and open society in which government is based on the will of the people. It also reflects the foundational principle of democratic government which ensures accountability, responsiveness and openness...⁶⁴

According to Brand,⁶⁵ journalists as persons do not inherently enjoy a greater degree of protection than ordinary citizens, nor do they hold a special status in the eyes of the law. This being said, through their work journalists can be afforded special protection due to the crucial role the press and other media play in society. In a similar vein, Justice Cameron recognised the special role of the press, but also made the case against any form of "press exceptionalism".⁶⁶ As much is considered desirable by Barendt,⁶⁷ stating that the media should only be allowed to make claim to special privileges and immunities to the extent that it promotes the values of freedom of speech generally.⁶⁸ This rejection of a strict doctrine of press exceptionalism, tempered by the acknowledgment of the singular importance of the role of the media, is regarded "as an endorsement by our

⁶⁴ *South African Broadcasting Corporation Ltd v National Director of Public Prosecutions* 2007 (2) BCLR 167 (CC) paras 28-29.

⁶⁵ *Brand Media Law in South Africa* 37.

⁶⁶ *Holomisa v Argus Newspapers* 1996 (6) BCLR 836 (W) para 236; *Brand Media Law in South Africa* 37.

⁶⁷ *Barendt Freedom of Speech* 421-422.

⁶⁸ *Barendt Freedom of Speech* 422.

Courts of a weak form of press exceptionalism".⁶⁹ The protection of sources, as a matter relating to a weak form of press exceptionalism, is discussed in due course.⁷⁰ It can thus be said that the media does not have claim to special rights further than where such rights are necessary to uphold freedom of expression in the public interest.

The media serves the watchdog role of being the public's eyes and ears in spaces where they cannot be present, through both general reporting and special investigative work. In a United Kingdom case where a media defendant reported very critically on the claimants, the latter of which then sued for defamation, the role of the media was described as follows:

In a modern, developed society, it is only a small minority of citizens who can participate directly in the discussions and decisions which shape the public life of that society. The majority can participate only indirectly, by exercising their rights as citizens to vote, express opinions, make representations to the authorities, form pressure groups and so on. But the majority cannot participate in the public life of their society in these ways if they are not alerted to, and informed about, matters which call or may call for consideration and action. It is largely through the media [...] that they will be so alerted and informed. The proper functioning of a modern participatory democracy requires that the media be free, active, professional and enquiring.⁷¹

Notwithstanding the important role the press and other media play in an open and democratic society, the limitations of what the media may do and publish are to be noted, as this directly ties in with how the press is regulated to ensure their considerable influence is not left unchecked.

⁶⁹ Milo, Penfold and Stein "Freedom of Expression" 42–34 - 42–35.

⁷⁰ See 2.4.3 below.

⁷¹ *McCartan Turkington Breen v Times Newspapers* (2000) 4 AER 913 (HL) 922 B–D.

2.2.2 Limitations and exclusions to the right to a free press and other media

2.2.2.1 Section 16(2) categories of exclusion

The right to freedom of expression, that includes the right to a free press and other media as set out in section 16(1), is presupposed unless explicitly excluded by section 16(2), which stipulates three instances where the expression is not only unprotected, but also regarded as unconstitutional.⁷²

The first exclusion is stated as "propaganda for war". Milo and Stein⁷³ state that this category, which emanates from the *International Covenant on Civil and Political Rights*,⁷⁴ is "notoriously vague" and should be "interpreted extremely narrowly". Elsewhere it is argued that it is important that South African courts should interpret the phrase "propaganda for war", as well as "war" and "propaganda" in a restrictive manner as not to be detrimental to freedom of expression.⁷⁵

The second category of exclusion prohibits the protection of speech that would give rise to the "incitement of imminent violence". The determining of what expression constitutes an incitement to imminent violence is not always that easy to determine. The following statutory definition serves as a test to determine if an act of expression can be regarded as incitement to violence, although not necessarily imminent:

A person shall be deemed to have committed the common law offence of incitement to public violence if, in any place whatever, he has acted or conducted himself in such a manner, or has spoken or published such words, that it might reasonably be expected that the natural and probable consequences of his act, conduct, speech or publication would, under the circumstances, be the commission of public violence by members of the public

⁷² See s 2.2 above.

⁷³ Milo and Stein *A Practical Guide to Media Law* 12-13.

⁷⁴ *International Covenant on Civil and Political Rights* (1966) art 20(1).

⁷⁵ Milo, Penfold and Stein "Freedom of Expression" 42-70 - 42-71.

generally or by persons in whose presence the act or conduct took place or to whom the speech or publication was addressed.⁷⁶

It is argued that, when interpreting whether expression that incites imminent violence exists, both a subjective and an objective element are required. This means that it must be found that the speaker or publisher subjectively intends to incite imminent violence, and that it is objectively likely that such violence will result from the expression.⁷⁷ The surrounding circumstances and context of the expression will remain to be crucial considerations to take into account when determining whether the requirements are met, including what type and intensity of violence is advocated for.⁷⁸

The third category of section 16(2) states that the "advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes an incitement to cause harm" is an unprotected form of expression. Simply put, this category of exclusion prohibits hate speech based on the listed grounds.⁷⁹ Hate speech is said to undermine the pressing goals of overcoming South Africa's divisive past and pursuing the tasks of reconciliation, the building of a democratic society as well as the great need of promoting dignity and equality.⁸⁰ This exclusion is broader than the second category, by not requiring the incitement of imminent violence as stated by section 16(2)(b), but rather determining whether there is a dissemination of hatred that gives effect to the incitement to cause harm.⁸¹ "Harm" goes further than "violence", as it may refer to physical, emotional,

⁷⁶ *Riotous Assemblies Act* 17 of 1956 s 17.

⁷⁷ Milo, Penfold and Stein "Freedom of Expression" 42–71 - 42–72.

⁷⁸ Milo, Penfold and Stein "Freedom of Expression" 42–71 - 42–72.

⁷⁹ Hate speech does not extend to that against an individual if it is not based on the listed grounds; Milo, Penfold and Stein "Freedom of Expression" 42–80.

⁸⁰ Milo, Penfold and Stein "Freedom of Expression" 42–76; *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC) paras 33, 45.

⁸¹ "Hatred" is considered to be that which instills detestation, enmity, ill-will and malevolence in another; Milo, Penfold and Stein "Freedom of Expression" 42–80.

psychological or financial harm.⁸² Nevertheless, in favour of upholding freedom of expression to the largest extent, a high threshold for hate speech is set by requiring that the expression amounts to advocacy of hatred *and* constitutes incitement to cause harm. This has the effect that advocacy of hatred in and of itself is not sufficient to trigger this provision.⁸³

2.2.2.2 General limitations as per section 36

As with section 16(2) categories, constitutional rights may be limited in certain circumstances, to be determined in accordance with the following:

(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 relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.⁸⁴

The general limitations clause of the *Constitution* comes to play only after the nature of the right has been determined. The clause is evoked when there is a need for more extensive limitations than what the right in itself entails. This is known as the two-stage analysis: the first stage of analysis requires the judge to determine the scope of the right as a practice of demarcation; the balancing of competing rights occurs in the second stage

⁸² De Waal, Currie and Erasmus *The Bill of Rights Handbook* 242; Milo, Penfold and Stein "Freedom of Expression" 42–81 - 42–82.

⁸³ Milo, Penfold and Stein "Freedom of Expression" 42–79.

⁸⁴ Section 36 of the *Constitution*.

of analysis, asking whether the limitation of a right is necessary and if it is the least restrictive way of ensuring justice to be done.⁸⁵

In the landmark case of *S v Makwanyane*,⁸⁶ the court stated that section 36 "involves the weighing up of competing values, and ultimately an assessment based on proportionality".⁸⁷ The judgement continued by enunciating that:

The fact that different rights have different implications for democracy, and in the case of Constitution, for 'an open and democratic society based on freedom and equality' means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case-to-case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could be reasonably achieved through other means less damaging to the right in question.⁸⁸

The press is thus limited in their right to publish whatever they would like if it goes against the law. They can be brought before a court of law for it to be tested if a transgression of another's right was either reasonable or unreasonable in terms of the general limitations clause. The media forms part of the open and democratic society the *Constitution* envisions and is beholden to all the rights and responsibilities laid out thereto.

⁸⁵ Milo, Penfold and Stein "Freedom of Expression" 34–20.

⁸⁶ *S v Makwanyane* 1995 (6) BCLR 665 (CC) (hereafter referred to as the *S v Makwanyane* case).

⁸⁷ *S v Makwanyane* case para 104.

⁸⁸ *S v Makwanyane* case para 104.

2.3 Legislation giving effect to the Constitution

2.3.1 Promotion of Equality and Prevention of Unfair Discrimination Act

A broad range of legislation expands on the requirements as set out by the *Constitution*. On the matter of freedom of expression, the *Promotion of Equality and Prevention of Unfair Discrimination Act*⁸⁹ (hereafter referred to as the *Equality Act*) prohibits hate speech that could be hurtful, harmful or propagate hatred,⁹⁰ based on any of the prohibited grounds of race, gender, sex, pregnancy, family responsibility or status, marital status, ethnic or social origin, HIV/AIDS status, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth; or any other grounds of discrimination that causes systemic disadvantage, undermines human dignity or that adversely affects a person's equal enjoyment of rights and freedoms.⁹¹ Section 12 of the *Equality Act* places a prohibition on the dissemination, publication, broadcast or display of any information that unfairly discriminates against any person. It is added that a clear intention to discriminate should be demonstrated, with the exception of *bona fide* artistic creativity, academic or scientific inquiry and fair and accurate reporting in the public interest.⁹² The *Equality Act* also creates the Equality Court that can, notably, issue interdicts to prohibit publication, order that an unconditional apology be made, order for the payment of damages, or make another declaration that it sees fit.⁹³

⁸⁹ *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000 (hereafter referred to as the *Equality Act*).

⁹⁰ Section 10 of the *Equality Act*.

⁹¹ Section 1 of the *Equality Act*.

⁹² Section 12 of the *Equality Act*.

⁹³ Section 21 of the *Equality Act*.

Another piece of legislation that gives effect to the constitutional provisions discussed above, the *Film and Publications Act 65 of 1996*, is addressed in more depth below.⁹⁴

From the above discussion it is seen that *bona fide* reporting in the public interest can be legally permissible even if the subject matter contravenes constitutionally acceptable forms of expression. A case in point is that of the legal proceedings brought against the former president of the ANC Youth League, Julius Malema, who on many occasions chanted the words "Dubula ibhunu" (meaning "Shoot the boer"). The Equality Court found that the expression, used in this context, was hate speech and accordingly issued an order for Malema to desist from singing the song.⁹⁵ With this finding having been made, the question arose whether the reports by the media on these words as used by Malema, put in the context in which they were chanted, were within legal bounds or went against the order of the Equality Court. Milo⁹⁶ states that the coverage of such events would not constitute the incitement of imminent violence or the advocacy of hatred, in that it serves only to inform the public of the facts and to comment on the matter. This ruling relates to the importance of an inquisitive and active media, as well as how they are regulated by the courts – in this case suggesting that the freedom of the media is not to be curtailed.

2.3.2 *Laws of general application*

The media may also be prohibited on reporting on certain matters where legislation so prohibits, i.e. matters of an ongoing police investigation or

⁹⁴ See 2.6 below.

⁹⁵ *Afri-Forum v Malema* 2011 (12) (6) SA 240 (EqC) para 109; Milo, Penfold and Stein "Freedom of Expression" 42–82.

⁹⁶ Milo and Stein *A Practical Guide to Media Law* 14.

publishing the names of accused minors. Such a matter was placed before the court in the *Media 24 Holdings* case⁹⁷ where the Afrikaans magazine *Huisgenoot* published the name and picture of a minor accused of the murder of his family, on the front page of the magazine. A complaint was lodged to the Press Ombud, the complaints adjudicator of the PCSA, who found against the publication. It was ordered that the magazine must publish a retraction as well as a specified reprimand, known as a "kicker", on its front page: "Griekwastad: Press Ombudsman severely reprimands Huisgenoot". The publication lodged a review application to the High Court, which upheld the decision made by the Press Ombud.

The court referred to the Press Ombud's finding based on *The Press Code of Ethics and Conduct for South African Print and Online Media* (hereafter referred to as the *Press Code*), which is attached as Annexure A:

The press shall not identify children who have been victims of abuse, exploitation, or who have been charged with or convicted of a crime, unless a public interest is evident and it is in the best interest of the child.⁹⁸

The ruling of the court further explored the rights and best interests of children in criminal proceedings, as provided for in the *Criminal Procedure Act*:⁹⁹

No person shall publish in any manner whatever any information which reveals or may reveal the identity of an accused under the age of eighteen years or of a witness at criminal proceedings who is under the age of eighteen years: Provided that the presiding judge or judicial officer may authorize the publication of so much of such information as he may deem fit if the publication

⁹⁷ *Media 24 Holdings (Pty) Ltd v Chairman of the Appeals Board of the Press Council of South Africa* 2014 ZAGPJHC 194 (referred to hereafter as the *Media 24 Holdings* case).

⁹⁸ Section 8.3 of the *Press Code*, see Annexure A.

⁹⁹ *Criminal Procedure Act* 51 of 1977 (hereafter referred to as the *Criminal Procedure Act*).

thereof would in his opinion be just and equitable and in the interest of any particular person.¹⁰⁰

The media must follow laws of general application that have the power to limit the freedom of the press. It may very well be, dependent on the circumstances, that it is not in the best interest of the public for confidential information to be published, or it may be that the balancing of rights favours the withholding of private or privileged information. This is supported by Judge Moshidi's judgment in the *Media 24 Holdings* case where it is so expressed:

I make the above finding fully mindful of the important role of the press, press freedom, and freedom of expression, in our democratic society. However, these rights are not limitless.¹⁰¹

A broad case for press freedom has been outlined, as well as the constitutional protection it enjoys through both constitutional provisions and judicial precedent. General and specific exclusions of the right to a free press and other media, as contained in the *Constitution*, have also been indicated. Going ahead, the focus is on how the law regulates the media, giving effect to the provisions of the *Constitution*. It is important to take note of how the law regulates the media outside of voluntary independent regulation by a press council or similar industry body. It is through legal precedent and the common law that the media is regulated when no piece of legislation sets out specific legal provisions.

2.4 How the law regulates editorial content of the media

As part of this study into the regulation of the press, it is necessary to understand how South African law does determine, in part, what the media

¹⁰⁰ Section 154(3) of the *Criminal Procedure Act*.

¹⁰¹ *Media 24 Holdings* case para 27.

may and may not publish, along with remedies and recourse for affected parties. According to Joe Thloloe, former director of the Press Council of South Africa, a survey of South African media regulation shows that the media, as in all countries, "are regulated in the first instance by the country's constitution and laws, and then by the codes they have voluntarily adopted to regulate themselves".¹⁰²

As was shown above¹⁰³ hate speech is considered unconstitutional.¹⁰⁴ Both the laws of defamation and privacy relate to the constitutional value or *grundnorm* of (human) dignity, stipulating the following: "Everyone has inherent dignity and the right to have their dignity respected and protected."¹⁰⁵ In addition to this, the law of defamation, which forms part of the law of delict, determines the circumstances in which liability arises due to wrongfulness committed towards another civil party, and includes a special liability regime for the press, as discussed below. It is also important to look into the law of privacy as it plays a similarly big role when it comes to the regulation of the press by the courts.

Going ahead, an overview of relevant legal principles and precedent with regard to the laws of defamation and privacy is conducted, analysed in light of the right to a free press. Through this discussion, it will be possible to later identify how regulation by the law and voluntary ethical codes differ in nature.

¹⁰² Thloloe "The South African regulatory regime in print, broadcasting and online" 109.

¹⁰³ See 2.3.1 above.

¹⁰⁴ See 2.2.2.1 above.

¹⁰⁵ Section 10 of the *Constitution*; Milo, Penfold and Stein "Freedom of Expression" 36–22, 36–43 and 36–55.

2.4.1 *The law of defamation and the media*

2.4.1.1 Introduction

As stated in the *Khumalo v Holomisa* case, "it has long been recognised in democratic societies that the law of defamation lies at the intersection of the freedom of speech and the protection of reputation or good name."¹⁰⁶ Justice O'Regan continues to say that "[w]hen considering the constitutionality of the law of defamation [...] we need to ask whether an appropriate balance is struck between the protection of freedom of expression on the one hand, and the value of human dignity on the other."¹⁰⁷

The following is quoted from Chief Justice Corbett from the then Supreme Court of South Africa, appellate division:

I agree, and I firmly believe, that freedom of expression and of the press are potent and indispensable instruments for the creation and maintenance of a democratic society, but it is trite that such freedom is not, and cannot be permitted to be, totally unrestrained. The law does not allow the unjustified savaging of an individual's reputation. The right of free expression enjoyed by all persons, including the press, must yield to the individual's right, which is just as important, not to be unlawfully defamed. I emphasise the word 'unlawfully' for, in striving to achieve an equitable balance between the right to speak your mind and the right not to be harmed by what another says about you, the law has devised a number of defences, such as fair comment, justification (i.e. truth and public benefit) and privilege, which if successfully invoked render lawful the publication of matter which is prima facie defamatory.¹⁰⁸

The law of defamation plays a big part in how the media is regulated through the courts, seeing as it is the manner in which the reading public can raise their grievances with what has been published. It is also the way in which the courts can rightfully curtail the freedom of the press. It does happen that

¹⁰⁶ *Khumalo v Holomisa* case para 26.

¹⁰⁷ *Khumalo v Holomisa* case para 28.

¹⁰⁸ *Argus Printing and Publishing Company Ltd. v Esselen Estate* 1994 (2) SA 1 (A) para 28.

competing societal interests are brought before the court, requiring the delicate balancing of rights. A range of tests have been developed by the courts to determine whether content published by the press is permissible, even if in contravention of another constitutionally entrenched right such as the rights to dignity and privacy, amongst others. A study of the elements required for defamation to exist, as well as the legal tests used to determine these elements is discussed forthwith.

2.4.1.2 Criminal law defamation

Criminal liability shares many similar features to the law of delict but is based on an entirely different rationale. Criminal sanctions are of a penal nature, aimed at punishing and discouraging criminal behaviour as determined by criminal law, committed against the state and public interest.¹⁰⁹ Cases of criminal defamation are very rare in South Africa, with only two having been reported between 1953 to 2009.¹¹⁰ This is largely due to the different tests used by the courts in determining guilt. In a civil dispute, the threshold for proof is that of the balance of probabilities, whereas in criminal cases that state needs to prove its case beyond reasonable doubt, whilst the presumption of innocence counts in favour of the accused. In civil cases, the onus is placed on the respondent to prove his or her innocence.¹¹¹ The Supreme Court of Appeal found that criminal defamation does not unconstitutionally limit the right to freedom of expression, seeing that it is much more onerous to prove than in civil matter.¹¹² It is, however, civil cases of defamation which is of greatest relevance to the regulation of the media.

¹⁰⁹ Brand *Media Law in South Africa* 53; Neethling *et al Law of Delict* 9.

¹¹⁰ Brand *Media Law in South Africa* 70.

¹¹¹ Brand *Media Law in South Africa* 70-71.

¹¹² *S v Hoho* 2009 (1) SACR 276 (SCA) para 33.

2.4.1.3 Defamation in terms of delict

2.4.1.3.1 Introduction

The law of defamation requires five essential elements to be present to establish liability, a test that has been developed taking specific account of the press. These elements, which are discussed individually, are unlawfulness, fault, publication, defamatory matter and a plaintiff.¹¹³ If one of these elements fails to be present, liability will not exist. Most relevant to the law of defamation is *actio iniuriarum*, an action which covers delictual liability for defamation and the invasion of privacy. It is used to restore the balance after wrongful and intentional injury to one's personality.¹¹⁴ The law of delict protects the interests of civil society, that includes group and individual interests. Delictual remedies are compensatory in nature, either through compensation for damage, or satisfaction due to harm.¹¹⁵ Both compensation and satisfaction are of monetary nature but are calculated differently.

The five aforementioned elemental requirements for delictual defamation are discussed separately below.

2.4.1.3.2 Unlawfulness

The test to determine unlawfulness is of an objective nature.¹¹⁶ In *National Media Ltd v Bogoshi*,¹¹⁷ a case that was brought before the court arising from the publication of a series of allegedly defamatory articles published in

¹¹³ Brand *Media Law in South Africa* 56.

¹¹⁴ Brand *Media Law in South Africa* 53.

¹¹⁵ Brand *Media Law in South Africa* 53-54.

¹¹⁶ Brand *Media Law in South Africa* 63.

¹¹⁷ *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA) (hereafter referred to as the *National Media v Bogoshi* case).

the daily newspaper *City Press*, it was stated that the test is that of "the application of a general criterion of reasonableness based on considerations of fairness, morality, policy and the court's perception of the legal convictions of the community."¹¹⁸ Various defences can be raised against unlawfulness, which include:

that the publication was true and in the public interest;
that the publication constituted fair comment;
that the publication was made on a privileged occasion;
that the publication of the statement, although false, was reasonable.¹¹⁹

The presumption of unlawfulness is set aside when it is shown that the statement was true and that it can be proved. Every single detail need not be accurate, as long as the statement is substantially true, along with its implications and innuendos. The statement needs also be in the public interest, which is broadly interpreted.¹²⁰ According to Stuart,¹²¹ matters that are in the public interest include the conduct of any person who holds or seeks to hold public office, political or state matters, matters of religion, the administration of justice, the management of public institutions, the administration of local affairs by local authorities, as well as reportage on public performers, actors, singers and the like.

Fair comment relates to every person's constitutional right to express his, her or their thoughts and opinions. The right to make one's voice heard has been confirmed time and again by the court, as it is an intrinsic part of the healthy functioning of a constitutional democracy. Stuart¹²² states that, for a statement to be classified as fair comment, it needs to be "honest, relevant

¹¹⁸ *National Media v Bogoshi* case paras 8-9.

¹¹⁹ *Brand Media Law in South Africa* 63.

¹²⁰ *Brand Media Law in South Africa* 63-64.

¹²¹ *Stuart A Newspaperman's Guide to the Law* 66.

¹²² *Stuart A Newspaperman's Guide to the Law* 65.

and free from malice, no matter how prejudiced or exaggerated it may be". Additionally, commentary must be clearly indicated as such, and should be clearly distinguishable from the facts or matters on which it is based.¹²³

The media is afforded qualified privilege on the reporting of certain matters. Parliamentary proceedings are absolutely privileged, and as such statements in Parliament are legally allowed to be made "irrespective of [the] motive in making the statement, the truth or falsity of the statement, or [the] awareness of the unlawfulness of the statement".¹²⁴ The absolute privilege does not extend to the media, although a qualified privilege does come to be. It is stated that:

Media reports of courts, Parliament and certain public bodies are provisionally privileged provided they are fair and substantially accurate. If a report is a summary of events, it has to be a reasonable representation of the events.¹²⁵

Additionally, the report should be balanced and impartial by giving a fair representation of all contrasting opinions and arguments made in Parliament. Qualified privilege also extends to statements made in judicial proceedings, as well as to statements made when there is a legal, moral or social duty to disclose, or to further or protect a legitimate interest or right, so discharged to a person who has a corresponding duty or interest to hear the statement.¹²⁶ In the case of *Zille v Johnson*¹²⁷ the court confirmed the extending of qualified privilege to the media, to report on matters of public

¹²³ Brand *Media Law in South Africa* 65; This requirement is similar to a provision in the Press Code, which stipulates that it should only be presented as fact that which may reasonably be true, and that opinions, allegations, rumours or suppositions shall be clearly indicated as such – see section 1.3 of the *Press Code* included as Annexure A.

¹²⁴ Burns *Communications Law* 161.

¹²⁵ Brand *Media Law in South Africa* 67.

¹²⁶ Burns *Communications Law* 162.

¹²⁷ *Zille v Johnson* 1984 (2) SA 186 (W).

interest, even if such reportage is defamatory due to the subject matter on which it is based.

Notably, as the last defence of unlawfulness that is discussed, the media can raise reasonableness with regard to having published material that later on turned out to be false or misleading, provided the circumstances for such publication were reasonable. The question of what is reasonable was addressed in *National Media v Bogoshi*¹²⁸ by the Supreme Court of Appeal, by drawing from the Australian case *Lange v Australian Broadcasting Corporation*¹²⁹ (quotation marks omitted):

Whether the making of a publication was reasonable must depend upon all the circumstances of the case. But, as a general rule, a defendant's conduct in publishing material giving rise to a defamatory imputation will not be reasonable unless the defendant had reasonable grounds for believing that the imputation was true, took proper steps, so far as they were reasonably open, to verify the accuracy of the material and did not believe the imputation to be untrue. Furthermore, the defendant's conduct will not be reasonable unless the defendant has sought a response from the person defamed and published the response made (if any) except in cases where the seeking or publication of a response was not practicable or it was unnecessary to give the plaintiff an opportunity to respond.¹³⁰

Midgley highlights the significance of *National Media v Bogoshi*, which has been affirmed by the Constitutional Court in the *Khumalo v Holomisa* case:¹³¹

For the media it is a watershed case which gives them some respite from the harsh effects of strict liability, yet still ensures that reasonableness and fair standards are maintained. Investigative journalists, in particular, will benefit from this decision. In future they will be able to inform readers on matters of public interest without fear of being sued if their information later turns out to

¹²⁸ *National Media v Bogoshi* case para 28.

¹²⁹ *Lange v Australian Broadcasting Corporation* (1997) HCA 25.

¹³⁰ *National Media v Bogoshi* case para 28.

¹³¹ *Khumalo v Holomisa* case paras 20, 39 and 43.

be wrong – provided, of course, that they take reasonable steps to verify the accuracy of their reports.¹³²

The press may therefore be excused for publishing incorrect information only if reasonable steps to ascertain the accuracy of the information were taken and if the publication had no reason to believe that the information was false at the time of its publishing. Blatantly dishonest and unethical behaviour by the press is not seen as reasonable by the courts. The element of fault is discussed hereafter.

2.4.1.3.3 Fault

Fault relates to the intention to cause harm (*animus iniuriandi*). Intent, according to Burns,¹³³ entails the will to defame and the knowledge of the wrongfulness of the expression. Brand¹³⁴ refers to the three forms of intent in South African law, and relates them to the law of defamation, being *dolus directus* ("when a person foresees and desires the consequences of his actions"), *dolus indirectus* ("when a person foresees the substantial possibility of defamation although he does not necessarily aim to defame"), and *dolus eventualis* ("when the person does not aim to defame and is not certain that defamation will occur, but foresees that it could occur and persists in the statement").

Generally, when there is no such intention, it constitutes a valid defence against a claim of defamation. In the past, the media were held strictly accountable on terms of delictual liability, even if the lack of intent was present. The courts were of the opinion that the potential damage that could be caused by false media reports outweighed the right of the media to claim

¹³² Midgley 1999 SALJ 223. Brand *Media Law in South Africa* 68.

¹³³ Burns *Communications Law* 170.

¹³⁴ Brand *Media Law in South Africa* 62.

lack of intent to harm.¹³⁵ This strict liability was found to be unconstitutional in *National Media v Bogoshi*,¹³⁶ stating that lack of intention may in certain circumstances give rise to a defence, and that the strict accountability system was placing too heavy a burden on the rights to freedom of expression and freedom of the press. However, it was stated by the court that the media could still be held accountable on the grounds of negligence.

Negligence, on the other hand, exists in the case where a person acts "carelessly, thoughtlessly or imprudently".¹³⁷ Furthermore, negligence exists when a reasonable person would have acted differently in the circumstances, if it was reasonably foreseeable and preventable to avoid acting unlawfully and causing damage.¹³⁸

Newsrooms do have to take great care in what they publish. Even if a genuine mistake was made, it has been shown that a court can find the press guilty on the grounds that they were negligent by not employing due diligence, ensuring that a high standard of journalistic integrity is upheld. The standard for care will depend upon the specific circumstances of the case, using the test of how the reasonable media professional would have acted in the same circumstances.¹³⁹

2.4.1.3.4 Publication

Defamation does not occur if the defamatory matter is not shared or published. It is a requirement that at least one other party should take notice of the defamatory matter for it to be deemed to have been published.

¹³⁵ Brand *Media Law in South Africa* 54.

¹³⁶ *National Media v Bogoshi* case paras 34-35.

¹³⁷ Burns *Communications Law* 170.

¹³⁸ Neethling *et al Law of Delict* 128.

¹³⁹ Milo and Stein *A Practical Guide to Media Law* 33-34.

According to Brand,¹⁴⁰ publication can take place by the publication of matter in a newspaper, magazine, or through distribution by broadcast media, or via personal communication such as text messages, phone calls or email. Abstract forms of the conveying of messages are not excluded; photographs, illustrations and cartoons can also give rise to the publication of defamatory matter. Publication is presumed when defamatory matter is published in a newspaper or magazine, not requiring any additional proof of its dissemination.¹⁴¹

News media needs to take great care with the publishing of matters which are defamatory at first sight (*prima facie*). In *African Life Assurance Society v Robinson*¹⁴² the court found that it might constitute defamation if the media draws attention to a defamatory statement within an article. Here, the test of negligence as well as unlawfulness would apply to determine if the media undertook due diligence, to determine if the statement was true or reasonably true, or if the statement is in the public interest, or it being fair comment, or having been made during a privileged occasion. The media can also in certain circumstances additionally be held responsible for republication of defamatory matter by third parties, following the original publication of defamatory matter, as was found to be appropriate in *Buthelezi v Poorter*¹⁴³ – seeing as the likelihood of the republication of significant news stories by other news outlets is high.

Publication, or the reach of a number of people, is therefore presumed when something appears in the printed or online press. It is this power to reach a potentially great audience that places obligations on the media to carefully

¹⁴⁰ Brand *Media Law in South Africa* 57.

¹⁴¹ Brand *Media Law in South Africa* 57.

¹⁴² *African Life Assurance Society Ltd v Robinson Ltd* 1938 NPD 277.

¹⁴³ *Buthelezi v Poorter* 1975 4 SA 608 (W) para 615.

select what it publishes. What constitutes defamatory matter is discussed in more detail below as another required element.

2.4.1.3.5 Defamatory matter

According to Brand,¹⁴⁴ defamatory matter is a statement that "injures the person to whom it refers by lowering him or her in the estimation of reasonable people of average intelligence, or right-thinking members of society generally." He continues to say that "defamatory statements include those that injure the reputation of a person in his character, trade, business, profession or office, or which expose him to hatred, ridicule or contempt". As previously stated, defamatory matter can also include photographs, illustrations and cartoons, and can also be extended to headlines, captions, letters, advertisements and even street pole headlines. The ultimate meaning of the statement will be tested, not excluding implied meaning. Each case brought before a court will be examined on its own merits and is dependent on the surrounding context.

To illustrate this, and as example of where law and regulation overlap, it is helpful to look at the Press Ombud's ruling in the case of *Jan Blohm vs Rapport*.¹⁴⁵ In his finding, Johan Retief stated that the heading of a newspaper story was defamatory. In this case, a well-known Afrikaans singer, who struggled with substance addiction for more than 20 years, was described to be addicted again ("wéér verslaaf") after he was rehabilitated and started taking to jogging. Even though there was no real issue with the article in question, which was generally written in good spirit, the heading of the piece stated that the singer had found a new drug to take the place of

¹⁴⁴ Brand *Media Law in South Africa* 56.

¹⁴⁵ *Rapport vs Jan Blom* 3859/06/2018 PCSA.

his previous addictions. The Ombud tested the complaint against section 10.1 of the *Press Code*,¹⁴⁶ which reads: "[h]eadlines [...] and posters shall not mislead the public and shall give a reasonable reflection of the contents of the report [...] in question".¹⁴⁷ The headline in question was found to be an unreasonable representation of the article, together with it being detrimental to the status of the complainant (the singer), taking into account the specific context of the delicate subject matter at hand. The article made it clear that the singer worked hard at improving his public image but did not take this into account with the writing of the headline.

2.4.1.3.6 A plaintiff as a natural or legal person

Any individual, who is referred to as a natural person in law, can be defamed in their personal or professional capacity.¹⁴⁸ In *Mthembi-Mahanyele v Mail & Guardian*¹⁴⁹ the appellant, the Minister of Housing at the time, sued for defamation due to a news story accusing her of corruption and low moral standards, also of being dishonest and incompetent. The respondents pleaded that, as a member of cabinet, the appellant had "no *locus standi* to sue for damages for defamation (suing in her professional capacity as member of the State service); that the words did not convey a defamatory meaning; that the words were at least substantially true; and that it was in the public interest that the facts were published."¹⁵⁰ They added to plead, seeing as the story was based on opinion, that it was presented in good faith. They claimed qualified privilege as being members of the press, "[...] both bound and entitled to make available to the public information, opinions

¹⁴⁶ The code of ethical conduct enforced by the PCSA.

¹⁴⁷ See Annexure A.

¹⁴⁸ *Brand Media Law in South Africa* 58.

¹⁴⁹ *Mthembi-Mahanyele v Mail & Guardian* 2004 (6) SA 329 (SCA) (hereafter referred to as the *Mthembi-Mahanyele* case).

¹⁵⁰ *Mthembi-Mahanyele* case para 4.

and criticisms about every aspect of political activity, in the public interest".¹⁵¹ The court dismissed the claim that the appellant did not have the *locus standi* (standing in law) to bring a claim of defamation in that the matter did impact her personally, but nevertheless found against the minister, stating that the reportage was reasonable.

Both natural and legal persons can lodge a case of defamation, excluding the deceased or the government.¹⁵² As indicated in the discussion by Brand,¹⁵³ corporations can sue when the brand of the company has been damaged or negatively effected, negatively impacting the reputation of the business.¹⁵⁴ Non-trading corporations can also bring forward a case of defamation, as was the case in *Treatment Action Campaign v Rath*.¹⁵⁵ In some circumstances, political parties can also open a case of defamation.¹⁵⁶ To best uphold the right to freedom of expression, which includes the right to criticise the state and government as part of participatory democracy, it is very rare that a case of defamation can be brought by the state, excluding state owned corporations and parastatals, which are commonly treated as corporations, and members of cabinet as discussed above.¹⁵⁷

Lastly, a plaintiff would need to prove that the defamatory statement indeed refers to him or her, or in the case of a legal person it should be proven to refer to the name of the entity. The test to determine this is that of the

¹⁵¹ *Mthembi-Mahanyele* case para 4.

¹⁵² Milo and Stein *A Practical Guide to Media Law* 29.

¹⁵³ Brand *Media Law in South Africa* 58-59.

¹⁵⁴ *Dhlomo NO v Natal Newspapers (Pty.) Ltd* 1989 1 SA 945 (A) (hereafter referred to as the *Dhlomo* case).

¹⁵⁵ *Treatment Action Campaign v Rath* 2007 (4) SA 563 (C).

¹⁵⁶ *Argus Printing & Publishing Company Ltd. v Inkatha Freedom Party* 1992 2 All SA 185 (A) paras 63-64.

¹⁵⁷ Brand *Media Law in South Africa* 59; *Post and Telecommunications Corporation v Modus Publications (Pty.) Ltd* 1998 (3) SA 1114 (ZS); the *Dhlomo* case.

reasonable person, using an objective view to determine whether an ordinary person would perceive the defamatory statement to have been made against any specific person.¹⁵⁸ In the case of a defamatory expression of indirect nature, it should be clear that the statement refers to a specific natural or legal person, and with regard to groups it is required that the person referred to be clearly distinguishable from the group.¹⁵⁹ Being part of a group that is spoken against does not amount to one's personal reputation and dignity being infringed upon, when a defamatory statement is made against such a group. It would have to be proven that a reasonable person would interpret the statement as being made directly against the person who institutes a case of defamation.

An example of this is the finding by the Equality Court,¹⁶⁰ that posters accompanying an art exhibition, reading "Fuck White People" was not hate speech nor actionable defamation, as no single person was singled out, and that the statement referred to the "structures, systems, knowledge, skills and attitudes which keep White people racist which are to be rejected confronted and dismantled [sic]".¹⁶¹ The court took into account the broader context in which the artworks were produced, as well as the artist's statements about the work, which provided clarification about the intended meaning and message.

¹⁵⁸ *Brand Media Law in South Africa* 60.

¹⁵⁹ *Brand Media Law in South Africa* 60-61.

¹⁶⁰ *Cape Party-Kaapse Party v Iziko – South African National Gallery* (EC) (unreported) case number 02/2017 of 4 July 2017 (hereafter referred to as the *Cape Party v Iziko* case).

¹⁶¹ *Cape Party v Iziko* case para 19.

Following the discussion about how the law regulates the media through the law of defamation, it also needs to be studied how the law of privacy plays a similar and prominent role in such regulation.

2.4.2 *The law of privacy and the media*

2.4.2.1 Introduction

Apart from defamation, another way the law regulates the press and other media is through the constitutional right to have one's privacy protected, as well as separate laws on privacy to this effect. Section 14 of the *Constitution* provides for every person's right to privacy, whereas the *National Health Act* 61 of 2003, the *Electronic Communication and Transactions Act* 25 of 2002, the *National Credit Act* 34 of 2005, the *Promotion of Access to Information Act* 2 of 2000 as well as the *Consumer Protection Act* 68 of 2008, amongst others, stipulate specific requirements regarding privacy, to which the media are beholden. It is not within the scope of this study to explore the law of privacy in full, but it is addressed how the right to privacy impacts the regulation of the press and other media.

2.4.2.2 Constitutional right to privacy

The right to privacy is set out in the *Constitution* as part of the Bill of Rights.¹⁶² It stipulates that every person has the right to privacy, including the right not to have their person or home searched,¹⁶³ their property searched,¹⁶⁴ their possessions seized,¹⁶⁵ or the privacy of their

¹⁶² Section 14 of the *Constitution*.

¹⁶³ Section 14(a) of the *Constitution*.

¹⁶⁴ Section 14(b) of the *Constitution*.

¹⁶⁵ Section 14(c) of the *Constitution*.

communications infringed.¹⁶⁶ Privacy, in regard to freedom of press, is discussed accordingly.

2.4.2.3 Legitimate expectation of privacy

According to Milo and Stein¹⁶⁷ the Constitutional Court has developed the doctrine of a "legitimate expectation of privacy", of relevance to the media, where it is tested on the specific grounds of the case if an individual can motivate that he or she had a legitimate, subjective expectation of privacy in the specific circumstances, which can be measured objectively and reasonably without hypersensitivity.¹⁶⁸ Being a public figure or entering into a public space has a reducing effect on one's rights to privacy, but does not absolve the right completely – this becomes an exercise of balancing the right to privacy with that of what is the public interest. On the limitations to privacy it is written:

As a fundamental right protected by the Constitution, the right to privacy can be limited in accordance with the limitation clause in the Bill of Rights; that is, by a law of general application, or by some other competing fundamental right, such as freedom of expression or the right of access to information. In each case a careful weighing up of the right to privacy and the opposing interests or rights will have to take place.¹⁶⁹

It is therefore necessary to establish on what grounds the press may reveal and publish personal information that may infringe on the right to privacy, where it is in the public interest to do so. Legislation pertaining to privacy and personal information is discussed below.

¹⁶⁶ Section 14(d) of the *Constitution*.

¹⁶⁷ Milo and Stein *A Practical Guide to Media Law* 190-191; PFC "Report on Press Regulation in South Africa" 52.

¹⁶⁸ *NM v Smith* 2007 (7) BCLR 751 (CC); Milo and Stein *A Practical Guide to Media Law* 190-191.

¹⁶⁹ Milo and Stein *A Practical Guide to Media Law* 190-191.

2.4.2.4 Personal information

What constitutes "personal information" is defined in section 1 of the *Protection of Personal Information Act* 4 of 2013 (hereafter referred to as the *POPI Act*). The definition's introduction notes it being "information relating to an identifiable, living, natural person, and where it is applicable, an identifiable, existing juristic person", after which a range of particular types of "personal information" are listed, amongst others including that of information related to a person's background, education, medical history, financials, criminal record and employment.¹⁷⁰

This section of the *POPI Act*, including the definition of "personal information", is replicated in full in the *Press Code*¹⁷¹ under the provision made for requiring due protection of personal information by members of the press. Notably, section 7 of the *POPI Act* gives an exemption from its stipulations to the processing of personal information for journalistic, literary or artistic purposes, provided such an exemption from the strict requirements as set out by the *POPI Act* is necessary to reconcile, as a matter of public interest, the right to privacy with the right to freedom of expression. This exception is specifically addressed by the *POPI Act* with regard to the media, concerning the *Press Code*, with it declaring that:

Where a responsible party who processes personal information for exclusively journalistic purposes is, by virtue of office, employment or profession, subject to a code of ethics that provides adequate safeguards for the protection of personal information, such code will apply to the processing concerned to the exclusion of this Act and any alleged interference with the protection of the personal information of a data subject that may arise as a result of such processing must be adjudicated as provided for in terms of that code.¹⁷²

¹⁷⁰ *Protection of Personal Information Act* 4 of 2013 s 1 (hereafter referred to as the *POPI Act*).

¹⁷¹ *Press Code* s 4, see Annexure A.

¹⁷² *POPI Act* s 7(2).

From this it can be seen that the *POPI Act* in principle acknowledges the *Press Code* as well as the PCSA as industry regulator of the online and printed press. It is relevant in light of the research question, showing the desirability, through the lens of the legislator, of a code of ethics for the press that is meant, in part, to safeguard the processing of personal information according to existing legal standards. Through this it can be argued that a code of ethics ensures accountability and professionalism.

2.4.2.5 The 'public interest' defence

The most common defence for the press and other media with regard to publishing information that can be regarded as being private, is that of public interest. This justification may be for publishing information about a public figure, or when disclosing any other sensitive information.¹⁷³ This defence is echoed in the *Press Code*.¹⁷⁴

In the *Tshabalala-Msimang* case¹⁷⁵ the High Court of the Witwatersrand Local Division, now the South Gauteng High Court in Johannesburg, found that the former and now late Minister of Health's privacy and dignity rights were not unjustly infringed on with the disclosure of her medical records. It was found by the court that publication of the records showing the Minister to be an alcoholic, whilst she was known to campaign against alcohol abuse, was in the overriding public interest, not in small part due to her prominence in society.¹⁷⁶ The court made use of a test to determine whether a person could be considered a "public figure", a fact that sometimes

¹⁷³ Milo and Stein *A Practical Guide to Media Law* 190-191.

¹⁷⁴ *Press Code* s 3.1, see Annexure A.

¹⁷⁵ *Tshabalala-Msimang v Makhanya* 2008 (3) BCLR 228 (W) (hereafter referred to as the *Tshabalala-Msimang* case).

¹⁷⁶ *Tshabalala-Msimang* case paras 22, 44.

determines whether private matters can, within bounds, be published in the public interest. The test is formulated as follows:

In short it is submitted that the test whether a person is a public figure should be: has he by his personality, status or conduct exposed himself to such a degree of publicity as to justify intrusion into, or a public discourse on, certain aspects of his private life? However, non-actionable intrusions on his privacy should be limited to those that are in the public interest or for the public benefit, so that unjustified prying into personal affairs, unrelated to the person's public life, may be prevented.¹⁷⁷

This being said, the medical records were obtained unlawfully by the respondent *The Sunday Times*, in terms of the *National Health Act*.¹⁷⁸ According to the judgment, it is ethically required of journalists to ensure that documents in their possession have been obtained legally. In this case, where the documents were not so obtained, Judge Jajbhay acknowledged that the medical records could very well contribute to a valid debate in South Africa's democratic society, although it also caused harm to the minister and her family.¹⁷⁹ On the matter of whether or not the personal information should have been published, some hesitation is expressed, with the judge saying that those "involved with the present stories should have thought long and carefully about suitable alternatives before they chose to release this information".¹⁸⁰

The judgment goes further by acknowledging the difficulty of weighing up competing constitutional rights, in this case the right to freedom of the press and that of the right to privacy. It is said that, when two such rights come into conflict, one of the rights would likely suffer.¹⁸¹ In this case, the ruling was made in favour of the *The Sunday Times* newspaper as the story was

¹⁷⁷ *Tshabalala-Msimang* case para 39.

¹⁷⁸ *National Health Act* 61 of 2003 s 17.

¹⁷⁹ *Tshabalala-Msimang* case para 54

¹⁸⁰ *Tshabalala-Msimang* case para 54.

¹⁸¹ *Tshabalala-Msimang* case para 56.

deemed to be in the public interest. The interdict as requested by the applicant, prohibiting any further reporting on the matter, was dismissed with the court stating that the "prospect of favouring the applicants with this remedy may suspend journalism in a manner too dangerous to accept."¹⁸² The ruling did not rule out other punitive actions based on criminal law as well as with regard to ethics, specifically referring to the Press Ombud:

[...] This is at least implied by the pronounced deference I have afforded to the media on matters of public interest. If I was presiding in a court of manners or ethics, I might well censure the respondents. I trust that the South African Press Ombudsman will fervently consider the conduct of the respondents. This also resides in the realm of the public interest. The possibility of a crime having been committed in contravention of section 17 of The National Health Act is being investigated by the prosecuting authorities. The due process of law expects this investigation to be conducted.¹⁸³

The court ordered the return of the medical records and to destroy any copies made. Although the *Sunday Times* was not served with an interdict, it was ordered that all of the respondents jointly and severally pay all costs of the application by the applicants (the Minister and the hospital group).¹⁸⁴ This goes to show how the court sought to find the delicate balance between the right to privacy, dignity and that of freedom of expression by the press.

2.4.2.6 Consent as defence

Other than the public interest defence, another defence against intrusion of privacy is that of consent, which can either be express or implied. Express consent, being more desirable than implied consent, exists when a person gives permission for the publication of certain private information according to a set of specific terms and conditions. Implied consent on the other hand,

¹⁸² *Tshabalala-Msimang* case paras 57.

¹⁸³ *Tshabalala-Msimang* case paras 55.

¹⁸⁴ *Tshabalala-Msimang* case para 61.

arises such as when a person attends a public event and is photographed there.¹⁸⁵

2.4.3 *Protection of confidential sources*

Legal precedent that protects the identity of confidential sources has been developed. The protection of confidential sources is an integral part to the proper functioning of a free and independent press.¹⁸⁶ The discussion about press exceptionalism above¹⁸⁷ relates to the protection of sources, with it being stated that "recognition of a journalistic privilege not to divulge the identity of sources, may be viewed conceptually as a weaker manifestation of 'press exceptionalism'."¹⁸⁸ Such protection is not absolute and is to be determined on the merits of each separate case at hand. The interest that the public has in a free and independent press, fulfilling its watchdog role through confidential informants, is weighed against other societal and individual rights.¹⁸⁹ In the *Bosasa Operation (Pty) Ltd v Basson* case¹⁹⁰ the court emphasised the fundamental importance of a free press in a democracy, and acknowledged the integral part the protection of sources plays in its role, acting for the public good. The *Press Code* discourages the use of anonymous sources unless absolutely necessary, but at the same time states that "the protection of sources is a basic principle in a democratic and free society."¹⁹¹

¹⁸⁵ Milo and Stein *A Practical Guide to Media Law* 60.

¹⁸⁶ Milo and Stein *A Practical Guide to Media Law* 109.

¹⁸⁷ See 2.2.1 above.

¹⁸⁸ Milo, Penfold and Stein "Freedom of Expression" 42–37.

¹⁸⁹ Milo and Stein *A Practical Guide to Media Law* 109-112.

¹⁹⁰ *Bosasa Operation (Pty) Ltd v Basson* 2013 (2) SA 570 (GSJ) para 38.

¹⁹¹ *Press Code* s 11, see Annexure A.

2.4.4 Conclusion on the legal remedies

From the above, it is seen that legislation and judicial precedent do provide for tests to be employed to determine whether any form of expression qualifies as defamation, prohibited speech, or if it intrudes unjustly with the constitutional right to privacy, whilst also providing legal remedies for affected parties. There is no set number of factors to take into consideration as every case will be judged on its own merit and circumstances. It should be considered, though, that bringing a case before a court of law is often expensive and protracted, especially considering that *pro bono* legal assistance with regard to defamation suits is not typically available. Even with the courts being in place to adjudicate on disputes between the media and the public, the system remains inaccessible to many as pursuing justice via this avenue requires time and money.

2.5 Self-regulation and its legal framework

2.5.1 Introduction: self-regulation as a form of mediation and arbitration

In a study focussing on the examination of the current press regulatory system, and the calls for its reform, it should be understood how regulation differs from court proceedings. This section discusses how self-regulation fits into the broader legal framework and oversight by the courts. It relates to the PCSA as voluntary independent co-regulatory system.¹⁹² This system is, in essence, a channel of mediation and arbitration. The aims and objectives as set out by the PCSA's constitution are as follows:

¹⁹² The PCSA and "voluntary independent co-regulation" are discussed at 3.1 below.

2. Aims and Objectives

2.1. To uphold and promote the Constitution of the Republic of South Africa by preserving the right to freedom of expression and freedom of the press;

2.2. To promote and develop ethical practice in journalism and to promote the adoption of and adherence to these standards by the South African press;

2.3. To adopt "The Press Code of Ethics and Conduct for South African Print and Online Media" ("The Press Code") and to act as its custodian, noting that the "press" as described in this Constitution excludes the broadcast media, which are regulated by the Broadcasting Complaints Commission of South Africa;

2.4. To establish and maintain a *voluntary independent mediation and arbitration process to deal cost-effectively and quickly with complaints* from the public about journalistic ethics and conduct at publications that subscribe to The Press Code [own emphasis added];

2.5. To promote the concept of independent co-regulation of Subscriber Publications and public awareness of the PCSA's mediation and arbitration services to deal with complaints about journalistic practice; and

2.6. To undertake such other tasks as are necessary to further the objectives of the Council.¹⁹³

From this is it clear that the *Press Code* purports to be rooted in the South African *Constitution* and the rights contained therein, as well as the standards giving effect to ethical journalism. The PCSA regulatory system self-identifies as being a form of mediation and arbitration. It acknowledges that this is a cost-effective and speedy way of dealing with complaints related to journalism ethics of publications subscribing to the *Press Code*.

2.5.2 *The advantages of self-regulation*

In *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews*¹⁹⁴ the Constitutional Court considered and affirmed the advantages of arbitration, noting its cost-effective, speedy, flexible, consensual and private nature. Justice O'Regan

¹⁹³ PCSA 2018 <http://www.presscouncil.org.za/pcsa-constitution/> s 2.

¹⁹⁴ *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews* 2009 (4) SA 529 (CC) paras 216-218 (hereafter referred to as the *Lufuno Mphaphuli v Andrews* case).

highlighted the informal, investigative manner of arbitration, compared to the formal and adversarial format which is found in a trial in a court of law.¹⁹⁵ O'Regan, writing for the majority, emphasised that arbitration remains subject to the ultimate authority of the rule of law and the *Constitution*, although arbitration and mediation remain independent from the courts or, as she put it, a statutory tribunal.¹⁹⁶ On the differences between a court of law and private arbitration and mediation, it is written that the latter must be consensual as no party may be compelled into private arbitration. It is not required that arbitration or mediation should be a process open to the public, as is required of a court of law. The arbitrator and process are chosen by parties involved, unlike in a court of law.¹⁹⁷ It is stated that the proper constitutional approach to private arbitration should take into account that "litigation before ordinary courts can be a rigid, costly and time-consuming process", also recognising that "it is not inconsistent with our constitutional values to permit parties to seek a quicker and cheaper mechanism for the resolution of disputes".¹⁹⁸

From the above, it is seen that the Constitutional Court has acknowledged the benefits of arbitration. It can be argued, however, that the benefits of cost-effectiveness and speediness contribute to a larger ideal – that of the greater realisation of freedom of expression. As discussed below it is also offered constitutional recognition.

¹⁹⁵ *Lufuno Mphaphuli v Andrews* case para 197.

¹⁹⁶ *Lufuno Mphaphuli v Andrews* case para 217.

¹⁹⁷ *Lufuno Mphaphuli v Andrews* para 217.

¹⁹⁸ *Lufuno Mphaphuli v Andrews* para 197.

2.5.3 Self-regulation's place within the legal framework

It is stated that, as entering into private arbitration is a voluntary choice, it should be respected by the courts, as it is the prerogative of parties to choose the forum they are willing to subject themselves to. The matter(s) to be arbitrated, the arbitrator, the procedural process as well as stipulations as to a body of appeal should be agreed on the willing parties to arbitration.¹⁹⁹ Again, this does not mean that arbitration falls outside the ambit of the rule of law. The justiciability of the terms of arbitration agreements was also addressed in the *Lufuno Mphaphuli v Andrews* case,²⁰⁰ especially asking the question whether section 34 of the *Constitution* applies to private arbitration. This section states that:

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, *another independent and impartial tribunal or forum* [own emphasis].²⁰¹

It is argued by O'Regan J that although section 34 should not be understood to apply primarily to private arbitrations, it does have relevance and applicability:

[...] as with other contracts, should the arbitration agreement contain a provision that is contrary to public policy in the light of the values of the Constitution, the arbitration agreement will be null and void to that extent [...]. In determining whether a provision is *contra bonos mores*, the spirit, purport and objects of the Bill of Rights will be of importance.²⁰²

The *Arbitration Act*²⁰³ gives legal effect to the arbitration process, whilst giving the court far-reaching powers to intervene in almost any aspect of the

¹⁹⁹ *Lufuno Mphaphuli v Andrews* para 219.

²⁰⁰ *Lufuno Mphaphuli v Andrews* para 218.

²⁰¹ Section 34 of the *Constitution*.

²⁰² *Lufuno Mphaphuli v Andrews* para 220.

²⁰³ *Arbitration Act* 42 of 1965 (referred to hereafter as the *Arbitration Act*).

arbitration proceedings, where it is so in the best interest of justice to do so. The Court has the power to set aside, prohibit or cease any matter or decision related to arbitration.²⁰⁴ It has the power to defer or refer any matter to arbitration proceedings, as well as to make orders in line with and in support of the findings of the arbitration tribunal.²⁰⁵ A finding of the arbitration tribunal can be made an order of the court, in certain circumstances.²⁰⁶ The *Arbitration Act* is not discussed in full, seeing that the policy and procedures of the Press Council, which is discussed below, have been developed in line with this Act.

In line with the research question of evaluating the desirability of a statutory tribunal for the press, it needs to be acknowledged that there is already statutory oversight on the work of the Press Ombud. The PCSA's processes can be reviewed in accordance with the *Arbitration Act*, as well as the *Promotion of Administrative Justice Act 3 of 2000* (hereafter referred to as *PAJA*). *PAJA* gives the courts power to review administrative action taken by a "natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision which adversely affects the rights of any person and which has a direct, external legal effect".²⁰⁷ The empowering provision(s) of the PCSA would be that of the *Press Code* to which publications subscribe and that it enforces, but also the constitution, policies and procedures of the PCSA that give shape and effect to its workings.²⁰⁸ Preference has been expressed for review through *PAJA* rather than the *Arbitration Act* seeing as the Press

²⁰⁴ *Arbitration Act* s 3.

²⁰⁵ *Arbitration Act* ss 6-8.

²⁰⁶ *Arbitration Act* s 33.

²⁰⁷ *Promotion of Administrative Justice Act 3 of 2000* s 1b.

²⁰⁸ These are discussed at 3.1 below.

Ombud's processes do not always fit in neatly with the concept of private arbitration.²⁰⁹

2.6 Film and Publications Act

2.6.1 Introduction

The Film and Publications Board (hereafter referred to as the FPB) finds its authority in the *Film and Publications Act* (hereafter referred to as the *FPA*),²¹⁰ which was introduced with the advent of South Africa's constitutional democracy.²¹¹ It deals with the classification of publications that would, *prima facie*, contravene the section 16(2) categories of exclusion to freedom of expression.²¹² It is important to discuss the FPB here not only because it forms part of how the media is regulated by law, but also as the *FPA*'s provisions prove relevant for later findings of this study.

²⁰⁹ PFC "Report on Press Regulation in South Africa" 39; The Press Freedom Commission (hereafter referred to as the PFC), which is discussed at 3.1.5.1 below, found it problematic that the PCSA's regulatory process is considered as "private arbitration". The PFC noted that in private arbitration proceedings the parties have the option to choose the terms of rules and procedures of the adjudication, whereas the PCSA's process is already determined beforehand. It is also argued that this form of regulation should rather be seen as an extension of the public watchdog role that the media plays, meaning that the regulatory proceedings have relevance to the broader public interest, beyond that of private arbitration. It is also argued that even if the structure of the complaints procedure is similar to that of private arbitrations, the allowance of third party complaints and an absence of a waiver clause, that would limit a complainant pursuing further legal action, means that it is more appropriate for *PAJA* to be used as a means of review rather than the *Arbitration Act*.

²¹⁰ *Film and Publications Act* 65 of 1996 (hereafter referred to as the *FPA*).

²¹¹ It repealed the infamous *Publications Act 42 of 1974* that gave power and effect to state sanctioned censorship under the apartheid regime.

²¹² Similar to that done by the *Equality Act*, see 2.3.1 above; For the discussion about the section 16(2) categories of exclusion see 2.2.2.1 above.

2.6.2 Regulation by the Film and Publications Board

Unlike the other forms of post-publication regulation discussed in this study, the FPB differs in the sense that it is a pre-publication classifying body. It has the power to effectively ban certain types of material, but only in the strict terms as set out in the *FPA* and in the *Constitution*. Other material that may be deemed offensive, or sensitive to younger viewers are classified on different levels of age restrictions, with the classification having to be noted clearly on the material being disseminated. The *FPA* expressly recognises the PCSA, acting through the Press Ombud, and affords all publications that subscribe to its recognised code of conduct (the *Press Code*) exemption from the stipulations of the *FPA*:

16 (1) Any person may request, in the prescribed manner, that a publication, other than a *bona fide* newspaper or magazine that is published by a member of a body, recognized by the Press Ombudsman, which subscribes, and adheres, to a code of conduct that must be enforced by that body, which is to be or is being distributed in the Republic, be classified in terms of this section.

(2) Any person, except the publisher of a newspaper or magazine contemplated in subsection (1), who, for distribution or exhibition in the Republic creates, produces, publishes or advertises any publication that –

...

(b) advocates propaganda for war;

(c) incites violence; or

(d) advocates hatred based on any identifiable group characteristic and that constitutes incitement to cause harm,

shall submit, in the prescribed manner, such publication for examination and classification to the Board before such publication is distributed, exhibited, offered or advertised for distribution or exhibition.²¹³

It is thus only compulsory to submit a publication for classification if it falls under the listed grounds, but any person may request the classification of a publication if it does not subscribe to the *Press Code* and authority of the

²¹³ Section 16 of the *FPA*.

PCSA.²¹⁴ The constitutionality of the now-removed section 16(2)(a) was brought before the Constitutional Court in 2012, in the *Print Media South Africa* case.²¹⁵ The section read that any publication that shows "sexual conduct which violates or shows disrespect for the right to human dignity of any person, degrades a person, or constitutes incitement to cause harm" should submit the content in question for classification before it is to be disseminated. As this clause is not included in the exclusions of freedom of expression in the *Constitution*, the Constitutional Court found that this was an unjustified limitation of the right to freedom of expression, and that prohibition of such material could be controlled through less restrictive methods, such as an interdict.²¹⁶ Additionally, this Court also ruled that section 16(1) of the *FPA*, in that it did not originally include "magazines" alongside a "bona fide newspaper", was unconstitutional, as there is no substantial difference between the two.²¹⁷ This goes to show how far the Constitutional Court will go to protect the extensive right to freedom of expression, which includes the right to a free press.

The Minister of Communications is tasked with appointing the Council of the FPB, who in turn appoints the Board.²¹⁸ The Board presides over matters brought before this body and is authorised to classify the nature of works, either directly or by the appointment of further committees to this end.²¹⁹ The Minister is also tasked with appointing the Appeal Tribunal, which

²¹⁴ As per ss 16(1) and 16(2) of the *FPA*, in accordance with s 16(2) of the *Constitution*, see 2.2.2.1 above.

²¹⁵ *Print Media South Africa v Minister of Home Affairs* 2012 (12) BCLR 1346 (CC) (hereafter referred to as the *Print Media South Africa* case).

²¹⁶ *Print Media South Africa* case paras 66-69.

²¹⁷ *Print Media South Africa* case paras 79-82.

²¹⁸ Section 4A of the *FPA*.

²¹⁹ Section 10 of the *FPA*.

serves as an independent body within the structure of the FPB, which can be approached to overturn or alter a decision reached by the Board.²²⁰

The FPB's mandate extends to the classifying of publications according to age restrictions and in extreme cases, where the content contravenes section 16 of the *FPA* (mirroring section 16 of the *Constitution*), it has the authority to restrict publication of the content in totality. Should such restricted content be distributed it would be punishable by a fine or imprisonment.²²¹ Child pornography is also prohibited, and should the FPB come across such an instance, the case should be referred to the South African Police Service for further investigation and criminal prosecution.²²²

2.6.3 *Exemption extended to PCSA subscribing publications*

Publications that are not affiliated with the PCSA are not offered the exemption from section 16(1) of the *FPA* (quoted above) and are in turn legally obliged to comply with the requirements as set by the *FPA*. As can be seen from section 16(2), it is only from a closed list of content types that the *FPA* makes it mandatory for publications to be submitted to the FPB before being distributed or advertised. However, in accordance with section 16(1) of the *FPA* as well as the classification guidelines as published in the *Government Gazette*,²²³ a publication must be classified upon the request of an interested person.²²⁴ The publication in question would then be classified with a rating, possibly being given an age restriction, all of which would need to be clearly indicated on the front page of the publication as

²²⁰ Section 6 of the *FPA*.

²²¹ Section 24(A) of the *FPA*.

²²² Section 16(6) of the *FPA*.

²²³ GN 539 in GG 42380 of 5 April 2019.

²²⁴ GN 539 in GG 42380 of 5 April 2019 s 10(2).

stipulated by the PFB and *FPA*.²²⁵ Control mechanisms would then also needed to be implemented to regulate the distribution and exhibition in accordance with the classification.²²⁶ Such requirements could have a substantial impact on how newspapers and magazines can be distributed, sold and produced, dependent on its rating. This is of relevance for later parts of this study.

2.6.4 Proposed amendments to regulate the internet

The matter of the exemption offered to PCSA subscribing publications is of specific relevance in light of the contested *Film and Publications Amendment Bill*,²²⁷ dubbed as the "Internet Censorship Bill", that was passed by the National Assembly and signed by the President, awaiting a date of proclamation at the conclusion of this study. It gives the FPB a broad authority to regulate most content published on the internet, taking cognisance of technological convergence, with the specific aim of protecting children from sexually explicit content, as well as to prevent hate speech and revenge porn from spreading.²²⁸ Although such a broad authority is alarming, the amendment bill's wording exclusively recognises the PCSA as the only body which exempts a "publication" (broader than that of a newspaper or magazine, which in theory includes online publications) from the PFB's regulatory ambit. Additionally, the Advertising Standards Authority (now the Advertising Regulatory Board), is also recognised as a

²²⁵ Section 18(A) of the *FPA*.

²²⁶ Section 24(A) of the *FPA*.

²²⁷ *Film and Publications Amendment Bill* 2015 B37-2015.

²²⁸ Reg 4.1 in GN 182 in GG 38531 of 4 March 2015; SAFREA 2018
http://www.safrea.co.za/news/98-SAFREA_denounces_Internet_Censorship_Bill.

regulator of advertisements in the same sense as the PCSA.²²⁹ The constitutionality of the amended *FPA* remains to be tested.

2.7 The Imprint Act

Another small way in which the law regulates the media is through the *Imprint Act*,²³⁰ albeit its implications are very limited. It is good to take notice of this act as it does relate to statutory regulation of the printed press. It requires that both the name and address of the printer of any publication or printed material that is meant for public distribution or sale, are included in any of the official South African languages.²³¹ Newspapers, magazines and other printed publications are legally obliged to comply with this requirement, although the *Imprint Act* does not provide for directives on digital publications. It can be said that this requirement does not encroach on the right to freedom of expression by the press and that it simply serves as a way to identify the publisher of a publication.

2.8 Regulation of journalism as a profession

Following the discussion of how the press is regulated by legislation, and in light of the calls for a statutory appeals tribunal to further regulate the press, it is valuable to highlight how the press is not regulated by the law. Journalists do not need a license to practice within the South African media sector, nor are special legal and procedural requirements stipulated to this end. According to Brand,²³² the Government Communication and

²²⁹ See 3.3 below.

²³⁰ *Imprint Act* 43 of 1993 (hereafter referred to as the *Imprint Act*); This act repealed the *Newspaper Registration Act* 63 of 1971 that required all newspapers to be registered, with specific focus on the former apartheid territories of Transkei, Bophuthatswana, Venda and Ciskei, serving as a (then) method of government control over the media.

²³¹ *Imprint Act* ss 3, 4.

²³² Brand *Media Law in South Africa* 45.

Information System (GCIS) issues press cards for identification purposes (when applied for), but this serves no other purpose than to assist media practitioners in their work and does not confer upon them any additional rights or responsibilities. The GCIS as governmental body provides professional services, sets and influences adherence to standards for an effective government communication system, drives coherent government messaging, and proactively communicates with the public about government policies, plans programmes and achievements.²³³

Print and Digital Media SA (PDMSA), an organisation that represents print and digital media companies, also issues press cards to journalists, photographers, editors and freelancers who belong to this organisation, mostly through their respective employers. This system of accreditation serves the purpose to assist members of the press to gain access to newsworthy events, but also does not confer any special rights or responsibilities upon the bearer of the card.²³⁴

No formal training is required of a person to practice as a journalist, although many do have graduate and possibly postgraduate degrees in journalism studies from tertiary institutions. Diplomas and certificates from short courses in journalism studies, or previous industry related experience or training also enable a person to do work within the media industry.²³⁵ However, it is mostly up to media companies to stipulate their training requirements for journalist employees. Brand²³⁶ states that bloggers are sometimes seen as journalists.

²³³ GCIS 2018 <https://www.gcis.gov.za/content/about-us>.

²³⁴ Brand *Media Law in South Africa* 45.

²³⁵ Brand *Media Law in South Africa* 45.

²³⁶ Brand *Media Law in South Africa* 45.

The last form of statutory influencing of the press that was studied is that of how media diversity is regulated and advanced by legislation. It is needed to look holistically at the broader issues that have an impact on the media industry at large, as these issues cannot be separated from the debate in its entirety, amidst calls for the press regulatory system's reform.

2.9 Regulation of media diversity and related discourse

2.9.1 Introduction

When considering the best forms of press regulation, looking at what kind of system would best ensure a free but responsible press, it remains important not to get caught up in the many other daunting issues faced by the media industry. The challenges currently faced by the media does, however, impact the effective functioning of independent regulation, both directly and indirectly. There seems to be a prevailing sense that almost all ills should be addressed by independent media councils, and them failing to do so is seen as indicative of their failure to properly execute their mandate of keeping the media in check.

The ANC proposals on media regulation, especially regarding the press, included the need to facilitate greater diversity within the South African media, which is addressed by Libby Lloyd, South African media development policy consultant:

The ANC proposals introduce the need for intervention to facilitate diversity of information available to South Africans – however any review needs to be holistic and focus not only on diversity of ownership (or black empowerment in ownership), but on how to ensure people all over the country have access to a range of media (including community and grassroots media but not confined to this) that reflects the cultural and linguistic diversity of the country. The emphasis must be on facilitating widespread distribution of many different titles, radio stations or television channels, and on extending the range of sources of information used by these outlets so that these genuinely reflect

different perspectives and reinforce the principle of independent quality journalism.²³⁷

Additionally, Lloyd states that although state interventions may lead to interference with freedom of expression, the market alone does not ensure access to information and media – as such media-specific policies need to be developed, apart from general competition laws, for greater plurality and diversity.²³⁸ Convergence and the effect of new technologies also need to be considered, as it has a far-reaching effect on the media, with Lloyd stating that "it is important to find ways to empower readers, listeners and viewers to critically analyse the media and use new technologies to meet their needs."²³⁹ The main challenges faced by the media, that also impact press regulation, can be grouped as being that of diversity, transformation and access; convergence and the effects of new media; as well as declining trust. These matters are discussed below.

2.9.2 Diversity, transformation and access

According to Reid and Isaacs, "[d]ebates surrounding the effectivity of the PCSA as an effective accountability mechanism for the regulation of the press are often framed within the broader discussion of media diversity and media transformation."²⁴⁰ They make reference to the ANC and a prominent proponent of the MAT, Lumko Mtimde,²⁴¹ whose calls for a statutory regulatory body were made citing a lack of media diversity, both in terms of ownership and staff, and editorial content. However, the conflation of these issues misplaces the role of the regulator and creates the risk of not

²³⁷ Lloyd "Watchdogs and News Hounds" 32.

²³⁸ Lloyd "Watchdogs and News Hounds" 32.

²³⁹ Lloyd "Watchdogs and News Hounds" 32.

²⁴⁰ Reid and Isaacs "Press regulation in South Africa" 77.

²⁴¹ Mtimde 2012 "Media accountability mechanisms: self-regulation, independent and statutory regulation".

advancing the discussion in a way that can affect necessary change. Referring to the media as a homogenous body, irrespective of medium, is also problematic. Reid and Isaacs argue that:

Positioning the question of the effectiveness of the PCSA into this broader discussion serves to somewhat misplace the issue. Often, these two very different and separate (though intersecting) topics are conflated, confused and blurred, and this serves to detract from more constructive discussion on both topics. Furthermore, the term 'media' is often conflated with the term 'print media'. The media is not a homogenous body, so this is also problematic and serves to empty discussions of the necessary recognitions of the complexities of the media sector, and all of its constituent parts.²⁴²

With them also stating:

[I]t becomes problematic when the role of the PCSA is conflated with the lack of content diversity available to audiences in South Africa especially with regard to the print media sector, because this implies that the PCSA is responsible for rectifying this lack of diversity, which it is not. Nor is the PCSA responsible for the economic and market challenges currently faced by newspapers and how these impact on print news reporting. Such ills, while important, fall outside of the mandate of the PCSA, which functions only as a post-publication accountability mechanism for the administration of complaints. One cannot expect the PCSA to be held responsible for such factors, since the responsibility of addressing these problems is simply not its role. This is an important point, since critics of the press regulatory system have consistently criticised the PCSA under the auspices of arguing that the press sector is untransformed and lacking in diversity.²⁴³

It is therefore stated that the Press Council can not solve issues of media diversity and transformation. Duncan,²⁴⁴ however, cautions against the danger of a single, shallow view of press regulation, specifically interrogating the liberal premise on which the conception of media freedom is based, and its adequacy to deal with the critique that has been levelled against it. Duncan addresses the ANC's claim that the print media is committed to a neoliberal viewpoint based on market fundamentalism.²⁴⁵

²⁴² Reid and Isaacs "Press regulation in South Africa" 77-78.

²⁴³ Reid and Isaacs "Press regulation in South Africa" 80.

²⁴⁴ Duncan 2011 *Ecquid Novi: African Media Studies* 95.

²⁴⁵ Duncan 2011 *Ecquid Novi: African Media Studies* 98.

She emphasises the need to understand that media freedom and media transformation are interdependent projects, and that media accountability be seen in this light.²⁴⁶ She writes that government and newspaper readers across the world "complain about excessive media commercialisation and concentration of ownership, declining ethical standards and the rise of tabloidisation, and the ineffectiveness of press councils in dealing with these problems."²⁴⁷

On freedom of expression being regarded as a negative freedom (the freedom from interference, as opposed to a positive right to action), she states that this conception "fails to acknowledge that access to the 'marketplace of ideas' is highly uneven, as ownership of the means of communication is often highly monopolised; therefore the ability to use the right is heavily mediated by power".²⁴⁸ Secondly, she refers to the notion of the free flow of information and ideas, being dominant to conceptions about freedom of the press, and how this can be used to mask ideological interests.²⁴⁹ Thirdly, she points out that that it is mainly understood that freedom of expression is a right that is claimed against the government, whereas in reality, especially in repressive regions, governmental as well as non-governmental actors often collude with each other. She also points out that, especially in African states, both state and market forces threaten freedom of expression.²⁵⁰ Fourthly, she again refers to freedom of expression being regarded as a negative right, which hampers placing positive obligations on the state and other industry players to allocate

²⁴⁶ Duncan 2011 *Ecquid Novi: African Media Studies* 95.

²⁴⁷ Duncan 2011 *Ecquid Novi: African Media Studies* 91.

²⁴⁸ Duncan 2011 *Ecquid Novi: African Media Studies* 94.

²⁴⁹ Duncan 2011 *Ecquid Novi: African Media Studies* 95.

²⁵⁰ Duncan 2011 *Ecquid Novi: African Media Studies* 95.

resources towards the promotion of freedom of expression.²⁵¹ This being said, Duncan does limit the scope of what a press council should and can be held responsible for:

But to the extent that these biases in print media coverage are a function of the commercial model of ownership, control and funding, they cannot be resolved by a press council or a media tribunal, as such bodies are confined to adjudicating on complaints about views that have already been published. Press councils and the tribunal will deal with the grievances with the already represented; not the grievances of the unrepresented. Press councils are not meant to deal with systemic problems in media coverage: [...] councils do not really deal with what [is described] as the 'real sins of the news media ... [these being] sins of omission and long-term distortions.²⁵²

In this light, Duncan argues that freedom from state control over media is a necessary condition for freedom of expression, but that it is not sufficient because certain positive measures should be implemented to democratise access to information.²⁵³ She writes that, although the negative right to freedom of expression is important, on its own it does not "address information inequalities in society, and leads to arguments that are vulnerable to attack on the grounds that media freedom is a little more than a self-serving freedom of those who own the printing presses, rather than of society as a whole."²⁵⁴

Additionally, considering the effects of convergence, it does not make sense any longer to isolate the press from broadcast media when looking at media diversity. A person now receives their news from a variety of interchanging sources, without necessarily having to distinguish between what platform it is coming from, with Reid stating:

²⁵¹ Duncan 2011 *Ecquid Novi: African Media Studies* 95.

²⁵² Duncan 2011 *Ecquid Novi: African Media Studies* 99.

²⁵³ Duncan 2011 *Ecquid Novi: African Media Studies* 95.

²⁵⁴ Duncan 2011 *Ecquid Novi: African Media Studies* 95.

Given this normative role of media diversity, coupled with the phenomenon of convergence, it makes no logical sense to contemplate print media diversity in isolation from the rest of the media space. Media diversity studies, as a scientific field of research, has long since abandoned the approach of seeing media types, like print, broadcasting or digital media, in isolation from one another because to do so is simply methodologically invalid. It no longer makes sense. Instead, we now focus on media genres. Instead of separating the media for analysis according to media types, i.e. print, broadcasting, digital and so on, we now think of media genres, such as entertainment, sport, documentary etc.²⁵⁵

Puddephatt wrote the following on the role of the state concerning media pluralism and diversity, focussing on the aspect of access:

What matters is the extent to which all sectors of society, especially those who are most disadvantaged or marginalised, can access the media to gain information and make their voices heard. Limited access to – or lack of engagement with – the media is a function of poverty and poor education. It may also be caused or exacerbated by language, gender, age, ethnicity or the urban-rural divide. Whatever the cause, it contributes to an environment that can undermine democratic development. However, the absence of state intervention on its own is no guarantee of a rich media environment. On the contrary: to promote a media environment characterised by pluralism and diversity, state intervention is necessary.²⁵⁶

The above addresses the important matter of lowering the cost of access to media for those who cannot afford exorbitant network and technological device prices. Through access to the media, a person's worldview is expanded and informed, of which the inverse can also be said. It could be argued that media diversity exists, in so far one can afford it. In South Africa, where a majority of the country lives in extreme or moderate poverty, this is a serious issue to consider.²⁵⁷

It is important that government, through a range of projects and initiatives, support grassroots, community and small independent media towards

²⁵⁵ Reid "Media Content Diversity in South Africa" 3.

²⁵⁶ Puddephatt "The Importance of Self Regulation of the Media in upholding freedom of expression" 10.

²⁵⁷ Reid "Media Content Diversity in South Africa" 5-6.

achieving greater media diversity, both in terms of creating new providers of information and to enhance public access to a diverse media. Due to the financial struggles of the media industry, its viability and sustainability should be fostered with help of the state. With regard to access to media, it is important that the government also intervene to ensure lower costs of access to media. ICASA, as communications technology regulator, is mandated with such pricing regulatory activities.²⁵⁸ There is also a South African government agency that is mandated with developing media diversity in all forms: print, online and broadcast, tasked with addressing broader issues such as ownership and media literacy. This is discussed below.

2.9.2.1 The Media Development and Diversity Agency

It is not the mandate nor responsibility of a self-regulatory body, focussed on the enforcement of a code of ethics of content published, to enforce the transformation of the press industry, nor can it be expected to undertake the task of promoting greater diversity within the media. There is, however, a South African state agency that was created for this very reason. The Media Development and Diversity Agency (hereafter referred to as the MDDA) is established by the *Media Development and Diversity Agency Act*.²⁵⁹ The MDDA is discussed in this chapter, seeing as it was created to regulate media diversity (albeit not editorial content). Because the calls for the MAT were made with pertinent reference to media diversity, it is important to address the claims and to determine where they fit into the larger media regulatory framework.

²⁵⁸ See 3.2.3 below.

²⁵⁹ *Media Development and Diversity Agency Act* 14 of 2002 (hereafter referred to as the *MDDA Act*).

The *MDDA Act*'s preamble states the desirability to "establish the [MDDA] to help create an enabling environment for media development and diversity that is conducive to public discourse and which reflects the needs and aspirations of all South Africans"; to "redress exclusion and marginalisation of disadvantaged communities and persons from access to the media and the media industry; and to "promote media development and diversity by providing support primarily to community and small commercial media projects."²⁶⁰ It is stated that the MMDA is "independent and must be impartial and exercise its powers and perform its duties without fear, favour or prejudice, and any political or commercial interference."²⁶¹ Importantly, the MDDA "*must not interfere in the editorial content of the media* [own emphasis]."²⁶² From the latter, it is clear that a divide is drawn in legislation between tending to the development and diversity of media, and the regulation of editorial content. It is worth noting the objectives of the MDDA as set out in section 3 of the *MDDA Act*, which is quoted in full:

The objective of the Agency is to promote development and diversity in the South African media throughout the country, consistent with the right to freedom of expression as entrenched in section 16(1) of the Constitution, in particular–

(a) freedom of the press and other media; and
(b) freedom to receive and impart information or ideas, and for that purpose to–

(i) encourage ownership and control of, and access to, media by historically disadvantaged communities as well as by historically diminished indigenous language and cultural groups;
(ii) encourage the development of human resources and training, and capacity building, within the media industry, especially amongst historically disadvantaged groups;
(iii) encourage the channelling of resources to the community media and small commercial media sectors;
(iv) raise public awareness with regard to media development and diversity

²⁶⁰ Preamble of the *MDDA Act*.

²⁶¹ Section 2(4) of the *MDDA Act*.

²⁶² Section 2(5) of the *MDDA Act*.

issues;
(v) support initiatives which promote literacy and it culture of reading;
(vi) encourage research regarding media development and diversity; and
(vii) liaise with other statutory bodies such as the Independent
Communications Authority of South Africa and the Universal Service
Agency.²⁶³

It falls outside of the scope of this study, focussed on the regulation of editorial content, to study the functioning of the MDDA in greater depth, but it does not make its efficacy any less critical. This government agency was created by legislation to promote media development. It is tasked to foster both platform and ownership diversity in light of South Africa's oppressive and divisive past; issues that go to the heart of some of the grievances noted in the calls for an MAT. Expanding media diversity, across different languages, cultures and classes is very important, but a resource-intensive exercise. Apart from this not being the role of a press council, it requires substantial financial investment to incubate and support new media voices and platforms. The effective functioning of the MDDA would likely lessen the incentive behind the calls for an MAT. It is a crucial role-player in addressing challenges faced by the media industry. It is of great importance that the MDDA performs well, as it has an impact on press regulation, being part of the interconnected media sector.

2.10 Conclusion

From the discussion about how the press is regulated by law, having established the constitutional imperative of a free and independent press, it is seen that legal regulation mostly takes place through doctrines developed through legal precedent, interlinked to applicable legislation. These doctrines, including those relating to defamation and the right to privacy, are

²⁶³ Section 3 of the *MDDA Act*.

not solely applicable to the media but are the laws of general application to which every person is bound in the South African republic. It is seen that the media does not inherently enjoy greater rights than the public at large, although the courts have implemented a limited form of press exceptionalism only when so required in the public interest, nevertheless being subject to the balancing of rights. It also appears that the media is not unjustly limited with regard to freedom of expression, as there is no media-specific legislation that serves to substantially determine what the media specifically may and may not publish. It was shown how the legislator has expressly recognised the role of the PCSA by offering exemptions to publications that subscribe to the *Press Code*. It was also studied how self-regulation fits into the legal framework as a form of arbitration and mediation, with decisions taken by the PCSA being able to be brought before a court of law on administrative review.

It was further studied how statutory regulation through the MDDA aims to enhance diversity and transformation within South Africa's media, although this being a matter that should be separated from the regulation of editorial content. It was found that matters of diversity and transformation cannot be the function or mandate of a press council or tribunal that is instituted to regulate editorial content. In light of the calls for an MAT, it was found that that access to a transformed and diverse media is very important, and that is needed to look at challenges faced by the media industry holistically.

CHAPTER 3: CURRENT REGULATORY FRAMEWORK OF THE MEDIA

3.1 Regulation of the press

3.1.1 Introduction

The regulatory system of the press, based on ethical principles rather than on legislation, is discussed in this chapter. The Press Council of South Africa (PCSA) has adopted the *The Press Code of Ethics and Conduct for South African Print and Online Media (the Press Code)*²⁶⁴ and acts as its custodian.²⁶⁵ Due to the fundamental role the PCSA plays as independent regulator of the press, it is necessary to discuss its efficacy comprehensively, in light of the calls for an MAT claiming that the PCSA does not, or is not able to effectively regulate the press. The *Constitution of the PCSA* governs the PCSA,²⁶⁶ and the *Complaints Procedures of the PCSA* guide its adjudicatory role.²⁶⁷ The formation, workings and efficacy of the PCSA and the office of the Press Ombud are discussed in order to determine if the current regulatory system of the press ensures both freedom and accountability. This discussion would also make it possible to evaluate the veracity of the statements made in favour of the MAT, serving the ends of evaluating the calls and establishing what regulatory system is best suited for the press.

²⁶⁴ Attached as Annexure A.

²⁶⁵ PCSA 2018 <http://www.presscouncil.org.za/pcsa-constitution/> s 2.3.

²⁶⁶ PCSA 2018 <http://www.presscouncil.org.za/pcsa-constitution/>.

²⁶⁷ PCSA 2018 <http://presscouncil.org.za/complaints>.

3.1.2 History of press regulation South Africa

The history of press regulation should be highlighted in brief to give insight into the larger surrounding historical context of press regulation in South Africa. The PCSA is rooted in a history that goes back to the year 1962, when the first industry regulator for the press was founded, also called the Press Council of South Africa. It was tasked with implementing the Newspaper Press Union's Code of Conduct, the current day equivalent of the *Press Code*.²⁶⁸ A new body, the South African Media Council, replaced the former regulator in 1983, which had the authority and mandate to regulate both print and broadcast media, and was intrinsically linked to the apartheid dispensation, known for curtailing freedom of expression and the suppression of the freedom of the press. In 1993, with the arrival of the current democratic dispensation, the South African Media Council was abolished and replaced with (again) the Press Council of South Africa, dealing with print media, and the BCCSA, an independent institution mandated with the self-regulation of broadcast media.²⁶⁹ In 1996, in a step to assert the independence of the print media regulator, the then Press Council of South Africa shifted the function of the Press Ombud to that of an independent office, to distance itself as industry organisation from the adjudicatory role of the regulator.²⁷⁰

It was only in 2007 that the PCSA as current press regulator was established. It took over from its predecessor, albeit in a newly envisioned and reinvigorated fashion. The similarly named body was created by the coming together of the then Print Media South Africa, the Newspaper

²⁶⁸ Brand *Media Law in South Africa* 90.

²⁶⁹ Brand *Media Law in South Africa* 90.

²⁷⁰ Brand *Media Law in South Africa* 90.

Association of South Africa, the Magazine Publishers Association of South Africa, the Association of Independent Publishers, the Forum of Community Journalists, and the South African National Editors Forum.²⁷¹ The PCSA is an established institution, drawing from an extended history and continuous development, which has culminated in its current incorporation and the functioning of the PCSA and its Press Ombud.

3.1.3 Functioning of the Press Council of South Africa

The *Complaints Procedures of the PCSA*²⁷² prescribes the procedure for bringing complaints to the PCSA. Complaints brought before the PCSA are first brought before the Public Advocate of this organisation, who assists members of the public in formulating a complaint, and who allows the relevant media entity to file a reply on the matter. At this stage a settlement between the parties is sought, following a negotiation phase based on the "without prejudice" principle. "Without prejudice" means taking part in this stage does not influence a party's right to act or litigate further. Should no settlement be reached, the matter will be referred to the Press Ombud.²⁷³

Cases are mostly adjudicated on the papers, calling for submissions from all sides. However, if the Press Ombud finds it necessary, an informal or formal hearing can also be held. In the case of the latter, the Press Ombud, together with two members of the Adjudication Panel comprising of one member of the public and one member of the press, will decide the case by majority vote.²⁷⁴

²⁷¹ Brand *Media Law in South Africa* 90-91.

²⁷² PCSA 2018 <http://presscouncil.org.za/complaints>.

²⁷³ PCSA 2018 <http://presscouncil.org.za/complaints> ss 1.3, 2.

²⁷⁴ PCSA 2018 <http://presscouncil.org.za/complaints> s 3.

If a party is dissatisfied with the outcome it can be appealed. The Chair of Appeals will grant the appeal if there are valid grounds for the leave to be awarded. The Appeals Committee is composed of one member of the press and up to three members of the public, excluding any members of the Adjudication Panel who sat together with the Press Ombud in the first instance.²⁷⁵

Leeway may be given to any party who does not conform to the procedural stipulations of the PCSA, such as with the extensions of deadlines, should the Press Ombud or Chair of Appeals regard it as fair and in the best interest of justice.²⁷⁶ Normally, no legal representation is allowed in the proceedings of the PCSA, but allowance to this end can be made, depending on the nature of the case, the complexities thereof and whether all parties agree to legal representation.²⁷⁷

If the complaint is not dismissed, the publication can be reprimanded or the Ombud can order an apology, correction, retraction or explanation to be issued in accordance with the severity of the offence or wrongdoing. The Press Ombud or the Chair of Appeals can stipulate requirements for the length, size or placement of the sanction.²⁷⁸

Bringing a complaint before the PCSA does not entail any fees for the complainant. Membership fees from its members fund the PCSA and its operations.²⁷⁹ Reid and Isaacs²⁸⁰ argue that the primary reason for a

²⁷⁵ PCSA 2018 <http://presscouncil.org.za/complaints> s 4.

²⁷⁶ PCSA 2018 <http://presscouncil.org.za/complaints> s 6.

²⁷⁷ PCSA 2018 <http://presscouncil.org.za/complaints> s 5.

²⁷⁸ PCSA 2018 <http://presscouncil.org.za/complaints> s 7.

²⁷⁹ PCSA 2018 <http://www.presscouncil.org.za/pcsa-constitution/> s 4.

²⁸⁰ Reid and Isaacs "Considering a cross-platform media accountability system for broadcast, print and digital new media in South Africa" 22.

publication to voluntarily subscribe to the *Press Code*, and to pay the associated membership fees, is that it extends a great deal of credibility to the publication in question, seeing that the PCSA is an established and acknowledged organisation. One could argue that is also cost-effective for media houses, as they save on legal fees by not having matters brought before a court of law.

The PCSA has jurisdiction over editorial content related to national, provincial and local elections seeing that there is no law that prohibits such jurisdiction. It is stated that top priority is given to complaints related to elections to ensure their speedy resolution, in order to ensure free and fair elections while they are being held.²⁸¹ The *Electoral Act*²⁸² states that no person may publish any false information with the intention of disrupting or preventing an election, or to create hostility or fear in order to influence the conduct or outcome of an election.²⁸³ It also provides that the Electoral Court has final jurisdiction over all election matters in accordance with the *Electoral Code of Conduct*, which could mean that a ruling made by the Press Ombud can be overruled by the Electoral Court.²⁸⁴

3.1.4 Inclusion of online content in the PCSA's regulatory ambit

The regulation of online content was a contentious issue for quite some time in the PCSA's history, which has been mostly resolved through the development and extended jurisdiction of the PCSA. The Press Freedom Commission, a body that was tasked with investigating the regulatory

²⁸¹ PCSA 2018 <http://presscouncil.org.za/complaints> s 1.5.

²⁸² *Electoral Act* 73 of 1998 (hereafter referred to as the *Electoral Act*).

²⁸³ Section 89(2) of the *Electoral Act*.

²⁸⁴ Section 96 of the *Electoral Act*; The *Electoral Code of Conduct* is contained in s 99 of the *Electoral Act*.

system of the press, in its 2012 report (discussed in more detail below)²⁸⁵ recommended that although the regulation of online press content was important, it should not fall within the regulatory ambit of the PCSA. Various reasons for this recommendation were cited, including the consideration that online content is updated frequently and can be changed throughout the day; the difficulty in regulating user-generated content such as comments; the rapid pace of technological advancement; the largely uncontrollable effects and reach of social media; and the fact that websites are hosted on servers around the world which would make the determining of jurisdiction difficult. In its motivation it also stated that the *Films and Publications Act (FPA)* sets out obligations for Internet Service Providers to report on restricted content such as child pornography.²⁸⁶

However, it is argued that these reasons do not form a logical case for online content to fall outside of the regulatory ambit of the PCSA. According to Reid and Isaacs,²⁸⁷ the PFC did not adequately engage with digitally published news content insofar it recommended that the PCSA excludes it from their jurisdiction. They added that the reasoning of the PFC, in this case, was essentially flawed.²⁸⁸ It is not necessary to go into these reasons in full seeing as the PCSA has since included online content into its regulatory jurisdiction.

It was in January 2016 that the PCSA, together with the Interactive Advertising Bureau South Africa (IABSA), resolved to adopt the *Code of Ethics and Conduct for South African Print and Online Media* that includes

²⁸⁵ See 3.1.4 and 3.1.5.1 below.

²⁸⁶ PFC "Report on Press Regulation in South Africa" 57-57.

²⁸⁷ Reid and Isaacs "Press regulation in South Africa: an analysis of the Press Council of South Africa, the Press Freedom Commission and related discourses" 53.

²⁸⁸ Reid and Isaacs "Press regulation in South Africa" 51-52.

online media within the PCSA's ambit.²⁸⁹ The IABSA is an industry representative body that played a part in the discussion surrounding the regulation of online news content.²⁹⁰

As previously discussed,²⁹¹ the PCSA has been expressly recognised by the legislator, with section 16 of the *Films and Publications Act* exempting publications and publishers who belong to the PCSA, and subscribe to the *Press Code*, from the prescriptions of classification that generally apply to publications. After much deliberation, the FPB additionally recognised the PCSA's authority, in collaboration with the IABSA, to regulate online media platforms, provided the publication in question subscribes to the *Press Code* and is recognised by the PCSA.²⁹²

The regulation of both the online and printed press is that which was placed under the spotlight by the call for an MAT, citing ineffectiveness and bias. Studies about the efficacy of the PCSA is discussed forthwith.

3.1.5 *Review of the PCSA's workings*

3.1.5.1 The Press Freedom Commission's report

After repeated calls for an MAT, the Press Freedom Commission (hereafter referred to as the PFC) was set up in 2012 by the South African National Editors Forum (hereafter referred to as SANEF) and the now Print and Digital Media South Africa (hereafter referred to as PDMSA). The PFC, led

²⁸⁹ Bratt 2016 <http://themediainline.co.za/2016/03/press-council-to-now-monitor-online-media-too/>.

²⁹⁰ Reid and Isaacs "Considering a cross-platform media accountability system for broadcast, print and digital news media in South Africa" 19.

²⁹¹ See 2.6.3 above.

²⁹² IAB SA, SANEF and PCSA 2015 <http://www.marklives.com/radar/online-regulation-press-council-authority-recognised-by-fpb/>.

by former Chief Justice of South Africa, Pius Langa, was tasked to compile a comprehensive report on press regulation in South Africa. It did so through calling for submissions from the media industry and members of the public, as well as through public hearings and consultations across the country. The following extract illuminates the PFC's task and process:

[...] the Commission examined the written submissions of 235 civil society groups, political parties, academics and members of the public, travelled to four different countries and held public hearings in three different cities (Cape Town, Durban and Johannesburg). In the light of the ANC's insistent calls for a media appeals tribunal, it was an important and timely process. The eventual report compiled by the PFC, at first glance, suggested relatively sweeping changes to the system of press self-regulation in South Africa. The most significant recommendation lay in the PFC's changing the system of self-regulation to what it called 'independent co-regulation': a system of accountability performed cooperatively by representatives from the press and the public, but independent of government.²⁹³

As part of the recommendations made, the PCSA was reclassified from being a self-regulatory body to an independent co-regulatory body, its membership still being voluntary. Co-regulation entails the equal representation of members of the media and members of the public. This reclassification is described as being a mostly political and symbolic step to have addressed the negative perceptions of the regulator, seeing that members of the public were already represented in the PCSA before the reclassification.²⁹⁴ For this reason the terms "self-regulation" and "independent co-regulation" are used interchangeably, specifically seeing that the former is used as keyword in media studies.

The report was in favour of the current system, provided some policy reforms were made. The recommendations²⁹⁵ entailed that there should be

²⁹³ Reid 2012 <http://www.dailymaverick.co.za/opinionista/2012-10-24-media-freedom-debacles-aside-the-press-is-failing-us>.

²⁹⁴ Reid and Isaacs "Press regulation in South Africa" 7.

²⁹⁵ PFC "Report on Press Regulation in South Africa" 8-9, 67-71.

more members of the public than members of the media industry in the PCSA,²⁹⁶ that there be a majority public representation on the Appeals Panel,²⁹⁷ that the Public Advocate's sole power to decide which cases can be heard should be limited,²⁹⁸ the waiver requirement should be expunged,²⁹⁹ third party complaints should be allowed,³⁰⁰ the protection of children in the *Press Code* should be strengthened,³⁰¹ and that the hierarchy of sanctions should be reviewed in accordance with the seriousness of infractions.³⁰² The PFC also noted that content diversification, skills development and training, a media charter and support for community newspapers are much needed, but that these do not fall within the mandate of the PCSA. Media diversity and transformation was previously discussed.³⁰³

3.1.5.2 Academic studies into the efficacy of the PCSA

There have been further studies conducted and reports compiled about the work of the PCSA which are invaluable for this dissertation as they evaluate in depth the efficacy of the Press Ombud system in light of calls for an MAT. The most recent study (published in 2015) is co-authored by Reid and Isaacs,³⁰⁴ named "Press regulation in South Africa: an analysis of the Press Council of South Africa, the Press Freedom Commission and related

²⁹⁶ Section 5 of the *Constitution of the PCSA* provides for a public/media ratio of 50/50; PCSA 2018 <http://www.presscouncil.org.za/pcsa-constitution/>.

²⁹⁷ Implemented through s 6.6 of the *Constitution of the PCSA*; PCSA 2018 <http://www.presscouncil.org.za/pcsa-constitution/>.

²⁹⁸ Implemented through s 1.8 of the *Complaints Procedure of the PCSA*; PCSA 2018 <http://presscouncil.org.za/complaints>.

²⁹⁹ Discussed at 3.1.7.2 below.

³⁰⁰ Discussed at 3.1.7.2 below.

³⁰¹ Implemented through s 8 of the *Press Code*, see Annexure A.

³⁰² Implemented through s 8 of the *Complaints Procedure of the PCSA*; PCSA 2018 <http://presscouncil.org.za/complaints>.

³⁰³ See 2.9.2 above.

³⁰⁴ Reid and Isaacs "Press regulation in South Africa" 7.

discourses", a study conducted as part of work of the *Media Policy and Democracy Project*. The authors collected and interpreted statistical data of the efficacy of the PCSA by looking at the cases brought before the PCSA between 2009 and 2013, and compared this to the findings and recommendations made by the PFC. Reid and Isaacs's study addresses matters which are not covered by the PFC report, and as such, it is valuable to draw from the detailed work and findings of this study. An earlier study was conducted by Edwards³⁰⁵ (published in 2012) in fulfilment of a Master of Arts in Communication degree, interpreting the cases brought before the PCSA between August 2007 and August 2011. These are the available sources that are drawn from for the discussion about the PCSA's efficacy. They remain relevant as they were published when the calls for an MAT were made.

The report by Reid and Isaacs set out to address a range of questions related to the PCSA, specifically taking into consideration the repeated calls for an MAT, based on the perceptions that the regulatory system is biased in favour of the press, and is not able to adequately perform its mandate. They state that most of the previous discourse surrounding the regulatory system of the press, including the calls for an MAT, had been based on "estimation, sometimes political interest, personal motivations, or conjecture".³⁰⁶ The key questions asked by Reid and Isaacs regarding the PCSA are as follows:

Is the PCSA and the Ombudsman biased in favour of the press?

What are the various profiles of the complainants?

³⁰⁵ Edwards *Towards press freedom through self-regulation: Trends in South African press ombudsman cases (August 2007 – August 2011)*.

³⁰⁶ Reid and Isaacs "Press regulation in South Africa" 7.

Is the prominence of the sanction stipulated and adhered to when it is published?

Does the PCSA take too long to resolve complaints?

Is the quality of news reporting in South Africa declining with regard to the code of ethics?

Is the PCSA a 'toothless' mechanism, resulting in publications repeating consistent breaches of the press code?³⁰⁷

Seeing that these questions go to the heart of the matter of the proper functioning of the PCSA, their findings will be outlined as it is directly relevant in responding to the calls made for an MAT. Findings of Edwards are also incorporated. It needs to be noted that as the research questions and methods of the two studies differed, as well as the timeframes in which they were conducted, that the findings of the two reports are not directly comparable, yet mutually supporting.

3.1.5.2.1 Is the PCSA and the Ombudsman biased in favour of the press?

The Reid and Isaacs study made its findings from an evaluation of all complaints coming before the PCSA between 2009 and 2013. From the 1433 complaints that were submitted to the PCSA, 1083 complaints were dismissed as they were deemed unacceptable for being anonymous, malicious, fraudulent or because the matter fell outside of the mandate of the PCSA. According to the report, if the complaints were resolved amicably between the complainant and the publication, through the Public Advocate, they were also dismissed. Such dismissals shouldn't subtract from the value of resolves before adjudication as facilitated by the Public Advocate, as a function of the PCSA. In the focus period of their study, 350 complaints were formally ruled upon. From these, 200 rulings were those in favour of the

³⁰⁷ Reid and Isaacs "Press regulation in South Africa" 8.

complainant, sanctioning the offending publication for breach of the *Press Code*, whereas 147 rulings were in favour of the publication in question, having found that no breach of the *Press Code* had occurred. It is argued that from this no apparent bias in favour of the press can be deduced, as a clear majority of complaints were held against the publication in question.³⁰⁸

This being said, the high number of cases dismissed could give rise to the indication of bias. In her study, Edwards found that 53% of all cases in the period August 2007 to August 2011 were dismissed, stating that "[t]his may be regarded as fuel to the fire in the light of criticism levelled at the ombudsman for being biased toward the press in his rulings".³⁰⁹ However, Edwards states that the dismissal of so many complaints is rather an indication of the lack of knowledge about the mandate of the Press Ombud acting in accordance with the *Press Code*. It is also stated that the dismissed complaints might very well have lacked enough substance to be considered, or as it is put, "simply did not hold any water".³¹⁰ It is argued that the dismissed complaints do not go against showing that the Ombud had been fair in his rulings, that the press did not transgress the *Press Code* as much as critics would say, and that a small amount of successful appeals (9% partially successful and 3% successful)³¹¹ indicate that the rulings of the Ombud "were free of any obvious bias and the acceptance of most complainants of the outcomes of their complaints".³¹²

³⁰⁸ Reid and Isaacs "Press regulation in South Africa" 10, 58.

³⁰⁹ Edwards *Towards press freedom through self-regulation: Trends in South African press ombudsman cases (August 2007 – August 2011)* 66.

³¹⁰ Edwards *Towards press freedom through self-regulation: Trends in South African press ombudsman cases (August 2007 – August 2011)* 68-69.

³¹¹ Edwards *Towards press freedom through self-regulation: Trends in South African press ombudsman cases (August 2007 – August 2011)* 75.

³¹² Edwards *Towards press freedom through self-regulation: Trends in South African press ombudsman cases (August 2007 – August 2011)* 82.

Edwards' study is also valuable as it specifically studied complaints by the ANC as well as national, provincial and local government, offering insight into the statistics of political cases. Edwards acknowledges the ANC's major criticism that the Ombud was biased in favour of the press, but states that her findings dispel this critique. It was found that less than half of all government complaints were dismissed, and that 34% of the dismissed cases and 100% of lapsed cases were due to the governmental complainants either not signing the waiver or failing to respond to communication during the complaints process. It is also found that the small number of appeals by government supports the case for the Ombud's fair approach.³¹³ Furthermore, it was found that out of all complainant types, government complainants held the largest percentage (14%) of upheld cases, while a further 14% of such complaints were partially upheld/dismissed, also supporting the case against bias by the Press Ombud, especially against the ANC and government.³¹⁴

3.1.5.2.2 What are the various profiles of the complainants?

According to the Reid and Isaacs report, of the 350 complaints that were ruled upon, 70 came from national, provincial and municipal branches of government, whereas 29 complaints were from political parties, of which the ANC submitted 12 complaints, more than any other political party. Celebrities and public figures submitted 26 complaints in total. The Office of the President submitted three complaints, the South African Police Service two, and the SABC six. Educational institutions submitted 14 complaints.

³¹³ Edwards *Towards press freedom through self-regulation: Trends in South African press ombudsman cases (August 2007 – August 2011)* 117.

³¹⁴ Edwards *Towards press freedom through self-regulation: Trends in South African press ombudsman cases (August 2007 – August 2011)* 71.

The overall majority of complaints came from the business and private sector that submitted a total of 140 complaints.³¹⁵

In light of these findings Reid argues against the claims that the press is disproportionately focused on the faults and actions of the ruling party, as claimed in the calls for an MAT, by referring to the business and private sector's usage of the PCSA system:

Although most of the criticism for the Press Council stems from political parties, these don't make up the bulk of the complainants. The largest majority of rulings (47.91%) emanate from complaints laid by the business and private sector. This is significant because it indicates three things. First, the business sector is far less tolerant of criticism by the press than the political sector. Second, the press is often criticised for publishing content that is critical of government/politicians, and comparatively too little content critical of corporates and the private sector – but these figures indicate that this assumption may not be accurate. Third, where the reputation of a company/prominent business person is involved (often a marketing or public relations concern), the business sector shows a remarkable level of trust in the current press regulatory system.³¹⁶

Edwards, using different metrics, found that 52% of cases received by the Ombud from August 2007 to August 2011 came from the public. Businesses and organisations submitted 22% of the complaints, government 15% and politicians and public figures 8%. It is similarly highlighted that the amount of government complaints is relatively small in comparison, being notable as it is government that is the fiercest critic of the system of self-regulation.³¹⁷

³¹⁵ Reid and Isaacs "Press regulation in South Africa" 15, 58-59.

³¹⁶ Reid 2015 <http://www.dailymaverick.co.za/opinionista/2015-12-07-is-the-anc-right-about-press-regulation-research-says-no>.

³¹⁷ Edwards *Towards press freedom through self-regulation: Trends in South African press ombudsman cases (August 2007 – August 2011)* 57-58.

3.1.5.2.3 Is the prominence of the sanction stipulated and adhered to when it is published?

Of the 200 rulings in favour of the complainant over the period of Reid and Isaacs' study, 95 were allocated a directive of prominence by the Press Ombud, entailing an order to publish an apology and correction, of which the content, size and placement were stipulated.³¹⁸ The sanction often follows the prominence and size of the original and infringing published content. In one case, for instance, *Drum* magazine was ordered to publish the following on its front page: "Drum apologises to Bonang Matheba, We never spoke to her, We made up quotes, We broke the law, We caused her unnecessary harm."³¹⁹ In addition, the magazine was directed to "publish inside the magazine the same picture at the same size that was used for the story in dispute, together with the specified text."³²⁰

As noted by the report, the frequency at which the prominence of the sanction was stipulated increased drastically until the last year of study in 2013 and remained so until 2015 when the report was published. The prominence of the sanction was stipulated in 61 of the 65 cases in 2013, which accounts for 94% of cases.³²¹ The study found that when the prominence is stipulated it is adhered to 100% of the times.³²²

From this, it is seen that the prominence of sanctions is not only stipulated in most cases when there is found against a publication, but that these stipulations are almost always adhered to. No argument can thus be made

³¹⁸ Reid and Isaacs "Press regulation in South Africa" 60.

³¹⁹ Reid and Isaacs "Press regulation in South Africa" 17, 143.

³²⁰ Reid and Isaacs "Press regulation in South Africa" 143.

³²¹ Reid and Isaacs "Press regulation in South Africa" 60.

³²² Reid and Isaacs "Press regulation in South Africa" 60.

that the subscriber publications of the PCSA do not adhere to the sanctions made against them. Edwards didn't specifically look at the adherence to sanctions, although indicated no concern about the matter.

3.1.5.2.4 Does the PCSA take too long to resolve complaints?

In Reid and Isaacs' study period into the PCSA's efficacy, a substantial increase in complaints were noted, together with a largely improved turnover time of resolving these complaints. In 2009, it took an average of 299 days for a complaint to be resolved, from where it steadily improved to a turnover of 59 days per complaint in 2013.³²³ 151 cases were recorded in 2009, whereas the amount incrementally rose to 529 complaints in 2013, a great increase, all while the resolving of complaints became much more efficient.³²⁴ These figures are attributed to the growth in prominence and visibility of the PCSA, the work of the Public Advocate, and the publicised process of review as performed by the PFC.³²⁵

Edwards notes that during her study it was not possible to accurately determine turnaround times on cases dealt with by the Ombud, due to incomplete record-keeping and as the date of outcome wasn't always noted.³²⁶ As her study precedes that of Reid and Isaacs, the more recent study is valuable in this regard. It can be deduced that although the adjudication of complaints appears to have taken long in the past, it has improved by a great deal and does not appear to be a matter of concern from the available data.

³²³ Reid and Isaacs "Press regulation in South Africa" 60.

³²⁴ Reid and Isaacs "Press regulation in South Africa" 17.

³²⁵ Reid and Isaacs "Press regulation in South Africa" 17.

³²⁶ Edwards *Towards press freedom through self-regulation: Trends in South African press ombudsman cases (August 2007 – August 2011)* 78.

3.1.5.2.5 Is news reporting's quality declining with regard to the Press Code?

To answer the question of whether the quality of news reporting in South Africa was undergoing a decline and could be categorised as bad, Reid and Isaacs conducted a study of the amount of breaches of the *Press Code* by the press. Of the more than 640 subscriber publications to the *Press Code*, as noted during Reid and Isaacs' five-year study, 83 were implicated in complaints submitted to the Press Ombud.³²⁷ Their report sets out which provisions in the *Press Code* were infringed, as well as the frequency of these offences and their recurrence. Reid and Isaacs found that the measurable infringements of the *Press Code* by publications were low. They state that "[c]ritics of the print media sector have since 2010 argued that the print news media in South Africa display a continuing decline in the quality of journalism, especially with regard to ethics. These findings do not validate that argument, and indeed indicate the contrary."³²⁸

They do continue, however, to highlight the limitations of their findings, to make it clear that a study of this nature, using the *Press Code* as an ethical framework and measure is only one way of looking at the quality of journalism in South Africa:

[T]his exercise cannot measure broader aspects of the media economy and political-economy, which would relate to a broader definition and understanding of 'high quality journalism'. For example, the mainstream print media sector has been criticised for offering investigative content which concentrates predominantly on state or government corruption, while offering comparatively little investigative content on corporate corruption. That said, it is notable that the findings presented in [...] this report, indicate that the business sector is far more likely to lay a complaint against a print publication than the government sector or political parties. Since this is the case, the view that the press enacts an apparent dearth of reporting on, for example, private

³²⁷ Reid and Isaacs "Press regulation in South Africa" 18.

³²⁸ Reid and Isaacs "Press regulation in South Africa" 31.

sector corruption may require further investigation, since the findings of this report suggest otherwise.

Similarly, the print media has been accused of offering content which displays a poverty of varying views, opinions, ideas or political diversity, while speaking most commonly to the interests of the economically strong and ignoring the interests and stories of the grassroots level and economically weak section of society (who are in the majority). The manner in which economic constraints negatively impact the capacity of print publication newsrooms, especially with regard to the declining readership figures owing in part to the on-set of digitally distributed news via online platforms, and the direct impact which this has on the potential for working journalists to deliver well-researched, in-depth, and high-quality reporting is also of concern.

Such concerns ought rightly to be addressed within a discussion of the broader context of the quality of journalism, but the methodology for such a study would involve a detailed content analysis, an ethnographic study, and an economic environment assessment, which is not the purpose of this report.³²⁹

Edwards does not make a definitive finding about the ethical quality of the South African journalism, but rather that the Press Ombud fulfilled his role of enforcing a socially responsible *Press Code*. It is said that the Ombud through adverse findings against the press encouraged professionalism and ethical standards.³³⁰ It is argued by Edwards that although the effectiveness of press councils should ideally be judged based on the council's ability to change the behaviour of media for the better over a period of time, that this is a much larger and more intricate study to conduct, being outside the scope of looking at the internal functioning of the PCSA.³³¹

Likewise, it is not within the scope of this legal study into press regulation to conduct in-depth media content analyses. The focus continues to be on how editorial content is regulated, and how this is best done within the

³²⁹ Reid and Isaacs "Press regulation in South Africa" 31-32.

³³⁰ Edwards *Towards press freedom through self-regulation: Trends in South African press ombudsman cases (August 2007 – August 2011)* 84.

³³¹ Edwards *Towards press freedom through self-regulation: Trends in South African press ombudsman cases (August 2007 – August 2011)* 127.

constitutional framework, amidst calls for statutory regulation of the press. It is assumed that the proper functioning of the body tasked with enforcing media ethics will have the effect of a more responsible press.

3.1.5.2.6 Is the PCSA a 'toothless' mechanism?

The last key question about the efficacy of the PCSA is related to whether or not the PCSA is a "toothless" system, an allegation made in the calls for an MAT. The PCSA does not issue financial fines as part of its regular sanctions. As discussed above, the PCSA employs the usage of space fines, amongst other punitive measures, ordering publications to publish the findings and ruling of the Press Ombud, along with a specified headline, to be approved by the office of the Ombud before being published. The considerations regarding placement are determined in light of the degree of seriousness of the offence, together with the prominence and placement of the original infringing material.³³²

Also addressed above, the report by Reid and Isaacs found that the number of repeat offenders of a particular article of the *Press Code* was low and that it happens "in remarkably few and limited cases".³³³ The conclusion is made, with regard to the argument that the PCSA is a toothless mechanism, that such an argument cannot be validated "with any reasonable substantiation or according to empirical or statistical evidence".³³⁴ From the available evidence it would thus appear that the PCSA has bite, in contrast with being labelled "toothless". To expand on this finding, it is worth taking a deeper look at the sanctions of the PCSA and their effectiveness.

³³² Reid and Isaacs "Press regulation in South Africa" 32-33.

³³³ Reid and Isaacs "Press regulation in South Africa" 35.

³³⁴ Reid and Isaacs "Press regulation in South Africa" 36.

3.1.6 Sanctions of the PCSA

A hierarchy of sanctions (consisting of reprimands, caution, corrections, retractions and apologies) is set out by the PCSA: being that of minor breaches (tier 1), serious breaches (tier 2) or serious misconduct (tier 3). The Press Ombud or the Chair of Appeals will determine the sanction according to the seriousness of the transgression – ranging from a small correction to any page in the publication, to a space determined fine which could be directed to be placed on the front page of the publication. The design and text of the sanction need to be approved by the Ombud.³³⁵

Monetary fines are not imposed by the PCSA, except in the case of non-compliance by recalcitrant members. In the case of serious violation of the Press Code, a publication may be suspended or expelled from the PCSA.³³⁶ According to a report presented by Raymond Louw, former Chairman of the PCSA at the SANEF Summit during August 2010, it is to the advantage of the freedom of the press and the public that monetary fines are not imposed within the open and flexible structure of an independent regulatory body. It is worth including an extended quote from Louw as he addresses the desirability of space fines versus monetary fines directly:

In regard to the Ombudsman's inability to impose 'serious' penalties, the ombudsman indeed imposes what is regarded by the media as a very serious sanction. If found to have offended the press code, a paper can be called upon to publish a correction and an apology and may even be reprimanded. These strictures have to be published prominently under the orders of the Ombudsman or Appeals Panel judge. Punishment as damning as this strikes at the heart of a newspaper's operation. It tells the public that the newspaper was not only inaccurate but that it behaved unprofessionally or even dishonestly. Nothing damages a newspaper more punitively than a finding

³³⁵ Clause 8 of the *Complaints Procedure of the PCSA*; PCSA 2018
<http://presscouncil.org.za/complaints>.

³³⁶ Clause 8 of the *Complaints Procedure of the PCSA*; PCSA 2018
<http://presscouncil.org.za/complaints>.

against its credibility and trustworthiness which, as stated above, could result in readers withdrawing support and circulation falling which can have an affect on advertising sales with the ultimate sanction being the closure of the business.

Answering the question why it does not impose fines, the British Press Complaints Commission says: In order to do this, the PCC would probably have to have statutory powers of enforcement, which would fundamentally change the nature of the system it oversees. Many of the existing benefits would be removed or reduced—it would become more legalistic, more confrontational and less flexible. But in any case, evidence from other countries suggests that where fines do exist (for example in France) editors risk publishing intrusive stories—and then paying the damages—because the increase in sales more than compensates for the cost of the fine. The system of critical adjudications available to the PCC is actually a much more powerful sanction as it acts effectively as a powerful 'name and shame' sanction.

A survey conducted by the New Zealand Press Council in 2007 found that of the 87 press councils it identified in the democratic world, 75 adopted this punishment procedure because they regarded it as the most effective way of dealing with breaches of the code.³³⁷

From the above it can be deduced that space fines are effective as it is a visible way of correcting incorrect information and reprimanding unethical behaviour by the press, in a way that is publicly visible and that goes to the heart of a publication's business. It is also alleged that the absence of monetary fines is integral to the nature of functioning of the PCSA, ensuring the speedy, flexible and accessible nature of the independent co-regulatory mechanism. It is also pointed out that this form of reprimand is preferred by press regulatory bodies across the world and can be considered as the norm.³³⁸

³³⁷ Louw "Press Ombudsman system vs. ANC's proposed Media Appeals Tribunal" unnumbered.

³³⁸ Norms and benchmarks of press regulation are discussed at 6.2 below.

3.1.7 *Faltering of the PCSA through Independent Media's withdrawal*

3.1.7.1 Introduction

Publications that subscribe to the authority of the PCSA, undertaking to act in accordance with the *Press Code*, predominantly form part of the umbrella association PDMSA. The PDMSA consists out of the largest print and online media companies in South Africa, namely Media24, Tiso Blackstar Group (formerly Times Media Group), Independent Media, Mail & Guardian, Caxton and CTP Publishers and Printers, and the Association of Independent Publishers, last of which represents a diverse membership of smaller community based print and online publications. The PDMSA state that the number of member publications of the association has grown to over 700 titles, catering to four different language groups.³³⁹

If a complaint is laid against a publication that does not subscribe to the PCSA, either directly or through another representative body such as PDMSA, jurisdiction can be established by the Public Advocate or Press Ombud approaching the publication in question to determine whether it subscribes to the *Press Code* and is willing to subject itself to the PCSA's jurisdiction for the adjudication of the complaint.³⁴⁰ If the publication refuses to do so, the PCSA cannot adjudicate the matter and is limited to making suggestions of alternative dispute resolution options available to the complainant.³⁴¹ The greatest strength of the PCSA lies within its ability to

³³⁹ PDMSA date unknown <http://www.pdmedia.org.za/whoweare.html>.

³⁴⁰ Section 6.1.4 of the *Constitution of the PCSA*; PCSA 2018
<http://www.presscouncil.org.za/pcsa-constitution/>.

³⁴¹ Section 6.1.4 of the *Constitution of the PCSA*; PCSA 2018
<http://www.presscouncil.org.za/pcsa-constitution/>.

make a claim that, apart from its effective functioning, all major print and online publications subscribe to its authority.

One of South Africa's largest media houses, Independent Media, withdrew from the PCSA in 2016. The reason it gave for doing so was that a waiver clause, that had to be signed by the complainant as part of the complaint form, had been abolished. The waiver stipulated that matters brought before the PCSA's adjudication body may not be brought before a court of law or any other tribunal following the PCSA proceedings. The waiver effectively limited the remedy of the complainant to the finding by the Press Ombud, or to that of the Chair of Appeals as forum of last resort.

Together with the statement of their withdrawal, Independent Media reiterated that they are opposed to state regulation.³⁴² However, it can be said that their withdrawal was a substantial setback for the current regulatory system, which needs trust and participation from both the press and the public to function effectively. It is necessary to look at the reasons for Independent Media leaving the PCSA, as well as to study how this impacts the regulatory system at large amidst the calls for its reform.

3.1.7.2 Removal of the waiver clause and allowance of third-party complaints

The waiver mentioned above, requiring a complainant to waive his, her or its rights to instigate legal action after a finding has been made by either the Press Ombud or the Chair of Appeals, was meant to thwart "fishing expeditions" of complainants approaching alternative forums if their case as

³⁴² Gqirana 2016 <https://www.news24.com/SouthAfrica/News/editors-forum-disappointed-at-independent-medias-press-council-exit-20161022>.

adjudicated on by the PCSA was unsuccessful, also limiting the need for publications having to answer twice on the same complaint.³⁴³

In its report, the PFC recommend the scrapping of such a waiver, arguing that the signing of such a waiver is non-existent in other countries with high levels of press freedom, citing Denmark, Sweden, the United Kingdom and New Zealand.³⁴⁴ Secondly, the PFC stated that the complainant could still be made aware that, seeing that all parties wilfully choose the PCSA as being "designed to be a quick, cheap and effective manner of resolving a dispute", the matter should not be brought before a court after the proceedings have been brought before the PCSA.³⁴⁵ It is added that "a court would in all likelihood not entertain a matter before it if the matter was seized before another body, such as the Press Council/Ombudsman's Office".³⁴⁶ It is stated that the PCSA complaints process is meant to be non-litigious and that a waiver creates an unnecessary barrier with regard to the accessibility of the complaints procedure. It is added that a court would, in the unlikely case of a future claim, be obliged to take into consideration the ruling by the PCSA. It is also argued that the possibility of some cases later ending up in a court of law should be tolerated, as the absence of a waiver clause is in the overall best interest of the PCSA regulatory system at large.³⁴⁷

The constitutionality of a contractual waiver preventing a person from having a dispute resolved by a court of law has also been questioned. It is argued that although parties have the right to agree on the stipulations of an arbitration agreement, and that findings made out of such an agreement can

³⁴³ PFC "Report on Press Regulation in South Africa" 41-42.

³⁴⁴ PFC "Report on Press Regulation in South Africa" 42.

³⁴⁵ PFC "Report on Press Regulation in South Africa" 42.

³⁴⁶ PFC "Report on Press Regulation in South Africa" 42.

³⁴⁷ PFC "Report on Press Regulation in South Africa" 19, 42-43.

be enforced by the courts (or taken on review), it might very well be an unreasonable limitation to limit access to the courts on a certain matter in perpetuity, beyond that of during a mediation process.³⁴⁸

Independent Media, which owns *Cape Times*, *Cape Argus*, *IOL*, *Pretoria News*, *Sunday Independent* and *The Star*, amongst other newspaper and magazine titles, stated their disagreement with the above. In a press release it was said:

The removal of the waiver by the Press Council has the unintended consequence of involving Independent Media and other media houses in excessively high legal costs which cannot be justified in the current economic climate in which media companies find themselves.³⁴⁹

The press release continued to state that Independent Media continues to be committed to self-regulation of the media and is still "vehemently opposed" to both state regulation and the prospect of the MAT. It concludes that for these reasons, Independent Media will be taking on all the regulatory matters onto themselves, appointing their own Press Ombud and instituting a new regulatory authority called the Independent Media Press Appeal Tribunal, to be chaired by a retired judge.³⁵⁰

Reacting to the above, Reid³⁵¹ argues that third-party complaints, which are necessary for the proper functioning of the PCSA, were incompatible with the waiver clause, in that the two cannot co-exist within the same procedural framework. Third-party complaints were allowed by the PCSA only in "exceptional circumstances", but the PFC report made the recommendation

³⁴⁸ Duncan 2011 *Ecquid Novi: African Media Studies* 97.

³⁴⁹ Independent Media 2016 <https://www.iol.co.za/business-report/companies/rantao-appointed-as-independent-media-press-ombudsman-2082067>.

³⁵⁰ Independent Media 2016 <https://www.iol.co.za/business-report/companies/rantao-appointed-as-independent-media-press-ombudsman-2082067>.

³⁵¹ Reid 2016 <https://www.dailymaverick.co.za/opinionista/2016-10-24-independent-medias-excuses-for-ditching-the-press-council-make-no-logical-sense/>.

that third-party complaints should be allowed within reason, with policy mirroring section 38 of the South African *Constitution* that includes the right of any person to approach a court of law if it is in the public interest, having an impact on society at large.³⁵² According to the *Complaints Procedures of the PCSA*, complaints can be made by those who are "acting as a member of, or in the interest of, a group or class of persons".³⁵³ Following Reid's logic, it would not make sense to have a complainant sign a waiver for a complaint relating to a issue that impacts society at large (LGBTI+ rights, for instance), only to have another person complaining about the same matter at a different forum. This would make the requirement of signing a waiver senseless.

Notably, and related to the submitting of third-party complaints, it is stated that the Public Advocate of the PCSA may file a complaint with the Press Ombud 30 working days after the date of publication of the editorial content in question, and when no complaints have been made by any other party, if the Public Advocate deems it to be in the public interest to do so, noting a *prima facie* contravention of the *Press Code*.³⁵⁴ This provision is relevant for later findings of this dissertation.

Before analysing Independent Media's withdrawal in more depth, it is worth noting another factor that also advocates against the requirement of signing a waiver when approaching the Press Ombud. Edwards³⁵⁵ found that a major reason for the dismissal or lapsing of many cases brought before the

³⁵² PFC "Report on Press Regulation in South Africa" 43-44; s 28 of the *Constitution*.

³⁵³ Section 1.1 of the *Complaints Procedure of the PCSA*; PCSA 2018
<http://presscouncil.org.za/complaints>.

³⁵⁴ Clause 1.9 of the *Complaints Procedure of the PCSA*; PCSA 2018
<http://presscouncil.org.za/complaints>.

³⁵⁵ Edwards *Towards press freedom through self-regulation: Trends in South African press ombudsman cases (August 2007 – August 2011)* 117-118.

PCSA in the past was due to the complainants not being willing or failing to sign to waiver. It is written that:

The waiving of one's constitutional right to legal recourse in the self-regulation process was one of the ANC's major critiques. However, the ombudsman has dispelled this criticism by arguing that outcomes of the [Press Appeals Panel] may be taken on review to the High Court and its office is legitimised in its private arbitration function. It was not just the ruling party that took issue with the waiver, however, since the PCSA Review Task Team received several submissions from the public and business to amend or do away with the waiver.³⁵⁶

Independent Media's issue taken with the now-expunged waiver clause and how their withdrawal from the PCSA has affected the self-regulatory system are discussed in more detail below.

3.1.7.3 The effects on the current press regulatory system

Reid³⁵⁷ criticises the reasons provided by Independent Media for their withdrawal from the PCSA. On Independent Media citing high legal costs as a result of the lack of a waiver, Reid states that neither the Director of the PCSA, nor the Press Ombud was aware of a single case that had been instituted as a legal proceeding after being adjudicated on by the PCSA, questioning whether this is the real reason for their withdrawal. She goes on to highlight that another independent regulatory body would easily accumulate to a much greater cost than continuing to be a member of the PCSA. The costs she mentions are those of "an Ombudsman, a judge, a senior advocate, a Public Advocate, support staff, administrative capacity,

³⁵⁶ Edwards *Towards press freedom through self-regulation: Trends in South African press ombudsman cases (August 2007 – August 2011)* 117-118.

³⁵⁷ Reid 2016 <https://www.dailymaverick.co.za/opinionista/2016-10-24-independent-medias-excuses-for-ditching-the-press-council-make-no-logical-sense/>.

relevant software and archiving systems, office space, hardware and, a country-wide public participation process".³⁵⁸

It is difficult, in light of all the circumstances, to envision the Independent Media Press Appeal Tribunal being sufficiently independent of Independent Media, seeing that their ombud will be on the same company's payroll whose publications the ombud is supposed to regulate. This, together with the fact that the elected ombud is a former editor of several Independent Media titles, is raised as a concern by Reid.³⁵⁹ Although Independent Media stated its firm opposition towards an MAT, by their actions they have considerably weakened the case against the calls for greater statutory regulation, with Reid concurring:

[I]t has taken a humungous lack of foresight and a dearth of political savvy for Independent Media not to realise how their sudden unceremonious abandonment of the Press Council has weakened the position of those of us who do not want to see the establishment of a government print regulator. Independent Media now joins the New Age, since the latter opted out of the Press Council last year. It would not be a far leap for detractors to argue that too many of our country's newspapers are now unaccountable to a reliable regulatory body, and therefore there is an urgent necessity to establish a government print regulator.³⁶⁰

Independent Media also now falls outside of the exemption offered by the *Films and Publications Act*,³⁶¹ effectively having opted into statutory regulation by the FPB. However, it would appear that Independent Media's

³⁵⁸ Reid 2016 <https://www.dailymaverick.co.za/opinionista/2016-10-24-independent-medias-excuses-for-ditching-the-press-council-make-no-logical-sense/>.

³⁵⁹ Reid 2016 <https://www.dailymaverick.co.za/opinionista/2016-10-24-independent-medias-excuses-for-ditching-the-press-council-make-no-logical-sense/>.

³⁶⁰ Reid 2016 <https://www.dailymaverick.co.za/opinionista/2016-10-24-independent-medias-excuses-for-ditching-the-press-council-make-no-logical-sense/>; *The New Age* was a newspaper in print and online. It withdrew from the PCSA's authority in March 2015, at a time it was facing serious sanctions by the PCSA; Nevill 2015 <http://themediamonline.co.za/2015/03/the-new-age-pulls-out-of-press-council/>.

³⁶¹ See 2.6.3 above.

publications are not being classified in terms of the *FPA* before being distributed. This is a matter that requires further inquiry.

Another matter to consider is the requirement that a refundable deposit of R5,000 be paid by any business that wishes to make use of Independent Media's ombud services:

Any complainant other than a natural person, a registered Non-Profit Organisation or a Public Benefit Organisation, shall pay a refundable deposit of R5 000.00 before the complaint will be considered by the Ombuds. The deposit will only become payable if no settlement [...] can be reached. If the complainant [...] is substantially successful, the deposit shall be refunded to the complainant.³⁶²

It is stated that the ombud may waive the requirement of a deposit when good cause exists as to the discretion of the ombud.³⁶³ The requirement of a deposit could easily be perceived as being inherently hostile towards the complainant and could very well discourage complaints from being initiated in the first place. This goes against the principle of accessibility as espoused by the PCSA. It is also strange that a complainant should have to pay a substantial deposit to the very company it intends to complain against. Through the term "substantially successful" it is also not clear if the deposit is returned if it is found in favour of the publication, having the effect of punishing a complainant for making use of a complaints mechanism.

In light of Independent Media's withdrawal from the jurisdiction of the PCSA, it might very well be that the voluntary nature of the PCSA becomes a pertinent weakness. The gap left, of having a number of prominent newspapers and other publications being unaccountable to an independent

³⁶² Section 3 of the *Independent Media Complaints Procedure*; Independent Media date unknown <https://www.iol.co.za/complaints>.

³⁶³ Section 3 of the *Independent Media Complaints Procedure*; Independent Media date unknown <https://www.iol.co.za/complaints>.

and credible sector-based regulator weakens the case against an MAT. The *Constitution of the PCSA* stipulates that any publication wanting to withdraw from the regulatory authority of the PCSA should give three years notice.³⁶⁴ This being said, the PCSA has not taken legal steps against Independent Media due to its withdrawal without due notice. This is also a matter that could benefit from further inquiry.

3.1.8 Conclusion

In this discussion the formation, workings and efficacy of the PCSA in regulating the press were discussed in order to determine the veracity of the critique against its workings. It was found, by drawing from extensive research about the workings of the PCSA, that its effectiveness seems to be in good standing and that statements claiming otherwise do not meet up with factual findings. However, it is argued that the PCSA's role can only be considered effective if all major publications subscribe to both its authority and the *Press Code*, ensuring the accountability of publications and the credibility of the PCSA as a recognised independent regulator. Going ahead it is necessary to look at how statutory regulation co-exists with independent voluntary regulation in the broadcast media sphere.

3.2 Regulation of broadcast media

3.2.1 Introduction

Broadcast media, encompassing television and radio, are regulated by a different system from that of the PCSA. The system comprises both a statutory and independent regulatory body which makes it a suited example

³⁶⁴ Section 4.3 of the *Constitution of the PCSA*; PCSA 2018
<http://www.presscouncil.org.za/pcsa-constitution/>.

to compare to the regulatory system of the printed and online press. The South African broadcast media regulatory system serves as a valuable case study of how state sanctioned regulation can co-exist with independent self-regulation. The parameters of looking into the regulation of broadcast media are set to where it relates to editorial content. Broadcast media as a medium differs substantially from the printed and online press in that the airwaves it uses are finite. As the airwaves are considered to be a limited public resource, it is also regulated in technical ways, which are not the concern of this study. The online and printed press do not make use of a limited frequency spectrum and is thus not subjected to technical regulation. The two different regulators of the South African broadcast media are discussed accordingly.

3.2.2 The Broadcasting Complaints Commission of South Africa

Much like the PCSA, the Broadcasting Complaints Commission of South Africa (hereafter referred to as the BCCSA) regulates those media entities that voluntarily subscribe to one of its codes of conduct.³⁶⁵ Similar to the *Press Code*, the codes of conduct set out a range of content that is prohibited from being broadcasted in two separate codes, one for free to air licensees and another for subscription broadcasting service licensees.³⁶⁶

The BCCSA, which is an independent regulatory body, was established by the National Association of Broadcasters (hereafter referred to as the NAB) in the year 1993, a collective industry body similar in nature to that of the PDMSA.³⁶⁷ Through its codes of conduct, the BCCSA sets certain minimum standards that broadcasters need to comply with, enforced by the BCCSA

³⁶⁵ Milo and Stein *A Practical Guide to Media Law* 177.

³⁶⁶ BCCSA 2018 <https://bccsa.co.za/codes-of-conduct/>.

³⁶⁷ Milo and Stein *A Practical Guide to Media Law* 177.

through a public complaints mechanism, setting out the rules and procedures to be followed when a complaint is laid against an alleged code-infringing broadcaster.³⁶⁸ Even though subscribing to the jurisdiction and authority of the BCCSA is voluntary, broadcasters are incentivised to do so, seeing as the *Electronic Communications Act*³⁶⁹ stipulates the following:

The provisions of subsection (2) do not apply to a broadcasting service licensee who is a member of a body which has proved to the satisfaction of [ICASA] that its members subscribe and adhere to a code of conduct enforced by that body by means of its own disciplinary mechanisms, provided such code of conduct and disciplinary mechanisms are acceptable to [ICASA].³⁷⁰

Subsection (2) refers to the legal requirement that all broadcast licensees subscribe to the code of conduct of the Complaints and Compliance Committee of the Independent Communications Authority of South Africa (hereafter referred to as ICASA). ICASA is the regulatory authority for the broadcast sector, as provided for in chapter 9 of the *Constitution* that calls to life statutory state institutions to support South Africa's constitutional democracy. The Complaints and Compliance Committee and ICASA are discussed following the BCCSA's analysis.³⁷¹

3.2.2.1 Membership of the BCCSA

As stated above, opting into the authority of the BCCSA is voluntary. Jurisdiction is established when a broadcaster formally subscribes to either

³⁶⁸ Milo and Stein *A Practical Guide to Media Law* 177.

³⁶⁹ *Electronic Communications Act* 36 of 2005 (hereafter referred to as the *Electronic Communications Act*).

³⁷⁰ Section 54(3) of the *Electronic Communications Act*.

³⁷¹ See 3.2.3 below.

of the BCCSA's codes of conduct, by signing its constitution.³⁷² The *Constitution of the BCCSA* states that:

The aims and objectives of the BCCSA are to ensure the adherence to high standards in broadcasting and to achieve a speedy and cost effective settlement of complaints against full members of NAB who have submitted themselves to the jurisdiction of the BCCSA and its Code and, where a settlement cannot be attained, to adjudicate upon a complaint and take appropriate steps in accordance with [section] 14 of this Constitution.³⁷³

It is also worth citing the founding principles of the BCCSA, included as a preamble to its constitution, as it deals directly with its independence and formation. Firstly, it is stated that the BCCSA is created in terms of section 34 of the South African *Constitution*, that provides for the right of every person to have any dispute resolved by an independent and impartial tribunal or forum.³⁷⁴ In accordance with this constitutional provision, it is stated that the "independence of the BCCSA is absolute".³⁷⁵ It is further stated that the BCCSA is neither accountable nor answerable to the NAB (subject to certain limitations), nor to any other body of organisations;³⁷⁶ that the BCCSA's decisions must be in accordance with the precepts of administrative justice as provided for in section 33 of the South African *Constitution*;³⁷⁷ that only the BCCSA may amend its constitution;³⁷⁸ only the BCCSA may dissolve itself;³⁷⁹ and that the NAB will fund all reasonable expenses of the BCCSA.³⁸⁰

³⁷² BCCSA 2018 <https://bccsa.co.za/bccsa-constitution/> s 3. Milo and Stein *A Practical Guide to Media Law* 177.

³⁷³ BCCSA 2018 <https://bccsa.co.za/bccsa-constitution/> s 2; Section 14 relates to the powers of an adjudicator or a tribunal of the BCCSA.

³⁷⁴ BCCSA 2018 <https://bccsa.co.za/bccsa-constitution/> s1 of preamble.

³⁷⁵ BCCSA 2018 <https://bccsa.co.za/bccsa-constitution/> s2 of preamble.

³⁷⁶ BCCSA 2018 <https://bccsa.co.za/bccsa-constitution/> s 3 of preamble.

³⁷⁷ BCCSA 2018 <https://bccsa.co.za/bccsa-constitution/> s 4 of preamble.

³⁷⁸ BCCSA 2018 <https://bccsa.co.za/bccsa-constitution/> s 5 of preamble.

³⁷⁹ BCCSA 2018 <https://bccsa.co.za/bccsa-constitution/> s 6 of preamble.

³⁸⁰ BCCSA 2018 <https://bccsa.co.za/bccsa-constitution/> s 7 of preamble.

A broadcaster may withdraw from the jurisdiction of the BCCSA, but not within three years of becoming a member. Such withdrawal does not impact the validity and enforceability of rulings made before the broadcaster ceased to be a member. A twelve month notice period is required after notice of withdrawal has been given, during which time the broadcaster continues to be liable both financially and jurisdictionally to the authority of the BCCSA.³⁸¹ Most of the major broadcasters in South Africa subscribe to the jurisdiction of the BCCSA.³⁸² Signatories of this regulatory authority are listed on the BCCSA's website.³⁸³ As noted above, only those broadcasters who are signatories of the BCCSA's constitution enjoy the exclusion as stipulated by the *Electronic Communications Act* from the jurisdiction of the Complaints and Compliance Committee of ICASA.³⁸⁴

3.2.2.2 Complaints procedure of the BCCSA

Broadcasters who subscribe to the jurisdiction of the BCCSA need to adhere to one of two codes of conduct. The first code of conduct is for broadcasters who fall within the category of free-to-air licensees and the other for subscription service licensees.³⁸⁵ Any complaints lodged against a broadcaster need to relate to one of the codes and a subsequent violation thereof, for it to be accepted by either the adjudicator of the BCCSA, or one of the commissioners of the BCCSA. The adjudicator of the BCCSA is tasked with the addressing of complaints when they are first filed, serving as a point of the first contact for complainants at the initial stage of the

³⁸¹ BCCSA 2018 <https://bccsa.co.za/bccsa-constitution/> s 12.3. Milo and Stein *A Practical Guide to Media Law* 177.

³⁸² Milo and Stein *A Practical Guide to Media Law* 177.

³⁸³ BCCSA 2018 <https://bccsa.co.za/signatories/>.

³⁸⁴ Milo and Stein *A Practical Guide to Media Law* 177.

³⁸⁵ Milo and Stein *A Practical Guide to Media Law* 178; BCCSA 2018 <https://bccsa.co.za/codes-of-conduct/>.

complaints process, determining if a *prima facie* contravention of the code has indeed occurred.³⁸⁶ This role is similar to that of the Public Advocate of the PCSA.

If a complaint is not resolved in its initial stages by the adjudicator through settlement or if it is rejected, it will then be referred to one of the commissioners to be adjudicated on the papers; or, in case of a more serious complaint, to a tribunal for a formal hearing where the arguments of the complainant(s) and broadcaster are heard and their evidence presented, either by the parties themselves or their legal representatives.³⁸⁷ A tribunal normally consists of three or five commissioners.³⁸⁸ The BCCSA normally consists of a total of 12 commissioners, appointed for a renewable period of five years.³⁸⁹ Half of the commissioners are appointed based on their experience or expertise in the broadcast media, with the remaining six commissioners being appointed based on their involvement with matters of public interest.³⁹⁰ The commissioners are appointed by a committee that consists of the chairperson of the BCCSA, the chairperson of the National Association of Broadcasters (NAB) as well as two members external to these organisations that are appointed to be members of the appointment committee.³⁹¹

In turn, the chairperson of the BCCSA is appointed at a general meeting, held annually, or at a special general meeting, as voted for by the members

³⁸⁶ Milo and Stein *A Practical Guide to Media Law* 178; BCCSA 2018 <https://www.bccsa.co.za/frequently-asked-questions/>.

³⁸⁷ Milo and Stein *A Practical Guide to Media Law* 178; BCCSA 2018 <https://www.bccsa.co.za/frequently-asked-questions/>.

³⁸⁸ BCCSA 2018 <https://www.bccsa.co.za/frequently-asked-questions/>

³⁸⁹ Milo and Stein *A Practical Guide to Media Law* 178.

³⁹⁰ Milo and Stein *A Practical Guide to Media Law* 178.

³⁹¹ Milo and Stein *A Practical Guide to Media Law* 178.

of the BCCSA. This position is also held for a renewable term of five years.³⁹² The NAB funds the BCCSA, and its office managed by a registrar that is appointed for a renewable period of three years, with the discretion of the chairperson. In the past the positions of adjudicator and registrar have been held by the same person.³⁹³

The BCCSA does not have jurisdiction over advertisements and concerns itself solely with editorial content. In the case of content that has been paid for or produced by the broadcaster as sponsored content, it is also seen as an advertisement and does not fall within the jurisdiction of the BCCSA.³⁹⁴

The BCCSA accepts written complaints from any person or organisation, and in the case of the latter, the complainant must be authorised in writing to act for the organisation.³⁹⁵ Only complaints against signatories of the BCCSA's constitution is accepted.³⁹⁶ Once the BCCSA accepts a complaint, it cannot be withdrawn unless it relates to personal reasons of the complainant, such as matters related to privacy or reputation.³⁹⁷ If no such valid reason for withdrawal is presented, the BCCSA will go on to adjudicate the matter even if it has been withdrawn.³⁹⁸

A previous version of the BCCSA's complaints procedure stated that complainants are not required to waive their right to formal legal recourse,

³⁹² Milo and Stein *A Practical Guide to Media Law* 178.

³⁹³ Milo and Stein *A Practical Guide to Media Law* 178.

³⁹⁴ BCCSA 2018 <https://bccsa.co.za/bccsa-constitution/> s 1.5.3 of the *Procedure of the Commission*; Milo and Stein *A Practical Guide to Media Law* 179; The regulation of advertisements in both the online and printed press, as well as in broadcast media, is discussed at 3.3 below.

³⁹⁵ BCCSA 2018 <https://bccsa.co.za/bccsa-constitution/> ss 1.1, 1.4 of the *Procedure of the Commission*; Milo and Stein *A Practical Guide to Media Law* 179.

³⁹⁶ BCCSA 2018 <https://bccsa.co.za/bccsa-constitution/> s 1.5.2 of the *Procedure of the Commission*.

³⁹⁷ Milo and Stein *A Practical Guide to Media Law* 179.

³⁹⁸ Milo and Stein *A Practical Guide to Media Law* 179.

although the chairperson might require the inclusion of such a waiver it is considered to be in the interest of fairness.³⁹⁹ Reference to a waiver has since been removed from the BCCSA's complaints procedure. According to Milo and Stein,⁴⁰⁰ a waiver of this nature is often requested where there is a possibility that the complainant might institute legal proceedings in a court of law after the BCCSA's adjudicatory processes.

It is not allowed by the BCCSA to submit complaints anonymously. Complaints are screened and rejected if they are considered to be fraudulent, frivolous, malicious or vexatious.⁴⁰¹ Complaints are generally required to be submitted as soon as possible and within 30 days after the broadcast in question, but the registrar can condone late complaints if sufficient reason is provided to allow such a complaint.⁴⁰²

When a complaint is accepted the registrar will notify the respondent; it can either be referred to a tribunal by the chairperson for immediate adjudication (mostly only in the case of a controversial or complex issue)⁴⁰³ or the complaint can be referred to a commissioner by the registrar or adjudicator. The commissioner will try to have the matter solved informally (with no legal representation) between the complainant and respondent. When no such resolution can be reached after the period of seven days, the commissioner or registrar will adjudicate on the matter in writing, after which both parties

³⁹⁹ Milo and Stein *A Practical Guide to Media Law* 179.

⁴⁰⁰ Milo and Stein *A Practical Guide to Media Law* 179.

⁴⁰¹ BCCSA 2018 <https://bccsa.co.za/bccsa-constitution/> s 1.5.1 of the *Procedure of the Commission*.

⁴⁰² BCCSA 2018 <https://bccsa.co.za/bccsa-constitution/> ss 1.3, 1.6 of the *Procedure of the Commission*.

⁴⁰³ BCCSA 2018 <https://bccsa.co.za/bccsa-constitution/> s 2.2 of the *Procedure of the Commission*; Milo and Stein *A Practical Guide to Media Law* 179.

have five days to appeal the decision, lodged to the chairperson of the BCCSA.⁴⁰⁴

An appeal is referred to a tribunal which consists of the chairperson as well as one public representative commissioner and one broadcaster representative commissioner. Although it is generally not required for parties to appear in front of the tribunal, the chairperson can in circumstances where it is considered necessary call upon any party to appear in the context of a round table discussion (contrary to the nature of a trial), and in failing to appear an adverse inference can be drawn from any party's wilful non-appearance.⁴⁰⁵

The lower appeal tribunal's decision can be challenged by requesting leave to appeal from the chairperson who acted in the first tribunal, or from an alternate chairperson or official who has been designated such a role, within five days of the appeal tribunal of the first instances' ruling.⁴⁰⁶ If leave to appeal is granted, a final ruling will be made by an alternate chairperson and up to a maximum of five commissioners, including the presiding chairperson, following the same process as that of the lower appeal tribunal. The decision will be binding and final, and can only be appealed on administrative grounds under the provisions of the *Promotion of Administrative Justice Act (PAJA as previously)*.⁴⁰⁷ As a *PAJA* review before a court of law does not entail the re-evaluation of the facts, a different ruling

⁴⁰⁴ BCCSA 2018 <https://bccsa.co.za/bccsa-constitution/> ss 2.3-2.5 of the *Procedure of the Commission*.

⁴⁰⁵ BCCSA 2018 <https://bccsa.co.za/bccsa-constitution/> s 3 of the *Procedure of the Commission*.

⁴⁰⁶ BCCSA 2018 <https://bccsa.co.za/bccsa-constitution/> s 4 of the *Procedure of the Commission*.

⁴⁰⁷ Discussed at 2.5.3 above.

can only be reached if there are grounds to prove that the ruling by the BCCSA tribunal was based on procedural unfairness.

It is not necessary to dissect the two codes of conduct of the BCCSA, seeing as this dissertation is mostly concerned with the overall framework of the media regulatory system in South Africa in order to answer what type and form of regulation is best suited for the online and printed press. This is best answered by looking at how the broadcast media sector's regulation is established and functions in law. In accordance, it is required to inspect the broad functioning of the Complaints and Compliance Committee of ICASA as statutory regulator of the broadcast media.

3.2.3 The Complaints and Compliance Committee of ICASA

The Complaints and Compliance Committee (hereafter referred to as the CCC) is a statutory committee of ICASA,⁴⁰⁸ established in terms of the *ICASA Act*⁴⁰⁹ in accordance with the provisions of section 54(1) of the *Electronic Communications Act*.⁴¹⁰ The CCC is informed and guided by its Code of Conduct for Broadcasting Service Licensees (hereafter referred to as ICASA's code of conduct), as published in the *Government Gazette*,⁴¹¹ as well as its rules and procedures also published in the *Government Gazette*.⁴¹²

⁴⁰⁸ Required by s 192 of the *Constitution* that reads: "National legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society."

⁴⁰⁹ Section 17 of the *Independent Communications Authority of South Africa Act* 13 of 2000 (hereafter referred to as the *ICASA Act*).

⁴¹⁰ First discussed at 3.2.2.

⁴¹¹ GN 958 in GG 32381 of 6 July 2009.

⁴¹² GN 45 in GG 32884 of 22 January 2010.

As mentioned previously,⁴¹³ any licensed broadcaster that does not subscribe to a recognised industry regulatory body (the BCCSA) automatically falls under the jurisdiction of the CCC, thus serving as a regulatory catch-all for the broadcast media. The online and printed press do not have a similar catch-all regulatory mechanism or legislative provision for post-publication regulation. For clarity it needs to be noted that broadcasters are subject to the authority of the CCC regardless of membership to the BCCSA with regard to matters of breaches of license conditions, in terms of the *ICASA Act* and its underlying statutes, that relate to technical aspects of broadcasting, *inter alia*.⁴¹⁴

ICASA's code of conduct is almost identical to that of the BCCSA's codes of conduct. This being said, as most broadcast licensees subscribe to the authority of the BCCSA, the CCC mainly deals with other regulatory matters that does not directly relate to the substance of programming.⁴¹⁵ However, sometimes the CCC is required to adjudicate on matters relating to editorial policy, specifically with regard to South Africa's public broadcaster, as is seen below.

In the *Freedom of Expression Institute v Chair, Complaints and Compliance Committee* case,⁴¹⁶ initially resolved before the CCC, the question before the court was whether an editorial policy of the SABC was fair and within bounds. Several political commentators were blacklisted from appearing on the national broadcaster's programmes by the head of the SABC's News and Current Affairs department at the time, who later denied having done

⁴¹³ At 3.2.2 and 3.2.2.1 above.

⁴¹⁴ Milo and Stein *A Practical Guide to Media Law* 188; ICASA 2019 <https://www.icasa.org.za/pages/complaint-and-compliance-committee>.

⁴¹⁵ Milo and Stein *A Practical Guide to Media Law* 189.

⁴¹⁶ *Freedom of Expression Institute v Chair, Complaints and Compliance Committee* 2011 JOL 26704 (GSJ) (hereafter referred to as the *Freedom of Expression Institute* case)

so even with evidence to the contrary. This ban on inviting commentators for interviews affected all of the national broadcaster's television channels and its radio stations. The Freedom of Expression Institute argued that the decision was based on the then head of the department's personal disagreement with the commentators, and that through this banning news and current affairs content was being unduly manipulated. It was alleged that this went against the license conditions of the SABC and that it violated the *Broadcasting Act* (see following citation) that requires of the SABC to:

[P]rovide significant news and public affairs programming which meets the highest standards of journalism, as well as fair and unbiased coverage, impartiality, balance, and independence from government, commercial and other interests.⁴¹⁷

The complaint was initially brought before the CCC of ICASA which was of the opinion that this was an internal matter of staff conduct and that it accordingly did not have jurisdiction to rule over the matter. This reasoning was found to be fundamentally flawed by the South Gauteng High Court in Johannesburg, stating that if this was so,

[I]t would mean that the SABC may with impunity manipulate and distort the preparation of its news and current affairs coverage and publically lie about it when they are caught out having done so [...] It amounts to the SABC being accuser and judge in its own cause, a concept which is anathema to basic legal and constitutional principles. If the SABC is to be regarded as the watchdog and disciplinarian, then who disciplines the SABC? Surely the intention of the legislature was to answer this question: the CCC of course.⁴¹⁸

Furthermore, the court found that the blacklisting of political commentators amounted to pre-censorship and that the SABC as the public broadcaster, funded by the public purse, is not allowed to take political sides nor to promote party political objectives.⁴¹⁹ The court ordered that the matter be

⁴¹⁷ S 10(1)(d) of the *Broadcasting Act* 4 of 1999.

⁴¹⁸ *Freedom of Expression Institute* case para 76.

⁴¹⁹ *Freedom of Expression Institute* case para 77.

heard afresh by the CCC of ICASA, with a newly compiled body of adjudicators that was not involved in the original decision. It also ordered the original decision to be set aside.⁴²⁰ It is relevant here to consider that the court found that the CCC of ICASA was legally responsible for adjudicating on the impartiality of the SABC. However, the court did take cognisance of the SABC being a public broadcaster, and noted that a commercial media entity might take political sides and voice opinions, stating "[w]hereas a private citizen or broadcaster may freely take political sides and promote party political objectives, a public broadcaster may not use public money to do so".⁴²¹

The *Freedom of Expression Institute* case sheds light on when matters that relate to the production of content, specifically with regard to the public broadcaster, is best regulated by the CCC of ICASA, rather than the BCCSA. Although it is important to take note of this within the larger scheme of media regulation, the focus will be kept on content that does ultimately appear in the media (as a matter of post-publication regulation), insofar it relates to the functioning of the post-publication press regulatory system.

3.2.3.1 Complaints procedure and sanctions of the CCC

The CCC as an independent committee of ICASA is at power to adjudicate on complaints related to the regulation of the broadcasting and telecommunications industries, but also the postal industry, over all of which it acts as a watchdog, mandated by legislation. Complaints brought before the CCC may relate to matters of the issuing of licences and their conditions; the controlling and managing of the frequency spectrum; as well as

⁴²⁰ *Freedom of Expression Institute* case para 100.

⁴²¹ *Freedom of Expression Institute* case para 77.

protecting consumers from unfair business practices, poor quality services and harmful or inferior products, amongst others.⁴²² Previously under the auspices of the Department of Communications, the regulation of South African postal services was later assigned to ICASA.⁴²³

The CCC does not directly issue sanctions but rather submits its findings and recommendations to ICASA which then determines what action to take, if any, along with written reasons for its decisions.⁴²⁴ The *Rules and Procedures of the CCC*⁴²⁵ determine the protocol relating to the filing of complaints, communication with licensees and complainants, default orders, legal representation and public hearings, urgent matters, quorum and place of hearings, special procedural powers of the CCC, findings and recommendations by the CCC, condonation for failure to comply with the rules, recording of proceedings, repeal of rules, and other matters.⁴²⁶

Unlike in the case of the BCCSA, oral hearings are required for every matter heard by the CCC, and a pre-hearing may also be held.⁴²⁷ Additionally, the seat of the CCC is based in Johannesburg, and only on good cause may its chairperson decide to hold a hearing in another location in South Africa.⁴²⁸ This factor might very well be a barrier to entry and accessibility and a cause for high costs, especially for members of the public wishing to complain

⁴²² Parliament of the Republic of South Africa "Report of the ad hoc Committee on the Review of Chapter 9 and Associated Institutions" 192.

⁴²³ Parliament of the Republic of South Africa "Report of the ad hoc Committee on the Review of Chapter 9 and Associated Institutions" 192.

⁴²⁴ Milo and Stein *A Practical Guide to Media Law* 190.

⁴²⁵ GN 45 in GG 32884 of 22 January 2010 (hereafter referred to as the *Rules and Procedures of the CCC* as per GN 45 in GG 32884 of 22 January 2010).

⁴²⁶ Sections 2-13 of the *Rules and Procedures of the CCC* as per GN 45 in GG 32884 of 22 January 2010.

⁴²⁷ Sections 3-4 of the *Rules and Procedures of the CCC* as per GN 45 in GG 32884 of 22 January 2010.

⁴²⁸ Section 7 of the *Rules and Procedures of the CCC* as per GN 45 in GG 32884 of 22 January 2010.

outside of Johannesburg. A matter brought before the CCC may be struck off its roll if the initiating party does not appear before the Committee during the hearings.⁴²⁹ As legal representation is allowed, the complaints process of the CCC is likely not conducive for speedy, informal and cost-effective settling between parties.

Notably, the CCC may through its Chairperson issue a written request to be delivered by a sheriff or another authorised person, requiring of any person to either appear before the CCC, or to make a statement, or to provide any documentation in the custody or control of a person as considered to be reasonably necessary to the complaint being considered.⁴³⁰ Neither the PCSA nor the BCCSA can summon a party to appear before it that does not subscribe to any of these two bodies' authority, or demand that statements and other documentation be submitted by such a party. It should also be noted that decisions of the CCC cannot be appealed, as there is no appeals body, other than on administrative grounds in a court of law.⁴³¹ The sanction, as recommended by the CCC to ICASA, can include the revocation or suspension of a license in case of a repeat offender, or in a less serious case, an order to desist from future breaches can be made, with additional remedial steps such as a fine payable or other stipulations contained in a settlement agreement.⁴³²

⁴²⁹ Section 4 of the *Rules and Procedures of the CCC* as per GN 45 in GG 32884 of 22 January 2010.

⁴³⁰ Section 8 of the *Rules and Procedures of the CCC* as per GN 45 in GG 32884 of 22 January 2010.

⁴³¹ Milo and Stein *A Practical Guide to Media Law* 190.

⁴³² Milo and Stein *A Practical Guide to Media Law* 190.

3.2.4 Concluding remarks on broadcast media regulation

Through the discussion of the regulation by the broadcast media it is notable that, although the CCC of ICASA is instituted as a statutory regulator of broadcast media content, it offers an exemption to broadcasters who subscribe to the authority of the BCCSA. This is of relevance when it comes to the consideration of how an MAT could be instituted and how it could function together with the PCSA. Greater consideration of how the MAT could be formed by legislation is conceptualised below,⁴³³ drawing from the insights that this chapter provides.

To conclude the study of the larger media regulatory system it is necessary to briefly look at how advertisements are regulated.

3.3 Regulation of advertisements

3.3.1 Introduction

It is necessary to take cognisance of how and by whom advertisements appearing in the media are regulated as part of the structural overview of both press regulation but also the larger media regulatory framework in South Africa. Without considering the regulation of advertisements a gap is left in the study of how all different types of material appearing in the media are regulated, although advertisements are not considered as being editorial content. It is beneficial to outline the basic framework of the regulation of advertisements, although in brief as an in-depth analysis is not necessary to answer the research question, focused on the regulation of editorial content.

⁴³³ See chapter 5 below.

Advertisements were generally subject to the Advertising Standards Authority of South Africa (hereafter referred to as the ASA)'s *Code of Advertising Practice*.⁴³⁴ However, the ASA was served with a notice of liquidation in October 2018 due to its bankruptcy. It was ordered to close its doors, but was soon after replaced by the Advertising Regulatory Board (hereafter referred to as the ARB) in November 2018, formed by some of the ASA's original members: The Marketing Association of South Africa (MASA), the Association for Communication and Advertising (ACA) and the Internet Advertising Bureau (hereafter referred to as the IAB). The CEO of the IAB stated that "[...] the continued self-regulation of advertising is critical", with her adding that the newly established ARB would be better suited to regulate advertising on social media platforms.⁴³⁵

The ARB is funded by major companies and brands that traditionally have big advertising budgets, including major South African incorporated fast food franchises, banks and insurance companies, which are credited on the ARB's website.⁴³⁶ It is perturbing that the ASA, as part of the integrated media regulatory network, which was entering its 50th year, was not able to keep itself afloat.

3.3.2 *Jurisdiction of the Advertising Regulatory Board*

The regulation of advertisements in the broadcast media sphere is enforced by statute, whereas the same cannot be said for advertisements appearing in the online and printed press. The *Electronic Communications Act* requires that all broadcast service licensees adhere to the *Code of Advertising*

⁴³⁴ Milo and Stein *A Practical Guide to Media Law* 178.

⁴³⁵ Author unknown 2018 <https://www.bizcommunity.com/Article/196/12/183980.html>

⁴³⁶ Advertising Regulatory Board 2019 <http://arb.org.za/>.

Practice,⁴³⁷ as determined from time to time by the ASA (now ARB).⁴³⁸ In the case of a broadcaster not accepting the authority of the ARB, and where such broadcaster is alleged to have breached the *Code of Advertising Practice*, the CCC of ICASA is at power to adjudicate the matter on the *Code of Advertising Practice*.

Subscribing to the *Code of Advertising Practice* is a prerequisite of ICASA's licensing conditions.⁴³⁹ However, the PCSA does not deal with the regulation of advertisement material,⁴⁴⁰ nor is it mandatory for print and online media to belong to the ARB. The jurisdiction of the defunct ASA was addressed in the *Herbex* case:⁴⁴¹

the Advertising Standards Authority of South Africa (the ASA) has no jurisdiction over any person or entity who is not a member of the ASA and that the ASA may not, in the absence of a submission to its jurisdiction, require non-members to participate in its processes, issue any instruction, order or ruling against the non-member or sanction it;

the ASA may consider and issue a ruling to its members (which is not binding on non-members) on any advertisement regardless of by whom it is published to determine, on behalf of its members, whether its members should accept any advertisement before it is published or should withdraw any advertisement if it has been published.⁴⁴²

When the ASA disbanded it was questioned whether its replacement, the ARB, would legally be able to fill the vacancy. According to the ARB, the *Electronic Communications Act* made provision for it as the replacement self-regulatory body, stating that the Act "allows for a change of entity", referring to how the Advertising Standards Authority is defined in the

⁴³⁷ Advertising Regulatory Board 2019 <http://arb.org.za/codes.html>

⁴³⁸ Section 55(1) of the *Electronic Communications Act*.

⁴³⁹ Section 55(2) of the *Electronic Communications Act*.

⁴⁴⁰ Press Council 2019 <https://presscouncil.org.za/complaints>.

⁴⁴¹ *Advertising Standards Authority v Herbex (Pty) Ltd* 2017 (6) SA 354 (SCA) (hereafter referred to as the *Herbex* case).

⁴⁴² *Herbex* case paras 1.1 and 1.2.

Electronic Communications Act: "the entity which regulates the content of advertising, or any entity that replaces it but has the same functions."⁴⁴³

The ARB has indicated that with regard to jurisdiction over non-members, they regard the principles in the outcome of the *Herbex* decision as binding on them and their members. They also made it known that the members of the ARB company:

[...] regard themselves as bound by, and hereby adopt as precedent, the principles of the decision-making organs of the Advertising Standards Authority of South Africa (1995/000784/08), as at the date that the aforementioned ceased to trade; and

All existing, binding decisions of the decision-making organs of the Advertising Standards Authority of South Africa (1995/000784/08) will continue in force and effect and will be given effect to by the Company.

They regard themselves as bound by, and undertake to bind their members, to the jurisdiction of the Company and the provisions of the Code of Advertising Practice. For the avoidance of doubt, the members acknowledge that any reference in the Advertising Code of Practice to the Advertising Standards Authority will be read as if it refers to the Company, *mutatis mutandis*...

At the time of the conclusion of this study, the ARB did not divulge all of its members publicly. According to Milo and Stein,⁴⁴⁴ membership of the defunct ASA comprised of a wide range of various industry representative bodies and their constituent members. Print and Digital Media South Africa also subscribed to the ASA, which includes almost all publications subscribing to the PCSA. The ARB predominantly makes findings against advertisers in whose name the advertising is disseminated. However, it is said that the *Code of Advertising Practice* applies to the advertiser, the advertising practitioner (such as an agency) as well as the medium on which

⁴⁴³ Advertising Regulatory Board 2019 <http://arb.org.za/faq.html>.

⁴⁴⁴ Milo and Stein *A Practical Guide to Media Law* 204-205.

the advertisement is shared (such as a press publication).⁴⁴⁵ As such, even if both an advertiser and an advertising agency do not subscribe to the authority of the ARB, but the publication in which the advertisement appears is a member of the ARB, it could be an avenue through which to implement a sanction. Sanctions mostly entail the withdrawal and/or amendment of advertisements, with stricter sanctions requiring prior approval of advertisements for a stipulated period, adverse publicity through the ARB's network, or an order to publish a summary of the ARB's ruling in all or some of the media where the advertisement was distributed.⁴⁴⁶ The *Code of Advertising Practice* deals with a range of different advertisement types, both regarding the form in which they appear and the product and services they promote.

3.3.3 Conclusion of advertorial regulation

It was found that the regulation of advertisements that are disseminated through broadcast media is made mandatory through statutory requirements. However, the printed and online press can only be held accountable by the ARB if the publication in question subscribes to the jurisdiction of the ARB. This serves as another example of how self-regulation in the media sphere can be limited in its effectiveness by not having a coercive statutory backing.

3.4 Concluding comments

In this chapter, the regulation of the overall media sector was analysed. Regulation of the online and printed press by the PCSA, broadcast media by the BCCSA and ICASA, and advertisements appearing in the media by

⁴⁴⁵ Milo and Stein *A Practical Guide to Media Law* 206-207.

⁴⁴⁶ Advertising Regulatory Board 2019 <http://arb.org.za/codes.html>.

the ARB was discussed. Separate conclusions were drawn in each part of the discussion, that will not be repeated here. It is important to study media regulation as an interconnected whole in order to identify areas of possible development and improvement. In order to make such findings, it is necessary to compare the functioning of the PCSA to models, benchmarks and examples from outside South Africa – this is done in the following chapter.

CHAPTER 4: MODELS AND BENCHMARKS OF PRESS REGULATION

4.1 Introduction

It is necessary to look deeper into different models of press regulatory mechanisms, as well as international principles and agreements on the matter. With the current regulatory framework of media regulation in South Africa having been examined,⁴⁴⁷ transnational regulatory best practice and policy should correspondingly be analysed for better insight into how the South African press regulatory system could be further developed, transformed, or its current form be preserved and strengthened.

4.2 International principles and agreements

A number of international instruments provide normative benchmarks for the regulation of the press, with others requiring freedom of expression, together with freedom and independence of the press. The *Universal Declaration of Human Rights*⁴⁴⁸ states that:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.⁴⁴⁹

The *International Covenant on Civil and Political Rights*⁴⁵⁰ (hereafter referred to as the *ICCPR*) stipulates the following:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all

⁴⁴⁷ See 1.9, 2.5 and chapter 3 above.

⁴⁴⁸ *Universal Declaration of Human Rights* (1948).

⁴⁴⁹ Article 19 of the *Universal Declaration of Human Rights* (1948)

⁴⁵⁰ *International Covenant on Civil and Political Rights* (1966).

kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (ordre public), or of public health or morals.⁴⁵¹

The United Nations Human Rights Committee's *General Comment No. 34*⁴⁵² constitutes an authoritative interpretation of the freedoms of opinion and expression guaranteed by article 19 of the *ICCPR*. It is valuable to look to this document for guidance on how best to regulate the editorial content of the media, whether through voluntary or statutory means.

It is acknowledged in *General Comment 34* that a "free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other [*ICCPR*] rights".⁴⁵³ It is also stipulated that in order to protect the rights of media users, including that of ethnic and linguistic minorities, that states should take "particular" care to encourage independent and diverse media.⁴⁵⁴ States should also take full cognisance of the effects of convergence.⁴⁵⁵ It is stated that any restrictions to freedom of expression must be stipulated by law, and must conform to the strict tests of necessity and proportionality.⁴⁵⁶ Such a law must be clear, accessible to the public and may not confer "unfettered discretion for the restriction of freedom of expression on those

⁴⁵¹ Article 19 of the *International Covenant on Civil and Political Rights* (1966); The limitations to article 19 of the *ICCPR*, stipulated in article 20, also appear in the *Constitution*, as discussed at 2.2.2.1 above.

⁴⁵² UN HRC *General Comment No. 34* CCPR/C/GC/34.

⁴⁵³ UN HRC *General Comment No. 34* CCPR/C/GC/34 s 13.

⁴⁵⁴ UN HRC *General Comment No. 34* CCPR/C/GC/34 s 14.

⁴⁵⁵ UN HRC *General Comment No. 34* CCPR/C/GC/34 s 15.

⁴⁵⁶ UN HRC *General Comment No. 34* CCPR/C/GC/34 s 22, 24.

charged with its execution".⁴⁵⁷ The following is stated specifically in regard to the regulation of the media:

States parties should ensure that legislative and administrative frameworks for the regulation of the mass media are consistent with the provisions of paragraph 3 [of article 19 of the *ICCPR*, as quoted above]. Regulatory systems should take into account the differences between the print and broadcast sectors and the internet, while also noting the manner in which various media converge. It is incompatible with article 19 to refuse to permit the publication of newspapers and other print media other than in the specific circumstances of the application of paragraph. Such circumstances may never include a ban on a particular publication unless specific content, that is not severable, can be legitimately prohibited under paragraph. States parties must avoid imposing onerous licensing conditions and fees on the broadcast media, including on community and commercial stations. The criteria for the application of such conditions and licence fees should be reasonable and objective, clear, transparent, non-discriminatory and otherwise in compliance with the [*ICCPR*]. Licensing regimes for broadcasting via media with limited capacity, such as audio-visual terrestrial and satellite services should provide for an equitable allocation of access and frequencies between public, commercial and community broadcasters. It is recommended that States parties that have not already done so should establish an independent and public broadcasting licensing authority, with the power to examine broadcasting applications and to grant licenses.⁴⁵⁸

It is seen that the above provision does not approve of licensing of print publications, seeing that a limited frequency spectrum is not used unlike with broadcast media. Publications may also not be banned, except when in conflict the general laws of freedom of expression.⁴⁵⁹ It is further stated in *General Comment 34* that states should prevent mass media monopolies.⁴⁶⁰ The penalisation of a media outlet, publisher or journalist for being critical of the government or the political social system is stated as something that can never be considered to be a necessary restriction of freedom of expression.⁴⁶¹ The importance of the protection of confidential sources by

⁴⁵⁷ UN HRC *General Comment No. 34 CCPR/C/GC/34* s 25.

⁴⁵⁸ UN HRC *General Comment No. 34 CCPR/C/GC/34* s 39.

⁴⁵⁹ See 2.2.2.1 above.

⁴⁶⁰ UN HRC *General Comment No. 34 CCPR/C/GC/34* s 40.

⁴⁶¹ UN HRC *General Comment No. 34 CCPR/C/GC/34* s 42.

journalists as well as their freedom of movement is also emphasised.⁴⁶² Lastly, it is again emphasised that any form of undue licensing of journalists are contrary to article 19 of the *ICCPR*:

Journalism is a function shared by a wide range of actors, including professional full-time reporters and analysts, as well as bloggers and others who engage in forms of self-publication in print, on the internet or elsewhere, and general State systems of registration or licensing of journalists are incompatible with paragraph 3 [of article 19 of the *ICCPR*, as quoted above]. Limited accreditation schemes are permissible only where necessary to provide journalists with privileged access to certain places and/or events. Such schemes should be applied in a manner that is non-discriminatory and compatible with article 19 and other provisions of the [ICCPR], based on objective criteria and taking into account that journalism is a function shared by a wide range of actors.⁴⁶³

Parmar⁴⁶⁴ highlights that the *Joint Declarations on freedom of expression* are valuable sources that serve as "progressive normative statements" for matters of freedom of expression as well as media regulation. The *Joint Declarations* are adopted annually by the four intergovernmental mechanisms on freedom of expression with the assistance of two non-governmental organisations.⁴⁶⁵ It is argued that there are three key reasons why the *Joint Declarations* are valuable: "the collaborative process leading to their adoption; the progressive normative standards they aim to articulate; and evidence of their impact upon key decision makers, especially judges".⁴⁶⁶ It is also written that the *Joint Declarations* are useful because they are considered to be legitimate sources of authority that can be used

⁴⁶² UN HRC *General Comment No. 34 CCPR/C/GC/34 s 45.*

⁴⁶³ UN HRC *General Comment No. 34 CCPR/C/GC/34 s 44.*

⁴⁶⁴ Parmar 2019 *NQHR* 184.

⁴⁶⁵ These are the UN Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organisation of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights' (ACnHPR) Special Rapporteur on Freedom of Expression and Access to Information. From 1999 also with support from two non-governmental organisations, Article 19 and the Centre for Law and Democracy (CLD).

⁴⁶⁶ Parmar 2019 *NQHR* 180.

to support policy positions, for making and shaping arguments as well as for the protection of freedom of expression at global, regional and national levels.⁴⁶⁷ The *Joint Declaration* of 2003 is specifically relevant for this study, with the applicable two clauses being quoted below:

All public authorities which exercise formal regulatory powers over the media should be protected against interference, particularly of a political or economic nature, including by an appointments process for members which is transparent, allows for public input and is not controlled by any particular political party.⁴⁶⁸

Imposing special registration requirements on the print media is unnecessary and may be abused and should be avoided. Registration systems which allow for discretion to refuse registration, which impose substantive conditions on the print media or which are overseen by bodies which are not independent of government are particularly problematical.⁴⁶⁹

The above clauses do not seem to be in favour of a mandatory authority to regulate the press.

Article 9 of the *African Charter on Human and Peoples' Rights*⁴⁷⁰ (hereafter referred to as the *African Charter*) also enshrines the right to express and disseminate opinions within the law. The African Commission on Human and Peoples' Rights in 2002 issued the *Declaration of Principles on Freedom of Expression in Africa*⁴⁷¹ (hereafter referred to as the *Declaration of Principles*), having effect on South Africa as having signed and ratified the *African Charter*, which creates the Commission. It guarantees freedom of expression and requires that any limitations on this right must "serve a

⁴⁶⁷ Parmar 2019 *NQHR* 187.

⁴⁶⁸ "Joint Declaration: International Mechanisms for Promoting Freedom of Expression" 2003 unnumbered.

⁴⁶⁹ "Joint Declaration: International Mechanisms for Promoting Freedom of Expression" 2003 unnumbered.

⁴⁷⁰ *African Charter on Human and Peoples' Rights* (1981).

⁴⁷¹ *Declaration of Principles on Freedom of Expression in Africa* (2002) (hereafter referred to as the *Declaration of Principles*).

legitimate interest and be necessary in a democratic society".⁴⁷² More specifically, the *Declaration of Principles* goes on to state that a public complaints mechanism must be made available for both the print and broadcast media, subject to specific principles. One principle is that "complaints shall be determined in accordance with established rules and codes of conduct agreed between all stakeholders",⁴⁷³ and another that "the complaints system shall be widely accessible".⁴⁷⁴ It is additionally stated that "[a]ny regulatory body established to hear complaints about media content, including media councils, shall be protected against political, economic or any other undue interference. Its powers shall be administrative in nature and it shall not seek to usurp the role of the courts,"⁴⁷⁵ and further that, notably, "[e]ffective self-regulation is the best system for promoting high standards in the media".⁴⁷⁶

The *Declaration of Principles* built on the earlier *Windhoek Declaration*,⁴⁷⁷ a UNESCO statement requiring a free, independent and pluralistic media as being essential to a democracy and being a fundamental human right. On regulation it states the necessity of "[d]evelopment and promotion of non-governmental regulations and codes of ethics in each country in order to defend more effectively the profession and ensure its credibility."⁴⁷⁸ The reference made to non-governmental regulations appears to advocate in favour of self-regulation. In April 2019, the draft *Declaration of Principles on*

⁴⁷² Section 2(2) of the *Declaration of Principles*.

⁴⁷³ Section 9(1) of the *Declaration of Principles*.

⁴⁷⁴ Section 9(1) of the *Declaration of Principles*.

⁴⁷⁵ Section 9(2) of the *Declaration of Principles*.

⁴⁷⁶ Section 9(3) of the *Declaration of Principles*.

⁴⁷⁷ *Windhoek Declaration for the Development of a Free, Independent and Pluralistic Press* (1991) (hereafter referred to as the *Windhoek Declaration*).

⁴⁷⁸ Annex IV of the *Windhoek Declaration*.

*Freedom of Expression and Access to Information in Africa*⁴⁷⁹ was issued by the African Commission on Human and Peoples' Rights' Special Rapporteur on Freedom of Expression and Access to Information in Africa, in order to bring the *Declaration of Principles* in line with technological advances, industry and political shifts, as well as the effects caused by the internet in particular.⁴⁸⁰

The clauses relating to self-regulation in the new draft declaration that indicate a departure from the *Declaration of Principles* are:

States shall encourage media self-regulation which shall be impartial, expeditious, cost-effective and promote high standards in the media, in accordance with Codes of Conduct developed through *multi-stakeholder* processes [own emphasis],⁴⁸¹

as well as the following section:

Multi-stakeholder regulation should also be encouraged by States as a complement to self-regulation and founded on informed collaboration between the State, private sector and civil society.⁴⁸²

It is interesting to note the shift towards so-called multi-stakeholder regulation in the principles for media regulation; not only do the clauses above provide for a role of the State in multi-stakeholder regulation, but also recommends multi-stakeholder regulation as complementary to self-regulation. This could be said to relate to the regulatory system of the South African broadcast media by the BCCSA as well as ICASA. In light of the discussion of self-regulation, one should keep in mind that the PCSA

⁴⁷⁹ *Draft Declaration of Principles on Freedom of Expression and Access to Information in Africa* (2019) (hereafter referred to without its date).

⁴⁸⁰ UNESCO 2018 <https://en.unesco.org/news/unesco-supports-updating-african-declaration-freedom-expression>.

⁴⁸¹ *Draft Declaration of Principles on Freedom of Expression and Access to Information in Africa* s 29.

⁴⁸² *Draft Declaration of Principles on Freedom of Expression and Access to Information in Africa* s 31.

identifies itself as being an independent co-regulatory body, including the public as stakeholder as opposed to just the media itself, although it does not include the State.

4.3 International trends in media regulation

The UNESCO 2017/2018 global report *World trends in freedom of expression and media development*⁴⁸³ is beneficial to this study as it outlines, as its title indicates, various findings with regard to global trends of media independence. It is insightful to note its main and pertinent findings as these connect to the overall discussion of this chapter. Increasing threats of and encroachment by statutory regulatory authorities are noted, and that these authorities claim to be instituted independently and to have autonomy from government, but that they are increasingly made subject to political and economic influence.⁴⁸⁴ On the self-regulation of the media, the report found that the efficacy and powers of self-regulatory bodies such as press councils are frequently criticised for being weak, being without the necessary authoritative power to implement punitive measures through the force of law.⁴⁸⁵ Furthermore, it is stated that "self-regulation continues to exist in the shadow of state regulation; its profile is informed by the possibility of state intervention that it is often designed to hold back."⁴⁸⁶ This means that self-regulation continuously remains a counter-reaction to the threat of state regulation, having to prove its efficacy in order to keep governmental regulation at bay. Notwithstanding, it was found that self-regulation "remains highly popular and is frequently expressed as a

⁴⁸³ UNESCO "World Trends in Freedom of Expression and Media Development".

⁴⁸⁴ UNESCO "World Trends in Freedom of Expression and Media Development" 109-110.

⁴⁸⁵ UNESCO "World Trends in Freedom of Expression and Media Development" 111.

⁴⁸⁶ UNESCO "World Trends in Freedom of Expression and Media Development" 111.

preferential system by journalists themselves".⁴⁸⁷ Additionally, it was also found that the system of self-regulation has continued to be fervently supported by media freedom and development organisations across the globe and that it has also received substantial development support by UNESCO.⁴⁸⁸ It is also needed to look at other trends that have an impact on the regulation of the press and media at large.

4.3.1 Convergence and the effects of new media

The effect that convergence has had on the media is of unprecedented magnitude. Apart from the strain it has caused on traditional economic models underlying the funding of journalism due to changing readership patterns, it has also affected media regulation. To illustrate what is meant by convergence, these examples give some context. As traditional television channels are increasingly publishing written news stories on their websites, and as traditional press publications are increasingly making use of audio-visual content such as videos and podcasts for richer news experiences together with disseminating their content digitally, and as social media platforms are increasingly used to share news and other information, the traditional divide between the printed press and broadcast media have begun fading to a large extent, coming together in the online environment.

It is necessary to consider how convergence impacts both traditional and new forms of media regulation. *Before* the inclusion of online content into the regulatory ambit of the Press Ombud,⁴⁸⁹ Reid and Isaacs wrote the following, which still rings true:

⁴⁸⁷ UNESCO "World Trends in Freedom of Expression and Media Development" 111.

⁴⁸⁸ UNESCO "World Trends in Freedom of Expression and Media Development" 111.

⁴⁸⁹ Discussed at 3.1.4 above.

[T]here are currently 'gaps' within the over-arching regulatory framework through which online news content slips. The problem with this situation is that it opens the entire framework of self-regulation, fostered from a media and public partnership for the regulation of media content, at risk of diminishing credibility. The risk of political pressure and criticism also arises again, since from a regulatory perspective, South African online news publishers are currently not held tightly to account for errors in journalistic practice. Proponents for more statutory regulation of media content would argue here that online news publishers are able to do as they please without being held to account (although counter arguments would explicate that they do not, in most cases, do so since this would harm the credibility of the online news publisher itself). But most importantly, while more and more of our news content is reproduced or appears exclusively in an online format, such gaps in the regulatory framework create a space in which news producers are arguably unaccountable to the public and the consumers of their content, at least in regulatory terms. The online news audience rightly deserves the same channels of recourse as the 'off-line' audience.⁴⁹⁰

The withdrawal of Independent Media (one of the four major media houses in South Africa) from the PCSA,⁴⁹¹ speaks to the gaps mentioned by Reid, where the framework of self-regulation, or in this case independent co-regulation, is opened to political pressure and public scrutiny due to a major media company not being regulated by an independent and credible regulator. However, with regard to the matter of convergence, it is the use of social media channels and platforms to disseminate media content that poses new questions about the functioning of self-regulation.

According to Puddephatt,⁴⁹² although the question of jurisdiction is becoming increasingly complex due to the globalisation of the media environment, self-regulation is well-suited to fill the resulting gap. However, he states that regulatory standards and norms that are accepted across the board have not been developed yet for the online environment, especially regarding social media. Puddephatt writes: "Consequently self-regulation –

⁴⁹⁰ Reid and Isaacs "Considering a cross-platform media accountability system for broadcast, print and digital news media in South Africa" 19.

⁴⁹¹ Discussed at 3.1.7 above.

⁴⁹² Puddephatt "The Importance of Self-Regulation of the Media in upholding freedom of expression" 12.

principally by companies, takes place in a vacuum where it is shaped by commercial interests or private pressure from governments."⁴⁹³ Major internet companies including Facebook, Twitter and Google have, after international pressure from both governments and the public, implemented their own regulatory systems and complaints mechanisms at company level. The efficacy of these internal systems, despite their continued development, is criticised for not being enough to curb the spread of disinformation ("fake news") together with toxic, divisive content.⁴⁹⁴

Article 19, a British organisation focussed on the defence and promotion of freedom of expression across the world, published a consultation paper in June 2019 outlining a proposed roadmap and model for the creation of what they call social media councils (hereafter referred to as SMCs).⁴⁹⁵ As with the recognised best practice of press regulation making use of self-regulatory or co-regulatory press councils,⁴⁹⁶ they propose a multi-stakeholder accountability mechanism (including social media companies and members of the public) to regulate content on social media platforms. It is stated that "solo-regulation", meaning when social media companies themselves decide on content moderation policies, has not been able to protect human rights and ensure freedom of expression sufficiently or transparently.⁴⁹⁷ Through the use of SMCs, they aim to provide an "open, transparent, accountable and participatory forum to address content moderation issues on social media platforms on the basis of international standards on human rights."⁴⁹⁸ The paper proposes that SMCs be voluntary,

⁴⁹³ Puddephatt "The Importance of Self-Regulation of the Media in upholding freedom of expression" 16.

⁴⁹⁴ UNESCO "World Trends in Freedom of Expression and Media Development" 112.

⁴⁹⁵ Article 19 "The Social Media Councils" 3.

⁴⁹⁶ See 4.6 below.

⁴⁹⁷ Article 19 "The Social Media Councils" 5.

⁴⁹⁸ Article 19 "The Social Media Councils" 7-8.

with membership not creating legal obligations, but that the SMC's efficacy be determined through voluntary compliance in good faith.⁴⁹⁹ Their paper states it *raison d'être* as:

In today's world, dominant tech companies hold a considerable degree of control over what their users see or hear on a daily basis. Current practices of content moderation on social media offer very little in terms of transparency and virtually no remedy to individual users. The impact that content moderation and distribution (in other words, the composition of users' feeds and the accessibility and visibility of content on social media) has on the public sphere is not yet fully understood, but legitimate concerns have been expressed, especially in relation to platforms that operate at such a level of market dominance that they can exert decisive influence on public debates.

This raises questions in relation to international laws on freedom of expression and has become a major issue for democratic societies. There are legitimate motives of concern that motivate various efforts to address this issue, particularly regarding the capacity of giant social media platforms to influence the public sphere. However, as with many modern communication technologies, the benefits that individuals and societies derive from the existence of these platforms should not be ignored. The responsibilities of the largest social media companies are currently being debated in legislative, policy and academic circles across the globe, but many of the numerous initiatives that are put forward do not sufficiently account for the protection of freedom of expression.⁵⁰⁰

Puddephatt,⁵⁰¹ in turn, emphasises the importance of self-regulation following clear and transparent norms, to prevent censorship by internet companies and internet service providers. Undertaking further research of SMCs and its development ought to be a fruitful field of study.

Up until such time that South Africa sees the creation of a SMC, if at all, content on social media continues to be subject to the regulation of the social media companies themselves. A line does have to be drawn between any speech published on the internet, compared to that of journalism by

⁴⁹⁹ Article 19 "The Social Media Councils" 8.

⁵⁰⁰ Article 19 "The Social Media Councils" 5.

⁵⁰¹ Puddephatt "The Importance of Self-Regulation of the Media in upholding freedom of expression" 16.

recognised publications that voluntarily hold themselves to a codified ethical standard. When a South African PCSA subscribing publication shares unethical information on its social media channels, it can still be approached either directly or through the PCSA to remove or alter such content, or to publish a correction and/or apology, provided the publication is willing to oblige. Alternatively, the social media company in question would have to be approached, or the courts if the matters go against the law. Commentary posted on social media can also be reported to the South African Human Rights Commission (SAHRC), a chapter nine institution, which can institute an investigation and make a finding based on the infringement of human rights.⁵⁰²

Nevertheless, can media regulation in South Africa be further developed to meet the demands and challenges created by the effects of conversion? Although sector-specific media regulation remains practical due to technical and operational considerations, such as broadcasting making use of a finite public resource through its use of the frequency spectrum, the press and broadcast media as different media sectors amalgamate in the online sphere. One option, then, is also amalgamating the two self-regulatory bodies, being the PCSA and BCCSA, into one single authority. On the topic of considering a cross-platform media accountability system, Reid and Isaacs write:

The BCCSA is subject to legal restrictions and is not permitted in terms the Electronic Communications Act 2005 to amend its Broadcasting Codes without the agreement of the Independent Communications Authority of South Africa (ICASA). The PCSA, however, is not subject to legal restrictions and can amend its constitution, code, policies and procedures without incurring legal implications (as it has done in recent years). Because of the legislation adopted in South Africa which governs the regulation of broadcasting, the

⁵⁰² SAHRC "Complaints Handling Procedures of the South African Human Rights Commission" s 3(1).

broadcasting regulatory environment in the country is comparatively inflexible when compared to a body such as the PCSA. As such, an amalgamation of the PCSA with the BCCSA would result in a further loss of flexibility in the media regulatory environment. Also, the PCSA, due to its amalgamation with a legally restricted body, would stand to lose some of its independence, or the perception thereof.⁵⁰³

It is important to note that the BCCSA cannot change its code(s) of conduct, constitution and policies without the approval of ICASA, whereas the PCSA may do so without having to seek permission from a statutory body. A less restrictive alternative to amalgamating the PCSA and the BCCSA is recognised, with Reid and Isaacs stating that the absence of a cross-platform media accountability system "does not preclude the possibility of establishing a single entry-point for the complainant, in an effort to make the entire regulatory system more accessible [...]."⁵⁰⁴ They further state that such a single entry-point could function as a referral office, which assesses a complaint and then directs it to the relevant regulator. Such an approach could contribute to increased public awareness of the ability to complain to an independent body about editorial content at no cost. Such an initiative would, however, have to be bought into by both the press and broadcast media sectors, as well as their respective regulatory bodies.

4.3.2 Declining trust in the media

It can be argued that the calls for an MAT were made more than just from a place of discontent with the press' regulatory system, but also a place with a deep mistrust towards the media. Addressing the matter of declining trust in the media is relevant because independent self-regulation or co-regulation, through press councils, are instituted for the very reason of

⁵⁰³ Reid and Isaacs "Considering a cross-platform media accountability system for broadcast, print and digital news media in South Africa" 30.

⁵⁰⁴ Reid and Isaacs "Considering a cross-platform media accountability system for broadcast, print and digital news media in South Africa" 33.

improving trust in the media by fostering credibility through accountability and transparency. Wasserman sets the argument for not leaving out fundamental issues such as these when looking at media regulation, specifically in light of the debate surrounding the MAT:

[T]he debates around press freedom in this context have often been marked by a simplistic binary between media and state, in which commercial media are often seen as inherently 'independent' rather than political and economic role players that themselves are positioned within an array of power relations. In a debate that has become characterised by rhetorical throwbacks to the struggle against apartheid, making use of simplistic dualities such as 'freedom' versus 'control', 'self-regulation' versus 'statutory intervention', the 'actually existing' mediated public sphere in South Africa is often left under examined while a battle to defend pre-conceived normative concepts – often removed from the everyday lived experience of the majority of citizens – is being fought out.⁵⁰⁵

One prominent reason why trust in the media is declining is marked by the use of the term "fake news" – a phenomenon that is paired with, according to the UNESCO report on trends in freedom of expression and media development, the political trends of widespread de-legitimation of the media. This de-legitimation also ties in with what the report describes as media capture.⁵⁰⁶

Media coverage is not objective. Although a journalist can endeavour to tell a story objectively, through the agency of editors and journalists it is decided which stories to write, how to present them and what perspective to take in doing so. The media becomes an actor in the social environment by taking editorial stances, as a partisan participant, shaping and filtering the debate

⁵⁰⁵ Wasserman *Press freedom in Africa: Comparative perspectives* 9.

⁵⁰⁶ UNESCO "World Trends in Freedom of Expression and Media Development" 114.

through omission and inclusion.⁵⁰⁷ This can be problematic, with Puddephatt writing:

In some contexts, the media may serve to reinforce the power of vested interests and exacerbate social inequalities by excluding critical or marginalised voices. In more established democracies, the role of the media has come under attack from those who believe it is undermining democracy through the trivial, antagonistic and personalized nature of its coverage. At its most extreme, the media can promote conflict and social divisiveness, particularly in a non-pluralistic media environment.⁵⁰⁸

Puddephatt asks if the state plays no role in ensuring that the press is responsible in its coverage, how it can be ensured that the power they hold is not abused and that they are kept accountable. "The answer has been self-regulation," says Puddephatt.⁵⁰⁹ This places self-regulation at the centre of the debate alleging that the media misuses its powers through biased and/or inaccurate reporting. On the use of the term "fake news" as a way of breaking down the credibility of the media, it is stated that:

Referring to credible news stories as 'fake news' [...] has been used by those in powerful positions to dismiss critical news stories. Again, this has been a growing trend for a number of years, but it has become a norm in the period covered by this study by the prominent use of such discourse in democratic countries. The systematic de-legitimation of the media has occurred most prominently when powerful actors have attacked major elements of the media, including incorporating such attacks as part of regular communication with the public. De-legitimation is a subtle and effective form of propaganda, reducing the public's confidence in the media to perform a collective and vital function as a check on government. Dangerous enough on its own, de-legitimation encourages and reinforces attacks on the media by other factions in society. Taken together, all this has the power to intimidate journalists and disrupt public faith in the foundational principles of the function of the media and press, as well as the credibility of facts and science. This can have far-reaching implications for the status of journalism and for journalist safety and for basic democratic practices. The de-legitimizing can be seen as part of a greater problem of political and social polarization, including sustained attacks

⁵⁰⁷ Puddephatt "The Importance of Self Regulation of the Media in upholding freedom of expression" 12.

⁵⁰⁸ Puddephatt "The Importance of Self Regulation of the Media in upholding freedom of expression" 11-12.

⁵⁰⁹ Puddephatt "The Importance of Self Regulation of the Media in upholding freedom of expression" 12.

on the legitimacy of public institutions, including independent judiciaries, throughout the world.⁵¹⁰

Through professionalism, the media can combat the issues above as well as the negative public perception of credible journalism. Independent self-regulation adds both to the credibility and trustworthiness of the media, as well as its professionalism by promoting ethical reporting and recognised journalistic standards. It is stated that the "concept of independence – and the professional standards and public interest purpose which independence protects – is sufficiently fragile that it depends on widespread understanding and appreciation of its functions and purposes."⁵¹¹ Considering the widespread attacking and trivialising of the media, self-regulation or co-regulation should play a prominent role in enhancing and ensuring the credibility and professionalism of the media.

A media council cannot be expected to address the systemic issues related to declining trust in totality, nor is it responsible for doing so. It does, however, have an essential part to play. Pertinent issues that need to be addressed include that of "fake news", having the ability to masquerade as verified information and to be shared widely.⁵¹² As the media landscape has changed due to conversion, and as traditional economic models have failed, systemic issues have and continues to develop. The effect that algorithms have on the dissemination of online information, creating so-called "echo chambers" have also started to be understood.⁵¹³ Such systemic issues require intervention from a wide range of industry role-players.

⁵¹⁰ UNESCO "World Trends in Freedom of Expression and Media Development" 116.

⁵¹¹ UNESCO "World Trends in Freedom of Expression and Media Development" 114.

⁵¹² UNESCO "World Trends in Freedom of Expression and Media Development" 87.

⁵¹³ UNESCO "World Trends in Freedom of Expression and Media Development" 84.

The UNESCO report emphasises the importance of media and information literacy and what role it can play to curb the effects of "fake news".

Researchers have long argued that one method for increasing effective diversity in media content is to empower audiences through enhancing media and information literacy. Media and information literacy may be particularly useful in addressing the consequences of democratized, unfiltered user-generated content and understanding the consequences of algorithms on modes of diffusion. Many media literacy initiatives have historically focused on young people and school-aged children, but the related capacity has a broader and growing relevance in a time of growing media consumption over the internet, 'fake news' and proliferating disinformation on social media.⁵¹⁴

Lastly, the report's use of the term "media capture" refers to all the forces that can restrict or skew coverage, especially by the private sector, apart from the commonly known threat of government control. It is stated that capture corrupts the media to the extent that they no longer fulfil the role of informing the public, but that their influence is used to promote vested interests through manipulated information. It was found that in all regions there are signs of government control of the media becoming "insidiously intertwined" with private business interests, all the while the illusion of a free and independent media is upheld.⁵¹⁵

4.4 Critique of statutory press regulation

The question remains to what extent the PCSA should be granted statutory recognition – as through the *Film and Publications Act* – but also whether there should be powers that are backed by legislative force to ensure compliance.⁵¹⁶ This question is of specific concern keeping in mind the withdrawal of Independent Media from the PCSA. Berger⁵¹⁷ describes the

⁵¹⁴ UNESCO "World Trends in Freedom of Expression and Media Development" 91.

⁵¹⁵ UNESCO "World Trends in Freedom of Expression and Media Development" 117-118.

⁵¹⁶ Berger 2010 *Communicatio* 293.

⁵¹⁷ Berger 2010 *Communicatio* 292.

question of looking for the ideal regulatory environment as looking for the "sweet spot", somewhere between government regulation and, essentially, unregulated media. According to him, the former could easily result in pre-publication censorship, whereas the latter could result in a "free-for-all".⁵¹⁸ Voluntary self-regulation is referred to as the "gold standard" for the printed and online media.⁵¹⁹

The calls for an MAT drew from the regulatory model of the broadcast media, specifically stating that the CCC of ICASA serves as an appeals body for the independent and voluntary BCCSA. Following this argument, the proposition has been that the MAT could (similarly) serve as an appeals mechanism for the PCSA's ombud system, strengthening the current system rather than replacing it. The understanding on which these statements have been made are, however, based on a false and misinformed premise. Duncan unequivocally states that "[...] to compare the envisaged relationship between the tribunal and the press ombudsman as being akin to that of the self-regulatory BCCSA and ICASA's Complaints and Compliance Committee (CCC) is false", adding "[...] although ICASA approves the code of conduct of the BCCSA, it does not override its decisions – only a right of review exists".⁵²⁰

The right of review mentioned above was confirmed and expanded on in a case where the SABC refused to accept a ruling against it by the BCCSA and wanted to appeal the decision to the CCC of ICASA.⁵²¹ After two failed attempts to request leave to appeal from the BCCSA to its appeals tribunal, the SABC stated that they would seek to have the decision set aside by the

⁵¹⁸ Berger 2010 *Communicatio* 292.

⁵¹⁹ Duncan 2011 *Ecquid Novi: African Media Studies* 91.

⁵²⁰ Duncan 2011 *Ecquid Novi: African Media Studies* 97.

⁵²¹ *SABC 3 v Mail & Guardian Ltd and Sole* 25/2011 BCCSA.

CCC based on a serious irregularity in the proceedings, stating that the process did not follow the requirements of fair administrative justice.⁵²² The BCCSA pointed out that the public broadcaster could not lodge a review application to the CCC as it was the *licensee* in this matter, whereas only *complainants* have the right to approach the CCC on procedural grounds.⁵²³

The ruling by the BCCSA refers to a Government Notice⁵²⁴ that sets out the regulations to be followed in the case of a review application brought to the CCC (then known as the Broadcasting Monitoring and Complaints Committee, or BMCC) from the BCCSA. The CCC may review any proceedings by the BCCSA brought by a complainant (excluding a licensee) on the following grounds: absence of jurisdiction on the part of the BCCSA; bias, malice or corruption on the part of the BCCSA; gross irregularity in the proceedings; or failure to comply with rules of natural justice.⁵²⁵ Notably, in case of the CCC finding in favour of an applicant, it may only refer the matter back to the BCCSA for re-hearing – it may not issue a new judgment itself.⁵²⁶ The SABC could still have approached a court of law to review the case on procedural grounds, but this was not the case. This case adds to the criticism of the calls for a statutory press regulator in South Africa that would be a higher authority than the PCSA.

Most press councils outside of South Africa are non-statutory in nature.⁵²⁷ An often made argument is that any form of statutory underpinning would open the door for government intrusion, and that a voluntary self-regulatory body's punitive powers should not exceed that for which the coercive power

⁵²² *SABC 3 v Mail & Guardian Ltd and Sole* 25/2011 BCCSA para 2.

⁵²³ *SABC 3 v Mail & Guardian Ltd and Sole* 25/2011 BCCSA para 7.

⁵²⁴ GN 1432 in GG 25573 of 9 October 2003.

⁵²⁵ GN 1432 in GG 25573 of 9 October 2003 ss 3.1-3.4.

⁵²⁶ GN 1432 in GG 25573 of 9 October 2003 s 4.12.

⁵²⁷ Berger 2010 *Communicatio* 293.

of law is required.⁵²⁸ It is conceded that "weakness in non-statutory self-regulation can pave the way for statutory self-regulation, which in turn creates the further potential for governmental regulation via the exercise of state power".⁵²⁹

Berger argues for press self-regulation as a means of press freedom in a democratic political dispensation, in light of the calls for instituting a statutory appeals body through the MAT, stating it is often the argument that:

"[...] in democracies there has to be a clear distinction between issues to be dealt with in legislation or case law, such as access to information or defamation, on the one hand, and on the other hand, journalistic ethics, such as accuracy or fairness, which are not legal matters to be regulated by statutory authority."⁵³⁰

In another article, he states that there is no clear political culture of respect for the independence of state institutions, pointing to the politicisation of some of these institutions, also critiquing their funding model(s) by specifically referring to a "handicapped ICASA" due to under-resourcing. He concludes that there are "no guarantees that statutory regulation in South Africa would not slide into becoming government regulation."⁵³¹

Similar distrust has been noted by Murray⁵³² in a study into the role of chapter nine institutions. She cites critical press coverage as well as crises relating to "essentially political allegations that their work is insufficiently independent."⁵³³ This ties in with South Africa's reputation of being plagued by rampant corruption and the misuse of power. A lack of independence cannot be attributed to all constitutional institutions all the time, nor

⁵²⁸ Berger 2010 *Communicatio* 293.

⁵²⁹ Berger 2010 *Communicatio* 294.

⁵³⁰ Berger 2010 *Communicatio* 289-290.

⁵³¹ Berger 2011 *Ecquid Novi: African Journalism Studies* 52.

⁵³² Murray 2006 *PER/PELJ*.

⁵³³ Murray 2006 *PER/PELJ* 124.

necessarily to an entire institution but only to a part of it, yet improper conduct does at times skew the execution of the constitutional mandate of these institutions.

Berger, distinguishing between freedom of expression as a self-regarding right and freedom of the press as an other-regarding right, addresses the concern of statutory regulation of the press. It is argued that free speech "is not per se obliged to take account of ethics, whereas journalistic speech lays claim to being guided by the ideals of truth-telling, independence, public interest and consideration for the impact of a given communication".⁵³⁴ It is argued that the press should be held accountable to the standards it voluntarily holds itself to through the mechanisms of self-regulation. Elaborating on this, Berger states:

When "other-regarding" speech depends on a public resource like scarce frequency spectrum, it has generally been the practice that a degree of statutory regulation of content is regarded as compatible with democratic rights to media freedom. Even here, however, a situation may prevail like in South Africa where the Independent Communications Authority of South Africa has delegated a large degree of content-regulatory authority to an industry-body which is recognised in statute, namely the Broadcasting Complaints Commission of South Africa [...]. [T]his is a situation of "co-regulation", meaning that it combines "non-state regulation and state regulation in such a way that a non-state regulatory system links up with state regulation". However, the real debate over self-regulation usually pertains to the press where the 'scarcity' rationale for government regulation does not come into play.⁵³⁵

This conception of what constitutes "co-regulation" is different from how the PCSA uses the term to indicate regulation by the press and public, excluding regulation by the state.

⁵³⁴ Berger 2010 *Communicatio* 290.

⁵³⁵ Berger 2010 *Communicatio* 290-291.

Regarding the stark debate about self-regulation versus statutory regulation of the press, existing literature seems to lack a nuanced conception or consideration of what could be meant by "statutory" when speaking about statutory regulation. Statutory in the sense of press regulation could also mean that legislation requires the press to subscribe to an independent self-regulatory body mandated with enforcing a code of ethical conduct, not necessarily creating a statutory institution. Such legislation could lay down certain fundamental principles to which any code of conduct must comply with, in line with existing legislation about hate speech, defamation and privacy, amongst others. It could perhaps be required that the PCSA or any other self-regulatory organisation report to the National Assembly or a specially created parliamentary committee, although not granting parliament powers to intervene with the functioning of such self-regulatory institutions. Such legislation could serve to give self-regulation greater legitimacy, strengthening it by giving it a basis in law. As such discussions have not been noted in existing literature, it is merely noted here, to be referred to again in this study's conclusion.

Going ahead, it needs to be studied what is considered to be necessary to ensure the effective functioning of press councils.

4.5 The functioning and role of press councils

The efficacy of media self-regulation is criticised all over the world. The same can be said about the current South African press regulatory system. Duncan⁵³⁶ states that the ANC failed through its calls for a statutory appeals tribunal to analyse the international debate about how to improve and expand media accountability. She states that these debates are moving in

⁵³⁶ Duncan 2011 *Ecquid Novi: African Media Studies* 100.

the direction of understanding the role of press councils as being more than mere passive complaints-receiving bodies, but that they should act proactively to promote greater accountability and ethical standards in the media.⁵³⁷ This proactivity includes the need to commission and conduct research about the functioning and influence of news media, the need to undertake public education drives and media literacy work, and to perform an active advocacy role in promoting a free and independent press. Additionally, matters such as the training of journalists, making use of statistics by research laboratories that monitor trends and omissions in the media, as well as opening up channels for feedback from all avenues of society should ideally be pursued. A number of these functions are performed by non-profit organisations and other institutions such as the South African National Editors Forum (SANEF) and the Right2Know Campaign, a freedom of expression advocacy organisation, although it needs to be analysed how well South Africa's press council fares in this regard.

The PCSA has been criticised for not performing proactively enough with regard to some of the above mentioned categories, specifically for not analysing their judgements sufficiently to identify and analyse long-term trends relating to media standards, issuing reports about this and acting on the findings.⁵³⁸ The PCSA did, in May 2018, issue a press release (as it has done before) reporting healthy growth in media ethics and awareness, expressing the successes of the Public Advocate mediating resolves between publications and its readership, as well as the willingness of the press to publish corrections and retractions when it was found by the Press

⁵³⁷ Duncan 2011 *Ecquid Novi: African Media Studies* 100.

⁵³⁸ Duncan 2011 *Ecquid Novi: African Media Studies* 101.

Ombud that they have acted wrongly. The press release also outlines how many complaints were received over a period of time, how many ended up going to adjudication and/or appeal, and against whom the findings were made. It could be argued that more is needed beyond the issuing of a press release. Although public outreach activities and input into regulatory issues are mentioned as having been undertaken, these are not specified.⁵³⁹

Duncan advocates for a more active approach, referring to regional citizens' press councils in the Philippines, that have been structured to function in two ways, on *complaints* and on *issues*, saying that broader trends in complaints are referred to a plenary of the council, which then engages with the industry on addressing these issues.⁵⁴⁰ Additionally, greater participation from journalists with their press council is deemed to be necessary, with Duncan⁵⁴¹ stating that there tends to be a lack of an organised voice for journalists on crucial issues affecting them in newsrooms, specifically in South Africa.

Krüger,⁵⁴² in a report published by fesmedia Africa,⁵⁴³ studied the case for media self-regulation in both the international and regional community. His study serves as a valuable indicator of norms and best practice concerning the regulation of the press. The main findings of the report, which are relevant to this study, are discussed accordingly.

⁵³⁹ PCSA 2018 <http://www.presscouncil.org.za/media-release-press-council-reports-healthy-growth-in-media-ethics-and-awareness/>.

⁵⁴⁰ Duncan 2011 *Ecquid Novi: African Media Studies* 101.

⁵⁴¹ Duncan 2011 *Ecquid Novi: African Media Studies* 101.

⁵⁴² Krüger "Media Courts of Honour".

⁵⁴³ The media project of the Friedrich-Ebert-Stiftung (FES) in Africa, working towards a legal, political and regulatory framework for the media that follows the relevant international and regional laws, the relevant protocols of the African Union, and declarations of the Southern African Development Community.

According to Krüger, there are advantages of making use of self-regulatory mechanisms rather than those of statutory regulation of the press – albeit self-regulation still falling within the ambit and framework of the law.⁵⁴⁴ Self-regulation stands in contrast to regulation by the state, the latter of which is common in authoritarian regimes.⁵⁴⁵ He qualifies this by stating that the law nevertheless has a hold on journalists in democratic regimes, such as through the law of defamation and legal obligations pertaining to reporting on vulnerable groups, areas with which the law deals extensively. He acknowledges that in democratic regimes across the world, using Britain as an example, there are frequently attempts to enlarge the ambit of the law with regard to the regulation of journalism, that would have the effect of reducing the sphere in which self-regulation functions.⁵⁴⁶

He continues to cite reasons why non-statutory self-regulatory bodies are better equipped to deal with the matters of ethics and news production rather than courts of law. Whereas courts are considered blunt instruments when it comes to dealing with the nuances of news production, demanding strict standards of proof in the same way evidence is demanded from lawyers, media councils are considered to be more mindful of the fast-paced and developing nature of journalism.⁵⁴⁷

Other reasons include the practical advantages of flexibility, speed and accessibility, and the lack of financial barriers for complaints to be laid.⁵⁴⁸ According to Krüger the role of press councils are twofold: they defend the principle of media freedom by their very existence, but also serve as an

⁵⁴⁴ Krüger "Media Courts of Honour" 13.

⁵⁴⁵ Krüger "Media Courts of Honour" 13.

⁵⁴⁶ Krüger "Media Courts of Honour" 13.

⁵⁴⁷ Krüger "Media Courts of Honour" 13-14.

⁵⁴⁸ Krüger "Media Courts of Honour" 14.

alternative to state regulation.⁵⁴⁹ Many press councils were instituted for the very reason of the threat of government control over what the press publishes, their formation being a counterreaction to quell this threat.⁵⁵⁰ According to Krüger, the battle against outside and governmental control of the media is never conclusively won, with calls for tighter regulation across the world emerging periodically, continually requiring press councils to prove their effectiveness.⁵⁵¹

Krüger acknowledges that broadcasting has traditionally been subject to greater regulation than that of the press, seeing that the spectrum on which it is broadcasted is a limited public resource. For this reason, press councils have tended to focus on the printed press, although having to grapple with the question of how to deal with internet publications and new media.⁵⁵² He refers to the BCCSA as being one of but a few independent self-regulatory bodies that serve only to regulate the broadcast media, adding that in countries with smaller media industries it makes sense for a single body to regulate both sectors.⁵⁵³ A few of the Southern African media councils deal with both the press and broadcasting media sector.⁵⁵⁴

Even though South Africa has a separate independent regulator for advertisements, Krüger notes that in some Southern African countries matters related to advertisements are brought before media councils as there is no alternative body to deal with the complaints. Concern is noted that such regulatory conflation with advertorial content can result in the blurring of the distinction between editorial and purely commercial content,

⁵⁴⁹ Krüger "Media Courts of Honour" 14-15.

⁵⁵⁰ Krüger "Media Courts of Honour" 15.

⁵⁵¹ Krüger "Media Courts of Honour" 15.

⁵⁵² Krüger "Media Courts of Honour" 18.

⁵⁵³ Krüger "Media Courts of Honour" 18, 31.

⁵⁵⁴ Krüger "Media Courts of Honour" 31.

and that this may impact the perception that the public has of the credibility of the press.⁵⁵⁵

Krüger states that self-regulatory bodies are usually comprised of publishers, journalists and the reading public, although there are some differentiations around the world where only two or one of these groups form part of the press council. Unions sometimes represent journalists, and several press councils draw candidates from their respective judiciaries for key positions – similar to the PCSA.⁵⁵⁶ The predominant source of funding for press councils are the media companies themselves, which have a vested interest in avoiding statutory regulation, although some other forms of funding – such as donations from individuals and corporates – are sometimes pursued.⁵⁵⁷ In South Africa the PCSA is funded by the media that subscribe to its authority, having decided not to seek money elsewhere.⁵⁵⁸

Across the world efforts by the state to implement statutory regulation is often vehemently opposed, while most press councils are incorporated as private associations. India and Kenya are some of the exceptions, with India's press council being established by legislation, and Kenya also having a statutory body and legislation that determines what the press may and may not publish.⁵⁵⁹

The general functioning of most press councils is rather similar, with complaints first being screened and a resolve sought before the matter is referred to adjudication by means of a hearing. Krüger states this being a

⁵⁵⁵ Krüger "Media Courts of Honour" 32.

⁵⁵⁶ Krüger "Media Courts of Honour" 19.

⁵⁵⁷ Krüger "Media Courts of Honour" 19-20.

⁵⁵⁸ Krüger "Media Courts of Honour" 37.

⁵⁵⁹ Krüger "Media Courts of Honour" 20.

mixture of a mediatory and judicial approach. Not all press councils have a specific staff position for being a complainant's first avenue of amicable resolve with council staff, an ombud or a public advocate being variably used for this purpose.⁵⁶⁰ South Africa follows the latter approach of employing the Public Advocate, in turn using the office of the Press Ombud for formal adjudication. In countries making use of self-regulation it is mostly the case that any affected party may lodge a complaint, thus allowing third party complaints. Most councils discourage legal representation, try to keep its processes as informal as possible and use moral sanctions of reprimand. The lack of punitive powers enforced by law is one of the most prominent characteristics of press councils across the world.⁵⁶¹

Krüger adds that, although the PCSA mostly considers its regulatory role to be reactive, around the world press councils tend to be more proactive. Such proactivity includes voicing concerns about matters relating to freedom of expression and the press. Proactivity also includes developing further forms of public engagement to enhance the visibility and accessibility of the respective council's work: this includes mock hearings, debates, presenting training courses, issuing awards and bringing out publications and reports.⁵⁶² Even though the PCSA has started exploring the possibilities of a broader mandate from 2007, Krüger acknowledges that in the South African context SANEF has become the pre-eminent body representing the media, also citing some others, and that duplicate efforts of advocacy and training might not necessarily make practical sense. This does not subtract

⁵⁶⁰ Krüger "Media Courts of Honour" 20-21.

⁵⁶¹ Krüger "Media Courts of Honour" 21.

⁵⁶² Krüger "Media Courts of Honour" 22-23.

from the importance of greater profile and credibility of councils in general, including the PCSA.⁵⁶³

Notably, with regard to the withdrawal of Independent Media from the authority of the PCSA and speaking on the matter of legitimacy, Krüger states that a press council must be known for representing the media industry in its entirety, especially when the self-regulatory system is voluntary in nature – as most press councils are. He further states that there are "often some titles that choose to stay outside the system, but credibility is undermined if that group is too large or influential."⁵⁶⁴ Such recalcitrance goes against the core requirements of a press council being participatory through involving all relevant parties, its members being willing to subject themselves to the authority of the council, and having complaints dealt with effectively. In addition, it is emphasised that the independence and proper stature of those who act for a council is of great importance.⁵⁶⁵

Elaborating on the effectiveness of press councils, considering the criticism lodged against them, Krüger writes:

Fundamentally, these criticisms raise the question of how the effectiveness of a council should be judged. On one level, one can look at its ability to resolve issues quickly and to the satisfaction of all concerned. Another measure might be the extent to which government interference is held at bay and media freedom protected. But the most difficult question is whether a council's success should be measured against the actual behaviour of the media. After all, if councils are intended to regulate the media, any misstep can be seen as proof of failure.

He continues his discussion by stating that the matter of the public's trust in the media is a complex issue, not just related to a single cause, but that it is integrally connected to structural matters of literacy and income levels. He

⁵⁶³ Krüger "Media Courts of Honour" 38, 41.

⁵⁶⁴ Krüger "Media Courts of Honour" 23-24.

⁵⁶⁵ Krüger "Media Courts of Honour" 24.

states that the great success of tabloid newspapers in many societies, "with their often tenuous relationship to the basic ethics of reporting, also illustrates that the connection between standards, credibility and audience size is a complex one."⁵⁶⁶ The example of not being able to measure the rate of crime in a country by the strength of its courts is used as an example to illustrate the relationship between journalism and its regulatory bodies, although Krüger suggests a more nuanced formulation. According to him, press councils can play a big part in improving the amount of trust the public has in the media, but that they are not the only factor. He states:

The media economy and the level of competitive pressures it creates; training levels; and the character of individual proprietors are just some of the factors that shape the atmosphere for good or ill. In considering the media culture as a whole, one must also accept that it is shaped over considerable time. An individual lapse is not indicative, but a pattern of behaviour on the part of individual titles, and of the media as a whole, will certainly influence public trust. For councils, the implication is that their effectiveness can and should be judged by their ability to influence media behaviour over time, taking into account the many other factors at play.

He raises reasons why press councils should become more muscular and proactive, stating that press councils will be held in higher regard when they are actively seen and their impact on media practice is publicly apparent.⁵⁶⁷ It is also stated that it is important for councils to draw attention to themselves through a variety of avenues, to ensure the public is aware of the possibility of lodging a complaint.⁵⁶⁸

Krüger also addresses self-regulation in the context of transitional societies that are undergoing the shifting process from imposed colonial structures to those of newly founded democracies; broadly stating that economic and market pressures, ethnic divides as well as undue political influence do not

⁵⁶⁶ Krüger "Media Courts of Honour" 25-26.

⁵⁶⁷ Krüger "Media Courts of Honour" 26.

⁵⁶⁸ Krüger "Media Courts of Honour" 39.

contribute to a conducive environment for fostering self-regulation, both financially and professionally.⁵⁶⁹ This being said, with the systematic maturing of South Africa's constitutional democracy, and with a large media landscape compared to other transitional societies, the country has been able to sustain and develop its system of independent co-regulation. Krüger attributes this, in part, to South Africa's long history of having a press council, compared to other Southern African media councils. The PCSA goes back to its first inception in 1962, although having seen various different incarnations, and having undergone a shift in dynamics with the changing of South Africa's political dispensation around 1994.⁵⁷⁰ The PCSA is by far the busiest council in Southern Africa, judging by the amount of complaints it receives.⁵⁷¹ Krüger refers to the "sustained attacks" by the ANC calling for a statutory Media Appeals Tribunal, and says if the proposal were to be picked up and moved forward a Constitutional Court challenge is likely to be seen.⁵⁷²

4.6 Norms and best practice of press self-regulation

Krüger writes that the Southern African councils, including the PCSA, are in line with international normative models and best practice as far as such standards can be said to exist objectively, considering that the political and media environment of each country is unique. In turn, Berger⁵⁷³ argues that one should be careful when looking at foreign examples as "best practice", in order to avoid selective borrowing and *ad hoc* transplants. Although he refers to a study by New Zealand's press council, which counted 87

⁵⁶⁹ Krüger "Media Courts of Honour" 26-27.

⁵⁷⁰ Krüger "Media Courts of Honour" 29-30; see the historical overview of the PCSA at 3.1.2 above.

⁵⁷¹ Krüger "Media Courts of Honour" 41.

⁵⁷² Krüger "Media Courts of Honour" 34.

⁵⁷³ Berger 2011 *Ecquid Novi: African Journalism Studies* 38.

countries with press councils of which 86% are wholly self-regulatory, and 63% of which have jurisdiction over both the print and broadcast media, he emphasises that common practice does not always relate to best practice. "What is 'best'? Clearly, there must be criteria here – and even then, what is best according to the criteria relevant to one society or set of circumstances, may not suit those with different conditions."⁵⁷⁴ The question is when should there be borrowed, and when should foreign practices be rejected?⁵⁷⁵

It can be added here that another study found that in 2011, out of the 50 countries which achieved the highest press freedom ratings in the world according to the Reporters Without Borders and Freedom House Reporters indexes, 35 practice self-regulation of the press (being 70%), and of countries where the press is considered completely free, 93% practice self-regulation.⁵⁷⁶ The statistics seem to be in favour of self-regulation, showing a strong correlation between a free press and the lack of governmental or statutory regulation, although generalisations do not take into account the socio-political context of a specific region.

It is to be understood that the press regulatory system of each country is unique, being developed against a country specific political climate and history.⁵⁷⁷ Additionally, it is stated that all knowledge, no matter how universal it may be, has its origins in a certain geographical, cultural and institutional context.⁵⁷⁸ Berger states that the South African media, both broadcast and the press as important role-players within the country's

⁵⁷⁴ Berger 2011 *Ecquid Novi: African Journalism Studies* 38.

⁵⁷⁵ Berger 2011 *Ecquid Novi: African Journalism Studies* 40.

⁵⁷⁶ Reid and Isaacs "Press regulation in South Africa" 70.

⁵⁷⁷ Berger 2011 *Ecquid Novi: African Journalism Studies* 44.

⁵⁷⁸ Berger 2011 *Ecquid Novi: African Journalism Studies* 49.

democracy, must operate within the normative ideal created by the South African Constitution.⁵⁷⁹

Wasserman,⁵⁸⁰ for one, takes a deep look at the role of journalism in post-apartheid South Africa as well as the contested norms on which this perceived role is based. While it is commonplace that an independent press, acting in the interest of the public is regarded as being a vital if not inherent element of democracy, he questions the assumed unified notions of "public" and "interest", in light of the wide disparities and inequality in South African society. The watchdog role that that media plays, often referred to collectively as the fourth estate, is also questioned on the grounds of whose interests the media claims to be defending. Does the watchdog role extend past watching government, also including the questioning and checking of corporate power?⁵⁸¹

On the matter of the proposed MAT, relating to the weighing up of self-regulation, co-regulation or statutory oversight, he stipulates this as being *procedural* questions – relating to the rules, mechanisms and codes of professional journalism.⁵⁸² He states "much effort has gone into constructing a formalist ethical system for the South African media. The oppressive laws governing journalism under apartheid made way for a system of self-regulation, with at its centre a Press Council that adjudicates public complaints according to ethical codes [...]."⁵⁸³

⁵⁷⁹ Berger 2011 *Ecquid Novi: African Journalism Studies* 48.

⁵⁸⁰ Wasserman 2013 *Communicatio* 71-72.

⁵⁸¹ Wasserman 2013 *Communicatio* 75.

⁵⁸² Wasserman 2013 *Communicatio* 74.

⁵⁸³ Wasserman 2013 *Communicatio* 74.

The question remains to what extent the procedural, formalist ethical system leads to *substantive* impact, having to affect a positive impact on the lives of ordinary people. This is elaborated on by Berger as follows:

Indian economist and Nobel laureate Amartya Sen makes a similar distinction in his discussion of justice. Sen [...] contrasts a procedural form of justice in early Indian jurisprudence, *niti*, with the substantive form, *nyaya*. Whereas the first concept is concerned with the rules and processes that make justice possible, the latter considers how the rules of justice affect people's everyday lives. For Sen, *niti* is located in the institutions that deliver justice through rules and regulations, whereas *nyaya* refers to the kind of world, the type of society that we want to see emerging from these institutions and their rules. Justice, for Sen, needs therefore to be measured in terms of the accomplishments of institutions as regards improving human lives and experiences.

On determining fit-for-purpose norms, Wasserman references the *Constitution's* protection of freedom of expression and the media, but also human dignity – giving cause to the balancing of rights.⁵⁸⁴ He relates this to the concept of the *ethics of listening*, asking "[w]ho do journalists listen to, and whose voices are amplified?"⁵⁸⁵ The development of the media regulatory system should take cognisance of the principle of transformative constitutionalism, within the bounds of its mandate. Can it be said to be the role of an independent press regulator to police systemic issues that plague the press? Such questions were addressed earlier,⁵⁸⁶ with it being found that press councils cannot be held responsible for the numerous and serious systemic issues faced by the press, although they have their part to play in ensuring that the press behaves ethically.

Going back to Berger,⁵⁸⁷ he warns against accepting norms without knowing where they come from and being aware of the unequal power balance when

⁵⁸⁴ Wasserman 2013 *Communicatio* 73.

⁵⁸⁵ Wasserman 2013 *Communicatio* 76.

⁵⁸⁶ See 2.9 above.

⁵⁸⁷ Berger 2011 *Ecquid Novi: African Journalism Studies* 38.

looking at the adoption of normative theories. He states that it might very well be useful to incorporate systems developed elsewhere, although it takes a considerable amount of resources to develop indigenous best-practice. He writes:

It can also be noted that the issue of 'best practice' exists within a real world of uneven knowledge power. We should acknowledge, for instance, that it is structured in terms of status (e.g. the 'final' liberation and potentially continental 'role model' that is symbolised by democratic South Africa, or the 'cradle of public broadcasting' represented by the British Broadcasting Corporation [BBC] in the UK). It is also structured in terms of language (English largely), and in terms of the volume of materialised knowledge, the prominence of that knowledge and its accessibility. To put it plainly, offline information in French about self-regulation in the Seychelles is not likely to come into play as a 'best practice' from which South Africa should consider drawing. It is precisely because 'borrowing' occurs in such a structured global context, that it is all the more important that conscious and critical thought goes into adding value to the exercise of this particular intellectual appropriation.⁵⁸⁸

Berger suggests criteria to apply when looking to borrow regulatory practices, to determine their legitimacy, desirability ("aspiration") and effectiveness. These criteria are "evaluating commonality of purpose and contextual fit-for-purpose; constructing ideal-type general models, and prioritising the particularities of the destination context to which the borrowing is supposed to apply."⁵⁸⁹ He relates the criteria specifically to the matter of the ANC's calls for an MAT, taking into account the pro-MAT critique that a statutory system of regulation exists for the broadcast media, but not for the press. He bases his application of the criteria on the premise that a statutory regulator of the press should be instituted as a chapter nine institution, as with the broadcast media. He then criticises this approach by stating that the press is already accountable to the *Constitution* through the

⁵⁸⁸ Berger 2011 *Ecquid Novi: African Journalism Studies* 39.

⁵⁸⁹ Berger 2011 *Ecquid Novi: African Journalism Studies* 47.

courts, "lacking only the same accountability that broadcasters have (ultimately) to parliament".⁵⁹⁰

It needs to be added that self-regulation is focused on making a codified set of ethics enforceable, to which the press cannot be held accountable by the courts as the press voluntarily subscribe to these higher standards beyond what is required by law. The question whether it is truly desirable that the press should not be legally required to subscribe to a code of ethical conduct, making it possible to escape accountability falling short of breaking the law on account of defamation, the infringement of the right to privacy or some other right, needs to be asked.

On the above, adding to the discussion about the desirability of a statutory regulator of the press,⁵⁹¹ Berger refers to the broadcast media having a choice of subscribing to the authority of the BCCSA, or if failing to do so, automatically falling within the ambit of the legal provisions giving authority to ICASA's Complaints and Compliance Committee.⁵⁹² He goes on to state that if regulatory parity was to be applied, drawing from the broadcast media as best fit for general purpose, that the press should (also) be offered a choice between the PCSA as already existing regulator and that of a statutory regulator.⁵⁹³ The viewpoint communicated by the ANC has been contrary to such a view, in that the MAT would be a superior authority to the PCSA.⁵⁹⁴ Furthermore, it is argued that the model of broadcasting regulation fails to lend itself as a model for how the MAT is envisaged, in that ICASA can only review the BCCSA on matters of procedural accuracy, and return

⁵⁹⁰ Berger 2011 *Ecquid Novi: African Journalism Studies* 48.

⁵⁹¹ See 4.4 above.

⁵⁹² See 3.2.2 and 3.2.3 above.

⁵⁹³ Berger 2011 *Ecquid Novi: African Journalism Studies* 48.

⁵⁹⁴ Berger 2011 *Ecquid Novi: African Journalism Studies* 48.

cases for reconsideration – it is not a superior authority which can overrule the BCCSA.⁵⁹⁵ For these reasons, the "borrowing" from the broadcasting regulatory model is considered to be problematic.⁵⁹⁶ Ultimately, Berger writes: "It is questionable whether a statutory equivalent defined for print media (which unlike broadcasting does not require licensing) would be constitutional."⁵⁹⁷ The test of constitutionality would, ultimately, need to be determined by the courts, a matter that could likely end up at the Constitutional Court.

4.7 Conclusion

In this chapter international principles and agreements that are binding on South Africa, with regard to media regulation, were discussed. From this it was seen that these international instruments are in favour of and advocate for self-regulation or, more recently, co-regulation – the latter of which encompasses wider involvement of various stakeholders that could also, within bounds, include the state.

By looking at the international trends in media regulation it was seen that self-regulation remains popular amongst journalists and media freedom organisations, but that it is also continuedly put under strain due to threats of regulation by the state across the world.

Tests for determining the legitimacy, desirability and effectiveness of borrowing from other models of regulation were discussed, highlighting the need to carefully consider both the origin and proposed destination of a regulatory model. In this light, criticism against statutory press regulation in

⁵⁹⁵ Berger 2011 *Ecquid Novi: African Journalism Studies* 48; Discussed at 4.4 above.

⁵⁹⁶ Berger 2011 *Ecquid Novi: African Journalism Studies* 49.

⁵⁹⁷ Berger 2011 *Ecquid Novi: African Journalism Studies* 49.

South Africa, with regard to the envisaged model of the MAT, includes that the proposals not only fail to adequately engage and deepen the debate about media accountability, but that the MAT calls drawing on norms from the broadcast media sector does not adequately match the destination context of press regulation, and misconstrue the relationship between the BCCSA and ICASA. Mistrust of government's ability to effectively and ethically regulate the press on an editorial level was noted, in light of South Africa's endemic corruption, with commentators warning of a slippery slope to the possibility of censorship when the door is opened for greater governmental control of the press. It is stated that the press holds themselves to higher ethical standards than what is required by law, and that this voluntary nature of press regulation is what keeps governmental interference at bay.

By exploring the desired functioning of self-regulatory institutions, it was found that greater proactivity is required to enhance the public perception that the public has of press councils, and that they are seen to have a real impact on the behaviour of the press. Such proactivity stems from advocacy work in a variety of forms, in order to make a press council more muscular. It was also found that it is important that press councils are seen to represent the press sector as a whole, and that it could be damaging if there are prominent media companies or publications that choose to stay outside of the voluntary regulatory system. However, it was confirmed that press councils are well-suited to deal with the nuances of news production, in that a self-regulatory system is flexible, speedy and accessible. Funding of press councils generally come from the media themselves, in line with how the PCSA is funded.

It was found that norms and best practice of media self-regulation cannot be said to exist outside of country and region-specific considerations, with there being no one-size-fits-all model for press regulation. Apart from being

influenced by international practice and norms, South Africa's press regulatory system functions first and foremost within the normative ideal as set out by the South African *Constitution*. The *Constitution* protects freedom of expression, but also human dignity, requiring the reasonable balancing of rights. In this light it is needed to ask if the press claims to act in the public interest, who is considered to be included as part of the "public" and what "interests" are being protected. It was flagged that it is important to question whether the procedural and formalist system of ethical self-regulation leads to substantive positive impact on the lives of ordinary people and the press' readership, not just the press themselves.

It was commented, noting the criticism against statutory regulation of the press, that existing literature would appear to lack a more nuanced conception of or engagement with what "statutory" could mean in support of independent self-regulation, suggesting some additions to the debate. It should not be precluded that legislation could play a role in fostering greater press accountability without compromising press freedom or the independence of self-regulatory bodies.

In the following and penultimate chapter, it is inspected how the regulatory model of the press in South Africa can be expanded to include a statutory regulator, by envisaging it as a constitutional institution. Such an analysis is a key part of the study of determining the possible conception and desirability of an MAT.

CHAPTER 5: FRAMING THE MEDIA APPEALS TRIBUNAL AS A CONSTITUTIONAL INSTITUTION

5.1 Introduction

Following the discussions about the current framework of media regulation in South Africa as well as best practice and norms, it is necessary to envisage how the proposed MAT could be instituted as a statutory authority. Notwithstanding the criticism against a statutory regulator of the press, it should not be precluded that the MAT may be instituted despite such criticism, or that it could play a role in media regulation after all – perhaps with a greater focus on media development rather than content regulation. It was noted that media diversity and transformation are critical issues to be addressed,⁵⁹⁸ but that the conflation of issues regarding media diversity and the regulation of editorial content is problematic.⁵⁹⁹ As the calls for an MAT did conflate these issues, the role of an MAT could go either way. The task of addressing media diversity would need to be reconciled with the mandate of the MDDA, should that be the direction taken.⁶⁰⁰ Instead of theorising the role of an MAT beyond what is known, this chapter studies how such an institution's constitutionality could be tested.

As there has been no draft legislation giving form to the proposed MAT, it is only possible to engage with it in principle. It has been stated that the MAT "would most likely be an institution with a special constitutional status, a chapter nine institution, which means that it would report to parliament."⁶⁰¹

⁵⁹⁸ See 2.9.2.1 above.

⁵⁹⁹ See 2.9.2 above.

⁶⁰⁰ See 2.9.2.1 above.

⁶⁰¹ Rens 2010 <https://www.opendemocracy.net/en/adam-haupt-andrew-reus-south-africa-at-the-rubicon-again/>.

The chapter nine classification is in line with the substance of the calls by the ANC, drawing from the statutory regulation of broadcast media in South Africa as a comparative model for how the press regulatory system could be (re)structured. Even with such a comparison having been criticised by commentators,⁶⁰² it is a key part of the MAT's conception and needs to be given due consideration. For this reason, it is needed to inspect ICASA's perceived and actual independence as the statutory regulator of the broadcast media. As freedom of the press and other media is protected in section 16 of the *Constitution*, any statutory body that would be mandated to regulate this right would need to be in balance with pre-existing constitutional rights.⁶⁰³ It is not possible, purely on speculation, to determine if a body such as the MAT would pass constitutional muster, but it is possible to identify the legal tests against which its constitutionality would be determined.

5.2 Existing chapter nine institutions

Chapter 9 of the *Constitution* provides for various state institutions to strengthen South Africa's constitutional democracy. These institutions are: the Public Protector; the South African Human Rights Commission; the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; the Commission for Gender Equality; the Auditor-General; as well as the (Independent) Electoral Commission.⁶⁰⁴ ICASA's inclusion in chapter 9 of the *Constitution* is discussed in due course.⁶⁰⁵

⁶⁰² See 4.4-4.6 above.

⁶⁰³ See 2.2.2 above.

⁶⁰⁴ Section 181(1) of the *Constitution*.

⁶⁰⁵ At 5.4.2 below.

It is stated that these institutions are "independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice."⁶⁰⁶ Additionally, it is required that "[o]ther organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions."⁶⁰⁷ It is also stated that "[n]o person or organ of state may interfere with the functioning of these institutions".⁶⁰⁸ Lastly, as a checks and balances mechanism, these institutions must report on their activities and the performance of their functions to the National Assembly (parliament) at a minimum of once a year.⁶⁰⁹

5.3 Tests for determining independence and constitutionality

The independence of the Independent Electoral Commission (hereafter referred to as the IEC) was brought under the purview of the Constitutional Court on two separate occasions, both of which resulted in legal precedent concerning the independence of chapter nine institutions. In the first case, handed down in 1999, Justice Langa wrote with the majority concurring, on how the independence of a chapter nine institution is to be tested:

In dealing with the independence of the Commission, it is necessary to make a distinction between two factors, both of which, in my view, are relevant to "independence". The first is "financial independence". This implies the ability to have access to funds reasonably required to enable the Commission to discharge the functions it is obliged to perform under the Constitution and the Electoral Commission Act. This does not mean that it can set its own budget. Parliament does that. What it does mean, however, is that Parliament must consider what is reasonably required by the Commission and deal with requests for funding rationally, in the light of other national interests. It is for

⁶⁰⁶ Section 181(2) of the *Constitution*.

⁶⁰⁷ Section 181(3) of the *Constitution*.

⁶⁰⁸ Section 181(4) of the *Constitution*.

⁶⁰⁹ Section 181(5) of the *Constitution*.

Parliament, and not the executive arm of government, to provide for funding reasonably sufficient to enable the Commission to carry out its constitutional mandate. The Commission must accordingly be afforded an adequate opportunity to defend its budgetary requirements before Parliament or its relevant committees.

The second factor, "administrative independence", implies that there will be control over those matters directly connected with the functions which the Commission has to perform under the Constitution and the Act. The executive must provide the assistance that the Commission requires "to ensure [its] independence, impartiality, dignity and effectiveness". The department cannot tell the Commission how to conduct registration, whom to employ, and so on; but if the Commission asks the government for assistance to provide personnel to take part in the registration process, government must provide such assistance if it is able to do so. If not, the Commission must be put in funds to enable it to do what is necessary.⁶¹⁰

Subsequent to this ruling in 2001, Justice Yacoob added to the above requirements of financial and administrative independence by stating that the IEC cannot be independent of national government and yet be part of it.⁶¹¹ It is argued that it is an oversimplification to presume that a body formed through legislation falls under the authority of the legislator (or the executive), because legislation cannot compromise the independence of the IEC as a constitutional institution.⁶¹² In conclusion it is declared that:

Our Constitution has created institutions like the Commission that perform their functions in terms of national legislation but are not subject to national executive control. The very reason the Constitution created the Commission - and the other chapter 9 bodies - was so that they should be and manifestly be seen to be outside government. The Commission is not an organ of state within the national sphere of government.⁶¹³

True independence of a chapter nine institution is thus a constitutional requirement. De Vos⁶¹⁴ highlights three points that would determine the

⁶¹⁰ *New National Party v Government of the Republic of South Africa* (CCT9/99) [1999] ZACC 5 paras 98-99.

⁶¹¹ *Independent Electoral Commission v Langeberg Municipality* (CCT 49/00) [2001] ZACC 23 para 29 (hereafter referred to as the *IEC v Langeberg Municipality* case).

⁶¹² *IEC v Langeberg Municipality* case para 30.

⁶¹³ *IEC v Langeberg Municipality* case paras 29-31.

⁶¹⁴ De Vos 2010 <https://constitutionallyspeaking.co.za/would-media-appeals-tribunal-be-constitutional/>.

constitutionality of an MAT. Firstly, he succinctly states that any such body would need to be independent because if it is not, it will be unconstitutional. "A body appointed by Parliament will not be independent as it will in effect be appointed by the majority party."⁶¹⁵ Secondly, he criticises the idea of an MAT that would be empowered to act punitively against the press on an ideological basis, since "[t]he very essence of media freedom hinges on the prohibition of state interference with the ideological content of what the media publishes."⁶¹⁶ He connects this to the right to freedom of expression, stating that the media has a right to choose what to write about and how to write about it, as is the right of any other person, including politicians. Thirdly, he invokes the role of the courts when it comes to matters of defamation, and questions whether there would be a less onerous standard when such matters are heard before the MAT, invalidating legal precedent:

[I]f the MAP [sic – referring to the MAT] will be empowered to address the possible infringement of the dignity of individuals by the media, this might also be constitutionally problematic. At the moment courts are legally empowered to deal with this through our defamation laws. The Constitutional Court has developed our common law of defamation to bring it in line with the guarantees of media freedom and it is now far more difficult for any person – including any politician – successfully to sue the media for defamation. If the MAP is required to apply a less onerous standard when it deals with complaints about the infringement of the human dignity of anyone, this would therefore most probably also be unconstitutional. If a court cannot impose a stricter standard to punish the media for defamation, then a MAP – who will always be less independent than a court – will never be constitutionally allowed to do so.⁶¹⁷

From the above it can be asked against what codes or principles the press will be held accountable if not the law, to which the press is already beholden through enforcement by the courts. As discussed previously, the press

⁶¹⁵ De Vos 2010 <https://constitutionallyspeaking.co.za/would-media-appeals-tribunal-be-constitutional/>.

⁶¹⁶ De Vos 2010 <https://constitutionallyspeaking.co.za/would-media-appeals-tribunal-be-constitutional/>.

⁶¹⁷ De Vos 2010 <https://constitutionallyspeaking.co.za/would-media-appeals-tribunal-be-constitutional/>.

voluntarily subject themselves to greater ethical standards through self-regulation,⁶¹⁸ but it may very well be unconstitutional to impose stricter standards than prescribed by law or as De Vos argues, to lower the standard of proof for transgressions by the press in favour of an MAT.

5.4 ICASA as a constitutional regulator of broadcast media

5.4.1 Introduction

As noted, it is needed to study ICASA's formation and independence in order to frame the MAT as a constitutional institution. Although ICASA is not named together with the other institutions under section 181 of the *Constitution*, it is required by section 192 – also part of chapter 9 of the *Constitution* – under the heading *Independent Authority to Regulate Broadcasting* that "[n]ational legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and a diversity of views broadly representing South African society".⁶¹⁹ An explanation provided for why ICASA is not included with the other chapter 9 institutions listed in section 181, is that the constitutional entrenchment of a broadcasting regulator was only agreed to in 1996, not long before the final *Constitution* was passed. It is explained:

The negotiators debated the proper location in the Constitution of the principle that had been embodied in section 15(2) of the 1993 Constitution, as the drafters of the 1996 Constitution did not believe that the provision should form part of the Bill of Rights. Nevertheless, it was thought that the protection afforded by section 15(2) of the 1993 Constitution was sufficiently important to require incorporation elsewhere in the Constitution.⁶²⁰

⁶¹⁸ See 4.4 above.

⁶¹⁹ Section 192 of the *Constitution*.

⁶²⁰ Parliament of the Republic of South Africa "Report of the ad hoc Committee on the Review of Chapter 9 and Associated Institutions" 190.

Legislation gave rise to an independent broadcasting authority in 1993, through the *Independent Broadcasting Authority Act 153 of 1993*, just before the *Interim Constitution*⁶²¹ came into effect. Section 15(2) of the *Interim Constitution* determined that "all media financed by or under the control of the state shall be regulated in a manner which ensures impartiality and the expression of diversity of opinion". The inclusion of this provision was made during the tumultuous time of the transition from the parliamentary sovereign apartheid government to South Africa's newly found constitutional democracy. As the media played a key part in this transition, it was of great importance for both the apartheid and incoming ANC-led government that no one party should have control over the state-owned public broadcaster, the SABC. To avoid political interference, it was decided that the public broadcaster should be regulated independently.⁶²²

The *Independent Communications Authority of South Africa Act 13 of 2000* later largely amended the *Independent Broadcasting Authority Act 153 of 1993*, renaming and redesigning what is now known to be ICASA. As a way of addressing increasing convergence of electronic communications – including broadcasting, telecommunications, network services and electronic communications – the *Electronic Communications Act 36 of 2005* later repealed the *Independent Broadcasting Authority Act 153 of 1993* and the *Telecommunications Act 103 of 1996*, it also repealed some sections and amended some parts of the *Broadcasting Act 4 of 1999*, amongst others. ICASA's mandate is now set out in a complex web of amended and amending acts: The *Independent Communications Authority of South Africa*

⁶²¹ *Constitution of the Republic of South Africa 200 of 1993* (referred to hereafter as the *Interim Constitution*); The *Interim Constitution* has been repealed.

⁶²² Parliament of the Republic of South Africa "Report of the ad hoc Committee on the Review of Chapter 9 and Associated Institutions" 189.

Act 13 of 2000, the *Electronic Communications Act* 36 of 2005, the *Postal Services Act* 124 of 1998 and the *Broadcasting Act* 4 of 1999 – to the ends of the regulation of electronic communications, broadcasting and the postal sectors in the public interest. It has been noted that ICASA's mandate is extremely broad.⁶²³

5.4.2 Findings on ICASA's independence

The National Assembly, on the 21st of September 2006, resolved to appoint the multi-party *ad hoc* Committee on the Review of Chapter 9 and Associated Institutions (hereafter referred to as the *ad hoc* Committee). The *ad hoc* Committee was tasked with a study into the effectiveness and relevance of chapter nine institutions, as well as other institutions referred to and established in other parts of the *Constitution*. It was also tasked with determining what is required to strengthen these institutions, to ensure they are best able to achieve their objectives.⁶²⁴

The *ad hoc* Committee studied the history, constitutional and legal mandate, efficacy and governance as well as the independence of ICASA in detail, which is included in its extensive report that was published on 31 July 2007. The report's findings, although somewhat dated, are still relevant seeing that many of its recommendations relating to legislative provisions that it found problematic are still in effect, at the time of this study's conclusion.

Most of the *ad hoc* Committee's ICASA related findings are about the institution's independence, through an array of considerations. This helps to

⁶²³ Parliament of the Republic of South Africa "Report of the *ad hoc* Committee on the Review of Chapter 9 and Associated Institutions" 195.

⁶²⁴ Parliament of the Republic of South Africa "Report of the *ad hoc* Committee on the Review of Chapter 9 and Associated Institutions" IX.

determine whether a chapter nine or other constitutional institution, specifically ICASA, can truly claim independence in regulating the media. The *ad hoc* Committee emphasised the importance of an independent regulator but noted its concerns about ICASA's independence. The *ad hoc* Committee stated that:

Both the Constitution and the enabling legislation describe the Authority [ICASA] as independent. Not only does section 192 of the Constitution establish an independent regulator through legislation, the enabling legislation affirms this by providing that the Authority is independent, subject only to the Constitution and the law. The Authority must be impartial, and perform its functions without fear, favour or prejudice. Furthermore, the legislation specifically provides that the Authority must function without any political or commercial interference.

The report states that while ICASA is described as independent in its enabling legislation, "the [ICASA] Act, as amended, contains several provisions that appear to conflict with, or potentially curtail the Authority's independence".⁶²⁵ Several provisions in the ICASA Act are flagged by the *ad hoc* Committee as being of concern relating to ICASA's independence, specifically regarding the Department of Communications and its Minister.

Firstly, the Minister has the power and is required, in consultation with the National Assembly, to establish a performance management system to monitor and evaluate the performance of ICASA's chairperson, councillors and its council, individually and collectively.⁶²⁶ The *ad-hoc* Committee was of the opinion that these matters should rather be undertaken internally by ICASA itself, and not the Minister.⁶²⁷ Secondly, it is provided for in the legislation that ICASA's council, consisting of a chairperson and eight other

⁶²⁵ Parliament of the Republic of South Africa "Report of the ad hoc Committee on the Review of Chapter 9 and Associated Institutions" 194.

⁶²⁶ Section 6A(1) of the *ICASA Act*.

⁶²⁷ Parliament of the Republic of South Africa "Report of the ad hoc Committee on the Review of Chapter 9 and Associated Institutions" 194.

councillors, are to be appointed by the Minister upon approval by the National Assembly.⁶²⁸ This alone is problematic. Added to this, the *ad hoc* Committee states that they are "dissatisfied with the extent of the Minister's involvement in the appointment of Councillors as this may create a perception that [ICASA] is not an independent institution."⁶²⁹ Thirdly, legislation stipulates that the chairperson and councillors of ICASA are to be paid remuneration and allowances and receive benefits as to be determined by the Minister in concurrence with the Minister of Finance.⁶³⁰ Additionally, the report noted that ICASA may only appoint an expert who is not a citizen or permanent resident of South Africa with the Minister's approval.⁶³¹ This provision was repealed after the report was published, yet not largely limiting the powers of the Minister, it now reading that when ICASA wishes to appoint experts that are not within its budget for a particular year, it is subject to the approval of the Minister.⁶³² Lastly, concern was raised about the provision that ICASA may (only) receive money other than through parliamentary allocation when so agreed between the Minister and the Minister of Finance and approved by Cabinet.⁶³³ These concerns are tied together with the *ad hoc* Committee stating that they are of the view that "the powers that the legislation gives to the Minister, as set out above, may negatively affect the independence of [ICASA] from the Executive and should, therefore, be revised."⁶³⁴ These findings of 2007 did not lead to a

⁶²⁸ Section 5(1) of the *ICASA Act*.

⁶²⁹ Parliament of the Republic of South Africa "Report of the *ad hoc* Committee on the Review of Chapter 9 and Associated Institutions" 197.

⁶³⁰ Section 10 of the *ICASA Act*.

⁶³¹ Parliament of the Republic of South Africa "Report of the *ad hoc* Committee on the Review of Chapter 9 and Associated Institutions" 194.

⁶³² Section 14(A)1 of the *ICASA Act*.

⁶³³ Sections 15(1) and 1(A) of the *ICASA Act*.

⁶³⁴ Parliament of the Republic of South Africa "Report of the *ad hoc* Committee on the Review of Chapter 9 and Associated Institutions" 194.

substantial change in legislation, up to the year 2019. In April 2019 the Minister of Communications, Stella Ndabeni-Abrahams, was accused of meddling with the internal affairs of ICASA by withholding the institution's funding based on not approving its annual performance plan.⁶³⁵

The report also noted that the funding model of ICASA poses a threat to its independence. It is stated that "[a]dequate funding is a prerequisite for an effective and independent regulatory agency. From the evidence received, the [*ad hoc* Committee] is of the view that [ICASA's] budget is inadequate for the efficient and effective performance of its operations [...]".⁶³⁶ The *ad hoc* Committee also raised concern at the high cost related to the ongoing effects of technological convergence.⁶³⁷ ICASA receives its funding as allocated by Parliament, transferred to it by the Department of Communications.⁶³⁸ ICASA collects well over a billion Rand in license fees from those whom it regulates, much more than its annual budget, although it is not entitled to this money which it has to transfer to the National Revenue Fund.⁶³⁹ Instead of being completely dependent on government funding, the report suggested that a hybrid model be followed, where ICASA ought to keep some of the fees collected as a percentage of the total fee, and look at funding sources in other market activities, stating that the current

⁶³⁵ Blignaut 2019 <https://city-press.news24.com/News/communications-minister-accused-of-meddling-unlawfully-in-icasa-20190428>.

⁶³⁶ Parliament of the Republic of South Africa "Report of the *ad hoc* Committee on the Review of Chapter 9 and Associated Institutions" 199.

⁶³⁷ Parliament of the Republic of South Africa "Report of the *ad hoc* Committee on the Review of Chapter 9 and Associated Institutions" 199-200.

⁶³⁸ Parliament of the Republic of South Africa "Report of the *ad hoc* Committee on the Review of Chapter 9 and Associated Institutions" 200.

⁶³⁹ Parliament of the Republic of South Africa "Report of the *ad hoc* Committee on the Review of Chapter 9 and Associated Institutions" 200.

budget process and funding model of ICASA "adversely affects its accountability and independence".⁶⁴⁰

The Constitutional Court's findings on the independence of the IEC⁶⁴¹ are echoed by the *ad hoc* Committee, highlighting that independence of chapter nine and associated institutions is a constitutional imperative. It states that the power to appoint granted to the President (or that of the Minister in the case of ICASA), is but a formal one and should thus not be used as a means of interference.⁶⁴² It adds, referencing the Constitutional Court with the concepts of financial and administrative independence:

The National Assembly is given the constitutional authority to deal with the independent institutions and has a constitutional duty to hold these institutions to account. Again, this excludes any interference in the daily operations or institutional arrangements of these institutions. Parliament can - and indeed has a constitutional duty in this regard - enact legislation that will allow these institutions to fulfil their constitutional mandates in an effective manner. However, two essential requirements must be met in respect of any intervention by Parliament or the National Assembly: First, an intervention must not interfere with the final control over the finances or administration of the relevant institution; and, second, it must not give rise to a reasonable apprehension of interference amongst informed individuals.⁶⁴³

The requirement of independence of chapter nine institutions as set out by the *Constitution*, and emphasised by the Constitutional Court, does however not guarantee that no interference will occur. Gaps and ambiguity in legislation can result in an interpretation that favours those who seek to encroach on the independence of the media at large, through its regulator(s). One such legislative ambiguity, relating to the independence of

⁶⁴⁰ Parliament of the Republic of South Africa "Report of the ad hoc Committee on the Review of Chapter 9 and Associated Institutions" 202.

⁶⁴¹ See 5.3 above.

⁶⁴² Parliament of the Republic of South Africa "Report of the ad hoc Committee on the Review of Chapter 9 and Associated Institutions" 14.

⁶⁴³ Parliament of the Republic of South Africa "Report of the ad hoc Committee on the Review of Chapter 9 and Associated Institutions" 14.

ICASA, is the specific placement of the clause calling for an authority to regulate broadcasting within the *Constitution*. Even with the clause being included under chapter 9 of the *Constitution*, it not being included in section 181 that lists the other chapter nine institutions appears to adversely affect its status. Rens,⁶⁴⁴ a legal scholar with a focus on telecommunications law, goes as far as to infer second class status to ICASA due to this placement:

The first section of Chapter 9, section 181 specifically lists a number of institutions [...] which "are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice" [...]. However the independent broadcasting authority required by section 192 of Chapter 9 is not listed in section 181, which has made considerable interference by the previous Minister of Telecommunications with the body (ICASA) intended to serve the function of an independent broadcasting authority. If the MAT were to join the broadcasting authority as a second class Chapter 9 institution that would not guarantee much meaningful independence.⁶⁴⁵

The issue of the definition and placement of ICASA is similarly addressed by the *ad hoc* Committee, following submissions made by the Department of Communications challenging both the independence and the inclusion of ICASA under chapter 9 of the *Constitution*. The Department argued that as ICASA is not listed together with the other chapter nine institutions, a distinction can be drawn between these institutions. The Department went as far to state that "there may be no justification for the regulator to be in the Constitution, in particular to be grouped with Chapter nine institutions responsible to support democracy in our country".⁶⁴⁶

The Department argued that the mandate of ICASA would be better served if it were located outside of the *Constitution*, as it would then be more agile

⁶⁴⁴ Rens 2010 <https://www.opendemocracy.net/en/adam-haupt-andrew-reus-south-africa-at-the-rubicon-again/>.

⁶⁴⁵ Rens 2010 <https://www.opendemocracy.net/en/adam-haupt-andrew-reus-south-africa-at-the-rubicon-again/>.

⁶⁴⁶ Moyo and Hlongwane 2009 *Journal of African Media Studies* 282-283.

to meet the demands of rapid technological advancement and to adapt swiftly to an ever-changing environment.⁶⁴⁷

5.5 Concluding comments

The tests as developed by the Constitutional Court with regard to the independence of chapter nine institutions serve as valuable measures against which a proposed model of the MAT can (and must) be compared. It is made unequivocally clear that chapter nine and other constitutional institutions must be independent of government and that undue influence or manipulation by the state is considered unconstitutional.

If an MAT was to be instituted as a chapter nine institution, or as a constitutional institution provided for elsewhere in the Constitution, it could likely face the same problems concerning its independence as that of ICASA. Many danger signs are sprouting from the study of ICASA's independence, which should be taken seriously if it is meant to serve as a model of how the MAT could be established.

⁶⁴⁷ Parliament of the Republic of South Africa "Report of the ad hoc Committee on the Review of Chapter 9 and Associated Institutions" 193.

CHAPTER 6: CONCLUSION

6.1 *Concluding findings*

There was set out to determine how the media in South Africa is regulated, analysed in light of the calls for the statutory Media Appeals Tribunal. It was asked how the constitutional imperative of a free and independent press could best be ensured. Current and prospective forms of media regulation, together with guiding literature and sources of law, were studied in order to make findings in this regard.

It was confirmed that a free and independent press is a vital part of South Africa's constitutional project. This freedom is not only explicitly protected by the *Constitution* as part of the Bill of Rights, but the press is also entrusted with constitutional obligations by the courts to report the news truthfully, accurately and fairly in the public interest, as enabler of every person's right to be made aware of issues in society. Through the media's vigour, courage, integrity and responsibility, it is made possible for ordinary citizens to fully participate in matters of democracy and society.⁶⁴⁸

The media is commonly referred to as the unofficial "fourth estate", which goes to illustrate why the matter of its regulation is so contentious, having regard to the principle of separation of powers, but also its checks and balances. Although the press functions predominantly in a commercial environment it is entrusted with a public service role, it is therefore expected that the press adhere to principles to ensure that their coverage and actions meet ethical standards. It has mostly been left to the press to form and maintain their own regulatory institution(s), which is meant to serve as a

⁶⁴⁸ See 2.2 above.

guarantor of their independence from regulation by the state, but also as a means to ensure their accountability.

Press freedom comes with its accompanying responsibilities, and with the neglect of these responsibilities the curtailment of the freedom they enjoy will necessarily come under discussion. As the media holds the power of scrutiny over others, it should be obliged to accept scrutiny itself. The press was scrutinised through the calls for a Media Appeals Tribunal, a proposed statutory institution that would regulate the press and report to parliament, conceptualised in line with how ICASA functions and is created in law.⁶⁴⁹ The comments and allegations made in the MAT calls were addressed throughout the study, of which the findings are summed up below.

6.1.1 The existing legal framework of press regulation

It was seen that through both legislation, legal precedent and the common law, including the laws of defamation and privacy, there is given effect to constitutional rights and responsibilities that impact what the press may and may not publish. Through the discussion it was shown how the law regulates the media in accordance with tests and standards developed for protecting fundamental rights such as dignity and privacy.⁶⁵⁰ Other legislation, such as that governing the Film and Publications Board, was also analysed. The FPB is mandated with the pre-publication classification of media content, in contrast with post-publication regulation by the PCSA, there also being an exemption offered to the online and printed press that subscribe to the authority of the PCSA and the *Press Code* from classification by the FPB.⁶⁵¹

⁶⁴⁹ See 1.9.above.

⁶⁵⁰ See 2.4 above.

⁶⁵¹ See 2.6 above.

The relevance of this exemption is addressed in more depth below.⁶⁵² The *Imprint Act* was also highlighted as it does relate to press regulation, although it does not directly concern the regulation of editorial content.⁶⁵³ It was also studied how self-regulation fits into the overarching constitutional and legal framework as a form of mediation and arbitration, giving legal effect to its workings.⁶⁵⁴

6.1.2 Systemic issues plaguing the press at large

Diversity and transformation of the media were included in the various calls for an MAT. It was, however, found that these specific issues cannot be a responsibility of South Africa's press council as it is simply not its mandate, nor can it be expected that the PCSA should take responsibility for these issues. It was shown that the Media Development and Diversity Agency, a statutory organisation, was formed for the very reason of addressing these important issues and that it should be held to account for addressing the matters of media diversity, development and transformation.⁶⁵⁵

Convergence and the effects of the emergence of new media were also discussed, showing that it is necessary to adapt in changing technological times and economic circumstances. It was studied how social media can be regulated by looking at the initial efforts of determining the viability of social media councils.⁶⁵⁶ Due to the far-reaching effects of convergence, it was also noted that there have been some suggestions of merging the PCSA

⁶⁵² See 6.3.1 below.

⁶⁵³ See 2.7 above.

⁶⁵⁴ See 2.5 above.

⁶⁵⁵ See 2.9 above.

⁶⁵⁶ See 4.3.1 above.

and the BCCSA into one independent, self-regulatory body for all types of editorial content media⁶⁵⁷ – conclusions about this are discussed below.⁶⁵⁸

The widespread phenomenon of declining trust in the media, as well as the de-legitimisation of the press was also addressed. It was found that the role of press councils may be undervalued in this regard, in that they should and do play a key role in the public's perception of a credible and ethically responsible press⁶⁵⁹ – recommendations in this regard are made below.⁶⁶⁰

The institutional formation as well as the broad functioning of the PCSA (press regulator), the BCCSA and Complaints and Compliance Committee of ICASA (broadcast media regulators) as well as the ARB (advertising regulator) were also laid out and discussed.⁶⁶¹ Findings with regard to the PCSA, as well as the BCCSA and ICASA, are stated in more detail below. The ARB is not mentioned further as it was found that its functionality does not relate to the regulation of editorial content, albeit its existence is an important part of the larger regulatory system.

6.2 Norms, best practice and other international considerations

It was found that international declarations and agreements applicable to South Africa are not in favour of state regulation, but require self-regulation or co-regulation – the latter of which is characteristic of the PCSA.⁶⁶² It was found that self-regulation remains popular amongst journalists and media freedom organisations, but that threats of greater state regulation by

⁶⁵⁷ See 4.3.1 above.

⁶⁵⁸ See 6.4.2 below.

⁶⁵⁹ See 4.3.2 above.

⁶⁶⁰ See 6.3.2 below.

⁶⁶¹ See chapter 3 above.

⁶⁶² See 4.2 above.

governments are never really quelled.⁶⁶³ Mistrust of the South African Government's ability to effectively and ethically regulate the press was noted, in light of South Africa's endemic levels of corruption.⁶⁶⁴

It was found that apart from being influenced by international practice, South Africa's press regulatory system functions first and foremost within the normative ideal as set out by the South African *Constitution*.⁶⁶⁵ The *Constitution* protects freedom of expression, but also human dignity, requiring the reasonable balancing of rights. It was also found that it is important to question whether the procedural and formalist ethical system of press regulation have a substantive impact on the press and society at large,⁶⁶⁶ a question that should arguably be foregrounded by the Media Ethics and Credibility Inquiry, as mentioned in the introduction of this dissertation.⁶⁶⁷

Findings with regard to the best functioning of self-regulatory institutions in line with international norms and best practice are highlighted below, together with conclusions outlining the critique of the proposed MAT.

6.3 On the workings and efficacy of the PCSA

It was found that a distinction between the laws of general application and the norms of ethics should be drawn. The press hold themselves to higher ethical standards than average speech, through a codified set of ethics. The enforcement of a code of ethics sees that the independence but also

⁶⁶³ See 4.3 above.

⁶⁶⁴ See 4.4 above.

⁶⁶⁵ See 4.6 above.

⁶⁶⁶ See 4.6 above.

⁶⁶⁷ See 1.9.3 above.

accountability of the media is strengthened.⁶⁶⁸ This is of relevance when looking at the editorial independence of the media not just from the perspective of political interference, but also that of commercial influence.⁶⁶⁹ Although complete independence is not possible, it remains an ideal to strive for. The presence and strength of professional industry bodies, such as the PCSA as well as other advocacy and civil society organisations, play an indispensable role in ensuring greater independence of the media, as well as requiring that the press act responsibly and in the public interest.

Self-regulatory press councils, or independent co-regulation in the case of the PCSA, hold the benefit of greater accessibility through speedy and cost-effective adjudication of complaints, compared to legal processes when approaching a court of law.⁶⁷⁰ This promotes access to remedies and justice when the press acts wrongly. In line with the discussions about norms and best practice and the best functioning of press councils, and the workings and challenges of the PCSA, the following findings and recommendations are made.

6.3.1 Acting strongly against withdrawing publications

For the PCSA to be considered effective, almost all commercial and influential press must belong to it.⁶⁷¹ If a prominent South African press publication withdraws or withholds from becoming a member of the PCSA the case of those arguing for a body such as the MAT is strengthened.⁶⁷² The withdrawal of Independent Media from the PCSA substantially

⁶⁶⁸ See 4.6 and 4.7 above.

⁶⁶⁹ See 4.6 above.

⁶⁷⁰ See 2.5.2 above.

⁶⁷¹ See 4.5 above.

⁶⁷² See 3.1.7.3 above.

weakened the case of independent co-regulation.⁶⁷³ Due to the PCSA's voluntary nature it is possible for non-subscribing publications to essentially be free from independent, external regulation under the false auspices of press freedom, which weakens the case for self-regulation.

The provision in the PCSA's constitution requiring that a member must give at least three years notice of its intention to withdraw from the jurisdiction of the PCSA, could be legally enforced.⁶⁷⁴ As part of the agreement between the PCSA and its members, a court of law could be approached to declare that a withdrawal such as that of Independent Media did not comply with the contractual stipulations of their membership. Voluntary membership and cancellation thereof do not mean that there should be no terms and conditions regulating the period of such membership. This would strengthen the authority of the PCSA, although further legal advice on this matter should be sought.

The exemption offered by the *Film and Publications Act* to publications subscribing to the authority of the PCSA could be utilised to strengthen self-regulation.⁶⁷⁵ Although it is likely that it is not meant for this purpose, the provision in the *FPA* could be used to create an administrative and economic burden for those media entities that choose to withdraw or stay outside the jurisdiction of the PCSA. Publications that do not subscribe to the PCSA could be required to submit themselves for classification by the FPB before publication, something that could possibly have a substantial effect on newspapers' and magazines' timely distribution, thus affecting their core business activities and bottom line. It is provided in the *FPA* that any

⁶⁷³ See 3.1.7.3 above.

⁶⁷⁴ See 3.1.7.3 above.

⁶⁷⁵ See 4.8 above.

interested person can request that a newspaper or magazine be classified if it does not subscribe to the authority of the Press Ombud. However, the practicalities and effectiveness of such an approach would need to be tested, as well as the FPB's willingness to play such a regulatory catch-all role. This being said, the FPB is not meant to serve as an alternative regulatory body to the PCSA. Its mandate is primarily focussed on the pre-classification of films and games, and it is not desirable that the press become subjected to its authority. It has also been noted that there are concerns regarding the amended legislation giving the FPB a broadened mandate to be at power to regulate all content on the internet, opening up an avenue through which censorship could possibly occur.⁶⁷⁶ It would need to be very clear on what grounds press publications would be classified and how their dissemination would be affected hereby, being an option that should be considered very carefully before being pursued.

6.3.2 *Increased visibility and proactivity*

As widespread de-legitimisation of the media has caused a decline of trust in the media, also considering the phenomenon of "fake news",⁶⁷⁷ the PCSA should recognise its responsibility to combat negative public perceptions of the press by going about more visibly and proactively regarding its work. The mandate of the PCSA is to enhance and ensure the credibility of the publications that subscribe to the *Press Code*, making it a central figure in addressing of these global issues locally. Criticism against the PCSA has been noted, stating that it lacks the proactivity of other press councils around the world.⁶⁷⁸ Apart from holding its subscribers to account for ethical

⁶⁷⁶ See 2.6.4 above.

⁶⁷⁷ See 4.3.2 above.

⁶⁷⁸ See 4.5 above.

breaches, the PCSA should improve its public visibility through educational drives about its work and the role of self-regulation, such as through publishing in-depth reports about its workings, efficacy and related matters. Other avenues for greater public engagement and awareness include mock hearings and debates, presenting training courses, issuing awards etc. This could be said to be a matter of improved strategy.

It was also noted that the Public Advocate of the PCSA may, 30 working days after the publication of what he or she deem to be a *prima facie* contravention of the Press Code, without there having been a complaint by a member of the public, file a complaint for adjudication with the Press Ombud.⁶⁷⁹ This provision in the *Complaints Procedure of the PCSA* could be used to proactively act against reporting that goes against the tenets of truthful, accurate and fair reporting. The instigation of complaints in this manner can also be used as a means of creating greater public awareness about the work of the PCSA, although it would need to be made very clear that it is the Public Advocate lodging the complaint(s) and not the Press Ombud, as the latter's actual and perceived impartiality is of great importance.

The PCSA could also require that publications indicate their subscription to the jurisdiction of the PCSA more prominently. A notice could be included on the publication's front page or in the website's footer or sidebar section, being a clear indication of a publication's reputation, a mark of cachet. The public can be encouraged to not buy or support a publication without such a mark, and advertisers could be discouraged to partner with media that do not subscribe to the authority of the PCSA. Media information literacy

⁶⁷⁹ See 3.1.7.2 above.

campaigns can be based on such markers that indicate accountability, transparency and credibility.

The PCSA's ability to fairly and effectively deal with complaints against the media were placed in question in the calls for an MAT. However, as was seen from research conducted on the efficacy of the PCSA, the statistics discredit such criticism.⁶⁸⁰ It is important that the PCSA continues to undergo periodic review, as that performed by the Press Freedom Commission, to ensure shortfalls of the system are identified and addressed. The review that started at the time of the finalisation of this dissertation is good news, although the PCSA is not the driving force behind the process, but SANEF.⁶⁸¹ Although it is important that the PCSA be seen to be acting proactively under its own name, by partnering with other organisations that shares its interests a greater scope of media freedom activism work can be achieved.

As the PCSA is dependent on the financial contributions of those it regulates,⁶⁸² it should be of concern that the media industry has not yet found a sustainable economic model in line with changing readership patterns. It might be a necessary proactive step for the PCSA to look into diversification of its income streams, especially in order to go about more proactively about its work, which would necessarily require more resources.

⁶⁸⁰ See 3.1.5.2 above.

⁶⁸¹ See 1.9.3 above.

⁶⁸² See 3.1.3 above.

6.4 On statutory regulation of the press

6.4.1 The MAT as a constitutional institution

Taking the cue from the calls for an MAT, its likely conception was analysed in comparison to the broadcast media's regulatory model, looking at ICASA's constitutional status and the legal framework within which it functions.⁶⁸³ It was found that the constitutionally guaranteed right of a free press would likely necessitate the creation of a new constitutional institution to properly balance any limitations on the existing rights to freedom of expression and freedom of the press. Considering the vital part that a free press play in the proper functioning of a democracy, any limitations would need to withstand constitutional muster. A governmental institution that would be given authority over the editorial content of the press, would arguably not be desirable. This statement is made in light of South Africa's endemic levels of corruption and maladministration, as well as the parliamentary report's findings on the lacking independence of ICASA.⁶⁸⁴

The study of norms and best practice with regard to media regulation showed a clear international preference for the model of self-regulation, in line with the model of the PCSA. The outright majority of countries where press freedom is rated highest employs self-regulation through that of a press council.⁶⁸⁵ These facts are highly supportive of the "general" model of self-regulation. It is also important to note that there are a number of international instruments applicable to South Africa, which declare that self-

⁶⁸³ See 5.4 above.

⁶⁸⁴ See 4.4 and 5.4.2 above.

⁶⁸⁵ See 4.3 above.

regulation is the best mechanism for regulating the press and warn against governmental control.⁶⁸⁶

It was found that norms and best practice of media self-regulation cannot be said to exist beyond of country and region specific considerations, with there being no one-size-fits-all model for press regulation.⁶⁸⁷ Tests for determining the legitimacy, desirability and effectiveness of borrowing from other models of regulation were also discussed, highlighting the need to isolate the regulatory model in question from its origin and envisaging it in its proposed destination.⁶⁸⁸ As much was done by studying the relationship between the BCCSA and ICASA in order to envisage a similar relationship between the PCSA and the proposed MAT, in line with the calls for the latter. Although it is beneficial to draw from the insights that the broadcast media's regulatory system offers, it was found that broadcast media's regulation is not a system that can be copied for the press without reserve, as there are various differences between the two types of media to take into account.⁶⁸⁹

6.4.2 A cross-platform media accountability system

The effects of convergence and new media on press regulation were addressed.⁶⁹⁰ It is acknowledged that it has become more relevant to distinguish between media in types, rather than those of medium.⁶⁹¹ As convergence and the internet continues to fade the distinction between the press and broadcast media, it would be short-sighted to disregard the importance of working towards the formation of a cross-platform media

⁶⁸⁶ See 4.2 above.

⁶⁸⁷ See 4.6 above.

⁶⁸⁸ See 4.6 above.

⁶⁸⁹ See 4.3.1 and 4.6 above.

⁶⁹⁰ See 4.3.1 above.

⁶⁹¹ See 4.3.1 above.

accountability system. Alternatively, an umbrella body acting as a referral office for all media regulatory complaints could be formed, although this could possibly lead to confusion about which regulatory institutions are authoritative on what matters.⁶⁹² This is a matter of further study.

It was noted that the BCCSA functions independently, but that it cannot make changes to its code of conduct without the prior approval of ICASA, and that the CCC of ICASA has the ability to review decisions by the BCCSA on the grounds of procedural fairness.⁶⁹³ The PCSA, however, can amend the *Press Code* and its constitution and policies without needing to seek approval stipulated by legislation. Additionally, if it were to happen that a MAT or similar institution is created, it would arguably be crucial to give written media publications the option to belong to a voluntary council that exempts them from the authority of such a statutory regulator, in order to safeguard the independence of the press.⁶⁹⁴ Such factors would need to be taken into account when looking at a cross-platform media accountability system.

6.4.3 Constitutional tests to determine independence

Throughout the study a broad range of considerations were noted that would need to be considered in making a case for or against the constitutionality and desirability of a statutory press regulator. In specific, constitutional tests that were developed to determine a chapter nine institution's independence were indicated.⁶⁹⁵ It was noted that the calls for and against an MAT originate from conflicting ideological outlooks, however

⁶⁹² See 4.3.1 above.

⁶⁹³ See 4.3.1 and 4.6 above.

⁶⁹⁴ See 4.6 above.

⁶⁹⁵ See 5.3 above.

the final test would be a constitutional question to be determined within the normative framework of the South African *Constitution*.⁶⁹⁶ Any and all regulatory bodies are subject to the test of constitutionality and can be challenged to abide by the constitutional imperative of a free and independent press.

Ultimately, it was determined that although self-regulation is considered to be the best way to ensure accountability yet independence of the press, the South African self-regulatory system was found wanting. The PCSA needs to be strengthened and more proactive for it to be considered truly effective. Additionally, all prominent publications must subscribe to its authority, which is not currently the case. As a matter of further study, it should be explored how it would be possible to ensure that all publications subscribe to the PCSA, by looking at the possibility of statutory underpinning for independent self-regulation.⁶⁹⁷ This being said, statutory regulation, including the concept of a Media Appeals Tribunal, was found to be undesirable. Of the various sources consulted, almost all seem to warn against direct or indirect government control of what the media publishes. In the South African context, the ability of a chapter nine or constitutional institution to independently regulate the press at an editorial level was placed under a sufficient amount of doubt that it cannot be recommended. It is recommended that the independent co-regulation of the PCSA be further developed in line with the recommendations made above.

⁶⁹⁶ See 1.9.1, 1.9.2, 4.6 and 5.3 above.

⁶⁹⁷ See 4.4 above.

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ANNEXURE A

The Press Code of Ethics and Conduct for South African Print and Online Media

(Effective from January 1, 2019)

The Press Council of South Africa and the Interactive Advertising Bureau South Africa adopt the following Code for print and online media (together referred to as "the media").

PREAMBLE

The media exist to serve society. Their freedom provides for independent scrutiny of the forces that shape society and is essential to realising the promise of democracy. It enables citizens to make informed judgments on the issues of the day, a role whose centrality is recognised in the South African Constitution.

Section 16 of the Bill of Rights sets out that:

1. Everyone has the right to freedom of expression, which includes:

- a) Freedom of the press and other media;
- b) Freedom to receive and impart information or ideas;
- c) Freedom of artistic creativity; and
- d) Academic freedom and freedom of scientific research.

2. The right in subsection (1) does not extend to:

- a) Propaganda for war;
- b) Incitement of imminent violence; or
- c) Advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

The media strive to hold these rights in trust for the country's citizens; and they are subject to the same rights and duties as the individual. Everyone has the duty to defend and further these rights, in recognition of the struggles that created them: the media, the public and government, who all make up the democratic state.

The media's work is guided at all times by the public interest, understood to describe information of legitimate interest or importance to citizens.

As journalists we commit ourselves to the highest standards, to maintain credibility and keep the trust of the public. This means always striving for truth, avoiding unnecessary harm, reflecting a multiplicity of voices in our coverage of events, showing a special concern for children and other vulnerable groups, and exhibiting sensitivity to the cultural customs of their readers and the subjects of their reportage, and acting independently.

Chapter 1: MEDIA-GENERATED CONTENT AND ACTIVITIES

1. Gathering and reporting of news

The media shall:

1.1 take care to report news truthfully, accurately and fairly;

1.2 present news in context and in a balanced manner, without any intentional or negligent departure from the facts whether by distortion, exaggeration or misrepresentation, material omissions, or summarization;

1.3 present only what may reasonably be true as fact; opinions, allegations, rumours or suppositions shall be presented clearly as such;

1.4 obtain news legally, honestly and fairly, unless public interest dictates otherwise;

1.5 use personal information for journalistic purposes only;

1.6 identify themselves as such, unless public interest or their safety dictates otherwise;

1.7 verify the accuracy of doubtful information, if practicable; if not, this shall be stated;

1.8 seek, if practicable, the views of the subject of critical reportage in advance of publication, except when they might be prevented from reporting, or evidence destroyed, or sources intimidated. Such a subject should be afforded reasonable time to respond; if unable to obtain comment, this shall be stated;

1.9 state where a report is based on limited information, and supplement it once new information becomes available;

1.10 make amends for presenting inaccurate information or comment by publishing promptly and with appropriate prominence a retraction, correction, explanation or an apology;

1.11 prominently indicate when an online article has been amended or an apology or retraction published and link such to that text, while the original article may remain;

1.12 not be obliged to remove any article which is not unlawfully defamatory; and

1.13 not plagiarise.

2. Independence and Conflicts of Interest

The media shall:

2.1 not allow commercial, political, personal or other non-professional considerations to influence reporting, and avoid conflicts of interest as well

as practices that could lead readers to doubt the media's independence and professionalism;

2.2 not accept any benefit which may influence coverage;

2.3 indicate clearly when an outside organization has contributed to the cost of newsgathering; and

2.4 keep editorial material clearly distinct from advertising and sponsored events.

3. Privacy, Dignity and Reputation

The media shall:

3.1 exercise care and consideration in matters involving the private lives of individuals. The right to privacy may be overridden by public interest;

3.2 afford special weight to South African cultural customs concerning the protection of privacy and dignity of people who are bereaved and their respect for those who have passed away, as well as concerning children, the aged and the physically and mentally disabled;

3.3 exercise care and consideration in matters involving dignity and reputation, which may be overridden only if it is in the public interest and if:

3.3.1. the facts reported are true or substantially true; or

3.3.2. the reportage amounts to protected comment based on facts that are adequately referred to and that are either true or reasonably true; or

3.3.3. the reportage amounts to a fair and accurate report of court proceedings, Parliamentary proceedings or the proceedings of any quasi-judicial tribunal or forum; or

3.3.4. it was reasonable for the information to be communicated because it was prepared in accordance with acceptable principles of journalistic conduct; or

3.3.5. the article was, or formed part of, an accurate and impartial account of a dispute to which the complainant was a party;

3.4 not identify rape survivors, survivors of sexual violence which includes sexual intimidation and harassment* or disclose the HIV / AIDS status of people without their consent and, in the case of children, from their legal guardian or a similarly responsible adult as well as from the child (taking into consideration the evolving capacity of the child), and a public interest is evident, and it is in the best interests of the child.

* The World Health Organisation inter alia defines sexual violence as follows: "Sexual violence encompasses acts that range from verbal harassment to forced penetration, and an array of types of coercion, from social pressure and intimidation to physical force..."

4. Protection of Personal Information*

The media shall:

4.1 take reasonable steps to ensure that the personal information under their control is protected from misuse, loss, and unauthorized access;

4.2 ensure that the personal information they gather is accurate, reasonably complete and up to date;

4.3 take steps to verify the accuracy of their information and, if necessary, amend it where a person requests a correction to be made to his or her personal information;

4.4 only disclose sufficient personal information to identify the person being reported on as some information, such as addresses, may enable others to intrude on their privacy and safety; and

4.5 inform the affected person(s) and take reasonable steps to mitigate any prejudicial effects where it is reasonably suspected that an unauthorised person may have obtained access to personal information held by the media.

* "Personal information" is defined as follows in Section 1 of the Protection of Personal Information Act 4 of 2013: "Personal information" means information relating to an identifiable, living, natural person, and where it is applicable, an identifiable, existing juristic person, including, but not limited to (a) information relating to the race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, sexual orientation, age, physical or mental health, well-being, disability, religion, conscience, belief, culture, language and birth of the person; (b) information relating to the education or the medical, financial, criminal or employment history of the person; (c) any identifying number, symbol, e-mail address, physical address, telephone number, location information, online identifier or other particular assignment to the person; (d) the biometric information of the person; (e) the personal opinions, views or preferences of the person; (f) correspondence sent by the person that is implicitly or explicitly of a private or confidential nature or further correspondence that would reveal the contents of the original correspondence; (g) the views or opinions of another individual about the person; and (h) the name of the person if it appears with other personal information relating to the person or if the disclosure of the name itself would reveal information about the person.

5. Discrimination and Hate Speech

The media shall:

5.1. avoid discriminatory or denigratory references to people's race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth or other status, and not refer to such status in a prejudicial or pejorative context – and shall refer to the above only where it is strictly relevant to the matter reported, and if it is in the public interest; and

5.2 balance their right and duty to report and comment on all matters of legitimate public interest against the obligation not to publish material that amounts to propaganda for war, incitement of imminent violence or hate speech – that is, advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

6. Advocacy

The media may strongly advocate their own views on controversial topics, provided that they clearly distinguish between fact and opinion, and not misrepresent or suppress or distort relevant facts.

7. Protected Comment

7.1 The media shall be entitled to comment upon or criticise any actions or events of public interest; and

7.2 Comment or criticism is protected even if it is extreme, unjust, unbalanced, exaggerated and prejudiced, as long as it is without malice, is on a matter of public interest, has taken fair account of all material facts that are either true or reasonably true, and is presented in a manner that it appears clearly to be comment.

8. Children

In the spirit of Section 28.2 of the Bill of Rights* the media shall:

8.1 exercise exceptional care and consideration when reporting about children*. If there is any chance that coverage might cause harm of any kind to a child, he or she shall not be interviewed, photographed or identified without the consent of a legal guardian or of a similarly responsible adult and the child (taking into consideration the evolving capacity of the child); and a public interest is evident;

8.2 not publish child pornography*; and

8.3 not identify children who have been victims of abuse or exploitation, or who have been charged with or convicted of a crime, without the consent of their legal guardians (or a similarly responsible adult) and the child (taking into consideration the evolving capacity of the child), a public interest is evident and it is in the best interests of the child.

* Section 28.2 of the Bill of Rights in the South African Constitution says: "A child's best interests are of paramount importance in every matter concerning the child."

* A "child" is a person under the age of 18 years.

* Child Pornography is defined in the Film and Publications Act as: "Any visual image or any description of a person, real or simulated, however created, who is or who is depicted or described as being, under the age of 18 years, explicitly depicting such a person who is or who is being depicted as engaged or participating in sexual conduct; engaged in an explicit display of genitals; participating in or assisting another person to participate in sexual conduct which, judged within context, has as its predominant objective purpose, the stimulation of sexual arousal in its target audience or showing or describing the body or parts of the body of the person in a manner or circumstance which, in context, amounts to sexual exploitation."

9. Violence, Graphic Content

The media shall:

9.1 exercise due care and responsibility when presenting brutality, violence and suffering;

9.2 not sanction, promote or glamorise violence or unlawful conduct; and

9.3 avoid content which depicts violent crime or other violence or explicit sex, unless the public interest dictates otherwise – in which case a prominently displayed warning must indicate that such content is graphic and inappropriate for certain audiences such as children.

10. Headlines, Captions, Posters, Pictures and Video / Audio Content

10.1 Headlines, captions to pictures and posters shall not mislead the public and shall give a reasonable reflection of the contents of the report or picture in question; and

10.2 Pictures and video / audio content shall not misrepresent or mislead nor be manipulated to do so.

11. Confidential and Anonymous Sources

The media shall:

11.1 protect confidential sources of information – the protection of sources is a basic principle in a democratic and free society;

11.2 avoid the use of anonymous sources unless there is no other way to deal with a story, and shall take care to corroborate such information; and

11.3 not publish information that constitutes a breach of confidence, unless the public interest dictates otherwise.

12. Payment for Information

The media shall avoid shady journalism in which informants are paid to induce them to give the information, particularly when they are criminals – except where the material concerned ought to be published in the public interest and the payment is necessary for this to be done.

Chapter 2: USER-GENERATED CONTENT AND ACTIVITIES*

13. Principles

The media:

13.1 are not obliged to moderate all user-generated content (UGC) in advance;

13.2 shall have a UGC Policy, consistent with the Constitution of the Republic of South Africa, governing moderation and/or removal of UGC or user profiles posted;

13.3 may remove any UGC or user profile in accordance with their policy;

13.4 must make their policy publicly available and set out clearly the:

13.4.1 authorisation process, if any, which would-be users must follow, as well as any terms, conditions and indemnity clauses during such registration process;

13.4.2 content which shall be prohibited; and

13.4.3 manner in which the public may inform them of prohibited content;

13.5 should, where practicable, place a notice on the platforms to discourage the posting of prohibited content;

13.6 should inform the public that UGC is posted directly by users, and does not necessarily reflect their views;

13.7 shall encourage users to report content which may violate the provisions of their policy; and

13.8 shall particularly carefully monitor online forums directed at children.

14. Prohibited Content

Material constitutes prohibited content if it is expressly not allowed in a member's UGC Policy, and in Section 5.2 of this Code (which refers to Section 16 of the Bill of Rights and overrules anything to the contrary contained in a UGC policy).

15. Defence

15.1 It is a defence for the media to show that they did not author or edit the content complained of;

15.2 However, where a complainant has sent a written notice to the particular media, identifying the content concerned, specifying where it was posted, and motivating why it is prohibited (see Clause 14); the media must then either:

15.2.1 remove the relevant UGC as soon as possible and notify the complainant accordingly; or

15.2.2 decide not to remove the UGC and notify the complainant accordingly. In the latter case, the complainant may complain to the Press Ombud, who will treat it as if the UGC was posted by the member itself.

* This section applies where a complaint is brought against a member in respect of comments and content posted by users on all platforms in controls and on which it distributes its content.