



**INFORMATION  
REGULATOR  
(SOUTH AFRICA)**

*Ensuring protection of your personal information  
and effective access to information*

# **INFORMATION REGULATOR SOUTH AFRICA'S SUBMISSION**

to the

**UNITED NATIONS HUMAN RIGHTS COUNCIL**

in respect of the

## **THEMATIC REPORT OF THE SPECIAL RAPPORTEUR ON FREEDOM OF OPINION AND EXPRESSION TO THE UN HUMAN RIGHTS COUNCIL**

***“Freedom of Opinion and Expression and Sustainable Development - Why  
Voice Matters”***

## 1. INTRODUCTION

1.1 The founding provisions of South African Constitution<sup>1</sup> provide that the Republic of South Africa is one, sovereign, democratic state founded on the following values, among others: -

1.1.1 Human dignity, the achievement of equality and the advancement of human rights and freedoms; and

1.1.2 Supremacy of the constitution and the rule of law.

1.2 The South African Constitution (Constitution) contains the Bill of Rights, which is the cornerstone of democracy in South Africa, and it enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom. The South African Constitution also guarantees, among others, the following rights to every person-

1.2.1 the right to privacy<sup>2</sup>;

1.2.2 the right to freedom of conscience, religion, thought, belief and opinion<sup>3</sup>;

1.2.3 the right to freedom of expression<sup>4</sup>, which includes-

1.2.3.1 freedom of the press and other media;

1.2.3.2 freedom to receive or impart information or ideas;

1.2.3.3 freedom of artistic creativity; and

1.2.3.4 academic freedom and freedom of scientific research.

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<sup>1</sup> *Constitution of the Republic of South Africa 108 of 1996*

<sup>2</sup> *Section 14 of the Constitution*

<sup>3</sup> *Section 15 of the Constitution*

<sup>4</sup> *Section 16 of the Constitution*

- 1.2.4 right of access to any information held by the state and any information that is held by another person and that is required for the exercise or protection of any rights<sup>5</sup>.
- 1.3 To give effect to the above-mentioned constitutional right of access to information and the right to privacy, the Promotion of Access to Information Act (PAIA) and the Protection of Personal Information Act (POPIA), respectively, were promulgated. In accordance with section 39 of POPIA, the Information Regulator (South Africa), was established to ensure the promotion and enforcement of the constitutional right of access to information, as well the right to privacy, in so far as it relates to the protection of personal information.
- 1.4 The Information Regulator (Regulator) is an independent statutory body which is subject only to the law and the constitution and it is accountable to the National Assembly (Parliament). Therefore, the Regulator, when performing its dual mandate as aforesaid, is required to ensure proper balancing of the above-mentioned constitutional rights to privacy and access to information.
- 1.5 The rights in the South African constitution may be limited only by a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors prescribed in section 36 of the Constitution.

## **2. SUBMISSIONS TO THE UNITED NATIONS HUMAN RIGHTS COUNCIL IN RESPECT OF THE THEMATIC REPORT OF THE SPECIAL RAPPORTEUR ON FREEDOM OF OPINION AND EXPRESSION**

The Regulator hereby submits its observations to the thematic report on freedom of opinion and expression and sustainable development.

- 2.1 challenges, opportunities, good practices and recommendations relating to freedom of expression, including the right to information, in the context of sustainable development in the following areas:

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<sup>5</sup> Section 32 of the Constitution

**2.1.1 transparency, accountability, and the fight against corruption and misuse of resources in the public and private sector;**

2.1.1 The (PAIA), the South African legislation promulgated to give effect to the above-mentioned constitutional right of access to information recognises (in its preamble) that *“the system of government in South Africa before democracy, amongst others, resulted in a secretive and unresponsive culture in public and private bodies which often led to an abuse of power and human rights violations”*.

2.1.2 One of the objects of PAIA is to generally promote transparency accountability and effective governance of all public and private bodies by, including, but not limited to, empowering and educating everyone to understand the functions and operations of public bodies; and to effectively scrutinize and participate in decision-making, by public bodies, that affects their rights.

2.1.3 Although the South African Constitution imposes an obligation on the State to respect, protect, promote and fulfil all the rights in the Bill of Rights which is the cornerstone of democracy in South Africa, there are instances wherein those rights may be violated. However, South Africa has the following sufficient mechanisms in place to ensure transparency, accountability, and the fight against corruption and misuse of resources in the public and private sector-

2.1.3.1 Establishment of the **Information Regulator**, with the one of its mandates being to promote access to any information held by the public and private sectors, thereby advancing the objectives of PAIA. Should there be any complaint regarding the violation of the principles of transparency and accountability, the Regulator has the power to investigate the complaint

and issue an Enforcement Notice, which notice has the same effect as a Court Order.

- 2.1.3.2 Establishment of the **South African Human Rights Commission (SAHRC)**, with its mandate being to promote the respect for human rights and a culture of human rights, as well as the promotion of the protection, development and attainment of human rights. The SAHRC has powers to investigate and to report on the observance of human rights and where there is human rights violation, the SAHRC has the power to take steps to secure appropriate redress.
- 2.1.3.3 **Judicial Authority** of the Republic of South Africa<sup>6</sup> is vested in the courts, which Courts are independent and subject only to the Constitution and the law. The South African Courts are required to apply the law impartially and without fear, favour or prejudice.
- 2.1.3.4 Establishment of the **Public Protector South Africa**, which has the power to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice.
- 2.1.3.5 Establishment of the **Special Investigating Unit**, with its primary mandate being to investigate serious allegations of corruption, malpractice and maladministration in the administration of State institutions, State assets and public money as well as any conduct which may seriously harm the interests of the public, and **to recover any financial losses suffered by State institutions through civil litigation.**

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<sup>6</sup> Section 165 of the Constitution

**2.1.4 equality, inclusion, participation and empowerment of women and girls, indigenous communities and other poor and marginalized groups;**

2.1.4.1 The founding provision of the Constitution<sup>7</sup> provides that *“the Republic of South Africa is one, sovereign, democratic state founded on the human dignity, the achievement of equality and the advancement of human rights and freedoms, as well as non-racialism and non-sexism”*.

2.1.4.2 The Constitution<sup>8</sup> guarantees the right to equality before the law and the right to equal protection and benefits of the law to everyone. In particular, the Constitution<sup>9</sup> provides that the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds mentioned therein, including gender, sex and pregnancy.

2.1.4.3 The South African Commission for Gender Equality is established<sup>10</sup> to promote the respect for gender equality and the protection, development and attainment of gender equality. The Commission for Gender Equality has the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality.

2.1.4.4 The government has established the Ministry and Department of Women, Youth and Persons with Disabilities, which are located in the office of the President. The mission of the Department includes to *“provide strategic leadership, coordination and oversight to government departments and*

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<sup>7</sup> Section 1 of the Constitution

<sup>8</sup> Section 9(1) of the constitution

<sup>9</sup> Section 9(3) of the constitution

<sup>10</sup> Section 182(d) of the constitution

*the country in mainstreaming empowerment programmes on women, youth and persons with disabilities”.*

2.1.4.5 In order to give effect to section 9 of the Constitution (right to equality), insofar as the empowerment of women and gender equality is concerned, a bill on Women Empowerment and Gender Equality was tabled in the National Assembly. One of the objectives of the bill, over and above the promotion of equality, specifically gender equality, is to facilitate compliance with the country’s commitments to international, regional and sub regional instruments, which include the following--

- (i) the Convention on the Elimination of All Forms of Discrimination Against Women (December 1979);
- (ii) the Beijing Declaration and Platform for Action (September 1995);
- (iii) the Millennium Declaration and Development Goals (September 2000);
- (iv) the Protocol to the African Charter on Human and People’s Rights on the Rights of Women in African (2003);
- (v) the Solemn Declaration on Gender Equality in Africa (July 2004); and
- (vi) the SADC Protocol on Gender and Development (August 2008);

2.1.4.6 Pending the coming into effect of the Women Empowerment and Gender Equality Bill, the equality, inclusion, participation and empowerment of women remain marginalised.

**2.1.5 the role of independent media and investigative journalism in promoting sustainable development and the barriers, threats and challenges they face.**

2.1.5.1 The South African Constitution<sup>11</sup> provides that “*everyone has the right to freedom of expression, which includes freedom of the press and other media*”.

2.1.5.2 The media is playing a critical role in exposing corruption in South Africa. However, the media, both the traditional and social media is playing a minimal role in educating communities and the society in general about the sustainable development goals. It hardly reports on the progress which the country is making towards the achievement of these goals.

2.1.5.3 Although journalists are rarely arrested in South Africa, in recent years, journalists have often been subjected to verbal attacks from political leaders and activists.

2.1.5.4 In February 2021, the Constitutional Court<sup>12</sup> ordered changes to the law on intercepting communications in order to safeguard the confidentiality of journalists’ phone conversations and sources.

2.1.5.5 POPIA<sup>13</sup> is also not applicable to the processing of personal information solely for the purpose of journalistic literary or artistic expression to the extent that such an exclusion is necessary to reconcile, as a matter of public interest, the right to privacy with the right to freedom of expression.

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<sup>11</sup> Section 16(a) of the constitution

<sup>12</sup> AmaBhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others; Minister of Police v AmaBhungane Centre for Investigative Journalism NPC and Others [2021] ZACC 3- (<http://www.saflii.org/za/cases/ZACC/2021/3.pdf>)

<sup>13</sup> Section 7(1) of POPIA



**2.1.6 policies and practices of digital technology companies in promoting sustainable development and reducing inequalities in access to information and communications.**

2.1.6.1 Digital technology companies have a huge role to play in promoting sustainable development and reducing inequalities in access to information. However, for them to fulfil this critical role, they must adopt relevant policies. Such policies can include addressing the digital divide and digital literacy, particularly in rural areas and in poverty-stricken areas. This will go a long way in reducing inequalities in access to information and communication.

2.1.6.2 The biggest impediment to the usage of technology as a critical mechanism of accessing information that enables the vast majority of the poor and marginalised South African to participate in opportunities for socio-economic development is the high cost of data.

2.1.6.3 According to a study<sup>14</sup> quoted by the World Economic Forum (2022) “South Africans pay up to 85 rand (\$5.29) per gigabyte (GB) of data, a cost equivalent to nearly four hours work for people earning the minimum wage.” This means that the cost of participating in the information economy in order to improve chances for socio-economic advancement is beyond the reach of most South Africans.

3. In your view, how does the right to freedom of opinion and expression contribute to the achievement of the SDGs? Please provide examples, where possible, with concrete data relating to impact. Please also mention relevant laws, policies and other measures.

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<sup>14</sup> Ichikowitz Foundation (2022). *African Youth Survey 2022*. Accessed on 01 February 2023 at <https://ichikowitzfoundation.com/storage/ays/ays2022.pdf>

- 3.1 *The right to freedom of opinion and expression contributes significantly to the achievement of Sustainable Development Goals through the rooting out of fraud and corruption and the media freedom to expose fraud and corruption.*
- 3.2 *For example, the South African media has played pivotal role in uncovering the true extent of state capture by self-serving, corrupt individuals and this has resulted in the establishment of the widely publicised State Capture Commission, which uncover how the public funds earmarked for the public benefit of the poor and vulnerable communities were being channeled to benefit individuals.*
- 3.3 *The Integrated Development Planning model has been adopted at local government structures and involves the participation of communities in the budget planning processes at local levels is now an entrenched practice. It enables the public to express their views, needs and opinions on the direction of development initiatives at local levels. The model has been so successful that South Africa has consistently placed at the highest rank of the Open Budget Index<sup>15</sup>.*

**4. Are there restrictions or other challenges to freedom of expression or access to information that affect the delivery of public services and achievement of economic, social and cultural rights in your country? Which groups of people are most affected by these restrictions and in what ways? What measures would you recommend to address their problems?**

- 4.1 *Although there are no legal restrictions or challenges to freedom of expression, there are certainly challenges on access to information. These challenges are attributed to the culture of secrecy which still exists in some government departments at all levels, poor record keeping and at times indifference or non-responsiveness to requests for access to information amongst some government officials. The people most affected are mostly black poor people who are staying*

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<sup>15</sup> International Budget Partnership (2022). *Open Budget Survey 2021*. Accessed on 01 February 2023 at <https://internationalbudget.org/open-budget-survey/open-budget-survey-2021>

*in the rural areas or information settlements, with no access to internet or proper telecommunication infrastructure.*

4.2 *There is a need for a multi-pronged strategy and a “carrot and stick approach” to address these challenges. On one hand, there is a need for an organisation such as the Information Regulator to empower communities by educating them on how they can use PAIA to access information from government on service delivery or the lack thereof. On the other hand, the Regulator must also use its powers in PAIA to take action against government officials who deliberately fails to make information available to a requester.*

5. What factors affect the right to expression and information of women and girls, indigenous peoples and other poor and marginalized communities and their access to information and communications technology in your country? What legal, policy or other measures has the government taken to overcome these problems? How effective are these measures and what improvements would you recommend?

5.1 *The digital divide, digital literacy and high cost of data are the main factors. The frequent flow of information into the big cities or urban areas in most developing countries, such as South Africa, is high compared to the rural and local poor communities. A major reason for this is that rural and poor communities struggle digital connectivity, i.e., Internet and broadband infrastructures are hard to penetrate in these communities. Other reasons are that the majority of people in these communities are illiterate or ill-educated, poor and therefore unable not only to operate smart mobile devices, but other technology-enabled devices may be too expensive to afford due to the low income and unemployment. Hence, it is challenging for these communities to maintain access to public services, get external information, and even get up-to-date information regarding their immediate communities. This further leads to poor education, inadequate health care, children who are left behind and rural hallowing. Therefore, it is essential to bridge and overcome the digital divide in rural and poor communities’ areas.*

5.2 *South Africa is going through a digital migration process and the main objective for South Africa to migrate from analogue to digital is to free up the spectrum that will be used for mobile broadband and other ICT communication related purposes.*

*The South African Government is currently implementing the policy for Broadcasting Digital Migration, which policy will ensure proper access to information by indigenous peoples and other poor and marginalized communities.*

5.3 *The government must implement the lessons that it learned during the peak of the Covid-19 pandemic when it made information on the virus constantly available and accessible to everyone almost in real time. The government must build on these lessons and make information on government services available to everyone. Covid-19 showed us that this can be done.*

6. What have digital companies done to promote safe and uninterrupted online access to timely and pluralistic information and communications of women and poor and marginalized communities? How can information and communication technology companies better engage with governments and communities to promote sustainable development?

6.1 *In South African, majority of the rural areas has access to mobile networks, although there is signal strength and coverage is sometimes minimal or intermittent, which results on poor or unreliable access to communications.*

6.2 *The electricity supply challenges in South African also exacerbate the communication problems, particularly in those poor communities wherein there is no backup power during the load shedding periods (scheduled periodic blackouts that have been introduced by the main electricity supplier – ESKOM – to stabilise power supply).*

6.3 *The information and communication technology companies must ensure that solar powered towers are installed in the rural areas to ensure continuous provision of uninterrupted online access to timely and pluralistic information.*

7. What laws, policies and practices exist in your country to facilitate public participation and access to information and data relating to sustainable development? Where have there been successes, or conversely challenges, with facilitating access to information and data relating to sustainable development in relation to a) governments and b) companies?

- 7.1 *Although there is no legislation which may be passed in South African without following public participation process, the poor and marginalised communities are still disadvantaged in terms of access to information, in that due to the demographic nature of South Africa, Parliament is unable to reach all communities in the Country.*
- 7.2 *In some instances, public participation may be conducted through email submission, and this excludes illiterate people and marginalised poor communities who have no access to internet.*
- 7.3 *This being said, apart from the general public participation in the law making process, we are not aware of any public participation and access to information relating to sustainable development.*
8. What role does the media play in promoting sustainable development in your country? What challenges and threats do journalists face in accessing public information or reporting on or criticizing development policies?
- 8.1 *Media in South African plays a critical role in the dissemination of information, as all deliberations in Parliament are not only carried by mainstream media, but Parliament of the Republic South African has its own 24/7 channel broadcasting all the deliberation in both houses of Parliament.*
- 8.2 *The role of the media in South African is very critical, particularly the public broadcasting media, which broadcast in all official languages in South Africa.*
- 8.3 *The media is by and large free in South Africa. The cases of threats to or harassment of journalists are few and far between.*
9. What laws, policies and other institutional measures exist in your country to protect investigative journalism and whistleblowing? How effective are they and what further measures should be taken to protect journalists and whistleblowers? Where possible, please provide concrete examples of investigative journalism or whistleblowing related to sustainable development, e.g. exposure of corruption or misuse of natural resources.

- 9.1 *Our constitution provides for freedom of the press and other media, as well as freedom to receive or impart information or ideas. We also have the Protection of Personal Information Act, which provides that the right to protection of personal information does not apply to the journalistic processing of personal information. In 2017, Daily Maverick’s newly launched investigative unit, started publishing stories from a trove of emails and a host of other documents called “GuptaLeaks”, wherein they exposed the fraud and corruption that has erupted the South African government in general.*
- 9.2 *Unfortunately, South Africa has not adopted legislation for the general protection of whistleblowers. The South African legal regime for whistleblower protection is centred on the Protected Disclosures Act, 26 of 2000 (PDA or Protected Disclosures Act), which governs so-called “protected disclosures”. “Protected disclosures” refer to the category of disclosures which entitle the whistleblower to certain legal safeguards (as opposed to those against which a whistleblower may validly be prosecuted). On paper, the PDA fulfils many of the theoretical requirements for whistleblower protection, although there are significant gaps.*
- 9.3 *The South African legal framework is based on labour law remedies, which are extremely limited in scope. There are also serious gaps in protection, the most significant of which is that there are no consequences for those who fail to comply with their legal obligations to protect whistleblowers, and no consequences for those who retaliate against whistleblowers. In the past decade, a number of high-profile whistleblowers, as well as an indeterminate number of less high-profile ones, have suffered devastating personal consequences after exposing fraud, corruption, and illegality in both the public and private sectors in South Africa.*
- 9.4 *The provisions of the Companies Act 71 of 2008<sup>16</sup> are stronger than those of the PDA, but only apply to potential whistleblowers who are, inter alia, shareholders, directors, and company secretaries, and who make a disclosure in good faith to, inter alia, the Companies and Intellectual Property Commission, the Companies Tribunal, a director, an auditor or a company secretary. The National Environmental Management Act 107 of 1998 and the Financial Intelligence Centre*

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<sup>16</sup> Section 159 of the Companies Act

*Act 38 of 2001 also protect whistleblowers from civil and criminal liability, but only in the relatively narrow circumstances applicable to environmental whistleblowing and money laundering, tax evasion and terrorist activities.*

10. What do you believe are the key issues in relation to sustainable development in addition to or instead of the bullet points above that deserve attention by this mandate? Do you have any specific recommendations that you think the Special Rapporteur should make in her report?

*10.1 The mandate must recommend the following to the South Africa government:*

- 10.1.1 Accelerate the implementation of policies that will address poverty and equality which remain race-based. To give an example, the sustainable development goal relating to the state obligation to ensure availability and sustainable management of water and sanitation for all is one of the biggest challenges in South Africa, particularly in the rural and poor communities. The most people affected by lack of water and sanitation are women and school children in the rural and poor communities. Women have to travel long distance to fetch unsafe and dirty drinking water from the rivers and children have to use pit latrine toilets at schools.*
- 10.1.2 The South African government has made plans to remove all pit latrine toilets through its Sanitation Appropriate for Education (SAFE) initiative. The SAFE initiative aims to replace all basic pit toilets with appropriate sanitation in accordance with the Norms and Standards for school infrastructure. However, the slow pace at which such programs in being implemented is very worrisome.*
- 10.1.3 Urgently adopt a general law to protect whistleblowers or expand the protections available to whistleblowers to include whistleblowers outside the scope of the employer-employee relationship or supplier-client relationships. The law must provide for compensation for actual harm or damage suffered by a whistleblower and not limit compensation to entitlements in terms of the labour law framework. Parliament must consider compensation on similar terms as the tort law where the*

*whistleblower is awarded a portion of the monies recovered as a result of having disclosed wrongdoing.*

10.1.4 *Address the digital divide, digital literacy and the high and unaffordable cost of data to facilitate effective communication with all sectors of society.*

## **11. CONCLUSION**

11.1 Under South Africa's current constitutional dispensation, the right to freedom of expression serves to protect everyone from censorship and thought control. It also serves to empower everyone to express themselves in both political and non-political contexts.

11.2 Although the constitution guarantees the right to everyone in the Republic of South Africa, there are certain rights, such as the political rights and freedom of trade, occupation and profession, reserved for South African citizen only.

11.3 In general, the South African laws are sufficient to advance the sustainable development goals, but there is lack implementation in some respect.

Yours sincerely

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**CHAIRPERSON**

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