

Sanef guidance doc on the safety of journalists during elections

In South Africa, media freedom, freedom of expression, the free flow of information and therefore the freedom of journalists to do their work, is protected in the Constitution of the Republic of South Africa in Section 16 (1). Everyone has the right to freedom of expression, which includes –

- (a) freedom of the press and other media;
- (b) freedom to receive or impart information or ideas;
- (c) freedom of artistic creativity;
- (d) academic freedom and freedom of scientific research.

Shortly before South Africa's historic first free election, in April 1994, its first democratic president Nelson Mandela said:

"A critical, independent and investigative press is the lifeblood of any democracy. The press must be free from state interference. It must have the economic strength to stand up to the blandishments of government officials. It must have sufficient independence from vested interests to be bold and inquiring without fear or favour. It must enjoy the protection of the constitution, so that it can protect our rights as citizens. It is only such a free press that can temper the appetite of any government to amass power at the expense of the citizen. It is only such a free press that can be the vigilant watchdog of the public interest against the temptation on the part of those who wield it to abuse that power. It is only such a free press that can have the capacity to relentlessly expose excesses and corruption on the part of government, state officials and other institutions that hold power in society."
http://www.mandela.gov.za/mandela_speeches/1994/940214_press.htm (Extract from speech to the IPI Congress, 14 Feb, 1994).

This remains as apposite today as it did in 1994, and as speaking notes to Sanef from public interest lawyer Okyerebea Ampofo-Anti, articulates:

“Freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters. (In *SANDF v Minister of Defence* the Constitutional Court made the following observation on the importance of the right to freedom of expression,

The media play a particular role in exercising the right to freedom of expression. Importantly our courts have acknowledged that this role does not only serve the interests of the media **but the interest of the public.**” (Emphasis is ours).

During elections, journalists come under attack, see examples in Appendix from Media Monitoring Africa (MMA). This happens even while we have protective legislation in the Electoral Code of Conduct.

4. The Electoral Code of Conduct

An introduction to the **Electoral Code of Conduct** (Electoral Code) has been provided in Module I. The important role of the media during elections has given rise to express recognition and protection of the media within the electoral law framework. However, as is to be expected, there are likewise specific rules and expectations relating to the media’s conduct during election periods.

The Electoral Code requires political parties and candidates to respect the role of the media during elections.⁴ It provides as follows:

“Every party and every candidate—

- (1) must respect the role of the media before, during and after an election conducted in terms of [t]he Electoral Act);
- (2) may not prevent access by members of the media to public political meetings, marches, demonstrations and rallies; and
- (3) must take all reasonable steps to ensure that journalists are not subjected to harassment, intimidation, hazard, threat or physical assault by any of their representatives or supporters.”

Section 80(a) of the Municipal Electoral Act provides that a conviction for a contravention or non-compliance with the Electoral Code may carry a fine or a sentence of imprisonment of up to ten years. In practice, political parties that breach the Electoral Code can, for instance, forfeit the party’s election deposit; be stopped from working in an area; have their votes in an area cancelled; or have their party registration cancelled.

The media plays a pivotal role in elections. As also noted by the ACE Electoral Knowledge Network (<https://elections.sanef.org.za/wp-content/uploads/2021/06/SANEF-Elections-2021-Module-2-Elections-Training-Modules-revised.pdf>)

“The media are essential to democracy, and a democratic election is impossible without media. A free and fair election is not only about the freedom to vote and the knowledge of how to cast a vote, but also about a participatory process where voters engage in public debate and have adequate information about parties, policies, candidates and the election process itself in order to make informed choices. Furthermore, media acts as a crucial watchdog to democratic elections, safeguarding the transparency of the process. Indeed, a democratic election with no media freedom, or stifled media freedom, would be a contradiction.” The media plays many important roles in enabling full public participation in elections, including:

- Educating voters on how to exercise their democratic rights.
- Reporting on the development of an election campaign.
- Providing a platform for the political parties and candidates to communicate their message to the electorate.
- Providing a platform for the public to communicate their concerns, opinions, and needs to the parties and candidates, the election management body, the government and other voters, and to interact on these issues.
- Allowing parties and candidates to debate with each other.
- Reporting results and monitoring vote counting.
- Scrutinising the electoral process in order to evaluate the fairness of the process.

2

But journalists have been attacked

Media freedom and the freedom of journalists to do their work during elections has increasingly been under attack with every passing year in the democratic age. Journalists come under attack for merely doing their jobs, in pursuit of providing information to their public which they serve. The attacks include physical bullying, emotional violence, online harassment of doxing and trolling, cybermisogyny against women journalists, surveillance and tapping of phones.

Yet during elections, journalists become the watchdogs of the public, regarding where votes have been “lost”, where voting stations have not opened in time, where political party members are intimidating voters, where parties are campaigning and should not

be, among so many other functions. Sometimes votes are cancelled in a certain area and not counted, sometimes a party's registration is suddenly cancelled.

International and African context and legal frameworks/treaties/agreements regarding Safety of Journalists

South Africa is party to several continental and international treaties that protect the right to freedom of expression:

1) Article 19 of the Universal Declaration of Human Rights

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.

2) Article 19 of the International Covenant on Civil and Political Rights (ICCPR)

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 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 or of public health or morals.

3) Comment 34 the Human Rights Committee, which is the treaty body tasked with ensuring compliance with the ICCPR emphasized the important role of the media in democracy:

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 Covenant rights. It constitutes one of the cornerstones of a democratic society. The Covenant embraces a right whereby the media may receive information on the basis of which it can carry out its function. The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion. The public also has a corresponding right to receive media output.

4) Article 9 of the African Charter on Human and People's Rights states that:

1. Every individual shall have the right to receive information.

2. Every individual shall have the right to express and disseminate his opinions within the law.

5) In the Declaration of Principles on Freedom of Expression in Africa adopted by the African Commission on Human and People's Rights in 2002, the Commission acknowledged the specific role that the media plays in ensuring full respect for freedom of expression, in promoting the free flow of information and ideas, in assisting people to make informed decisions and in facilitating and strengthening democracy. The African Commission is in the process of updating this Declaration and in the draft version that has been published the issue of safety for journalists receives specific attention.

While there are many treaties, declarations and agreements in place, internationally and continentally, attacks against journalists still continue, and especially during election seasons.

- a. The issue of the safety of journalists has also received attention from the United Nations in recent years because it has been recognized as one of the key factors that inhibits media freedom.
- b. The UN General Assembly, the Human Rights Council of the UN and UNESCO have all adopted numerous resolutions which identify concerns around the safety of journalists. The UN has also adopted a Plan of Action on the safety of journalists which sets out how the UN will work with various stakeholders to implement interventions to enhance the safety of journalists.
- c. Un General Assembly Resolution 72/175 which was adopted on 19 December 2017 reflects in large part the tenor of the resolutions which have been adopted at UN level on this issue. The resolution states in relevant part:

Recognizing that the work of journalists often puts them at specific risk of intimidation, harassment and violence, the presence of which often deters journalists from continuing their work or encourages self-censorship, consequently depriving society of important information,

Deeply concerned by all human rights violations and abuses committed in relation to the safety of journalists and media workers, including killing, torture, enforced disappearance, arbitrary arrest and arbitrary detention, expulsion, intimidation, harassment, threats and acts of other forms of violence,

Expressing deep concern at the increased number of journalists and media workers who have been killed, tortured, arrested or detained in recent years as a direct result of their profession,

Recognizing also the crucial role of journalists and media workers in the context of elections, including informing the public about candidates, their platforms and ongoing debates, and expressing serious concern that attacks against journalists and media workers increase during election periods,

Acknowledging the specific risks faced by women journalists in the exercise of their work, see new book *Women Journalists in South Africa: democracy in the age of social media*, Palgrave Macmillan (Glenda Daniels and Kate Skinner, 2022) and underlining in this context the importance of taking a gender-sensitive approach when considering measures to address the safety of journalists, including in the online sphere, in particular to effectively tackle gender-based discrimination, including violence, inequality and gender-based stereotypes, and to enable women to enter and remain in journalism on equal terms with men while ensuring their greatest possible safety, to ensure that the experiences and concerns of women journalists are effectively addressed and gender stereotypes in the media are adequately tackled.

Threats and Trends to watch

According to lawyer, Okyerebea Ampofo-Anti, Unesco which identifies trends every two years, show incidents of violence against journalists have increased globally, in Africa impunity has increased, with justice in only one in 10 cases.

Globally there has also been a substantial rise in other forms of violence against journalists, including in kidnapping, enforced disappearance, arbitrary detention and torture.

Digital safety is an increasing concern for journalists across all regions, with threats posed by intimidation and harassment, disinformation and smear campaigns, website defacement and technical attacks, as well as arbitrary surveillance.

Misogynistic cyber harassment has continued to be a significant threat, potentially silencing journalists and hindering media pluralism in terms of gender diversity in media production. Women journalists, in particular, have experienced increasing online abuse, stalking and harassment.

Threats to digital safety pose a new and evolving risk, especially in relation to online harassment and the protection of confidential sources.

Surveillance: there have been numerous cases across all regions, and throughout democratic and other societies, of both state and non-state actors using malware to spy on journalists and activists. This trend has been facilitated by the rise of inexpensive surveillance technologies that are readily available for purchase by both state and non-state actors alike. Journalists across the globe have reported digitally-mediated threats of death, bombing, violence against themselves and family members, rape, abuse and insult.

An analysis of more than two million tweets performed by the think tank Demos found that women journalists experienced approximately three times as many abusive comments as their male counterparts on Twitter.

De-legitimation by political actors The report also finds that one of the most significant political trends impacting media systems around the world is the widespread de-legitimation by political actors of the media. Government actors and other powerful actors initiate and engage in the process of systematic attacks on the media by trivializing it, or sometimes characterizing it as an ‘enemy’ or part of the political opposition which has widespread implications for the independence and well-being of the sector. A common tactic is to blur the distinction between mainstream news media, and the mass of unverified content on social media – this includes dismissing credible news stories as fake news.

Propaganda: 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. De-legitimizing:

- i. encourages and reinforces attacks on the media by other factions in society;
 - ii. encourages and reinforces attacks on the media by other factions in society;
 - iii. has the power to intimidate journalists;
 - iv. disrupts public faith in the foundational principles of the function of the media and press, as well as the credibility of facts and science.
- d. The de-legitimizing can be seen as part of a greater problem of political and social polarization, including sustained attacks on the legitimacy of public institutions, including independent judiciaries, throughout the world.

Since the advent of the Constitution our courts have through a series of cases fleshed out the attendant rights and protections that flow from the protection afforded to media freedom in our Constitution. These include:

- i. The right to attend and report on the proceedings of courts, tribunals, parliament and similar forums, which includes the right to take visual and audio recording for purpose of broadcast
- ii. The right to access court papers;
- iii. The right to protect the confidentiality of their sources;
- iv. The High Court has interdicted a political organization from making threats, harassing and intimidating journalists online and offline, including by staging protest action at their homes or places of worship;
- v. The High Court has ruled that in the context of elections it is not acceptable for political parties to disclose the personal contact details of journalists and that there is an obligation on political parties not only to refrain from fueling threats, intimidation and harassment by their supporters against journalists but to take positive steps to call on their supporters to desist from taking such actions. The court did not accept

that the alleged political affiliations or bias of a journalist can be an acceptable basis for threats, intimidation and harassment. This was based on the Electoral Code, which provides that:

Every registered party and every candidate- (a) must respect the role of the media before, during and after an election conducted in terms of this Act; (b) may not prevent access by members of the media to public political meetings, marches, demonstrations and rallies; and (c) must take all reasonable steps to ensure that journalists are not subjected to harassment, intimidation, hazard, threat or physical assault by any of their representatives or supporters.”

The Constitutional Court in 2021 ruled sections of RICA are unconstitutional. One of the reasons is that the surveillance of journalists could lead to a breach of the confidentiality of their sources. Parliament has been directed to amend the legislation to deal with the issue of surveillance on journalists and the court has expressed that this should only be allowed in exceptional circumstances.

Considering, all of the above, the agreements in place, internationally, and on the African continent, the SA Constitution and other legislation to protect journalism, as well as the problems thus far experienced regardless of all this in place, we recommend:

RECOMMENDATIONS TO IEC: GUIDELINES ON THE SAFETY OF JOURNALISTS

- Condemn political parties, politicians and individuals who intimidate or attempt to intimidate journalists as they try to perform their work during elections through some form of sanction.
- Pay close attention to cyberbullying, particularly on women, i.e. cybermisogyny incidents that get reported to the IEC. The incidents of intimidation, bullying, online trolling and vilification on women reporting in the political space, has increased.
- Online bullying must be treated in the same way as physical bullying.

- No harassment of journalists online or offline. No encouraging directly or indirectly of supporters to harass journalists online or offline. For purposes of this clause on harassment will have the same meaning as in the Protection from Harassment Act 17 of 2011.¹
- No intimidation of journalists online or offline, including by making direct or implied threats against their personal safety.
- No intimidation or harassment of journalists with a view to forcing them to reveal their sources.
- No encouraging party supporters to physically accost or stage protest actions against journalists at their homes or in public spaces.
- A journalist's equipment such as cameras, recording equipment and cell phones must not be confiscated or deliberately damaged.
- No doxxing: i.e. Parties will not disclose to their supporters or to the public the personal information of a journalist such as contact details, home address, email address, ID number or personal information about a journalist's family such as the identities of their spouses, children and family members.
- No interception of a journalist's private communications through electronic or other means, whether done by the party or a third party who provides the information to the political party.

¹ "harassment" means directly or indirectly engaging in conduct that the respondent knows or ought to know -

(a) causes harm or inspires the reasonable belief that harm may be caused to the complainant or a related person by unreasonably -

(i) following, watching, pursuing or accosting of the complainant or a related person, or loitering outside of or near the building or place where the complainant or a related person resides, works, carries on business, studies or happens to be;

(ii) engaging in verbal, electronic or any other communication aimed at the complainant or a related person, by any means, whether or not conversation ensues; or

(iii) sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant or a related person or leaving them where they will be found by, given to, or brought to the attention of, the complainant or a related person; or

(b) amounts to sexual harassment of the complainant or a related person;

- No sexism and cybermisogyny: engagements with female journalists must not include harmful gendered stereotypes, objectification or sexualization of the journalist whether this is done verbally, in writing or through images.
- No insulting of specific journalists through the use of derogatory or profane language, particularly language that is based on any discriminatory characteristics such as race, gender, disability, sexual orientation or social and ethnic origin.
- When there are concerns about a story, criticism or comment should be focused on the story – (for complaints, report it to the Press Council of SA or to the BCCA) - and should not target a specific journalist.
- If there is verifiable evidence of ethical misconduct by the journalist, such evidence must be provided to the journalist in question upon request.
- Parties agree not to make false allegations against journalists with a view to undermining their credibility.
- Parties agree not to make allegations that a journalist or media organization has published a story with a view to pursuing a specific political agenda unless they have verifiable evidence to that effect which must be made available upon request.
- Parties agree not to ban specific media organizations or journalists from events held by the party to which the media are invited, such as press conferences and party events that are open to the media.

ENDS

Ampofo Anti speaking notes