

ANALYSIS OF COVID-19
REGULATIONS VIS-À-VIS
FREEDOM OF EXPRESSION
IN THE SADC REGION



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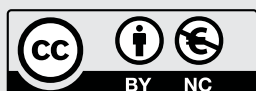


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Executive summary

The Corona Virus Disease popularly known the COVID-19 is a life-threatening virus that has spread across the globe including the African continent and has plunged the world into a global health crisis whose impact is felt across the economic, political and social spectrum.

Governments across the world have had to adopt crisis response mechanisms to contain the spread of the virus and protect public health. These responses have included the introduction of national lockdowns, restrictions on movement and curfews among other measures. Regulations were thus enacted for the prevention, containment and treatment of COVID-19. In that regard, these regulations also impacted the exercise of fundamental rights including the right to freedom of expression.

It is imperative that while emergency measures are adopted to reduce the spread of the virus, human rights are respected. This research therefore analyses those regulations and scans at the nature of their impact on the right to freedom of expression. This paper also analyses the laws that have been adopted by SADC governments to address disinformation that spreads through social media platforms.

What has been noted is that as governments respond to the COVID-19 pandemic, the threats on freedom of expression are worrisome as they undermine democracy which is underpinned on respect of civil and political rights including freedom of expression and access to information. Any restrictions on freedom of expression induced by the on-going COVID-19 pandemic (although not desirable) must be specific, time bound and in the interest of public health.

The purpose of this study is to map the current measures and levels of restrictions on freedom of expression imposed by SADC governments. The study also provides recommendations for the present and future circumstances and intends to inform further interventions and advocacy strategies to promote media freedom and freedom of expression in the SADC region. The study is a desktop research review based on the literature that has been surveyed including academic literature, relevant reports by development organisations and civil society and also governments' regulations. The review employs the human rights based approach as a conceptual framework which is based on the understanding of, or advancement of human rights generally. In this regard, reference has been made to international human rights law and standards.

List of abbreviations

COVID-19 -Coronavirus Disease 2019

MISA- Media Institute of Southern Africa

MMA –Media Monitoring Africa

PPE- Personal protective equipment

SADC- Southern African Development Community

SANDF- South African National Defence Force

SAPS- South African Police Services

UNESCO- United Nations Educational Scientific and Cultural Organization

WHO- World Health Organisation

Definition of terms

Disinformation and misinformation.

Misinformation and disinformation on COVID-19 has been about conspiracy theories on the origins of the virus, its treatment, mechanisms of infection and spread. Disinformation is a form of false information that is generated and disseminated deliberately to mislead or cause harm. On the other hand, misinformation refers to false information and differs from disinformation in that there will be no intention to mislead or case harm.

Infodemic

The World Health Organisation conceived this term (Infodemic) refer to the “over-abundance of information, some accurate and some not, that makes it hard for people to find trustworthy sources and reliable guidance when they need it.”¹ The information on COVID-19 has been growing exponentially and it included truthful and false information (misinformation and disinformation).

Human rights-based approach

A human rights-based approach is a conceptual framework that is embedded in international human rights law and standards is advances the promotion and protection of human rights.

¹ ‘Novel Coronavirus (2019-nCoV) Situation Report –13’ 2 February 2020 <https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200202-sitrep-13-ncov-v3.pdf> (accessed 10 June 2020).

Introduction

The Coronavirus disease (COVID-19), which was declared a global pandemic by the World Health Organisation (WHO), is caused by a novel strain of coronavirus, SARS-CoV-2. The COVID-19 pandemic is an unprecedented crisis that has seen various governments across the globe resort to various forms of crisis management measures to contain the spread of the virus. Governments have adopted measures such as lockdowns and curfews. In the SADC region, different measures have been adopted to respond to COVID-19. Some member states have declared states of emergency or states of national disaster. Angola, Botswana, Eswatini, Lesotho, Mozambique and Namibia declared COVID-19 as a state of emergency while Zimbabwe and South Africa declared the pandemic as a state of national disaster. These proclamations were accompanied by an assortment of regulations whose scope impinge on civil and political rights.

COVID-19 is not only a public health crisis. It has implications for the practice of democracy and human rights. The measures to protect public health impact on democracy in exceptional ways. Former United Nations Special Rapporteur on Freedom of Opinion and Expression, David Daye, noted that COVID-19 is an “intense global challenge to health and to the foundations of a democratic society.”²

A relevant representation of this, would be

the numerous media freedom violations that have been witnessed in the SADC region since governments started their response efforts.³ As responses to the pandemic are initiated and modified it is important to restate the significance of freedom of expression in a health crisis. It is true that being an extra-ordinary phenomenon, COVID-19 requires extra-ordinary measures aimed at securing people’s health and safety.⁴

Equally important in confronting the pandemic is the right of access to information which requires vigilance in proactive disclosure of credible COVID-19 information and also serves as an antidote to disinformation. Although what is at stake currently is the preservation of life through protection of public health, the nature, extent and longevity of the crisis management measures that impact on freedom of expression and access to information is worth reflecting on. The measures should be proportionate to the demands of the crisis whilst respecting democratic governance, protecting fundamental human rights and adhering to the rule of law.⁵ States can limit freedom of expression to protect public health but some of the restrictions that have been instigated in the SADC region are “unnecessary or disproportionate”.⁶ Even in time of crisis, human rights have to be protected as rights such as freedom of expression play a vital role in the face of a deadly global pandemic. Freedom of expression contributes to access

² D Kaye ‘Disease pandemics and the freedom of opinion and expression’ <https://undocs.org/A/HRC/44/49> (accessed 10 June 2020).

³ As above.

⁴ A Game ‘Keeping our eyes on the ball: Human rights in the time of COVID-19’ 7 April 2020 <https://ifex.org/keeping-our-eyes-on-the-ball-human-rights-in-the-time-of-covid-19/> (accessed 10 June 2020).

⁵ ‘Mitigating a global health crisis while maintaining freedom of expression and information’ <https://rm.coe.int/en-mitigating-a-global-health-crisis-while-maintaining-freedom-of-expr/16809e2d1e> (accessed 10 June 2020).

⁶ <https://ijnet.org/en/story/key-quotes-media-freedom-threats-and-covid-19-un-special-rapporteur-david-kaye-and-cpj's> (accessed 10 June 2020).

and dissemination of information which is very important when faced with a crisis such as COVID-19.

Freedom of expression is a facilitative right that contributes to the realisation of other human rights. In this case, this study reaffirms that freedom of expression and access to information are essential elements of the right to health.⁷ The study examines the state of freedom of expression in the SADC region in the context of COVID-19 and government instigated regulations to curb its spread. Specifically, 1) it looks at the regulations passed in the SADC region and their effect on media freedom and free expressions; 2) regulation of disinformation during COVID-19; 3) recommendations on how governments can curb disinformation without infringing free expression; and, 4) the different roles that stakeholders including civil society and journalists can play in curbing disinformation.

This research draws on international human rights law and standards. In this regard, it relies on the African Charter on Human and Peoples' Rights that enshrines the right of freedom of expression. Further, it references the 2019 Declaration of Principles on Freedom of Expression and Access to Information in Africa as a guiding standard.⁸ The Declaration provides that to protect and promote freedom of expression,

states should create an enabling environment for the exercise of freedom of expression and access to information, including ensuring protection against acts or omissions of non-State actors that curtail the enjoyment of freedom of expression and access to information.⁹ Equally important to this research is the Joint Declaration on Freedom of Expression and 'Fake News', Disinformation and Propaganda is also considered as it provides valuable recommendations that are beneficial to this study.¹⁰

International human rights standards

Freedom of expression is a fundamental right that is protected under international human rights laws and standards; namely the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR art 19), African Charter on Human and Peoples' Rights among others. The 2019 Declaration of Principles on Freedom of Expression and Access to Information in Africa provides principles on the right to freedom of expression in Africa.¹¹ The Declaration also affirming that *"the same rights that people have offline should be protected online and in accordance with international human rights law and standards"*.¹² As already highlighted, freedom of expression

7 The position was taken by the Committee on Economic, Social and Cultural Rights. See CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health, article 12.

8 The revised Declaration of Principles on Freedom of Expression and Access to Information in Africa was adopted by the African Commission on Human and Peoples' Rights during its 65th Ordinary Session in 2019. It elaborates article 9 of the African Charter on Human and Peoples' Rights which guarantees individuals the right to receive information, as well as the right to express and disseminate information. The Declaration contributes to an enhanced normative standard for freedom of expression, access to information and digital rights in Africa, in line with international human rights and standards. The revision of the Declaration was undertaken pursuant to Article 45(1) of the African Charter on Human and Peoples' Rights (the African Charter) which requires the African Commission to promote human and peoples' rights, among others, by formulating and laying down principles and rules to solve legal problems relating to human and peoples' rights and fundamental freedoms upon which African States may base their legislation. The Declaration encapsulates principles that define the rights to freedom of expression and access to information as guaranteed under article 9 of the African Charter.

9 Declaration of Principles on Freedom of Expression and Access to Information in Africa, principle 1(2).

10 This project was commissioned by UNESCO in 2017 n 2017. The joint statement was issued by the UN Special Rapporteur for Freedom of Opinion and Expression, the OSCE's Representative on Freedom of the Media, the Organisation of American States' Special Rapporteur on Freedom of Expression, and the African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression and Access to Information. The Declaration is focused on disinformation and propaganda, and attacks on news media.

11 See generally, the revised Declaration of Principles on Freedom of Expression and Access to Information in Africa (2019).

12 Declaration, see preamble, principle 1, principle 5 and principles 37-42.

is important for the realization and enjoyment of other human rights and consolidation of democracy.

However, the right of freedom of expression is not an absolute right. It can be limited under certain circumstances. The standards set under international human rights law stipulate that the limitation should be prescribed by the law¹³, serve a legitimate aim and should be necessary and proportionate to achieve the stated aim in a democratic society.¹⁴ Consistent with international human rights law, freedom of expression can be limited in the public interest such as to protect public health during a public health crisis. However, the limitation should be time limited and should cease once the crisis has been averted. Also, the limitations should be applied in a non-discriminatory manner and should not be arbitrary. They should be regularly reviewed to check their proportionality and necessity.¹⁵ In addition, the state's derogation from the right to freedom of expression should be informed by circumstances such as nationwide public emergency that threatens public life.¹⁶ The nature and extent of the states of emergency should only address the demands of the stated situation.

The right to freedom of expression, which includes the freedom to receive and impart information is guaranteed and protected under constitutions of the SADC countries. This includes the freedom to seek, receive and communicate ideas and other information;

academic freedom; freedom of artistic expression and scientific research and creativity. Some of the SADC member states constitutions provide for circumstances under which freedom of expression can be limited including protecting a person's reputation or dignity; incitement to violence; advocacy of hatred or hate speech and malicious or unwarranted breach of a person's right to privacy.

For instance, Section 16 of the Constitution of South Africa makes the following provisions: "Everyone has the right to freedom of expression, which includes freedom of the press and other media; freedom to receive or impart information or ideas; freedom of artistic creativity; and academic freedom and freedom of scientific research."¹⁷ However, these rights are not absolute as indicated in Section 16 (2) which provides limitations to the right to freedom of expression: "The right in subsection (1) does not extend to propaganda for war; incitement of imminent violence; or advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm..."¹⁸

Section 61(5) (a) of the Constitution of Zimbabwe also limit freedom of expression and of the press on the grounds of incitement to violence.¹⁹ Also, Section 187 (1) (a) of the Criminal Code of Zimbabwe provides as follows;

1. Any person who, in any manner, communicates with another person,
2. intending by the communication

13 See African Commission: Malawi African Association v Mauritania Communication Nos 54/91, 61/91, 98/93, 164-196/97 and 210/98 (2000), African Court: Konaté v Burkina Faso Application No 004/2013 (2014).

14 Declaration, principle 9. See also the Joint Declaration on Freedom of Expression and "Fake News", Disinformation and Propaganda adopted in Vienna, on 3 March 2017 <https://www.osce.org/files/f/documents/6/8/302796.pdf> (accessed 10 June 2020).

15 'Coronavirus: Impacts on freedom of expression' <https://www.article19.org/coronavirus-impacts-on-freedom-of-expression/> (accessed 10 June 2020).

16 Access Now: 'Fighting Misinformation and Defending Free Expression during Covid-19: Recommendations for States' <https://www.accessnow.org/cms/assets/uploads/2020/04/Fighting-misinformation-and-defending-free-expression-during-COVID-19-recommendations-for-states-1.pdf>. There has to be a public pronouncement by the government of this state of emergency.

17 The South African Constitution, Section 16.

18 The South African Constitution, Section 16(2).

19 The Constitution of Zimbabwe, Section 61(5) (a).

to persuade or induce the other person to commit a crime, whether in terms of this Code or any other enactment; or

3. realizing that there is a real risk or possibility that the other person may be persuaded or induced by the communication to commit a crime, whether in terms of this Code or any other enactment; shall be guilty of incitement to commit the crime concerned.

These laws were used recently by the Zimbabwe government to arrest and detained renowned investigative journalist, Hopewell Chin'ono, who was accused of inciting the public.²⁰ Mr. Chin'ono, whose work as an investigative journalist have been critical of the government, especially on matters relating to corruption. His recent investigation into corruption in the awarding of contract for medical equipment and PPEs has led to the sacking of the country's former health minister. Mr Chin'ono arrest has attracted both domestic and international criticism against the government from the United Nations, civil societies groups and members of the public who accused the government of using Covid-19 as an excuse to stifle freedom of expression and descent.²¹ Several journalists and activists have been intimidated and arrested in Zimbabwe including 5 journalists that were arrested in April while covering government declared lockdown as a measure to curb the spread of the virus.²²

The obligation of the state therefore, is to create an enabling environment for the exercise of freedom of expression and access to information, including by ensuring protection against acts or omissions of non-State actors that curtail the enjoyment of freedom of expression and access to information.²³ It is also the obligation of the state to ensure that, "everyone enjoys the rights to exercise freedom of expression and access to information without distinction of any kind, on one or more grounds, including race, ethnic group, colour, sex, language, religion, political or any other opinion, political association, national and social origin, birth, age, class, level of education, occupation, disability, sexual orientation, gender identity or any other status."²⁴

The right to freedom of expression in the context of a pandemic

The right to freedom of expression is a facilitative right that is necessary for the realization of other human rights, in this case the right to health as guaranteed under the International Covenant on Economic, Social and Cultural Rights.²⁵ The Committee on Economic, Social and Cultural Rights affirmed and underscored the significance of freedom of expression in this broad sense, including the academic and scientific freedom. This translates to the freedom to generate and share information on COVID-19 through various platforms including the media.²⁶ In this regard,

20 N Bolani 'Zimbabwean journalist, civil activist arrested on Monday' (2020) <https://www.sabcnews.com/sabcnews/zimbabwe-government-under-fire-after-arrests-of-journalist-civil-activist/> (accessed 26 March 2020).

21 'Ramaphosa urged to secure release of Hopewell Chin'ono and other jailed journalists in Africa' (2020) <https://www.dailymaverick.co.za/article/2020-07-23-ramaphosa-urged-to-secure-release-of-hopewell-chinono-and-other-jailed-journalists-in-africa/#gsc.tab=0> (accessed 26 July 2020).

22 'Five Zimbabwean reporters arrested while covering coronavirus lockdown' (2020) <https://rsf.org/en/news/five-zimbabwean-reporters-arrested-while-covering-coronavirus-lockdown> (accessed 26 March).

23 Declaration, principle 1(2).

24 Declaration, principle 3.

25 D Kaye n 2 above, para 12.

26 Committee on Economic, Social and Cultural Rights General Comment No. 25 (2020) on science and economic, social and cultural rights (article 15 (1) (b), (2), (3) and (4) of the International Covenant on Economic, Social and Cultural Rights).

it is the obligation of the state to ensure that this right is respected to achieve the objectives under the various methods of the containment of the virus. It is worth noting that the advancement of the right of freedom of expression during a pandemic is significant to the extent that it contributes to the public health interests that are embodied in the containment measures. It is therefore important that the public acts responsibly in their exercise of the right so as not to cause unwarranted public panic or derail the containment measures.

Covid-19 and freedom of expression in the sadc region

This section of the study is premised on the impression that freedom of expression particularly freedom of the media is essential in containing the spread of virus. The section explores the attitude of the government towards the media including the recognition of the media as providing an essential service; the violations against the media; and the false news regulations in the SADC region. A review of the situation in the SADC member states reveals that violations have been perpetrated against members of the public and the media including the arrests of journalists and closure of media outlets for mainly criticising government responses to COVID-19.²⁷

Media as ‘essential service’ in the wake of covid-19

The Covid-19 health crisis has in a significant way brought to the limelight the crucial role of access to verified and reliable information and

freedom of expression. Credible information produced by a free and independent journalism could make the difference between life and death. Such life-saving information help people to distinguish between facts and lies as the scourge of misinformation rises during the times of Covid-19. In recognition of this important role, the United

Nations, especially, the United Nations, Education, Social and Cultural Organisation, UNESCO has encouraged world leaders to support a free and vibrant press to complement the work of countering the rise of misinformation which continues to impede the fight against Covid-19.²⁸ UNESCO in particular calls on stakeholders; government and media owners to guarantee the safety of journalists.²⁹

This call has been heeded to by some governments in the SADC region, who have classified the media as a provider of essential service, as government announced measures that were meant to curb the spread of the virus through people to people transmission. These measures include restricting public freedom of movement through quarantined and lockdowns measures. Essentially, designating media as an essential service and allowing journalists to move around freely to cover and report on the Covid-19 outbreak is an acknowledgment of the crucial role of information in times of a crisis, especially a public health catastrophe that was an enigma to many. The media plays an important role in educating the public about measures to combat and curb the spread of Covid-19.

In South Africa, government acknowledged the significant role of the media during times of crisis,

27 D Muchena ‘Southern Africa: COVID-19 a pretext for surge in harassment of journalists and weakening of media houses by states’ 3 May 2020 <https://www.amnesty.org/en/latest/news/2020/05/southern-africa-covid19-a-pretext-for-surge-in-harassment->

[of-journalists-and-weakening-of-media-houses-by-states/](https://www.amnesty.org/en/latest/news/2020/05/southern-africa-covid19-a-pretext-for-surge-in-harassment-of-journalists-and-weakening-of-media-houses-by-states/) (accessed 10 June 2020).

28 R Pollack et al ‘Journalism, press freedom and COVID-19’ (2020) https://en.unesco.org/sites/default/files/unesco_covid_brief_en.pdf (accessed 27 March 2020).

29 ‘UNESCO stresses importance of safety of journalists amid COVID-19 pandemic’ (2020) <https://en.unesco.org/news/unesco-stresses-importance-safety-journalists-amid-covid-19-pandemic> (accessed 27 July 2020).

emphasised that in the Covid-19 crisis the media is an important national asset and necessity. For this significant role, the media is classified as an essential service.³⁰ The media provides relevant information about the pandemic and essentially informs, enlightens, empowers and brings hope to citizens and stakeholders. In view of the proliferation of false news during the pandemic, quality journalism could also contribute to a reduction of misinformation and the negative impact of false news. The South African National Editors' Forum (SANEF) welcomed the essential services status and noted that it is important that journalists are allowed to do their work without hindrance from the authorities.³¹

Other SADC countries have also classified media as an 'essential service' in the wake of Covid-19. Botswana also deemed the media as providing an 'essential service' during the lockdown and therefore allowed the movements of journalists to give them access to be on the frontline of reporting compliance of the Covid-19 measures instituted by the government.³² In Namibia, although not classified as providing an essential service, the media was classified as providing a 'critical service'.³³

Violence against the media

Despite the classification of the media as providing as 'essential' service, journalists have

continued to face several challenges in carrying out their work. Some countries the media has been under siege and targeted. Deprose Muchena, "*from Madagascar to Zambia, we have seen governments criminalising journalists and shutting down media outlets that are perceived to be calling out poor government responses to Covid-19.*"³⁴ The safety of journalists is a human rights principle that is enshrined in international law. States have an obligation in terms of Principle 20 of the Declaration of Principles on Freedom of Expression and Access to Information in Africa to guarantee the safety of journalists and other media practitioners through adoption of "*measures to prevent attacks on journalists and other media practitioners, including murder, extra-judicial killing, torture and other forms of ill-treatment, arbitrary arrest and detention, enforced disappearance, kidnapping, intimidation, threats and unlawful surveillance undertaken by State and non-State actors.*"³⁵ The following examples of the clampdown on the media during the pandemic are illustrative of how governments in the SADC region reneged on their human rights obligations of guaranteeing freedom of expression including the media freedom.

30 'Government on media reporting during Coronavirus COVID-19 lockdown period' (2020) <https://www.gov.za/speeches/government-media-reporting-during-covid-19-lockdown-period-26-mar-2020-0000> (accessed 27

July 2020).

31 'Journalists 'essential service' amid Covid-19' (2020) <https://rekordeast.co.za/239230/journalists-essential-service-amid-covid-19/> (accessed 27 March 2020).

32 M Galeragwe 'Botswana: Media responsible for shaping our future' (2020) <https://allafrica.com/stories/202006230258.html> (accessed 27 July 2020).

33 C Ngatjheue 'Essential services explained' (2020) <https://www.namibian.com.na/199562/archive-read/Essential-services-explained> (accessed 27 July 2020).

34 Amnesty International Director for East and Southern Africa; *ibid*

35 Declaration, principle 20.

Harassment and intimidation of journalists and assaults

In Botswana, the Emergency Powers Act that was passed in the context of the Covid-19 pandemic to enable the president to rule by decree. The Act also proscribes journalists should report on Covid-19 based on information that is furnished by the director of health services or the World Health Organisation only. Contravening this law attracts a fine of \$10,000 or a five-year jail term.³⁶ In this way, criticising the government could be viewed as a criminal offence. There are many aspects of the pandemic that deserve public scrutiny and may not necessarily fall within the purview of the director of health services or the World Health Organisation. For example, the use of public funds that are meant for the government's response to the pandemic. The government has placed itself above public scrutiny yet it is accountable to the public. The heavy punishment is too steep and prohibitive and might scare away those that might information that is in the public interest but not based on the recommended sources.

In Lesotho, the regulations state that media houses or journalists will be arrested and their media houses might be shut down for sharing 'misleading information'.³⁷ In Zambia, the clampdown on the media has been witnessed by Radio stations that host opposition party

officials who expose the government's failures in handling the pandemic. The attacks have also been from supporters of the ruling party who are against political campaigns during the subsistence of pandemic.³⁸ In Malawi, a journalist Macmillan Mozeyo of Ufulu FM was assaulted by four unknown people in Chikwawa over a Covid-19 story that he had authored. In the story, Mozeyo quoted a Covid-19 patient who lamented the manner in which he was treated.³⁹

In South Africa, during the commencement of the lockdown, several journalists were assaulted, harassed and threatened by members of the by the South African National Defence Force (SANDF) and the South African Police Services (SAPS).⁴⁰ Examples include a News24 journalist that was shot at in Yeoville, Johannesburg and the confiscation of a *Weekend Argus* photographer had her cellphone in Capricorn Park, Cape Town. In May, a community journalist Paul Nthoba, was forced to flee his home town in South Africa to Lesotho out of fear for his life after he was brutalized by police in Ficksburg, Free State after he filmed the police overzealous enforcement of the Covid-19 lockdown. Recently, there was also the despicable experience of News24 journalist, Jenni Evans who suffered injury after she had rocks thrown at her car and got her cell phone stolen while on duty covering protests

36 Civicus Monitor: 'Authorities Accused of Abusing Covid-19 Restrictions to Stifle Expression despite Improved Ranking' 30 June 2020 <https://monitor.civicus.org/updates/2020/06/30/authorities-accused-abusing-covid-19-restrictions-stifle-expression-despite-improved-ranking/> (accessed 20 July 2020).

37 'Alert: Lockdown order by Government of Lesotho' (2020) <https://ls.usembassy.gov/alert-lockdown-order-by-government-of-lesotho/> (accessed 27 July 2020).

38 S Sishuwa 'In Zambia, Covid-19 has claimed democracy, not human life' 15 Jun 2020 <https://mg.co.za/africa/2020-06-15-in-zambia-covid-19-has-claimed-democracy-not-human-life/> (accessed 20 July 2020).

39 'UFULU FM Journalist Assaulted over Covid-19 Reporting' 23 Apr 2020 <https://malawi.misa.org/2020/04/23/journalist-macmillan-mozeyo-assaulted-by-unidentified-people/> (accessed 20 July 2020).

40 SANEF: 'SANEF concerned about attacks by security forces during day one of the Covid-19 Lockdown' 28 March 2020 <https://sanef.org.za/sanef-concerned-about-attacks-by-security-forces-during-day-one-of-the-covid-19-lockdown/> (accessed 20 July 2020).

in Khayelitsha late July 2020.⁴¹ The continued harassments of journalists in the field by the South African police inspired the journalism welfare organisation, South African national editors' forum to convene a meeting on 23 July 2020 with the leadership of the police where they deliberated and agreed that police must desist from hindering the work of journalists.⁴²

In Tanzania, authorities suspended Talib Ussi Hamad, a journalist from the *Daima* daily newspaper, for six months for reporting on

COVID-19.⁴³ The Star Media Tanzania Ltd, Multichoice Tanzania Ltd and Azam Digital Broadcast Ltd was fined five million Tanzanian shillings (about USD 2200 and compelled to apologise for falsely reporting on Tanzania's response to Covid-19.⁴⁴

Arrests of journalists

Zimbabwe has been described as the “Africa's biggest press freedom violator in connection with coronavirus crisis”.⁴⁵ MISA has recorded 19 cases of Covid-19 related harassment, intimidation and detention of several journalists.⁴⁶ Journalists were arrested while reporting on the enforcement

of the lockdown or for working without valid journalism accreditation cards. The arrests happened at a time when the Zimbabwe Media Commission (ZMC) was not issuing accreditation cards.⁴⁷ The latest arrest is that of Hopewell Chin'ono (a journalist) and Jacob Ngarivhume (leader of Transform Zimbabwe, an opposition party) on 20 July 2020 in Harare. Although the charges against them do not indicate and link with Covid-19, the two Chin'ono and Ngarivhume have been using social media platforms (Facebook and Twitter) to expose and condemn corruption by public officials and political and economic crisis in Zimbabwe.⁴⁸ Chin'ono in particular had exposed corruption in the use of public funds that are for the government response to the Covid-19 pandemic.⁴⁹ Following these revelations, the Minister of Health is facing charges of corruption and has been dismissed from his position. In Botswana, an official from the Botswana Patriotic Front, an opposition party, Justice Motlhabane, was arrested for “degrading and maligning the leadership” and was charged under the Penal Code. Motlhabane commented on Facebook on the possibility that the president

41 S Ngqakamba ‘Sanef dismayed by attack on News24 journalist covering unrests in Khayelitsha’ (2020) <https://www.news24.com/news24/southafrica/news/sanef-dismayed-by-attack-on-news24-journalist-covering-unrests-in-khayelitsha-20200721> (accessed 28 July 2020).

42 ‘Joint statement of Sanef and SAPS following a robust and fruitful meeting’ (2020) <https://sanef.org.za/joint-statement-of-sanef-and-saps-following-a-robust-and-fruitful-meeting/> (accessed 28 July 2020).

43 Amnesty International: ‘Tanzania: Authorities must end crackdown on journalists reporting on COVID-19’ 21 April 2020 <https://www.amnesty.org/en/latest/news/2020/04/tanzania-authorities-must-end-crackdown-on-journalists-reporting-on-covid19/> (accessed 20 July 2020).

44 Amnesty International: ‘Tanzania: Authorities must end crackdown on journalists reporting on COVID-19’ 21 April 2020. <https://www.amnesty.org/en/latest/news/2020/04/tanzania-authorities-must-end-crackdown-on-journalists-reporting-on-covid19/> (accessed 20 July 2020).

45 Reporters without Borders: ‘Five Zimbabwean reporters arrested while covering coronavirus lockdown’ 10 April 2020 <https://rsf.org/en/news/five-zimbabwean-reporters-arrested-while-covering-coronavirus-lockdown> (accessed 20 July 2020).

46 MISA: ‘COVID-19 is the enemy, not the media!’ 9 April 2020 <https://zimbabwe.misa.org/2020/04/09/covid-19-is-the-enemy-not-the-media/>. See also <https://rsf.org/en/news/five-zimbabwean-reporters-arrested-while-covering-coronavirus-lockdown> (accessed 20 July 2020).

47 Media Institute of Southern Africa (MISA) Zimbabwe chapter to eventually sort a High Court order ordering the police and other law enforcement agencies charged with enforcing the COVID-19 lockdown not to interfere “in any unnecessary way” with the work of journalists. The order was granted on 20 April.

48 They have been charged with allegations of contravening section 187(1) (a) as read with section 37(1) (a) of the Criminal Law [Codification and Reform] Act, Chapter 9:23, which pertains to incitement to participate in a gathering with intent to promote public violence, and breaches of peace or bigotry. They have also been charged under alternative charges of incitement to commit public violence.

49 ‘Zimbabwe police detain prominent journalist, opposition official’ 21 July 2020 <https://www.aljazeera.com/news/2020/07/zimbabwe-police-detain-prominent-journalist-protest-leader-200720193232172.html> (accessed 26 July 2020).

could use the lengthy state of emergency to ‘deal with political rivals and business competitors.’⁵⁰

Banning of radio programmes

In Madagascar, radio phone-in programmes were banned to inhibit listeners from criticising the government’s measures against Covid-19.⁵¹

Revocation of licenses

In Tanzania, the licence of Mwananchi daily newspaper was suspended after the paper reported on the failure by President John Magufuli to follow social-distancing requirements while shopping.⁵² In Zambia, Prime TV’s license was revoked by the Independent Broadcasting Authority (IBA), the broadcasting regulator “in the interest of public safety, security, peace, welfare or good order.”⁵³ Prior to the closure, Prime TV had been critical of the government stance on COVID-19.⁵⁴

The aforementioned incidences which occurred regardless of the recognition of the media as essential service during the pandemic in some jurisdictions, have a chilling effect on freedom of expression which is an essential element in the fight against COVID-19. The violations have a potential to force journalists and media houses into self-censorship and compromise the flow of the much-needed information about the pandemic. The crackdown on the media compromise the media’s duty to inform

the public. Access to information is essential in many respects during this deadly pandemic. It is crucial to note that the media complement the role of the state in disseminating essential information about COVID-19 and should be viewed in that light and treated with respect not as adversaries.⁵⁵ In addition to the constant threat of physical violence, some journalists are vulnerable to the virus due to lack of personal protective gears while others also suffer the psychosocial impact of the immense pressure of reporting the evolving nature of the outbreak as well as concerns for job security, especially for freelance reporters.⁵⁶ The violence, threats, arrests and intimidation of journalists undermines the watchdog role of the media which should be well-regarded during this crisis.

Covid-19 and disinformation

COVID 19, being a novel virus, plunged people into an uncharted terrain, intensified panic, exacerbated anxieties and grew uncertainties. Falsehoods about it gained traction and flourished.⁵⁷ As a result, an information disorder emerged which the World Health Organisation (WHO) referred to as an ‘infodemic’. WHO defines an ‘infodemic as an “over-abundance of information, some accurate and some not, that makes it hard for people to find trustworthy sources and reliable guidance when they need it.”

50 Civic Monitor: ‘Authorities Accused of Abusing Covid-19 Restrictions to Stifle Expression despite Improved Ranking’ 30 June 2020 <https://monitor.civicus.org/updates/2020/06/30/authorities-accused-abusing-covid-19-restrictions-stifle-expression->

[despite-improved-ranking/](https://monitor.civicus.org/updates/2020/06/30/authorities-accused-abusing-covid-19-restrictions-stifle-expression-despite-improved-ranking/) (accessed 20 July 2020).

51 W Gumede ‘Freedom of Expression and Covid-19 in Africa’ 20 April 2020. <https://democracyworks.org.za/freedom-of-expression-and-covid-19-in-africa/> (accessed 10 June 2020).

52 Amnesty International: ‘Tanzania: Authorities must end crackdown on journalists reporting on COVID-19’ 21 April 2020

53 ‘Zambia cancels broadcaster Prime TV’s license, police shutter office’ 13 April 2020 <https://cpj.org/2020/04/zambia-cancels-broadcaster-prime-tv-s-license-police/> (accessed 10 June 2020).

54 *ibid.*

55 See Media Institute of Southern Africa (Zimbabwe) statement <https://zimbabwe.misa.org/2020/04/09/covid-19-is-the-enemy-not-the-media/> (accessed 10 June 2020).

56 As above, UNESCO (n 32).

57 ‘During this coronavirus pandemic, ‘fake news’ is putting lives at risk: UNESCO’ 13 April 2020 <https://news.un.org/en/story/2020/04/1061592> (accessed 10 June 2020).

⁵⁸It is so widespread to the extent that according to Guy Berger, the UNESCO Director for Policies and Strategies regarding Communication and Information “*there seems to be barely an area left untouched by disinformation in relation to the COVID-19 crisis*” ⁵⁹

False information about health, and specifically about the origin, the cure and prevention is being disseminated mainly through social media platforms. There are genuine concerns about disinformation concerning the pandemic as such practices could lead to catastrophic consequences to human health and security.

⁶⁰The challenge with disinformation is that it can mislead the public and impede on the fundamental right to right to know and fuels panic and fear which also creates significant challenges to national crisis response efforts.⁶¹

The pandemic has led to an increased use of the internet as a source of information about COVID-19. Consequently, the internet and social media are the platforms for exercising the right to freedom of speech, democracy and a source of information on COVID-19 outside mainstream media.⁶²Digital technologies and internet driven social media have changed the mode of generating and distributing news. The advent of internet renders anyone who has internet connectivity a potential news producer. News production is no longer confined to traditional media which abides to professional standards

and ethics. Rigorous editorial processes ensured that only verified information is published. The social media space is murky as rumours, false news, unverified information, conspiracy theories and conspiracies find spaces there with tremendous ease.⁶³

It should be noted however that although these falsehoods are generated from a basis of intending to disinform, they are then predominantly shared or disseminated by ordinary people who do so unintentionally. Ordinary people receive and share false information without the knowledge of its falsity. The information which usually contain aspects about the pandemic that are seemingly helpful to the public such as remedies for cure. The intention is mainly to inform other and not necessarily mislead. As the public seeks to understand the nature of the coronavirus, the proliferation of disinformation might result in reliance of the wrong information that is presumably meant to assist them in dealing with the coronavirus. The information is ordinarily shared on social media such as WhatsApp groups. Falsehoods can be easily generated and disseminated on these platforms. Messages are forwarded as received with verification. The information gaps that are a result of the newness of the virus create an environment where misinformation thrives.⁶⁴Some of the common falsehoods that were disseminated thorough social media

⁵⁸Novel Coronavirus (2019-nCoV) Situation Report –13’ 2 February 2020 [https://www.who.int/docs/default-](https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200202-sitrep-13-ncov-v3.pdf)

[source/coronaviruse/situation-reports/20200202-sitrep-13-ncov-v3.pdf](https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200202-sitrep-13-ncov-v3.pdf) (accessed 12 June 2020).

⁵⁹ G Berger cited in ‘During this coronavirus pandemic, ‘fake news’ is putting lives at risk’ 13 April 2020 <https://news.un.org/en/story/2020/04/1061592> (accessed 10 June 2020).

⁶⁰ Cross-Regional Statement on “Infodemic” in the Context of COVID-19 <https://unmy.mission.gov.au/files/unmy/120620%20Cross-Regional%20Statement%20on%20Infodemic%20in%20the%20Context%20of%20COVID-19.pdf>

⁶¹ D Brindha et al ‘Social Media Reigned by Information or Misinformation about COVID-19: A Phenomenological Study’ (2020) 9 *Alochana Chakra Journal* 591.

⁶² D. Brindha as above 586.

⁶³ C Bernardo ‘Fake news’ and COVID-19: How have we performed? 23 April 2020 <https://www.news.uct.ac.za/article/-2020-04-23-fake-news-and-covid-19-how-have-we-performed> (accessed 13 June 2020).

⁶⁴ Joint Communication to The European Parliament, The European Council, The Council, The European Economic and Social Committee and The Committee of the Regions Tackling COVID-19 Disinformation - Getting the Facts Right JOIN/2020/8 final <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020JC0008> (accessed 13 June 2020).

include statements such as that white people are more likely to be infected with the virus;⁶⁵ that young people are unlikely to be infected with the coronavirus⁶⁶, that coronavirus can be cured using alcohol,⁶⁷ and that the virus can be killed using heat.⁶⁸ The public often find it difficult to distinguish between credible content and that which is false or misleading or content that is harmful but not necessarily illegal.

Government responses to disinformation in the sadc region

In order to respond to the proliferation of the COVID-19 ‘infodemic’, governments in the SADC region ensured that responses to COVID-19 included regulations that criminalise publication and dissemination of false news. The regulations are similar across the sub-region and include sanctions in the form of fines and imprisonments. Curbing disinformation is ideally meant to prevent panic and preserve public health and order. This section outlines and analyses the regulations from selected examples and arrests that were instigated for contravening the regulations. In addition, this section includes the role of stakeholders in combating disinformation.

Botswana

Under Botswana’s Emergency Powers (COVID-19) Regulations the government declared a state of emergency in response to COVID-19. The regulations criminalise publication of information, through any medium, including social media, with “the intention to deceive” the public about COVID-19 or measures taken by government to address the virus. Contravening this regulation is punishable by a prison term of up to five years or a 100,000 Pula (\$8,100) fine or both.⁶⁹ The regulations confine dissemination of COVID-19 information to the public to the Director of Health Services and the WHO.

Namibia

In Namibia section 15(1)(e) of the State of Emergency COVID-19 Regulation (Amendment) provides that a person commits an offence if they publish a false or misleading statement about COVID-19, a crime that is punishable by a fine of N\$2,000 (USD 128) and/or six months’ imprisonment.⁷⁰

Lesotho

In Lesotho, the government declared a state of emergency under the Declaration of COVID-19 State of Emergency Order 26 of 2020. The decree stipulates that the press should ‘refrain from publishing fake news’.⁷¹ The sanctions are not

65 U Nkanjeni ‘5G, a vaccine & ‘white people’s virus’ — Covid-19 conspiracy theories the government has debunked’ 17 April 2020 [https://www.timeslive.co.za/news/south-africa/2020-04-17-5g-a-vaccine--white-peoples-virus--covid-19-conspiracy-](https://www.timeslive.co.za/news/south-africa/2020-04-17-5g-a-vaccine--white-peoples-virus--covid-19-conspiracy-theories-the-government-has-debunked/)

[theories-the-government-has-debunked/](https://www.timeslive.co.za/news/south-africa/2020-04-17-5g-a-vaccine--white-peoples-virus--covid-19-conspiracy-theories-the-government-has-debunked/) (accessed 13 June 2020).

66 ‘During this coronavirus pandemic, ‘fake news’ is putting lives at risk: UNESCO’ 13 April 2020 <https://news.un.org/en/story/2020/04/1061592> (accessed 10 June 2020).

67 ‘No, drinking alcohol won’t kill the coronavirus’ 18 March 2020 <https://africacheck.org/fbcheck/no-drinking-alcohol-wont-kill-the-coronavirus/> (accessed 10 June 2020).

68 Hot baths, hot hand dryers and other heat will NOT kill coronavirus 11 March 2020 <https://africacheck.org/fbcheck/hot-baths-hot-hand-dryers-and-other-heat-will-not-kill-coronavirus/> (accessed 10 June 2020).

69 Statutory Instrument No. 61 of 2020 Emergency Powers (COVID-19) Regulations, 2020

Emergency Powers Act (Cap. 22:04). See <https://bw.usembassy.gov/wp-content/uploads/sites/125/Emergency-Powers-COVID-19-Regulations-2020.pdf> (accessed 13 June 2020).

70 Namibia State of Emergency - COVID-19 Regulation (Amendment), section 15(1) (e) https://www.chr.up.ac.za/images/researchunits/litigation/covid19_country_regulations/Namibia-State_of_emergency-Covid-19_Regulations.pdf (accessed 13 June 2020).

71 Lesotho Declaration of COVID-19 State of Emergency Order 26 of 2020 <https://www.gov.ls/wp-content/uploads/2020/03/Lockdown-Gazette-Lesotho.pdf> (accessed 13 June 2020).

stipulated in the regulations.

Mozambique

In Mozambique article 27(5) of the Presidential Decree prohibits the media from transmitting information about Covid-19 contrary to the official position.⁷²

South Africa

In terms of the Disaster Management Act 57 of 2002, it is a criminal offence to publish false information about COVID-19 and the offence is punishable by a fine or six-month imprisonment or both. Eight people were arrested for allegedly disseminating false information about the pandemic whilst a man was arrested for discrediting the COVID-19 tests kits that the government intended to use in its massive testing campaign and discouraged people from participating in the testing exercise.⁷³ Those that were arrested were charged in terms of the Disaster Management Act.

Swaziland

In Swaziland, Section 29 of the COVID-19 Regulations⁷⁴ criminalise the spreading of any rumour or unauthenticated information regarding COVID-19; publishing any statement, through any medium, including social media, with the intention to deceive any other person about COVID-19; using print or electronic media on the COVID-19 infection status of any person; or spreading of any rumour or unauthentic information regarding any measure taken

by the government to address COVID-19. The offence is punishable by a fine not exceeding twenty thousand Emalangeni (US\$ 1173.71) or imprisonment for a term not exceeding five (5) years. Eugene Dube, Editor of the Swati Newsweek and reporter Mfomfo Nkhambule was arrested for contravening the COVID-19 regulations on the publication of false news. After seven hours of interrogation, Dube was released without a charge. Prior to the arrest, the *Swati Newsweek* had published articles that were critical of the King.⁷⁵ The article that Nkhambule wrote criticised the Kingdom's approach in their COVID-19 response.

Zimbabwe

In Zimbabwe, the government adopted Statutory Instrument 83 of 2020 in terms of the Public Health Act. The regulations include prohibition of publication and communication of false news about public officers, officials or enforcement officers involved with enforcing or implementing the national lockdown regulations. This criminal offence is punishable under the Criminal Law Code by a fine or a twenty-year prison term.⁷⁶ In an incident that is said to be in contravention to the regulations, a man was arrested for allegedly authoring and circulating, on social media platforms, a fake statement that announced the extension of the lockdown period.⁷⁷ The statement was alleged to have been authored by the President. Two women were later arrested for disseminating the aforementioned false statement.⁷⁸ They were charged with publishing

72 Mozambique of the Presidential Decree, article 27(5) <https://icnl.org/covid19tracker/covid19uploads/Mozambique%20Declaration%20of%20SOE.jpg>

73 A Nyathi et al 'Cele: 8 People Arrested for Spreading Fake News on Covid-19' <https://ewn.co.za/2020/04/07/cele-8-people-arrested-for-spreading-fake-news-on-covid-19> (accessed 13 June 2020).

74 <http://www.gov.sz/images/CORONA/The-Coronavirus-COVID-19-Regulations-2020.pdf> (accessed 13 June 2020).

75 <https://cpj.org/2020/04/swaziland-journalists-harassed-threatened-with-tre.php>

76 Public Health (COVID-19 Prevention, Containment and Treatment) (National Lockdown) Order, 2020 Statutory Instrument 83 of 2020 https://www.chr.up.ac.za/images/researchunits/litigacion/covid19_country_regulations/Zimbabwe-Public_Health_COVID-19_Prevention_Containment_and_Treatment_National_Lockdown_Order_2020.pdf (accessed 13 June 2020).

77 'Man Arrested For "Publishing Fake Mnangagwa Statement" On Lockdown Extension' 20 April 2020 <https://news.pindula.co.zw/2020/04/20/man-arrested-for-publishing-fake-mnangagwa-statement-on-lockdown-extension/> (accessed 14 June 2020).

78 M Netsianda 'Bulawayo women in court over fake news' 5 May 2020 <https://www.chronicle.co.zw/bulawayo-women-in-court-over-fake-news/> (accessed 14 June 2020).

or communicating false statements prejudicial to the State as defined in section 31 (a) (i) of the Criminal Law (Codification and Reform) Act.

Zambia

In Zambia publication of false news is an offence that is punishable under the section 67 of the Penal Code. The Zambia Information and Communications Technology Authority (ZICTA) warned the public to refrain from circulating false and unverified information that cause fear and public alarm about COVID-19 using ICT platforms.

Madagascar

In Madagascar, although the regulations could not be established, in Madagascar there were arrests for publication of false information. Arphine Helisoa, a journalist and publishing director of the newspaper *Ny Valosoa*, was arrested for spreading fake news and inciting hatred towards President. Arphine Helisoa published a post that was critical of the government's response to COVID-19. The post questioned the use of excessive force in enforcing the government regulations and the rationale behind opening markets without putting in place any protective measures.⁷⁹

Analysis of the disinformation regulations

The above-mentioned regulations have been pronounced as a heavy-handed approach to combating disinformation during the coronavirus pandemic. The regulations have also been criticised for their vagueness. The vagueness of a law awards the executive

with unfettered discretion, permitting them to infringe on human rights using such laws.⁸⁰In Zimbabwe, Section 31 of the Criminal Law Code, which was referenced to in Section 14 of SI 83 of 2020 (Covid 19 regulations) criminalise the publication or communication of false statements that are prejudicial to the state. It prohibits publication or communication of statements, which are wholly or materially false. Among the prohibited statements are those that have adverse effects the economic interests of Zimbabwe.⁸¹The Criminal Code does not define what constitutes 'economic interests' of the state. It is not stated which economic interests fall within the ambit of this provision. As far as what constitutes illegality is concerned, it is difficult to tell whether one is acting within the confines of the law or has encroached into the realm of activities that warrant arrest. The same applies to the other grounds that warrant arrest. It is not clear what is being regulated as nothing is explicitly stated in definite terms. Essentially, the law does not enumerate what is required and what is prohibited. The prosecuting authorities exercise their discretion in determining the types of conduct that are punishable.

In Eswatini, the requirement to obtain permission from the minister of health under the COVID-19 regulations, before using print or electronic media for information on COVID-19 is also not clear and difficult to imagine its enforceability. Such a requirement is difficult to justify and could potentially result in the prohibition of legitimate speech which is a violation of media freedom and could limit meaningful dialogue and public debate on COVID-19. There cannot be freedom of expression

⁷⁹ 'Madagascar: Journalist Held in Pre-Trial Detention as Authorities use Covid-19 Context to Intimidate Journalists' 9 April 2020 <https://www.amnesty.org/en/documents/afr35/2117/2020/en/> (accessed 14 June 2020).

⁸⁰ D Kaye n 2, para 14. Courts have also condemned vague laws. See: *Big Brother Watch and Others v. the United Kingdom*, application No. 58170/13, No. 62322/14 and No. 24960/15, and *OOO Flavius and four other applications v. Russia*, application No. 12468/15, No. 20159/15, No. 23489/15, No. 19074/16 and No. 61919/16.

⁸¹ Zimbabwe Criminal Law (Codification and Reform) Act [Chapter 9:23], section 31.

if public debate or dialogue on matters on public concern is stifled.

Also, regarding the enforceability of the disinformation regulations, for all the countries that have been identified, there is no indication that the law enforcement departments were trained to handle disinformation cases. This lack of training could result in unfair and unjustified arrests because of the failure by the police to comprehend the determinants of disinformation.⁸² Also, it will be cumbersome to prove or defend elements such as the ‘intention to deceive, rumours and opinions.’⁸³ There are instances where intention to deceive or to cause harm could not have been foreseen. Such vaguely couched laws that restrict freedom of expression are incompatible with international standards that regulate restrictions on freedom of expression⁸⁴ and can be misused in emergency situations to justify criminal defamation which intimidates people from speaking out especially journalists and other media practitioners. Provisions of such laws should be articulated with clarity.

The regulations seem to be spirited in muzzling alternative sources of information and social media promoting officialdom of news and information only from government departments and mainstream media. The regulation requires publication or dissemination information that has been authenticated and based on information from official sources. The COVID-19 pandemic is a new disease that everyone

including health experts is grappling with. Consequently, there are still grey areas regarding this disease and to expect all information to be authenticated information is impossible. Thus, while restrictions are necessary as part of crisis management, it is important to note that the restrictions should not be excessively criminalised and leave room investigate and explore this COVID-19 phenomenon.

The over-criminalisation can potentially suppress dissemination of objective speech. While the main motive is to protect public health, approaches to control disinformation should be based on international human rights standards.⁸⁵ Over-criminalisation falls beyond the scope of what is necessary, reasonable and proportionate as decreed by international standards. In addition, the penalties are severe (upto 20 years in Zimbabwe). There is a possibility of being prosecuted even if reasonable steps had been taken to verify information if it turns out that the information is false.⁸⁶ Consequently, the over-criminalisation and harsh penalties could result in self-censorship. Self-censorship will disadvantage the public who are in need of information that could help them comprehend the global crisis as it unfolds.⁸⁷

In Zimbabwe, while the ‘presumptive purpose’ of the regulation is to curb false information, what is actually prohibited is the “publication or communication of false news about any public officer, official or enforcement officer involved with enforcing or implementing the national

82 TF Hodgson et al ‘Southern Africa has cracked down on fake news, but may have gone too far’ <https://mg.co.za/article/2020-04-05-southern-africa-has-cracked-down-on-fake-news-but-may-have-gone-too-far/>

83 TF Hodgson et al as above.

84 Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda adopted in Vienna, on 3 March 2017 <https://www.osce.org/files/f/documents/6/8/302796.pdf>

85 <https://www.accessnow.org/cms/assets/uploads/2020/04/Fighting-misinformation-and-defending-free-expression-during-COVID-19-recommendations-for-states-1.pdf>

86 TF Hodgson et al n 55 above.

87 TF Hodgson et al ‘Southern Africa has cracked down on fake news, but may have gone too far’ <https://mg.co.za/article/2020-04-05-southern-africa-has-cracked-down-on-fake-news-but-may-have-gone-too-far/> (accessed 14 June 2020).

lockdown in his or her capacity as such, or about any private individual that has the effect of prejudicing the state's enforcement of the national lockdown."⁸⁸ The provision is couched in the language of criminal defamation. Criminal defamation is disproportionately restrictive.

These COVID-19 regulations might derail the decriminalisation of defamation that had been achieved in some countries in Africa. Criminalising speech stifles dissent and compromises the enjoyment of freedom of expression.⁸⁹ The Human Rights Committee cautioned against these excessive punitive measures⁹⁰ and this position was affirmed by the African Court on Human and Peoples' Rights.⁹¹ The Court held that such measures are incompatible with international human rights law and standards and therefore violate freedom of speech. Through Declaration, the African Commission calls on states to review all criminal restrictions of content to ensure that they are justifiable and compatible with international human rights law and standards and repeal laws that criminalise sedition, insult and publication of false news.⁹²

The arrests in Eswatini were not necessary and proportionate in that the police were abusing the COVID-19 regulation to clamp down on the media for merely reporting on the state's preparedness and response to the COVID-19 pandemic. Such

actions by law enforcement agents deny the media an opportunity to facilitate debate and to provide the public space to scrutinize various government interventions and responses to the COVID-19. Such open debate is necessary for transparency and accountability. The seizure of the journalists' equipment and work documents in Eswatini is also not necessary as it is likely to force journalists to practice self-censorship. In addition, the identification of those who generate and disseminate disinformation could potentially result in disproportionate online surveillance which could infringe on the right to privacy online and possibly stifle online prodemocracy activism.⁹³

The COVID-19 pandemic has "provided governments with a new excuse to wield laws criminalizing the spread of "fake news," "misinformation," or "false information" and offered a reason to implement new ones."⁹⁴ TF Hodgson et al argue that although the right to freedom of expression can be limited, these regulations that criminalise publication of false news are "strictly necessary to ensure the protection of public health or proportionate".⁹⁵ The aim of protecting public health can still be achieved with less punitive or less restrictive measures, instead of the criminalisation that gives latitude to the governments to determine the standard of truth, which could be subjective and journalists, whistle-blowers or any other

88 Public Health (COVID-19 Prevention, Containment and Treatment) (National Lockdown) Order, 2020 Statutory Instrument 83 of 2020 https://www.chr.up.ac.za/images/researchunits/litigation/covid19_country_regulations/Zimbabwe-Public_Health_COVID-19_Prevention_Containment_and_Treatment_National_Lockdown_Order_2020.pdf (accessed 13 June 2020).

89 'Media Release: New South African regulation "criminalizing" fake news/disinformation about COVID-19' 20 March 2020 <https://mediamonitoringafrica.org/2020/03/20/media-release-government-gazette-criminalizing-fake-news-disinformation-around-covid-19/> (accessed 14 June 2020).

90 Human Rights Committee General Comment No. 34

91 *Konaté v Burkina Faso* [Application 004/2013 (2013)]

92 Declaration, principle 20.

93 'Spain: Concerns as Penal Code used to criminalise jokes and misinformation about coronavirus' 17 April 2020 <https://www.article19.org/resources/spain-penal-code-used-to-criminalise-jokes-and-misinformation-about-coronavirus/>

94 K Jacobsen 'Amid COVID-19, the prognosis for press freedom is dim. Here are 10 symptoms to track' <https://cpj.org/reports/2020/06/covid-19-here-are-10-press-freedom-symptoms-to-track/>

95 TF Hodgson et al n 55 above.

persons who might desire to contribute to the COVID-19 public discourse. The criminalisation of disinformation is susceptible to abuse and tests the limits of free speech, which is unnecessary in a democratic society.⁹⁶ When individuals enjoy the right of freedom of expression, they can criticise their governments and without fear of the harsh punishments if turns out that their criticism was not unjustified.

Impact on freedom of expression

The adoption of state of emergency regulations that criminalise publication of false information is a smokescreen to control public information. These regulations also have the potential to silence dissenting voices. As previously stated, these measures are not just logistically impractical but also have profound impact on the work of journalists and the right of the public to access information. A profound immediate impact of all of these regulations that criminalise the sharing of false information are their potency to stifle free speech because journalists have to resort to self-censorship for fear of being persecuted due to the ambiguity of the regulations that govern false news. So, therefore, while on the surface the regulations are meant to regulate false news, the ramifications of such regulations go beyond that by limiting journalists from providing lifesaving information at a time when the need for such a service is crucial. Criminalising fake news is usually not a good thing in a democracy. These kinds of laws can be abused by state authorities

to punish critical reporting, particularly. The cases of Eswatini, Tanzania and Botswana are illustrative of how these laws can be abused or have the potential to be abused.

The role of fact checkers and media monitoring services in countering disinformation

Real411

In South Africa, Media Monitoring Africa (MMA)⁹⁷ developed a digital platform to challenge and address disinformation in an open, transparent and accountable manner within the South African laws and constitutional principles.⁹⁸ The platform is referred to as Real411 and is guided by principles such as the recognition that speech is nuanced and includes journalistic, artistic or satirical expression or opinions; transparency and accountability.⁹⁹ Real411 also considers issues on hate speech, incitement, and harassment of journalists which together with disinformation are collectively referred to as ‘digital offences’.¹⁰⁰ Using the digital complaints platform, the public can participate in curbing this scourge through submitting what they perceive as disinformation, in any one of the eleven official languages of South Africa, for consideration by a constituted Digital Complaints Committee (DCC).¹⁰¹

From March to end of May 2020, 387 complaints were received and 149 were confirmed as disinformation. These include COVID-19

96 C Bernardo ‘Fake news’ and COVID-19: How have we performed? 23 April 2020 <https://www.news.uct.ac.za/article/-2020-04-23-fake-news-and-covid-19-how-have-we-performed> (accessed 15 June 2020).

97 See <https://mediamonitoringafrica.org> Media Monitoring Africa (MMA) is a South African based media lobby organisation focusing on media freedom, democracy and access to information.

98 <https://www.real411.org> (accessed 15 June 2020).

99 <https://www.real411.org>. The initiative started during South Africa’s 2019 national elections. MMA partnered with the Independent Electoral Commission (IEC) in curbing the spread of disinformation during elections based on the notion and acceptance that a threat to elections and democracy. The electorate can meaningfully exercise their right to vote if they have access to accurate information about the elections and the electoral process.

100 <https://www.real411.org/digital-offences> (accessed 15 June 2020).

101 <https://www.real411.org/complaints-process>. The working language of the DCC is English.

related complaints about the conspiracy theories associated with the pandemic or its existence.¹⁰²The outcomes include a referral to the Press Ombudsman, South African Police Service (SAPS), South African Human Rights Commission (SAHRC) and/or any other independent statutory body; publication of a counter-narrative; seeking assistance from relevant online platforms; instituting a case with the Equality Court or any other appropriate court or tribunal. Sometimes it can be decided that no action is required.¹⁰³The outcomes of complaints are publicly accessible, complainants are notified accordingly and where necessary, decisions can be appealed with the Appeals Committee.

In this initiative, MMA works in collaboration with the Department of Communications & Digital Technologies, the Government Communication & Information System, and the CovidComms volunteer communication network. The initiative also contributes to the work of a special Ministerial Task Team established by the Department of Communications & Digital Technologies, which has in it, representatives from Independent Communications Authority of South Africa (ICASA), ZADomain Name Authority (ZADNA), Film & Publications Board, mobile phone companies and other major players in the ICT sector including platform owners.¹⁰⁴This endorsement of the Real411 initiative by the

government of South Africa is an indication of strengthened public-private partnership in tackling the disinformation scourge.¹⁰⁵This partnership, although rare, is significant because it serves as an oversight mechanism and counterbalance to the criminalisation stance on disinformation that the government took under the State of Disaster regulations.¹⁰⁶



Image adopted from Daily Maverick.¹⁰⁷

A similar initiative has been developed and launched in Malawi with the assistance of MMA.¹⁰⁸

Africa Check

Africa Check is also another distinguished initiative whose work is on fact-checking¹⁰⁹ and promotes accuracy in the media and

¹⁰² W Bird & T Smith 'Disinformation during Covid-19: Weekly Trends from Real411 in South Africa' 8 June 2020 <https://www.dailymaverick.co.za/article/2020-06-08-disinformation-during-covid-19-weekly-trends-from-real411-in-south-africa/#gsc.tab=0> (accessed 15 June 2020).

¹⁰³ <https://www.real411.org/complaints-process> (accessed 15 June 2020).

¹⁰⁴ Government monitors and responds to misinformation and fake news during Coronavirus Covid-19 lockdown 15 April 2020 <https://www.gov.za/speeches/government-monitors-and-responds-misinformation-and-fake-news-during-coronavirus-covid-19>

¹⁰⁵ <https://blog.real411.org.za/2020/04/17/media-release-government-partners-with-mma-to-curb-fake-information-during-covid-19/>

¹⁰⁶ C Bernardo n 69 above

¹⁰⁷ <https://www.dailymaverick.co.za/article/2020-06-08-disinformation-during-covid-19-weekly-trends-from-real411-in-south-africa/#gsc.tab=0>

¹⁰⁸ 'Misa Malawi Launches Digital Platform to Fight Disinformation' 18 June 2020 <https://malawi.misa.org/2020/06/18/misa-malawi-launches-digital-platform-to-fight-disinformation/>

¹⁰⁹ Fact-checking (in the context of information disorder) is the process of determining the truthfulness and accuracy of official, published information such as politicians' statements and news reports. Fact-checking emerged in the U.S. in the 1990s, as a way of authenticating claims made in political ads airing on television. There are now around 150 fact-checking organizations in the world, and many now also debunk misinformation and disinformation from unofficial sources circulating online.

public debate in Africa.¹¹⁰ It operates in several countries including South Africa. It is guided by principles such as transparency of sources, fairness, openness and honesty. One of the stories that was researched and fact-checked by Africa Check is that of claims by the Executive Mayor of the City of Ekurhuleni, Mzwandile Masina that Interferon alpha-2b is a vaccine for COVID-19. Africa Check's verdict was that "Interferon alpha-2b has been used to treat some earlier strains of coronavirus, but it's not a vaccine that would prevent people from getting COVID-19."¹¹¹ Their research also confirmed that alcohol weakens the immune system and a ban could help South African fight COVID-19 infection.¹¹²

ZimFact

ZimFact is a Zimbabwean fact-checking organisation whose aim is to ensure that the "general public can receive verified news information and real facts in the wake of a rise in propaganda and misinformation"¹¹³ ZimFact publishes "fact reports" with claims, stories and information that have been fact-checked for accuracy.¹¹⁴ One of the reports dismissed the claim that inhaling steam can treat or cure COVID-19.¹¹⁵ Fact checking and verification service initiatives do not necessarily stop the publication of false information but contribute to confirming the facts and dispelling falsehoods. They reduce the proliferation of falsehoods and raise awareness on misinformation and disinformation.

World Health Organisation (WHO)

The WHO monitors trends in misinformation and disinformation. It communicates extensively and provides regular COVID-19 updates on social media platforms. The up-to-date information and advice on COVID-19 provides reliable information to counter the 'infodemic'.¹¹⁶ Also, WHO's partnership with Facebook, Pinterest, Twitter, Tencent and TikTok is aimed at eliminating misinformation and disinformation by providing accurate information to the public.¹¹⁷ This commendable approach increases chances of many people accessing accurate information while on different social media platforms even if they are not on the WHO website.¹¹⁸

The role of fact checkers and media monitoring services in countering disinformation

It is imperative to counter disinformation with credible information that is proactively disclosed in a rights-respecting manner, timeously, clearly and accurately. COVID-19 information must articulate the nature and extent of the pandemic in the country. It must also include general information about the virus, provision of health services and challenges in the health delivery system. In addition, the government's response to the pandemic should be clearly articulated and made available and accessible to everyone. For example, COVID-19 information should be disseminated in African indigenous

¹¹⁰ <https://africacheck.org>

¹¹¹ <https://africacheck.org/reports/south-african-mayor-incorrect-that-interferon-alpha-2b-a-covid-19-vaccine/> (accessed 15 June 2020).

¹¹² More than an inconvenience: Alcohol ban could help South Africans fight Covid-19 infection <https://africacheck.org/reports/more-than-an-inconvenience-alcohol-ban-could-help-south-africans-fight-covid-19-infection/> (accessed 15 June 2020).

¹¹³ <https://zimfact.org/about-us/> (accessed 15 June 2020).

¹¹⁴ <https://zimfact.org/category/fact-reports/> (accessed 15 June 2020).

¹¹⁵ WP Dunlop 'No, inhaling steam will not treat or cure novel coronavirus infection' 31 March 2020 <https://zimfact.org/no-inhaling-steam-will-not-treat-or-cure-novel-coronavirus-infection/>

¹¹⁶ World Health Organisation <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happe>

¹¹⁷ D. Brindha et al n 34 589

¹¹⁸ D. Brindha as above 589.

languages that are understood by marginalized populations considering that a majority of information is still being disseminated in the so-called official languages of English and French that are a legacy of colonialization. In addition, televised communication should include sign language interpretation. Concerning children, age appropriate information should be produced and disseminated to assist them in understanding the crisis and ways of protecting themselves.

The COVID-19 disaster has validated the necessity for access to credible information that facilitates public dialogue and public participation.¹¹⁹ In public emergencies, states have additional obligations to ensure that information is publicly available as it is the right of the people to be informed so that they understand the health risks that they are facing and to enable public participation in response processes and efforts.¹²⁰ This position has been emphasised by the African Commission in a press statement wherein it noted that

“In times of public health emergencies, members of the public have the right to receive factual, regular, intelligible and science-based information on the threat COVID-19 poses to their health, the role and impact of the measures adopted for preventing and containing the virus, the precautionary measures that members of the public should take, and on the scale of the spread.”¹²¹

The Declaration of Principles on Freedom of Expression and Access to Information in Africa identifies relevant principles that reinforce proactive disclosure of information held by public bodies and relevant private bodies, as a basic principle in the access to information ecosystem.¹²² With COVID-19 spreading rapidly across the SADC region, “there has never been a greater need for

accurate news and information to help people stay informed and safe. Yet, the authorities across the region are targeting journalists and media houses for their critical reporting on the pandemic, which is weakening this vital information flow”.¹²³ In the absence of credible information, “there is a high probability that the credible information void will be filled with false information, hence the need for authorities and relevant stakeholders to adopt robust communication strategies underpinned by the principle of proactive disclosure”.¹²⁴

Proactive disclosure means that those with the information that is relevant to the COVID-19 circumstance such as records should release without prompting. The lack of proactive disclosure of information, can be attributed to a culture of secrecy which is also manifest in some governments’ response to COVID-19. Proactive disclosure of credible information minimises the chances of confusing the public with conflicting messages. South Africa proactively discloses COVID-19 information

119 ‘Cross-Regional Statement on “Infodemic” in the Context of COVID-19’ <https://unmy.mission.gov.au/files/unmy/120620%20Cross-Regional%20Statement%20on%20Infodemic%20in%20the%20Context%20of%20COVID-19.pdf> (accessed 22 June 2020).

120 I Fevola & D Banisar ‘Ensuring the Public’s Right to Know in the COVID-19 Pandemic’ (2020) Article 19 5

121 African Commission on Human and Peoples’ Rights, Press Statement on human rights based effective response to the novel COVID-19 virus in Africa, 24 March 2020, <https://www.achpr.org/pressrelease/detail?id=483> (accessed 22 June 2020).

122 Declaration of Principles on Freedom of Expression and Access to Information in Africa

123 D Muchena n 21 above. See also https://en.unesco.org/sites/default/files/disinfodemic_deciphering_covid19_disinformation.pdf

124 H Dube ‘COVID-19 and the access to information conundrum in Africa’ 10 April, 2020 <https://africlaw.com/2020/04/10/covid-19-and-the-access-to-information-conundrum-in-africa/#more-1687> (accessed 22 June 2020).

through a zero-rated comprehensive resource portal.¹²⁵In addition, the Department of Health uses an automated WhatsApp support service to disseminate information about the testing, symptoms prevention and other relevant COVID-19 related information and dismissing false information about COVID-19.¹²⁶

Instead of focusing a lot on criminal sanctions, governments could concentrate on promoting lifesaving narratives and countering disinformation.¹²⁷Most countries across Africa have entered into partnerships with Facebook to counter the fake social media campaign and messages on Facebook and WhatsApp platforms.¹²⁸Coronavirus information centres are created on Facebook and appear at the top of the newsfeed and serve as a central point for accessing timely and credible information on COVID-19. In Southern Africa, South Africa and Seychelles and part of the initiative and this contributes to access to credible information.

While SADC countries grapple with the SADC region COVID-19 pandemic, the faults and gaps on the access to information ecosystem have been exposed. Most of them still do not have laws that facilitate access to information. Where the laws exist, there is lack of or inadequate implementation. The existing challenges hamper the exercise and enjoyment of the right of access to information, which has been pronounced as essential to the right to health. For example,

only 39% of Africa's 1, 3 billion population is connected to the internet.¹²⁹Other challenges associated with access to internet include the exorbitant cost of data in most African countries; social media taxes that reduce the number of social media users; digital and media illiteracy; absence of infrastructure that supports internet connectivity; the high cost of assistive devices for persons with disabilities; violence against women online and electricity problems in most parts of Africa. As a result of these challenges, even the requirement of fact-checking to curb the spread of disinformation becomes impractical. For the digitally unconnected world mostly rural communities, there is a high probability of relying on unverified information.

Whistle-blower protection

Whistle-blower protection is an essential element of freedom of expression. In a crisis like the COVID-19 pandemic, whistle-blowers expose the capacity of the healthcare delivery system and the wrong doing associated with the government's responses to the crisis. The response to coronavirus including mitigation and containment measures require more financial injection. Because of this, governments, international organisations, NGOs and companies have been releasing funds for managing the health crisis. The response mechanisms are conceptualised and implemented in emergency mode and it is in

125 South African repository <https://coronavirus.datafree.co/> (accessed 22 June 2020).

126 African governments, Facebook and Twitter are fighting to dispel misinformation on coronavirus <https://qz.com/africa/1820712/coronavirus-in-africa-facebook-twitter-fight-misinformation/> (accessed 22 June 2020).

127 In the UK, for example, the government established a rapid response unit under its Department for Digital, Culture, Media and Sport to address misinformation and disinformation. Working with other departments such as the Department of Health and Social Care, it tackles falsehoods and rumours which could cost lives and ensures that the public consumes accurate medical advice. While rebutting false medical advice through relevant departments, the anti-fake news agency also supports and promotes health campaigns that are based on reliable sources. This approach guarantees the proactive disclosure of accurate information that is relevant about the pandemic or government's responses to the pandemic, at the same time it dispels the falsehoods. The Canadian initiative is also worth emulating and reduces the spread of misinformation. A video game app was developed to teach people how to identify falsehoods. See K Proctor 'UK anti-fake news unit dealing with up to 10 false coronavirus articles a day' 30 March 2020 https://www.theguardian.com/world/2020/mar/30/uk-anti-fake-news-unit-coronavirus?utm_term=RWRpdG9yaWFsX01lZGlhQnJpZWZpbmctM-jAwMzmx&utm_source=esp&utm_medium=Email&CMP=media_email&utm_campaign=MediaBriefing. See also <https://mediasmarts.ca/break-fake> (accessed 22 June 2020).

128 G Msowoya 'ICTAM partners Facebook in ending fake news on COVID-19' 29 April 2020 <https://www.manoonline.gov.mw/index.php/component/k2/item/13970-ictam-partners-facebook-in-ending-fake-news-on-covid-19> (accessed 22 June 2020).

129 For internet connectivity statistics see: <https://www.internetworldstats.com/stats1.htm>

managing the crisis that transparency and accountability measures may be compromised deliberately or inadvertently and corruption or wrongdoing can go unchecked as the decisions are made in the absence of any scrutiny or checks and balance.

It is in such a context that Whistle-blowers are valued as they often detect such delinquencies.¹³⁰ Corruption tendencies have been reported in Zimbabwe and a minister of health was arrested for alleged procedural misconduct in the procurement of health equipment that will be used as part of the response to the pandemic.¹³¹ Whistle-blower protection enables those that are in a position to expose wrongdoing such as journalists, healthcare workers or government personnel to do so without fear. The Declaration of Principles on Freedom of Expression and Access to Information in Africa enshrines a principle of protecting disclosures in the public interest.¹³² It places an obligation on states to adopt laws to establish protected disclosure regimes so that,

No person shall be subject to civil, criminal, administrative or employment-related or other sanctions or harm, for releasing information on wrongdoing or which discloses a serious threat to health, safety or the environment, or whose disclosure is in the public interest, in the honest belief that such information is substantially true.¹³³

Whilst there is an indication of commitments to protect whistle-blowers globally¹³⁴, in the SADC region, there is a legal vacuum with regards to whistle-blower protection. In cases where criminal sanctions have been adopted against publication and communication of false statements/news, there should be robust whistle-blower protection. In the SADC region, none of the laws on access to information promote proactive disclosure of information held by public bodies. In such a context, combined with anti-false news legislation, statements by whistle-blowers could be easily construed as false information. The overemphasis of publication of false news and statements that denounce whistle-blowers creates a situation where whistle-blowers do not feel safe, and this ultimately could silence those who wish to report wrongdoing in the interest of the public. It will be prudent to even establish some safeguards to protect whistle-blowers like establishing an ombudsman during the pandemic and beyond. This will enable citizens or the public to hold officials accountable during the pandemic. Whistle-blower protection is central to freedom of expression and the promotion of transparency and accountability and suppressing whistle-blowers negatively impacts on the right to freedom of expression and raises pertinent questions about the government's commitment to saving the lives of the people through containment of the deadly pandemic.

130 'COVID-19 is a chilling reminder of why the world needs to protect whistleblowers' <https://oecdonthellevel.com/2020/05/18/covid-19-is-a-chilling-reminder-of-why-the-world-needs-to-protect-whistleblowers/> (accessed 15 June 2020).

131 'Zimbabwe's health minister nabbed over graft charges' 20 June 2020 <https://www.aa.com.tr/en/africa/zimbabwe-s-health-minister-nabbed-over-graft-charges/1884124> (accessed 22 June 2020).

132 Declaration, principle 35.

133 Declaration, principle 35 (1)

134 G20 High-Level Principles for the Effective Protection of Whistle-blowers https://www.bmjv.de/SharedDocs/Downloads/EN/G20/G20_2019_High-Level-Principles_Whistleblowers.pdf?blob=publicationFile&v=1 (accessed 15 June 2020).

Media and information literacy

Navigating the infodemic is complex when one does not have the requisite skills.¹³⁵ Media and information literacy is an essential skill when faced with the infodemic of this magnitude that has been witnessed during the COVID-19 pandemic. Media and information literacy activates one's critical thinking skills and sets one in a position to meaningfully engage with the information that they receive including verifying suspicious news and to detect false information.¹³⁶ Due to increased use of digital technologies and internet connectivity, information that may cause unnecessary confusion and panic can be easily disseminated on social media very fast from an individual to various parts of the world. As a result, there is need to use social media responsibly to share or disseminate reliable information that creates awareness on the pandemic and eliminates unnecessary confusion or panic. Media literacy is important in that it equips a person with skills that enables them to be sceptical and scrutinise the information that they receive before sharing it¹³⁷.

Recommendations

Freedom of expression and freedom of the media should always be prioritised. The media has a role in information dissemination, demanding transparency; holding the government accountable; scrutinize various government interventions and responses to the COVID-19 and identify gaps in government responses to COVID-19,

reporting on the excesses of those entrusted with enforcing the government directives (security and law enforcement agencies); and facilitating debate on issues relevant to COVID-19

SADC member states should adopt measures in line with article 9 of the Africa Charter and the Declaration of Principles on Freedom of Expression and Access to Information in Africa. Alignment with these standards creates and sustains a favourable environment for the enjoyment of the right of access to information and freedom of expression. An environment where independent and professional media should be promoted in crisis circumstances. This can be enabled through, for example, transforming government-controlled broadcasters into public service broadcasters that are accountable to the public through the legislature or other mechanism for public accountability.¹³⁸ A public service media can serve as a reliable source of information at a time when false news is proliferating at an alarming rate.

The media must adhere to highest professional and ethical standards on COVID-19 without bias.¹³⁹ The media must disseminate factual, accurate and comprehensive information to the public timeously, while taking into account the needs of different groups in society. Credible and verified authoritative information should be given prominence. In this time of crisis, professional journalism is important for reliable information dissemination on the pandemic and

¹³⁵ Media and Information Literacy <https://en.unesco.org/themes/media-and-information-literacy> (accessed 22 June 2020).

¹³⁶ Media and Information Literacy <https://en.unesco.org/themes/media-and-information-literacy> (accessed 22 June 2020).

¹³⁷ C Bernardo n 69 above.

¹³⁸ Declaration, principle 11.

¹³⁹ 'Coronavirus: ARTICLE 19 briefing on tackling misinformation' 6 March 2020

<https://www.article19.org/resources/coronavirus-new-article-19-briefing-on-tackling-misinformation/> (accessed 10 June 2020).

the responses and to counter disinformation.¹⁴⁰

In a time of crisis, the media play a crucial role and should be viewed as part of the solution not adversaries. As such, journalists and all other media practitioners should be granted access to information on COVID-19. Freedom of movement should be permitted for frontline media practitioners including access to decision makers, quarantine centres, healthcare centres and to health professionals and; emergency powers should not hinder the operations of the media but instead should promote media freedom.

The media should give ample airtime to health experts and government officials to articulate credible information to the public regarding the pandemic; the investigative role of the media should be protected and guaranteed; citizens should be encouraged to debate, scrutinize and critique government responses to the pandemic; and media scrutiny of the government's positions and decisions should not be misconstrued as disinformation neither should the crisis be used to suppress, punish or restrict media operation. The adequacy of the measures by the government should be freely debated.

The fact that there is a public emergency is not enough justification to limit public debate because it upon this public debate that democracy thrives. Criminal restrictions of content should be justifiable and compatible with

international human rights law and standards and repeal laws that criminalise sedition, insult and publication of false news. Going forward, such criminal sanctions should not be the norm.¹⁴¹ They should only remain in place to the extent that they are applicable to the crisis or emergency situation.

To address the scourge of disinformation, a multi-stakeholder approach should be adopted and supported by the government.¹⁴² Such approaches increase chances of crafting appropriate and long-term responses but also enhance the understanding of disinformation and its impact in a crisis such as the COVID-19 pandemic.

The measures that have been adopted by SADC governments give them discretion to decide on what amounts as truth and that which is false information. There are chances that legitimate speech that raise legitimate concerns especially by whistle-blowers could be censored or suppressed. Thus, it is important to establish independent oversight mechanisms to ensure that freedom of expression is not unnecessarily limited during the pandemic

Any approaches or actions to tackle misinformation or disinformation or publication and dissemination of false information should be made with clarity and in a rights respecting manner that follows due process.¹⁴³ Such approaches should centre on transparency

140 'Information Sharing & Countering Disinformation' <https://en.unesco.org/covid19/communicationinformationresponse>. See also Cross-Regional Statement on "Infodemic" in the Context of COVID-19 <https://unmy.mission.gov.au/files/unmy/120620%20Cross-Regional%20Statement%20on%20Infodemic%20in%20the%20Context%20of%20COVID-19.pdf> (accessed 22 June 2020).

141 'Keeping our eyes on the ball: Human rights in the time of COVID-19' <https://ifex.org/keeping-our-eyes-on-the-ball-human-rights-in-the-time-of-covid-19/> (accessed 10 June 2020).

142 Joint Declaration on Freedom of Expression and "Fake News", Disinformation and Propaganda adopted in Vienna, on 3 March 2017 <https://www.osce.org/files/f/documents/6/8/302796.pdf> (accessed 22 June 2020).

143 'Coronavirus: ARTICLE 19 briefing on tackling misinformation' 6 March 2020

<https://www.article19.org/resources/coronavirus-new-article-19-briefing-on-tackling-misinformation/> (accessed 10 June 2020).

and media freedom instead of censorship and criminal sanctions.¹⁴⁴

Governments and other relevant stakeholders should purposefully and vigilantly provide easily accessible information on COVID-19, including mode of infection, symptoms and preventive measures, the government's crisis management measures and safety measures for victims of abuse. Information should be provided or disseminated without discrimination in all national languages and accessible in various platforms and in formats that are accessible to persons with disabilities.

Information on the transmission, treatment and prevention of COVID-19 should be aligned with the advice and guidelines by the WHO, health experts and authorities should be promoted and strictly followed.¹⁴⁵ This is to ensure credibility of information and potentially control the information disorder that has proliferated in this crisis. It is also important to promote a transparent information ecosystem and denounce the culture of secrecy and withholding information that is in the public interest. Those entrusted with the responsibility to enforce the crisis management measures (the national security and law enforcement sector) should provide regular and credible information through press conferences and other possible means such as setting up information centres.

Civil society organisations, particularly media lobby organisations should play a key role in advocating for and safeguarding of freedom of expression and promote access to information during this time of the pandemic. Initiatives being undertaken to counter the scourge of disinformation should respect human rights especially freedom of expression. In tackling this scourge, a sustained approach is required

and should involve different stakeholders; and include both legal and non-legal means.

Conclusion

As governments across the SADC region respond to COVID-19, some freedoms that would be ordinarily enjoyed such as freedom of movement are being restricted. The emergency response measures are necessary to curb the spread of the virus, but should be implemented within the confines of international human rights law and standards. Any restrictions that infringe on freedom of expression should meet the test of legality, proportionality, necessity as stipulated in the norms and standards that the research alluded to.

Transparency and accountability mechanisms should be enhanced through laws and relevant institutions such as the human rights commissions, ombudsmen, and public protector offices among others. It is also important to note that any restrictions that have been introduced during the crisis period should be constantly reviewed and should not be carried over to the post-pandemic period. Throughout the pandemic, the governments and other stakeholders should ensure that the public receives timely and adequate credible information that would empower them to respond to the pandemic from an informed perspective.

Excessive control on free flow of information such as censorship, restrictions on movement of journalists and their access to information and surveillance are an interference with democratic values that should not be sustained even during a crisis. It is therefore crucial that criminalisation should not take precedence, but more emphasis should be placed on media

¹⁴⁴ As above.

¹⁴⁵ As above.

literacy, media freedom and expanding avenues and platforms for public debate on COVID-19 as it is a matter of public interest. Ultimately, the government restrictions on freedom of expression should be proportionate and necessary. They must be informed by the legitimate aim of protecting public health not arbitrary suppression of free speech. To facilitate the enjoyment of freedom of expression and access to information, there should be universal access to quality and affordable internet. It also essential to strengthen legal frameworks and institutions that promote human rights such as national human rights institutions, and create mechanisms for them to partner with civil society. In executing their responses to the pandemic, governments must be transparent and keep the public adequately informed.



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