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SOUTH AFRICA

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**FX IN SA: A REVIEW OF FREEDOM OF
EXPRESSION IN SOUTH AFRICA, 2016**

PEN INTERNATIONAL CHARTER

PEN affirms that:

Literature knows no frontiers and must remain common currency among people in spite of political or international upheavals.

In all circumstances, and particularly in time of war, works of art, the patrimony of humanity at large, should be left untouched by national or political passion.

Members of PEN should at all times use what influence they have in favour of good understanding and mutual respect between nations; they pledge themselves to do their utmost to dispel race, class and national hatreds, and to champion the ideal of one humanity living in peace in one world.

PEN stands for the principle of unhampered transmission of thought within each nation and between all nations, and members pledge themselves to oppose any form of suppression of freedom of expression in the country and community to which they belong, as well as throughout the world wherever this is possible. PEN declares for a free press and opposes arbitrary censorship in time of peace. It believes that the necessary advance of the world towards a more highly organised political and economic order renders a free criticism of governments, administrations and institutions imperative. And since freedom implies voluntary restraint, members pledge themselves to oppose such evils of a free press as mendacious publication, deliberate falsehood and distortion of facts for political and personal ends.

Membership of PEN is open to all qualified writers, editors and translators who subscribe to these aims, without regard to nationality, ethnic origin, language, colour or religion.

<http://www.pen-international.org/pen-charter/>

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This booklet has been produced on behalf of PEN SA by Nooshin Erfani-Ghadimi, a member of its board.

Designs and layout by Ricky Stoch.

PEN SOUTH AFRICA CHARTER

PEN South Africa (PEN SA) is an organisation of writers that has been active for more than 50 years and currently has over 200 members. The organisation is led by a board that has both extensive literary credentials and advocacy experience, including award-winning journalist and author Margie Orford, who has been the President of the organisation since 2014 and also serves on the board of PEN International, award-winning author Mandla Langa and veteran journalist and media freedom activist Raymond Louw.

PEN SA follows the tenets of the PEN Charter and the Girona Manifesto to guide the work that it does as a branch of PEN International. The Centre joins other branches across the world in advocating for freedom of expression and promoting literature and the role of writers in society.

During apartheid, PEN SA worked to oppose censorship and race-based legislation. The Centre now works to oppose legislation that could threaten freedom of expression, assists writers and journalists when their freedom of expression has been threatened and regularly partners with other PEN centres and civil society organisations to do so.

One of the long term goals of PEN SA is the deepening of a democratic culture that fosters freedom of expression for all people living in South African. Another is the fostering of South African and other literatures in a range of languages – both original and in translation. In order for both of these to be meaningful and practical, children need to be enabled and encouraged to read – and to delight in that reading – in their own languages as well as additional languages. In order to be a fully active and participatory citizen of a democracy one needs to be able to read and write with fluency, confidence, pleasure and conviction. Learning to read in one's own language – seeing one's own language honoured in print – provides this essential foundation.

PEN SA works on a number of campaigns and projects relating to freedom of expression, literature and translation rights. Visit pensouthafrica.co.za for more information or follow the Centre on Facebook and Twitter.



FOREWORD

Freedom of expression (FX) is not a nice-to-have. It is not icing on the democratic cake. It is not an optional extra. Freedom of expression is a foundational democratic right. The rights of all citizens to express themselves freely is what distinguishes a democratic and human-rights based society. Freedom of expression encompasses a range of human activity. In the most direct and simple terms it is what allows for a range of political views, for public debate about the kind of society people want, for critical thought and creative expression, for gender equality and the expression of gender identity.

South Africans' constitutionally enshrined right to free expression was hard won. It is the cherished centrepiece of our democracy. Freedom of expression is vital for the social and economic well being of society. For example, it is vital that we can write freely about social inequality, that we as a society can organise and protest social ills. Freedom of expression is vital for education, for literature and for the creative responses of citizens to those in power.

This is the focus of PEN South Africa's work – to champion and to protect the right to free expression.

Freedom of expression is the oxygen that makes a democracy dynamic, sometimes fractious but it is essential for growth, for equity and a society that does good for all its members. A society in which freedom of expression is protected and where people can think, and say and write what they like is a healthy one. This report takes the social pulse of South Africa by assessing the current status of freedom of expression.

There are some areas of concern. There have been some severe tests of the limits of free speech. But generally South Africa has borne up well. We are heading into an uncertain future in which democracy, truthful and accurate reporting, and the protection of human rights, is increasingly threatened across the world. In many countries – Putin's Russia, Erdogan's Turkey and Trump's United States – the press and free expression has come under sustained attack. In South Africa we are in a better position but we need to remain vigilant because without freedom of expression all other political, social and human rights are easily lost.

*Margie Orford
President PEN South Africa*

WHAT IS FREEDOM OF EXPRESSION?

When surveying history we see that one of the hallmarks of enlightened civilisations is the production of literature and art, and the veneration of the intellect. Even in ancient states, such as the Greek¹ and Roman² empires, there were elements of freedom of speech or freedom of expression.

Advancing societies have always understood that free expression is a prerequisite for attaining the full potential inherent in each of us. It is also for this reason that those seeking to subjugate often do so through censorship.

South Africa's own cultural practice of "ubuntu" – a person is a person through other people – reflects the global and deep-seated understanding that we can only be fully ourselves when we can communicate and be understood and be connected to our fellow humans.

South African constitutional scholar and law professor Pierre de Vos outlines

what he sees as the human rights implications of freedom of expression:

The protection of the right to freedom of expression is of vital importance for a democracy to thrive. If our right to engage in robust discussion and debate about political and social issues is curtailed, we lose some of our ability to form independent opinions. Our ability to think critically about the world we live in is diminished and it becomes ever more difficult to make meaningful and real political choices.

Moreover, where novels and movies are censored and the content of magazines, the internet and newspapers subjected to state control, we lose some of the ability to explore our desires and dreams, to discover for ourselves how we wish to live and love; in short, we lose some of the ability to decide who we are and how we wish to live. When that happens our dignity is catastrophically impaired because we lose some of our agency.³

The Economist explains the importance of free expression – and its corollary, a free press – for maintaining democracy in a 2015 article as follows:

Democracy is founded on the proposition that people can govern themselves, and well-informed self-governance is impossible in an atmosphere where members of the press are excoriated for doing their jobs or where controversial ideas are subject to punishment. John Stuart Mill argued in "On Liberty" that unconventional views often contain a seed of truth that society should heed. The punitive impulse is inconsistent with searching debate that may lead to novel approaches to old problems. Even when dissenting views are completely without merit, he wrote, they might help others understand anew why their ideas are worth holding.⁴

The need to protect each individual's right to express themselves freely has evolved along with the physical, mechanical and technological means at that person's disposal. Having a "voice" in an ancient Greek assembly is different to being a newspaperman with access to a moveable type printing press, or a citizen journalist armed with a smartphone.

In having a voice, one also needs to be heard. The right to express thoughts and opinions only becomes a healthy, democratic conversation – whether with other citizens, or with elected officials – once one's right to be heard is also protected.

Therefore, freedom of expression needs to be understood to be the right to seek, receive and impart information and ideas, through all mediums and art forms. This also means that the protection of freedom

of speech as a right includes not only the content, but also the means of expression.⁵

In a recently published book *Free Speech: Ten Principles for a Connected World*,⁶ the notions of freedom of expression and speech are explored and updated to reflect the complexity of today's technologically advanced and interconnected world. The author, Timothy Garton Ash, proposes ten principles with which to construct a framework to protect and promote free speech and expression.

Garton Ash emphasises the need to update and challenge our notions of free speech and expression continually, saying:

Never in human history was there such a chance for freedom of expression as this. And never have the evils of unlimited free expression – death threats, paedophile images, sewage-tides of abuse – flowed so easily across frontiers. [...]

I contend that the way to live together well in this world-as-city is to have more and better free speech. Since free speech has never meant unlimited speech – everyone sprouting whatever comes into his or her head, global logorrhea – that entails discussing where the limits to freedom of expression and information should lie in important areas such as privacy, religion, national security and the ways we talk about human difference. [...]

In this crowded world, we must learn to navigate by speech, as ancient mariners taught themselves to sail across the Aegean Sea. We can never learn if we are not allowed to take the boat out.⁷

In arguing for the need to update our understanding of free expression, and of doing so through open discussion with "robust civility", Garton Ash gives a particularly interesting analysis of the impact of the internet:

The internet subverts the traditional unities of time and space. It telescopes space, making us virtual neighbours, but it also concertinas time. Once something is up there online, it is usually there forever. Whether an ill-advised remark was made this morning or 20 years ago, if it comes up in an online search it is still, in some important and novel sense, part of the here and now. [...]

A man publishes something in one country and a man dies in another. Someone threatens violence in that other country and a performance or publication is halted in the first. In this disturbing way, too, we are all neighbours now. [...]

What are the most characteristics affordances of the internet? Put most simply: it is easier to make things public and more difficult to keep things private.⁸

The issues raised here are of particular interest in South Africa, where the pernicious effects of apartheid are still affecting society today. Using "robust civility" to come to a shared understanding of what South Africans will accept as limitations on their free expression, in order to strive towards a non-racist, diverse and tolerant society, is part of the reason for producing this publication.

South Africa today still battles with old-world ideas of hierarchy and control. The apartheid regime's hold on information and communication was so absolute that it still

has devastating effects on how ordinary citizens understand their own rights to data, information and feedback from their elected officials.

Traditional African cultures, too, contain elements that feed into notions of the "untouchability" of leaders, which are at odds with a rights-based Constitutional democracy. The almost daily "service delivery" protests show that South Africans are still struggling to find successful ways to voice their opinions and to feel that they have been heard.

Part of PEN SA's mission is to help establish a culture of openness and transparency in the country, based on South Africa's Constitution, and the belief that each person is born with equal potentialities that can only be fulfilled if their rights are vigorously protected, including the right to express themselves freely.

South Africa's attitude towards this fundamental right is pivotal not just for its own citizens but also for the global community. Identifying South Africa as one of what he terms "swing states", Garton Ash argues that given the current power struggle between major states, huge corporations and individuals, a few countries could determine the outcome of global freedom of expression issues:

The United States, Europe and China are the three biggest [countries] competing to promote their norms across the world, but of course they are not the only ones. Arguably a handful of major regional powers, such as India, Brazil, Turkey, South Africa and Indonesia, will be decisive in the evolution of this global struggle. They may aptly be called the swing states for free speech. [...]

All these countries have a strong attachment to sovereignty and are therefore susceptible to the Chinese argument for "information sovereignty". On the other hand, each of them has its own distinctive free speech tradition and a substantial inheritance from the broader Western one. [...]

South Africa combines a Dutch and English legal heritage with strong native traditions, memorably evoked in Nelson Mandela's Long Walk to Freedom. [...]

These swing states and their societies are not simply objects of a global struggle for word power. They are decisive actors in it.⁹

10 PRINCIPLES OF FREE SPEECH¹⁰



LIFEBLOOD

We – all human beings – must be free and able to express ourselves, and to seek, receive and impart information and ideas, regardless of frontiers.



JOURNALISM

We require uncensored, diverse, trustworthy media so we can make well-informed decisions and participate fully in political life.



KNOWLEDGE

We allow no taboos against and seize every chance for the spread of knowledge.



VIOLENCE

We neither make threats of violence nor accept violent intimidation.



DIVERSITY

We express ourselves openly and with robust civility about all kinds of human difference.



RELIGION

We respect the believer but not necessarily the content of the belief.



PRIVACY

We must be able to protect our privacy and to counter slurs on our reputations, but not prevent scrutiny that is in the public interest.



SECRECY

We must be empowered to challenge all limits to freedom of information justified on such grounds as national security.



ICEBERGS

We defend the internet and other systems of communication against illegitimate encroachments by both public and private powers.



COURAGE

We decide for ourselves and face the consequences.

LIMITS TO FREE SPEECH

No (serious) proponent of free speech has ever advocated for unrestricted, completely free speech. There must be limits to this freedom, given the strength of its impact and potential.

The history of legal and statutory protection of free speech – from the French Declaration of the Rights of Man and of the Citizen in 1789 to the United Nations Universal Declaration of Human Rights in 1948, and subsequent regional declarations – shows various attempts to define how free speech should be limited in order to prevent harm to others.

It would be naïve, however, to overlook the fact that restrictions are often disguised as concern for citizens' protection, but are in fact methods of entrenching non-democratic power.¹¹

Nonetheless, it is important to consider

how to determine what limits there should be to free expression. As Garton Ash poses the question: how free should speech be?

In what style, with what conventions and mutual understandings, should we choose to express something (or not)? A right to say it does not mean that it is right to say it. A right to offend does not entail a duty to offend. This challenge goes beyond voluntary self-restraint to the active exploration of opportunities. What social, journalistic, educational, artistic and other ways are there of making free speech fruitful, enabling creative provocation without tearing lives and societies apart? How can we treat each other like grown-ups, exploring and navigating our differences with the aid of this defining human gift of self-expression?¹²

These questions are particularly important for South Africans to grapple with, since recent incidents and headlines show that some freely expressed opinions have caused real emotional harm and societal rifts (see below).

A coalition of free speech experts and organisations – Article 19¹³ – has produced

a series of principles to help provide a balance between the good and the harm that can result from freedom of expression. One set of principles they set out is particularly focused on the protection of reputation (i.e. defamation laws), but is useful to keep in mind when prescribing limits on free speech in general:

1.1 PRESCRIBED BY LAW

Any restriction on expression or information must be prescribed by law. The law must be accessible, unambiguous and narrowly and precisely drawn so as to enable individuals to predict with reasonable certainty in advance the legality or otherwise of a particular action.

1.2 PROTECTION OF A LEGITIMATE REPUTATION INTEREST

Any restriction on expression or information which is sought to be justified on the ground that it protects the reputations of others, must have the genuine purpose and demonstrable effect of protecting a legitimate reputation interest.

1.3 NECESSARY IN A DEMOCRATIC SOCIETY

A restriction on freedom of expression or information, including to protect the reputations of others, cannot be justified unless it can convincingly be established that it is necessary in a democratic society. In particular, a restriction cannot be justified if:

- less restrictive, accessible means exist by which the legitimate reputation interest can be protected in the circumstances; or
- taking into account all the circumstances, the restriction fails a proportionality test because the benefits in terms of protecting reputations do not significantly outweigh the harm to freedom of expression.¹⁴

In analysing how these principles fit into the complex and connected world we live in today, Garton Ash provides the following reflections:

Even in mature liberal democracies, free speech is distorted by the immense and often hidden power of money, which both speaks and silences; by political manipulation; by popular prejudice; by media proprietors and bad journalism; by power relations in the workplace, communities and the home, as well as between sexes, classes and ethnic groups; and, not least, by the silencing force of the individual man or, less often, woman. In practice, religious, social and cultural norms can also be more compelling than the letter of the law.¹⁵

Take the ultimate harm: the unnatural termination of a human life. Who would disagree with the proposition that speech that leads to murder should not be allowed? But how do we know what speech “leads to” murder? It all depends on the context. The very same words or images can be harmless in one context, fatal in another. We therefore have to look at the time, manner, place and medium of speech, an exercise significantly complicated by the fact that the internet telescopes both time and space.¹⁶

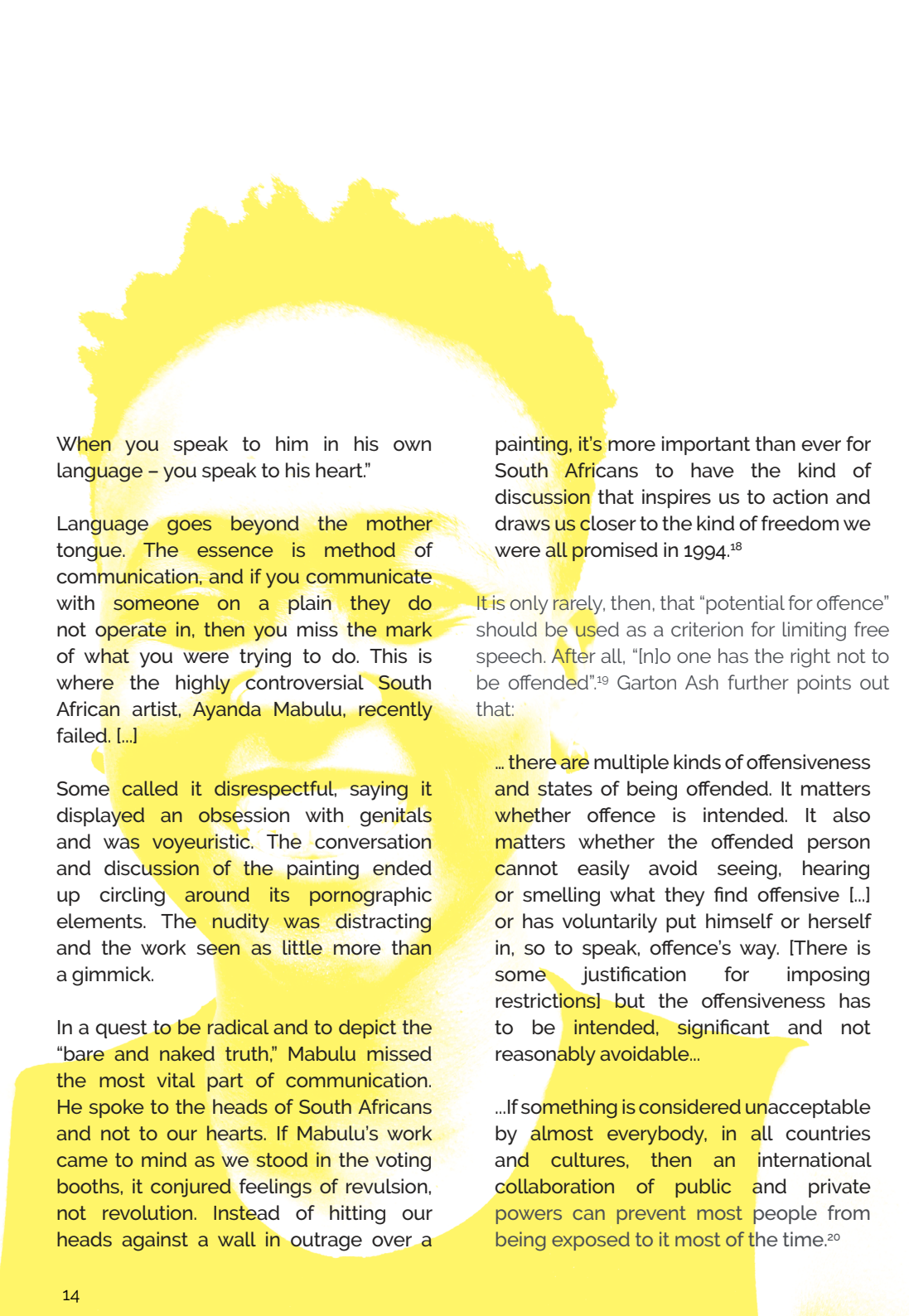
CAUSING OFFENCE

In the South African context, calls for limiting expression – as in the case of the “The Spear” painting¹⁷ – have often been made because the action or object in question has caused offence. The issue is made complex because of the range of cultures in South Africa – what is seen as “art” by one culture is deeply offensive and problematic in another. Is it enough for an art piece, a cartoon or an op-ed to have the *potential* to offend for it not to be published or displayed? And who will decide what is offensive?

Part of the function of writers and artists is to push boundaries, culturally and in our minds. It is only when we are exposed to matters that make us uncomfortable, or reveal to us a different truth (as is the case with excellent journalism), that we grow intellectually, and emotionally.

In a commentary about a similar painting by South African artist Ayanda Mabulu, journalist Shandukani Mulaudzi made an important point about the purpose of using shocking imagery and whether it is, in the end, even effective:

Nelson Mandela once said, “When you speak to a man in a language he understands, you speak to his head.



When you speak to him in his own language – you speak to his heart.”

Language goes beyond the mother tongue. The essence is method of communication, and if you communicate with someone on a plain they do not operate in, then you miss the mark of what you were trying to do. This is where the highly controversial South African artist, Ayanda Mabulu, recently failed. [...]

Some called it disrespectful, saying it displayed an obsession with genitals and was voyeuristic. The conversation and discussion of the painting ended up circling around its pornographic elements. The nudity was distracting and the work seen as little more than a gimmick.

In a quest to be radical and to depict the “bare and naked truth,” Mabulu missed the most vital part of communication. He spoke to the heads of South Africans and not to our hearts. If Mabulu’s work came to mind as we stood in the voting booths, it conjured feelings of revulsion, not revolution. Instead of hitting our heads against a wall in outrage over a

painting, it’s more important than ever for South Africans to have the kind of discussion that inspires us to action and draws us closer to the kind of freedom we were all promised in 1994.¹⁸

It is only rarely, then, that “potential for offence” should be used as a criterion for limiting free speech. After all, “In]o one has the right not to be offended”.¹⁹ Garton Ash further points out that:

... there are multiple kinds of offensiveness and states of being offended. It matters whether offence is intended. It also matters whether the offended person cannot easily avoid seeing, hearing or smelling what they find offensive [...] or has voluntarily put himself or herself in, so to speak, offence’s way. [There is some justification for imposing restrictions] but the offensiveness has to be intended, significant and not reasonably avoidable...

...If something is considered unacceptable by almost everybody, in all countries and cultures, then an international collaboration of public and private powers can prevent most people from being exposed to it most of the time.²⁰

THREATS OF VIOLENCE, HATE SPEECH AND DANGEROUS SPEECH

For most countries, history plays a pivotal role in what is deemed permissible, what can be protected and what is “unconstitutional”. In the United States, for example, there is fierce defence of the First Amendment²¹ and the wide-ranging freedoms of assembly, religion and speech. In Germany, on the other hand, there are tighter controls on what can be deemed “hate speech”, which were put in place because of the country’s Nazi past.

In South Africa, similar considerations need to be taken into account. Centuries of slavery, colonialism, racism and apartheid history have shaped the physical, societal and psychological structures of the country. It is because of this that recent incidents of “racist speech” have again sparked heated discussions about the legal and acceptable levels of free speech (see 2016 case study sections below).

University of Cape Town Vice-Chancellor Dr Max Price gave an explanation of what the South African Constitution outlines as possible limitations to academic freedom and free expression as part of his explanation regarding the cancelling of the 2016 TB Davie Memorial Lecture on academic freedom (see 2016 case study section below):

No freedom, however, is unlimited. As with all rights, context and consequence are also critical. The right to academic freedom is fundamental, but cannot be exercised in a vacuum. We have a responsibility to exercise this right with due, thoughtful consideration

of other equally important rights, and the possibility of other harmful consequences. Indeed, in terms of our Constitution (as in all modern democratic constitutions), every right is subject to limitation by law of general application which complies with a number of requirements, the most significant of which is that the limitation must be proportional to the context in which it operates, and to the impact which its exercise will have on those affected by its exercise.

Moreover, in the specific case of the right to freedom of expression, the framers of the Constitution were very wary of the harm that unlimited freedom of expression could cause to the social fabric of South Africa. Thus, unusually among all the rights in the Bill of Rights, the general grant of the right to free expression is immediately specifically qualified in section 16(2), as follows: “The right ... does not extend to – (a) propaganda for war; (b) incitement of imminent violence; or (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.” Many recent public controversies about the boundary between freedom of expression and racist hate speech have reiterated this fundamental point. So in measuring the justifiability of any action which seeks to further a right or freedom, the impact of its exercise on the immediate community will weigh heavily with the reviewing authority.²²

Expressing a similar understanding of the Constitutional parameters of freedom of expression, Professor Pierre de Vos provides the following commentary, from a South African point of view

and in response to specific incidents of racist speech:

But, not all forms of speech make any contribution to democratic debate or enhance our personal wellbeing. In fact, some forms of expression harm individuals or groups with no discernible benefit for society, for individuals or for our democracy.²³

And...

One of the reasons why overtly racist speech is problematic is because it harms those targeted. The harm may be physical and direct or it may be indirect: if I propagate the absurd notion that some people are not fully human because of their race, I am creating an atmosphere in which some would consider it unproblematic to assault or kill members of that group. Racist speech can also inflict severe emotional harm on those targeted – especially in a world in which the dignity and worth of the targeted group is systematically undermined because of structural racism, sexism or homophobia. [...]

As a matter of principle and as a matter of fact, the actual choice confronting us when we have to consider the protection of free speech is not whether it should be protected absolutely or not protected at all. The choice is about which types of harmful speech the law should limit and what the extent of that limitation should be.

When we try to find answers for these difficult questions we would do well to recall that speech is not harmful merely because it makes us uncomfortable,

we disagree with it or we do not like the person who uttered the speech. At the same time, we would also do well to recall that we may not be best placed to judge whether speech that targets a specific group to which we do not belong directly harms the members of that group and what the extent of this harm might be.²⁴

ASSASSIN'S VETO

Recent history is replete with examples of freedom of expression being curtailed by the fear of unintended consequences. If a person clearly incites violence or hate, which is intended, then legal and moral limitations should apply. However, if a cartoonist, author or singer has the potential to so offend another person, or group of people, that they will react with violence, then some people have seen that as sufficient reason to limit that person's right to express themselves. This is what is referred to as the "assassin's veto" – by threatening death and violence, a person or group of people could effectively wield extrajudicial censorship.

On the other hand, if the consequences of publishing a book or cartoon, or allowing a speech to go ahead, are violent, do public officials and those in authority, knowing the fragility of the equilibrium, have a responsibility to stop what could cause death and injury?

Garton Ash provides further insight on this complex issue:

The generic evil underlying so many illegitimate abuses of and curbs on free speech turns out to be the real or attributed threat of violence. [...]

Every thing is what it is and not another thing. The physical integrity of the human person is one thing. Psychological wellbeing is another. Dignity is dignity. Equality is equality. They are all good things, but they are not all the same thing. Violations of them may not all properly be called violence. [...]

... we need to look more closely at what makes violence "likely" or "imminent". As we have seen, the internet telescopes both space and time. [...]

The American analyst Susan Benesch has developed a set of five guidelines for determining when hate speech becomes dangerous speech. Her first three guidelines, which build on Aristotle's analysis of the three dimensions of rhetoric, are "a powerful speaker with a high degree of influence over the audience", "a vulnerable, impressionable audience, with grievances and fear that the speaker can cultivate" and "a speech act that is clearly understood as a call to violence". She adds two more: "a social or historical context that is propitious for violence" and "a means of dissemination that is influential in itself, for example because it is the sole or primary source of news for the relevant audience"²⁵

In South Africa in 2010, then-ANC Youth League leader Julius Malema sang an apartheid-era song that contains the lyrics "Awudubula (i) bhulu" and "Dubula amabhunu baya raypha", which loosely translate as "Shoot the boer/farmer" and "Shoot the

boers/farmers they are rapists/robbers".²⁶ The expression "boer" is a widely used term for white Afrikaans South Africans.

An analysis of this was contained in the 2011 PEN International and South African PEN contribution to the 13th session of the Working Group of the Universal Periodic Review:

The Gauteng High Court held that the song constituted hate speech under the Equality Act and the judgment further prohibited the entire ANC party from singing the song at any public or private meeting. However, some felt that the legal grounds upon which the court decided the case – which lessens the requirement for actual incitement to inflict harm – may be overly broad and ambiguous, blurring classes of protected speech.²⁷

Garton Ash comments:

The story of Malema and "Shoot the Boer" is particularly instructive because his revival of an old struggle song became so controversial only after it was broadcast on television in Afrikaans, made the subject of Afrikaner protests and brought to court. When it went beyond the internal rituals of a particular group, [...] its meaning and implications changed irrevocably. As the judge noted, it "would never be innocuous again". But was that Malema's intention? Was violence intended and likely?²⁸

TIMELINE: HIGHLIGHTS OF THE HISTORY OF FREE SPEECH UNTIL THE END OF THE 20TH CENTURY

399BC **1215** **1516**

Socrates speaks to jury at his trial: "If you offered to let me off this time on condition I am not any longer to speak my mind ... I should say to you, 'Men of Athens, I shall obey the Gods rather than you.'"

Magna Carta, wrung from the unwilling King John by his rebellious barons, is signed. It will later be regarded as the cornerstone of liberty in England.

The Education of a Christian Prince by Erasmus. "In a free state, tongues too should be free."

1689 **1644** **1633**

Bill of Rights grants "freedom of speech in Parliament" after James II is overthrown and William and Mary installed as co-rulers.

"Areopagitica", a pamphlet by the poet John Milton, argues against restrictions of freedom of the press. "He who destroys a good book, kills reason itself."

Galileo Galilei hauled before the Inquisition after claiming the sun does not revolve around the earth.

1770 **1789** **1791**

Voltaire writes in a letter: "Monsieur l'abbé, I detest what you write, but I would give my life to make it possible for you to continue to write."

"The Declaration of the Rights of Man", a fundamental document of the French Revolution, provides for freedom of speech.

The first 10 amendments to the US Constitution are collectively known as the Bill of Rights, and there are five freedoms guaranteed by the First Amendment: religion, speech, the press and the right to assemble, and the right to petition the government for a redress of grievances.

1929 **1948** **1859**

Justice Oliver Wendell Holmes, of the US Supreme Court, outlines his belief in free speech: "The principle of free thought is not free thought for those who agree with us but freedom for the thought we hate."

The Universal Declaration of Human Rights is adopted virtually unanimously by the UN General Assembly. It urges member nations to promote human, civil, economic and social rights, including freedom of expression and religion.

"On Liberty", an essay by the philosopher John Stuart Mill, argues for toleration and individuality. "If any opinion is compelled to silence, that opinion may, for aught we can certainly know, be true. To deny this is to assume our own infallibility."

1958 **1960** **1962**

Two Concepts of Liberty, by Isaiah Berlin, identifies negative liberty as an absence or lack of impediments, obstacles or coercion, as distinct from positive liberty (self-mastery and the presence of conditions for freedom).

After a trial at Old Bailey, Penguin wins the right to publish DH Lawrence's sexually explicit novel, *Lady Chatterley's Lover*.

On the Origin of Species, by Charles Darwin, expounds the theory of natural selection. TH Huxley publicly defends Darwin against religious fundamentalists.

1992 **1989** **1962**

In *Manufacturing Consent*, Noam Chomsky points out: "Goebbels was in favour of free speech for views he liked. So was Stalin. If you're in favour of free speech, then you're in favour of freedom of speech precisely for views you despise."

Iranian leader Ayatollah Khomeini issues a fatwa against Salman Rushdie over the "blasphemous" content of his novel, *The Satanic Verses*. The fatwa is lifted in 1998.

One Day in the Life of Ivan Denisovich by Aleksandr Solzhenitsyn describes life in a labour camp during Stalin's era. Solzhenitsyn is exiled in 1974.

BLACK LINES AND WHITE SPACES

Extract from a speech to 2016 graduates by Professor Anton Harber, founding co-editor of Weekly Mail (now Mail & Guardian) and adjunct professor of journalism at Wits University.

In the 1980s, in the darkest days of apartheid, I was working as a political reporter on the *Rand Daily Mail*, not this funny website that exists now, but what was the leading liberal newspaper of its time. In May 1985, it was closed by its owners, who had tired of its costly opposition to apartheid, and I and a whole lot of journalists found ourselves unemployed and unemployable.

Then a colleague who I barely knew came up to me and said, "Isn't this the time for us to start a new newspaper?" Now you have to understand just how crazy an idea that was. Apartheid censorship was at its worst, and they had just succeeded in forcing the closure of what was no more than a moderately liberal voice. You had to register a newspaper in those days, and they were likely to ask us for a huge deposit that would make it impossible. We had no money. We knew very little about the business of printing, publishing, selling advertising and distributing. Printers didn't want to touch us, the distributor was scared stiff of handling us, and the security police were watching us like hawks. The economy was in a bad state, so any new venture was high risk. It was a ferociously hostile climate, political and financially.

But I had a quick answer for my colleague: "That's a good idea," I said. "Let's do it..."

Let me tell you another story, also about censorship. In the 1986 State of Emergency, the government published a long series of media laws that severely restricted what we could do. We couldn't report on the security force action, on political detainees, on sanctions, on the ANC in exile ... all the important issues of the day.

That first day of the emergency, they confiscated our newspaper off the streets.

The next week, we did not know what we could do, or what we could get away with. We thought we were doomed. The purpose of our newspaper was to tell people what was going on under apartheid, and if we couldn't do it, then what were we going to do? We might as well pack up. But we told ourselves that we had to do the most we could under the circumstances. We might as well go down fighting, we said.

We told our journalists to go ahead and write the news as if there were no restrictions. Let the journalists do their job and then the lawyers would go through it and tell us what we had to remove.

But when the lawyers arrived and took a look, they put their red pens through every second word or line, whole pictures and stories and headlines and captions. We were in trouble. We hardly had a newspaper.

We turned the problem into a solution. Let's draw a black line through every word, phrase,

sentence or whole story that the lawyer says is problematic. If a picture is illegal, let's remove it. And we will print the newspaper like that. So we printed a whole edition that had only the occasional word that you could read. The rest was black lines and blank spaces.

It was bold, daring and risky. We thought it was the last newspaper we would ever produce because it was too cheeky and provocative. We put it to bed thinking this was our swansong.

When the police arrived at the printer, they looked at the paper, noted that we had complied with the law, and left. What they did not realise was that what we had created, with a mass of black lines and blank spaces, was the most graphic and powerful representation of censorship, a display for all the world to see of how much was being hidden from them. That edition featured on the front pages of other newspapers around the world, and it became a collector's item.

FX IN SA LEGAL BASIS

After almost 50 years of government-imposed censorship in South Africa, the democratic election of 1994 ushered in a new era of openness and transparency and led to the adoption of a progressive, rights-based constitution in 1996.²⁹

SA AND INTERNATIONAL FX STATUTES

In terms of its international commitments, South Africa is bound by various treaties, including the Article 19 of the International Covenant on Civil and Political Rights and Article 9 of the African Charter on Human and Peoples' Rights.

ARTICLE 19, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.³⁰

ARTICLE 19, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;

- (b) For the protection of national security or of public order (order public), or of public health or morals.³¹

ARTICLE 9, THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

1. Every individual shall have the right to receive information.
2. Every individual shall have the right to express and disseminate his opinions within the law.³²

ARTICLE 2, THE UNESCO CONVENTION ON THE PROTECTION AND PROMOTION OF THE DIVERSITY OF CULTURAL EXPRESSIONS

Principle of respect for human rights and fundamental freedoms: Cultural diversity can be protected and promoted only if human rights and fundamental freedoms, such as freedom of expression, information and communication, as well as the ability of individuals to choose cultural expressions, are guaranteed. No one may invoke the provisions of this Convention in order to infringe human rights and fundamental freedoms as enshrined in the Universal Declaration of Human Rights or guaranteed by international law, or to limit the scope thereof.³³

FX IN SA CONSTITUTION

The South African Constitution³⁴ is often cited as one of the most advanced and progressive in the world. It is a human rights charter, and a framework for a set of laws that help to protect the rights and dignities of every person in the country. Its architects wrote the Constitution at a time when the country was transitioning

from being a morally corrupt state, designed to profit the minority through the subjugation of the majority, to a democratic country.

The transition process, which many would argue still continues to this day, is one where structural inequalities have had to be dismantled and replaced with equitable ones instead.

Importantly, the way apartheid structures spread a hateful narrative of racial superiority and inferiority through mass media, schools and churches has meant that the country is intimately aware of the inherent power of speech. The constitutional provisions that deal with expression, privacy and information are therefore carefully crafted, and attempt to balance individual rights with societal protections.

Unsurprisingly, freedom of expression – as well as the right to privacy and access to information – is clearly spelt out in a section referred to as the "Bill of Rights". Describing the section, the Constitution clearly states why it makes this classification:

This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.³⁵

Freedom of expression is guaranteed under Article 16 of the Constitution, and access to information under Article 32. The provision which safeguards privacy, Section 14, is also pertinent here, especially given recent technological advances and the shifting landscape of electronic communication. Section 15 is included here, too, since it protects an individual's right to belief and thought.³⁶

14. PRIVACY

Everyone has the right to privacy, which includes the right not to have–

- their person or home searched;
- their property searched;
- their possessions seized; or
- the privacy of their communications infringed.

15. FREEDOM OF RELIGION, BELIEF AND OPINION

Everyone has the right to freedom of conscience, religion, thought, belief and opinion.

[Section 15.2 and 15.3 refer to religious freedoms.]

16. FREEDOM OF EXPRESSION

1. Everyone has the right to freedom of expression, which includes –
 - (a) freedom of the press and other media;
 - (b) freedom to receive or impart information or ideas;
 - (c) freedom of artistic creativity; and
 - (d) academic freedom and freedom of scientific research.
2. The right in subsection (1) does not extend to –
 - (a) propaganda for war;
 - (b) incitement of imminent violence; or
 - (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

32. ACCESS TO INFORMATION

3. Everyone has the right of access to –
 - (a) any information held by the state; and
 - (b) any information that is held by another person and that is required for the exercise or protection of any rights.
4. National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

LIMITS TO FX IN SA CONSTITUTION

There are necessary limits to freedom of expression in the Constitution. Professor Pierre de Vos explains them as follows:

Section 16(1) of the Constitution protects all speech not explicitly excluded by section 16(2). This protected speech includes child pornography, defamatory speech and racist speech that does not amount to the type of speech set out in section 16(2). (Of course, speech protected by s 16(1) can be limited by any law of general application which complies with the requirements of the limitation clause in section 36. The Constitutional Court thus had no problem in *De Reuck Director of Public Prosecutions* to find that the criminalisation of child pornography in section 27(1) of the Films and Publication Act was

justifiable in terms of the limitation clause.)

Section 16(2) itself does not regulate speech. It merely defines which speech is entirely excluded from constitutional protection. It is for the legislature to regulate speech it believes to be harmful and for the court to decide whether the regulated speech falls within section 16(2). If it does fall within the ambit of section 16(2) then the limitation will automatically be constitutionally valid as the speech will be unprotected. If not, the question will be whether the limitation is justifiable in terms of the limitation clause. Section 16(2) states that the right to freedom of expression protected in section 16(1) does not extend to: (a) propaganda for war; (b) incitement of imminent violence; or (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.³⁷

THE "K-WORD" AS HATE SPEECH

In a unanimous judgement handed down on 8 November 2016, on the case of *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others* [2016], the South African Constitutional Court gave new guidelines on what is considered hate speech.

The case asked whether the use of the word "kaffir" by an employee, in the workplace, had made the working relationship intolerable and his subsequent dismissal an appropriate remedy.

In a unanimous judgment written by Chief Justice Mogoeng (Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mbha AJ, Mhlantla J, Musi AJ and Zondo

J concurring), the Court highlighted the seriousness of the use of the word kaffir and described it as a very egregious, derogatory and humiliating expression. The Court held that the use of that word amounts to hate speech and that courts are obliged to act fairly but firmly against those who use it, to contribute to the eradication of racism in line with the foundational values of our Constitution.³⁸

The judgement, in part, reads as follows:

This case owes its genesis to the use of the term kaffir in a workplace and a more assertive insinuation that African people are inherently foolish and incapable of providing any leadership worthy of submitting to. It bears testimony to the fact that there are many bridges yet to be crossed in our journey from crude and legalised racism to a new order where social cohesion, equality and the effortless observance of the right to dignity is a practical reality. South Africa's special sect or brand of racism was so fantastically egregious that it had to be declared a crime against humanity by no less a body than the United Nations itself. And our country, inspired by our impressive democratic credentials, ought to have recorded remarkable progress towards the realisation of our shared constitutional vision of entrenching non-racism. Revelations of our shameful and atrocious past, made to the Truth and Reconciliation Commission, were so shocking as to induce a strong sense of revulsion against racism in every sensible South African. But to still have some white South Africans address their African compatriots as monkeys, baboons or kaffirs and impugn their intellectual and leadership capabilities

as inherently inferior by reason only of skin colour, suggests the opposite. And does in fact sound a very rude awakening call to all of us.

... the word kaffir was meant to visit the worst kind of verbal abuse ever, on another person. Although the term originated in Asia... in colonial and apartheid South Africa it acquired a particularly excruciating bite and a deliberately dehumanising or delegitimising effect when employed by a white person against his or her African compatriot. It has always been calculated to and almost always achieved its set objective of delivering the harshest and most hurtful blow of projecting African people as the lowest beings of superlatively moronic proportions.³⁹

The footnote following this last paragraph of the judgment has important implications for our analysis of the freedom of expression in South Africa, in particular the *Penny Sparrow* case highlighted in following sections:

It is even worse compared to another weapon of gross insult regularly resorted to pulverise whatever racists thought was left of the dignity and self-worth of the African people. That insult is either "monkey" or "baboon". See *Strydom v Chiloane 2008 (2) SA 247 (T)* (*Chiloane*) where Hartzenberg J was seized with a matter involving the use of the word baboon in *Chiloane*, and relying on *Mangope v Asmal 1997 (4) SA 277 (T)* at 286J-287A he said:

"If a person is called a baboon, when severely criticized, the purpose is to indicate that he is base and of

extremely low intelligence. It was also stated that it can be inferred from the use of the word, in the circumstances, that the person mentioned is of subhuman intelligence and not worthy of being described as a human being. It follows that the person described as a baboon in those circumstances may rightfully perceive them to be hurtful. The magistrate was accordingly not wrong to find that the words complained of fall within the definition of 'hate speech' as defined in section 10 of PEPUDA.⁴⁰⁴¹

The Constitutional Court's judgment continues to say:

It could only have been with this disrespect in mind and the need to make a decisive break from the ills of the past, ... that non-racialism, human dignity and freedoms (which include freedom of expression without any trace of hate speech) are values foundational to our constitutional democracy.... The healing of the divisions of the past, the national unity and reconciliation that need to be built and fostered respectively,... are likewise intended to entrench peaceful co-existence, respect and the right to dignity of all our people.

Calling an African a 'kaffir' thirteen years deep into our constitutional democracy, as happened here, does in itself make a compelling case for all of us to begin to engage in an earnest and ongoing dialogue in pursuit of strategies for a lasting solution to the bane of our peaceful co-existence that racism has continued to be. The duty

to eradicate racism and its tendencies has become all the more apparent, essential and urgent now. For this reason, nothing that threatens to take us back to our racist past should be glossed over, accommodated or excused. An outrage to racism should not be condescendingly branded as irrational or emotional. This is so not only because the word kaffir is "an inescapably racial slur which is disparaging, derogatory and contemptuous"... but also because African people have over the years been addressed as kaffirs. This seems to suggest that very little attitudinal or mind-set change has taken place since the dawn of our democracy. South Africans of all races have the shared responsibility to find ways to end racial hatred and its outstandingly bad outward manifestations. After all racism was the very foundation and essence of the apartheid system. But this would have to be approached with maturity and great wisdom, obviously without playing down the horrendous nature of the slur. For, the most counterproductive approach to its highly sensitive, emotive and hurtful effects would be an equally emotional and retaliatory reaction. But why is it that racism is still so openly practised by some despite its obviously unconstitutional and illegal character? How can racism persist notwithstanding so much profession of support for or commitment to the values enshrined in our progressive Constitution and so many active pro-Constitution nongovernmental organisations?

Are we perhaps too soft on racism and the use of the word kaffir in particular? Should it not be of great concern that kaffir is the embodiment of racial

supremacy and hatred all wrapped up in one? My observation is that very serious racial incidents hardly ever trigger a fittingly firm and sustained disapproving response. Even in those rare instances where some revulsion is expressed in the public domain, it is but momentary and soon fizzles out. Sadly, this softness characterises the approach adopted by even some of those who occupy positions that come with the constitutional responsibility or legitimate public expectation to decisively help cure our nation of this malady and its historical allies.⁴²

After laying out the facts of the particular case before the court, the judgement returns to address the seriousness of the use of such language in the workplace:

It bears repetition that the use of the word kaffir is the worst of all racial vitriols a white person can ever direct at an African in this country. To suggest that it is necessary for the employer to explain how that extremely abusive language could possibly break the trust relationship and render the employment relationship intolerable, betrays insensitivity or at best for Mr Kruger desperation of the highest order. Where such injurious disregard for human

dignity and racial hatred is spewed by an employee against his colleagues in a workplace, that ordinarily renders the relationship between the employee and the employer intolerable.

SARS is not only an organ of State but it obviously has numerous African and white employees. It is constitutionally and relationally intolerable to have any racist daring enough to refer to fellow employees as kaffirs, within the employ of SARS. His African co-employees know that he called one of them a kaffir and that he regards them as lazy, incapable of leading him and intellectually inferior to him solely because of their race. They would be entitled to feel extremely offended and regard as highly insensitive of SARS, to keep in their midst someone like Mr Kruger. Labour jurisprudence reveals that, where employees have discovered that there is in their workplace an active racist, it has sometimes led to labour unrest. To retain Mr Kruger as an employee, wherever he might be placed, would be similar to recklessly leaving a ticking time-bomb unattended to, knowing that it could self detonate at any time, with consequences that are too ghastly to contemplate.⁴³



PEN SOUTH AFRICA'S WORK ON FREEDOM OF EXPRESSION – 2016 REPORT

This year PEN SA has focused its advocacy work on establishing itself as a platform where conversations can be held on some of the complex and difficult topics that are arising around freedom of speech. We have also been calling on writers to respond to some of these issues through their writing as we believe in the power of writing to effect change and inform the way we see the world and ourselves.

When the student protests started last year we **wrote to President Jacob Zuma, the Minister of Higher Education and the Vice Chancellors of South Africa's** universities calling on them to safeguard the lives of the protesting students. The letter stated that "the exclusion of so many from university because the cost of an education is too high denies an educated, literate productive future to this generation of South Africans".

This year we worked on a number of different projects that focused on the student protests, including holding a **Student Writing Prize** on the topic of #FeesMustFall, commissioning research into the relationship between the media and the #FeesMustFall movement and holding a dialogue in association with Wits Journalism on the topic of #FeesMustFall and the media. The writing prize, which was **won by the talented poet Koleka Putuma**, showcased how literature can be used to explore and express complex issues, while the research and dialogue explored some of the various issues that have arisen between the media and student protestors, including representation and hostility towards journalists.

Another issue that arose in higher education was the University of Cape Town rescinding its invitation to Danish journalist and writer Flemming Rose to give the TB Davie lecture on Academic Freedom. This sparked a wide-ranging debate on the nature of academic freedom and free speech. PEN SA President Margie Orford **wrote that** "If freedom of speech carries with it the reciprocal obligation to listen" and called for people to share their thoughts on the issue. The **responses that we received** were diverse and nuanced and as Orford wrote, will "inform the work that lies ahead of us as this part of an ongoing debate that needs principled thought each and every time such issues confront us."

We have continued our partnership with the Project for the Study of Alternative Education in South Africa (PRAESA) working on projects that are aimed at furthering translation rights for children in South Africa. In January we held a workshop with them on "Raising key issues for **transforming children's literacy and literature**", which was attended by visiting Swedish Minister of Culture and Democracy Alice Bah Kuhnke.

PEN SA Board Member Raymond Louw has been working on a project with PEN International looking at criminal defamation laws in Africa. The project is aimed at "Strengthening the Voice of African Writers in Civil Society to Promote Freedom of Expression and Democracy in Africa".

In March, PEN SA Board member Mark Heywood **shared a talk** he had given at the PEN Africa Network meeting in Johannesburg about the unique importance of the writers' voice in struggles for social justice. Towards the end of October **Heywood wrote about the State capture crisis** as well as Save South Africa's plans to address it and put out a call for creative responses to the crisis. **We published six of the submissions that we received, ranging from short fiction to poetry.**

In July we wrote to the South African Communications Minister **protesting the suspension of three SABC journalists** and later demanded the **reinstatement of the fired journalists at the broadcaster**. Together with PEN Afrikaans we released a **joint statement on the draft Copyright Amendment Bill** and then later we submitted the 2016 **Universal Periodic Review submission on human rights in South Africa** with PEN Afrikaans and PEN International.

We supported other PEN Centres and organisations in numerous campaigns on freedom of expression issues in other countries this year, including taking part in a **Worldwide Reading for Palestinian poet Ashraf Fayadh** who was been sentenced to death for apostasy in Saudi Arabia and in PEN International's **Day of the Imprisoned Writer campaign**. In February we joined the Committee to Protect Journalists and the Federation of African Journalists in an amicus initiative at the ECOWAS Court to challenge the "culture of persecution, violence and injustice" towards journalists in The Gambia. We also **wrote a letter** to Angolan President José Eduardo dos Santos and South African President Jacob Zuma urging them to ensure the release of the 17 Angolan activists, known as the Luanda Book Club.

This year PEN SA **awarded Raymond Louw the inaugural Freedom of Expression Champion Award**, which has been established to recognise the people and organisations in South Africa who help to ensure freedom of expression in the country.

"Freedom of expression provides the essence and relevance of life as it should be lived. Without it, inevitable opportunity for authoritarian rule leads to loss of freedom and imprisonment of our thoughts and minds. Protection of freedom of expression is essential if life is to have any meaning."

– Raymond Louw, Journalist, Editor, PEN South Africa Board Member

A portrait of Margie Orford, a woman with shoulder-length brown hair, wearing a dark blue top and a necklace with a small pendant. She is looking directly at the camera with a slight smile.

PARTNER PROFILES

“Freedom of expression, freedom of thought, the freedom to write what one likes, to say what one likes, is the foundational democratic right. It extends of course to the commitment to listen and to be in dialogue with other people – the prerequisite for a society in which self-expression, imagination, creativity and tolerance are celebrated.”

– Margie Orford, Author, *President Pen South Africa*

FREEDOM OF EXPRESSION INSTITUTE

In August 2016, South Africa hosted the most tightly contested local government elections in the country's relatively short history of democratic elections.⁴⁹ While previous elections received praise from observers and were recognised as free and fair, the lead-up to this year's election drew criticism from civil society and other human rights defenders, who condemned the government's increasing attempts to suppress free expression. In response to these threats, the work of the Freedom of Expression Institute (FXI) was focused primarily on activating existing expression related rights such as the right to protest; proactively extending established rights to information; and defending existing and new platforms of expression from legal and extra-legal limitations.

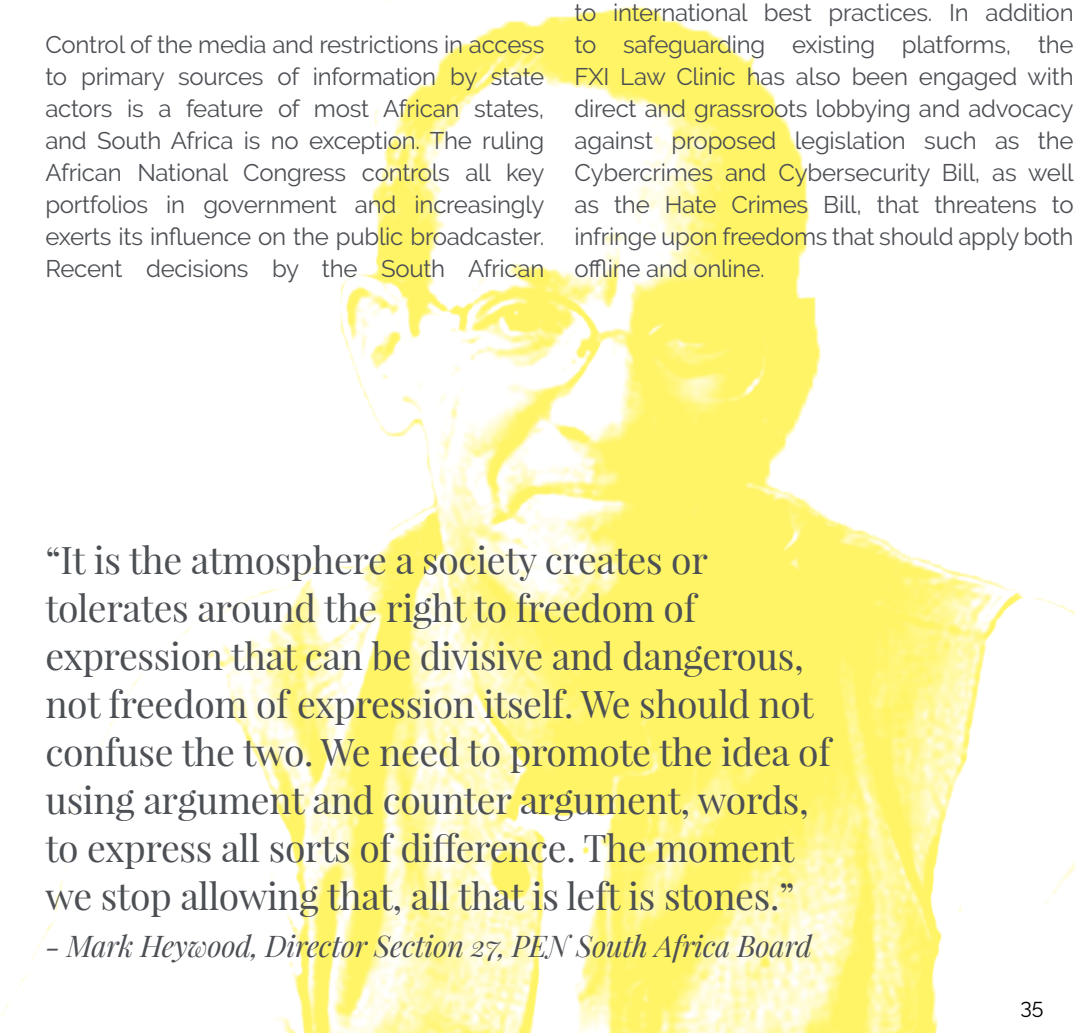
Community protests are commonplace in South Africa and as the country headed towards local government elections there was an increase in service delivery protests, particularly among the poorest in society.⁵⁰ In response, attempts to exercise the right to protest were met by increasingly repressive

attitudes and practices by local authorities, who should be tasked with the responsibility of administering the right.⁵¹ Interventions by the FXI were based on participatory research that revealed an extensive list of violations and abuses of the right to protest by local authorities in South Africa. The FXI has been working to strengthen the right to protest through the capacitation of community advice officers, enabling them to offer basic legal support to communities that are caught in cycles of protests. Through the Freedom of Expression Network⁵², the FXI has been able to train community activists in Mpumalanga, Free State, North West and the Northern Cape in the practical skills necessary to apply the Regulations of Gatherings Act. This has enabled community grievances to be highlighted more effectively without damage to property or loss of life. The FXI has also been involved in more proactive attempts to strengthen free expression through enhanced information rights. Vulnerable groups in marginalised peri-urban communities from Limpopo, Northern Cape and Gauteng face increasing challenges in accessing information,

primarily from local government authorities and private businesses, particularly mines, whose activities have a detrimental effect on the environment and health of communities in the Northern Cape and Limpopo. The FXI's outreach initiatives have been directly engaged in efforts to develop awareness and highlight the importance of access to information. Furthermore, the FXI has been actively supporting local community groups and authorities in developing the proactive and reactive capacity to ensure access to information that is critical in shaping opinions and making decisions.

Control of the media and restrictions in access to primary sources of information by state actors is a feature of most African states, and South Africa is no exception. The ruling African National Congress controls all key portfolios in government and increasingly exerts its influence on the public broadcaster. Recent decisions by the South African

Broadcasting Corporation (SABC) have called the broadcaster's editorial independence into question.⁵³ The effective censorship and filtering of news and information, particularly in light of the impending elections, was a matter that the FXI opposed by lodging a complaint with the communications regulator. The public broadcaster was compelled to comply with the ruling that it was illegal to censor the flow of news. Legal interventions and advocacy for strengthening of media and internet freedom has been at the core of the FXI's Law Clinic work, which is aimed at ensuring that laws and policies are aligned to international best practices. In addition to safeguarding existing platforms, the FXI Law Clinic has also been engaged with direct and grassroots lobbying and advocacy against proposed legislation such as the Cybercrimes and Cybersecurity Bill, as well as the Hate Crimes Bill, that threatens to infringe upon freedoms that should apply both offline and online.

A portrait of Mark Heywood, a man with glasses and a beard, wearing a light-colored shirt. The image is partially obscured by the text on the right page.

"It is the atmosphere a society creates or tolerates around the right to freedom of expression that can be divisive and dangerous, not freedom of expression itself. We should not confuse the two. We need to promote the idea of using argument and counter argument, words, to express all sorts of difference. The moment we stop allowing that, all that is left is stones."

- Mark Heywood, Director Section 27, PEN South Africa Board

The Right2Know⁵⁴ Campaign launched in August 2010 and is growing into South Africa's first post-apartheid movement centred on freedom of expression and access to information. We are a democratic, activist-driven campaign that strengthens and unites citizens to raise public awareness, mobilise communities and undertake research and targeted advocacy that aims to ensure the free flow of information necessary to meet people's social, economic, political and ecological needs and live free from want, in equality and in dignity.

In keeping with this commitment, the Right2Know Campaign now mobilises on three focuses:

STOP SECRECY

We aim to ensure security legislation and the conduct of security agencies – in particular the policing of gatherings – is aligned to the South African Constitution and underlying values.

INFORMATION ACCESS

We aim to ensure that public and private

sector information is easily accessible to citizens and that that people with information of wrongdoing and/or of the suppression of information in the public interest are free and encouraged to share information with the public.

COMMUNICATION RIGHTS

We aim to ensure that South Africa enjoys a free and diverse range of public, private and non-profit media and affordable access to the open and secure internet and telecommunications.

We current organise through three democratic provincial working groups based in Gauteng, KwaZulu-Natal and the Western Cape – as well as an elected national committee made up of representatives from key civil society organisations, community groups and social movements from across our support bases.

The Right2Know Campaign held its sixth National Summit in Glenwood, Durban, from 26-28 February 2016. The Summit consisted of delegates elected at Provincial

Summits in Gauteng, KwaZulu-Natal and the Western Cape, as well as members of the outgoing National Working Group and a number of observers from supporting organisations.

Delegates assessed the progress made since the fifth National Summit⁵⁵ (in February 2015) and the challenges and opportunities facing the campaign in the coming year. Delegates then developed and adopted resolutions and elected a 2015/16 National Working Group.

The full 2016 Summit report is available online⁵⁶ but some pertinent resolutions include:

SECRECY AND SURVEILLANCE

Noting the increasing reach of securocrats in closing democratic spaces, and noting that these issues are central to the challenges facing activist struggles across South Africa, R2K resolves to make the

1. following interventions:
Adopt "secrecy and surveillance" as the popular term for this leg of the campaign;
2. Prioritise the building of a popular

campaign against surveillance of activists.

MEDIA FREEDOM

1. In relation to media freedom, R2K resolves to:
Continue to campaign for free, independent and diverse media, including, and especially, in the community
2. media space;

Respond to legislative and regulatory threats, including the Secrecy Bill, the Broadcast Amendment

3. Bill, and the proposed Media Appeals Tribunal;
Engage on the Department of Communications' proposed media
4. transformation discussion document;

Campaign for the right to film and photograph the police and ensure the

rights of ordinary people and citizen journalists to record the police is protected.

INTERNET FREEDOM

1. **(#HANDSOFFOURINTERNET!)**
In relation to internet freedom, R2K resolves to:
2. Campaign for a free and open internet;

Fight back against attempts to censor the internet. This includes opposing the

Regulations and Amendment legislation

proposed by the Film and Publications Board and the draft Cybercrimes Bill.

RIGHT TO PROTEST

Recognising that the right to protest is a

1. growing and increasingly urgent part of the campaign's work on the ground, R2K resolves to make the following interventions:

R2K should ensure that the proposed Protest Hotline and dedicated protest attorney hosted by the Centre for Applied Legal Studies (CALS) is up and running in 2016. This also includes a strong legal support network of lawyers for protesters facing charges;

2. R2K must investigate what existing bail funds are available for arrested protesters,

and what steps need to be taken to ensure that arrested protesters have access to bail when needed. This must be finalised by the NWG's mid-term review in 2016;

3. We must also challenge the use of excessively high bail amounts that keep protesters in detention.
4. Push for progressive amendments to the Gatherings Act by supporting the legal challenges of the Act.
5. Challenge municipal bylaws that undermine our right to protest
6. Collect and publish evidence of abuses of the right to protest, and submit this as a complaint to the Cooperative Governance Ministry.

"It is very easy to see the rapidly eroding quality of South Africa's democracy – as measured by the number of continued threats and impositions on free expression – in the broader African context, and become pessimistic. But South Africa also remains a place of tremendous opportunity. Freedom of expression remains robustly protected under the country's supreme law, the constitution, and has been repeatedly affirmed in its courts. There remains a strong connective tissue between media organisations, civil society and wide sections of the political class too. This is evident in petitions, marches and court cases in defence of whistleblowers who get jailed, journalists whose freedom to report is threatened and in draconian policies which have yet to see the light of day. Thus while South Africa's challenges are unique in their enormity and severity, the response to them is also perhaps unprecedented on the African continent."

- Vinayak Bhardwaj, Right2Know Activist

MEDIA MONITORING AFRICA

Media Monitoring Africa was started in the run-up to the first democratic election in 1994, specifically to monitor the media coverage of political parties, as we knew that would be a critical element in declaring the elections free and fair. We have monitored all subsequent elections since that time in South Africa. The tragedy is that as we carried out monitoring of 73 media this year we found ourselves in a similar position as we did in 1994 with regard to the public broadcaster. Despite having some really good programmes that were clearly planned ensuring equitable coverage of parties, we found for the first time clear evidence of systemic bias on 3 of the SABC ' programmes. While overall coverage across the SABC 's platforms was largely fair around 90%) The programme s where we found clear bias is indicative of a downward trend towards self censorship and direct censorship within the SABC. In these cases we found that coverage clearly favoured the ANC. For example in cases where the ANC was a source in a news item in 65% of cases the item ANC would be clearly favoured. The findings raise critical questions of the SABC ability to deliver

free and fair coverage as well as whether it is able to meet its public service mandate.

Our core work has media monitoring at its base, which we do to help encourage ethical and quality reporting that promotes media freedom and human rights. So in addition to working with media to improve quality and provide useful tools we also advocate for media freedom. To achieve this we have a media quality and pilot programme that carries out focused research and also undertakes submissions on critical areas relevant to media. Most recently we completed a submission on the draft Film and Publications Amendment Bill, which seeks to allow significant encroachment on online freedom. We have also successfully convened meetings with diverse stakeholders, ensuring that we start to identify points of consensus and divergence on emerging media policy issues. Most recently we hosted a discussion focused on addressing hate speech crime and the draft Hate Crimes Bill. We had government, regulators, industry leaders like Facebook, advertisers, NGO's legal experts and child rights organisations.

As part of our quality and policy programme, as well as our governance and democracy programme, we also undertake strategic litigation. We currently have a range of cases running that are largely focused on the SABC. With this background, when the SABC took its decision to censor coverage of public protests, it made sense for us to take the lead in challenging the decision. We did this with two of our partners, SOS Coalition and FXI.

The case was a critical one as the ban was far-reaching, illogical and offensive. We are of course thrilled with the outcome of the Icasa ruling but see that we need to do a lot more to have a real impact. We have a range of activities and strategies planned to up the pressure. These including updating our suite of tools for citizens and journalists to help media do a better job and help citizens understand media power and hold media accountable, <http://www.newstools.co.za>

“I grew up with censorship, banned people, the state monopoly of radio and TV, a largely commercial print media and a small and often beleaguered array of brave voices to fight the erasures, droning certainties, monopolies and oppressive silences of apartheid, so of course I value the freedom to be able to think, read, consider, share, debate, critique and celebrate ideas. I also know that I live in a world of many views and uneven access to voicing them. Some voices are loud, some are commodified and some are violent, so voice is not the only measure of freedom. Simply to declare or simply to oppose are too simple. I’ve had to learn how to take seriously, empathetically and ethically those who have different views. I’ve had to learn how to listen. And even how to appreciate the textures of silence. As Africans who are often the objects of others’ voices, I’d like us always to call for context, history and complexity, and to testify how the appeal to the universal can be oppressive in itself.”

– Gabea Baderoon, Poet, PEN South Africa Boardt

BURNING ISSUES IN 2016



PENNY SPARROW & TWEETING RACIST SPEECH

In January 2016, South Africa was rocked by the realisation that even after 22 years of democracy and living in the “rainbow nation” there were still people who felt entirely justified in holding vile and racist views.

It started with a post from a part-time estate agent living in Durban, Penny Sparrow. She wrote on her Facebook wall about the number of black people that she had seen on Durban's beaches over the Christmas and New Year's holidays. What was most offensive was her description of black people as “monkeys” who bring “dirt” and litter on the beaches.⁵⁷

The post was published on Sparrow's private Facebook wall, but went viral after it was shared by people horrified at her statements, who were soon asking whether this was how some white people still spoke amongst themselves, when they thought nobody was listening.

In the uproar that followed, Sparrow and her daughter defended the statement by

saying Sparrow didn't mean anything rude by it since she likes monkeys.⁵⁸ In a South African context, however, it is well known that comparing black people to monkeys is a racist and malicious trope. Sparrow was fired from her job, and had to go into hiding as her home address and telephone numbers had been widely shared on social media.

The ANC brought Sparrow before the Equality Court, where she was found guilty of hate speech and fined R150,000. In late July 2016, Sparrow appeared in court to face criminal charges of crimen injuria.⁵⁹

During the immediate aftermath of Sparrow's initial Facebook post, radio and TV personality Gareth Cliff was fired from Idols SA for having defended her right to free speech (having disavowed its racist nature). His legal fight to be reinstated was successful, but it did bring to light the common misapprehension that freedom of expression in South Africa has no limitations.

Professor Pierre de Vos deals with this defence as follows:

When somebody defends the right of Penny Sparrow to say what she wishes (while indicating that they disapprove of her racism), that person is defending speech that is almost certainly not protected by the Constitution and definitely regulated by the Promotion of Equality and Prevention of Unfair Discrimination Act. [...]

In several opinions the South African Human Rights Commission – following Canadian Supreme Court jurisprudence – found that the harm envisaged

by section 16(2)(c) went beyond physical harm to include serious emotional harm. It thus argued that speech that constitutes incitement to inflict serious emotional harm on a group because of their race, ethnicity, gender or religion could constitute hate speech excluded from constitutional protection.

If this is correct, the kind of hate speech uttered by Penny Sparrow would constitute speech entirely unprotected by s16 of the Constitution. Any and every limitation of it would thus be constitutionally valid. Only a person who is uninformed about constitutional



law would therefore unequivocally claim that Penny Sparrow has a constitutional right to say what she did.⁶⁰

In the months that followed, South Africa saw a slew of similar incidents: posts on social media platforms or cellphone videos of incidents that contained implied or overt racist statements. Some were of black people advocating violence against white people as a punishment for racism.

In a commentary on hate speech in South Africa, Associate Director of the SA Jewish Board of Deputies, David Saks summarised this as follows:

There could be no doubt that Sparrow's comment, in view of the enormous hurt and anger it had caused, had been harmful, even if, strictly speaking, she had not directly incited harm against black people. Just as significantly, it had led directly to a flurry of anti-white responses, many of which clearly did constitute such incitement, including to actual violence.

One comment that was widely reported on was that of Gauteng government employee Velaphi Khumalo, who wrote that blacks should "cleanse this country of all white people", and "act as Hitler did to the Jews". However, his was just one of dozens of similar comments that appeared in reaction to the Sparrow post, and that went all but unnoticed at the time.

They included, "They killed our children and raped our sisters kill the Boer nizozwa soon!!!" and "The annihilation of the White devil is the

only thing that's [sic] heal this country." This demonstrated, we contended, how demeaning racial comments, even when non-threatening, could easily lead in turn to statements that do incite harm, even to the extent of advocating mass murder on the basis of race.⁶¹

The government has mooted a Prevention and Combating of Hate Crimes Bill. Professor Steven Friedman, Director of the Centre for the Study of Democracy, argues that such a bill would simply be a Band-Aid on an issue that needs serious engagement if it is to be eradicated:

The planned law is the sort of "solution" that this fixation with symptoms produces. It may rid us of the bigotry that inflames passions on social media, but it will do nothing to tackle the racism that really matters. We need a national conversation that acknowledges our failure to deal with race and begins to find ways of correcting this. Passing a law does not take us nearer to that discussion – it distracts us from it.

[...]

This is why the proposed law seems designed to make the problem go away, not to tackle it. Negotiating a way out of racism is difficult and risky. It may need tough bargaining and creative solutions. A law that targets a small band of obvious racists is the easy option. It enables the government to seem to be dealing with a problem it continues to avoid. Despite all the attempts to wish it away, racism remains this country's most serious problem. It needs a serious response; instead, we are offered a symptom dressed up as a cure.⁶²

The role of the media in reporting these incidents has also been put in the spotlight. In an article published in the Mail & Guardian in July⁶³, Dr Glenda Daniels considered whether freedom of expression protections "let racists off the hook". She argued that proponents of free speech would find the hate speech aspects of the Hate Crimes Bill difficult to swallow. In an analysis of the article, France News Headlines summarised Daniels's arguments for and against the proposition:

The free speech advocates argue that the right to offend is necessary for the sustenance of democracy. South Africa must avoid authoritarianism and social control. No one policy can satisfy everyone. Politics cannot exist without expression.

Others argue that unfettered hate speech reproduces inequality and therefore random rants have to be punished. Another view is that race is a social construct and there is only one race, the human race.⁶⁴

In the 8 November 2016 judgement, that helps shed light on what constitutes hate speech in the South African context (see section "Limits to FX in SA Constitution" above), the South African Constitutional Court said the following:

Revelations of our shameful and atrocious past, made to the Truth and Reconciliation Commission, were so shocking as to induce a strong sense of revulsion against racism in every sensible South African. But to still have some white South Africans address their African compatriots as monkeys, baboons or kaffirs and impugn their intellectual and leadership capabilities as inherently inferior by reason only of skin colour, suggests the opposite. And does in fact sound a very rude awakening call to all of us.⁶⁵

This ground-breaking judgement gives important guidance for South African jurisprudence and collective understanding of the limits of free expression in South Africa.

INTERNET GOVERNANCE

RIGHTS AND ACCESS⁶⁶

Currently, some laws are being contemplated, or are at various stages of enactment:

1. The Regulation of Interception of Communications and Provision of Communication-Related Information Act (RICA) is the overarching law governing domestic surveillance of cellphone and internet use:

- (a) It provides for mandatory installation of surveillance technology at Internet Service Providers and at cellphone companies; attached to this is the mandatory requirement for registration of cellphones and internet connections under the act.
- (b) It provides the grounds on which an interception order may be sought (by the police) from a specially designated court where a judge (RICA judge) adjudicates on the merits and issues a court

order sanctioning interception of communication (the equivalent in US may be the FISA court).

- (c) Very little information about the court's functioning is made available to the public. Its judgments are never released, even retrospectively. What information currently exists is provided in the annual reports of the Joint Standing Intelligence Committee (a parliamentary oversight committee). Although outdated – and often released to the public after much campaigning and advocacy – these appear to indicate a year-on-year increase in numbers of requests for interception sought (and approved) at the RICA court.
- (d) There are at least two court challenges to RICA. The first is amaBhungane, where managing partner and accomplished investigative journalist Sam Sole's own communications were

intercepted as he was investigating corruption charges relating to the president. The case is challenging the entire structure of the Act – although I am not specifically aware of the details of the legislation. There is certainly scope for international comparative law contribution in the form of an amicus brief.

2. Cybersecurity and Cybercrimes Bill: While a broad critique of this (very long) piece of legislation is beyond the scope of this note, a major concern is that the Bill also imposes potentially onerous obligations on electronic communications service providers, which are defined so widely that they will include any person or entity which transmits, receives, processes or stores data on behalf of any other person. In its current form, the Bill could have far-reaching consequences for any company that stores, uses and collects data for advertising or analytics or even broadcast or report on certain information. Other concerns highlighted by R2K include that:

- (a) It subjects oversight of the internet to the notorious state security

ministry, handing massive powers to unelected state security apparatus (offending clauses are: sections 51-57).

- (b) The Bill empowers the state security apparatus authority to declare parts of private networks "critical infrastructure" thus providing "backdoor" entry to private networks (Offending clauses: s1 – definition of NCII; s58(2) – powers to declare NCII; s58(5) – powers to regulate NCII).
- (c) Section 16 of the draft Bill introduces a range of offences under the banner of "computer-related espionage". These provisions make it an offence to "unlawfully and intentionally" possess, communicate, deliver, make available, or receive data "which is in possession of the State and which is classified". There is no public interest defence or any protections for whistleblowers and journalists. The penalty is anywhere from five to 15 years in jail with no option of a fine.

UCT & ACADEMIC FREEDOM LECTURE 2016

In July 2016, the University of Cape Town (UCT) decided to disinvite its speaker for the TB Davie Memorial Lecture on academic freedom: Flemming Rose, who as cultural editor of the Danish magazine Jyllands-Posten had in 2005 published a controversial series of cartoons depicting the Prophet Mohammed. In explaining its decision, the University's Acting Vice-Chancellor, Professor Francis Petersen, said:

The publication of the cartoons generated extensive debate and controversy globally, regarding freedom of speech, blasphemy and Islamophobia, and was accompanied by public protests, riots and even loss of life. [...]

The UCT Executive remains committed to academic freedom and freedom of expression and we view these rights as fundamental to our institutional culture. As with all rights, however, context and consequence are also critical. We recognise that UCT also has a paramount responsibility to the campus community.⁶⁷

In response, the UCT Academic Freedom Committee argued that rescinding the invitation acted against the very ideal for which the lecture is held:

Academic freedom is severely compromised when security and other pragmatic considerations preclude inviting speakers who – while controversial – in no way violate our Constitutional limitations on free speech. In light of the expected protest against Mr Rose's appearance, we had also planned, in consultation with Mr Rose, a panel discussion between him and his critics in order that disagreements related to tolerance and freedom of expression could be aired.

The AFC thus refused to rescind the invitation. We have subsequently been instructed by the Vice Chancellor, Dr Max Price, on behalf of the university Executive, that we will not be permitted to bring Mr Rose onto the campus. There will thus be no TB Davie Academic

Freedom Memorial Lecture in 2016. The book which bears the name of each TB Davie speaker since 1959 will carry an appropriate entry for 2016 reflecting this development.

We regret the Executive's decision and what it reveals about the limited scope of academic freedom at UCT. Ours should be a campus on which people are free to express and contest ideas, even unpopular ones.⁶⁸

Kenan Malik, who had delivered the 2015 TB Davie Memorial Lecture, wrote a commentary on the decision of the University to disinvite the Rose, expressing his dismay at the decision:

I appreciate that, as the letter puts it, "Our campuses have become charged spaces, in which ideological and social faultlines have become intensely politicised, sometimes violently so." I recognise the heat and friction generated by issues from the "Rhodes Must Fall" campaign to debates about Israel, and by the simmering conflicts, not just on campus but throughout the nation, over matters of race, religion, identity and representation. But it is precisely because there is such discord and tension that free speech becomes even more important. These issues cannot be resolved by censoring one view or the other, but only by open, robust debate. As I argued in my TB Davie lecture last year:

The university is a space for would-be adults to explore new ideas, to expand their knowledge, to interrogate power, to learn how to make an argument; a space within which students can be challenged, even upset or shocked or made angry. [...] To be at a university is to accept the

challenge of exploring one's own beliefs and responding to disagreement.

In disinviting Flemming Rose, in seeking to protect students from his views, in signalling that it would rather censor than risk conflict over contested ideas, the UCT executive suggests that it fails to understand the significance not merely of academic freedom but of the university, too.

Perhaps the most deplorable line in the UCT statement is the rhetorical question that asks "will progress on this issue be advanced by inviting someone who represents a provocatively – potentially violently – divisive view to make the case for a considered version of academic freedom that is avowedly sensitive to the concurrent rights to dignity and freedom from harm?"

It is deplorable because it appears to blame Rose for the violent actions of others. Rose has not been responsible for violence. He has, rather, been the object of death threats. If there were to be a violent protest against Rose on the UCT campus, why does the executive imagine that the issue would be Rose's "violently divisive view" rather than the actions of those who were violent?⁶⁹

In a subsequent statement, Rose gave the following response to his disinvitation:

I find it disgraceful that the Vice-Chancellor Mr [sic] Max Price puts the blame on me instead of taking responsibility for his decision. He is afraid that some people might react in certain ways to my presence. That's not my responsibility. If they choose to act in a way that concerns

the VC, it's their decision, not mine. The VC has to hold them responsible for their actions, not me. It's the heckler's veto. Mr Price talks about "the harm that unlimited freedom of expression could cause". I don't know any person including myself who is in favour of unlimited free speech, that's a caricature of free speech activists. What I oppose is the kind of "I am in favour of free speech, but"-position that Mr Price provides a classic example of. His approach to free speech would make it possible to ban any speech.⁷⁰

PEN SA released a statement, written by its President Margie Orford, in the days that followed. In an appeal reminiscent of Garton Ash's "robust civility" argument, the statement asked for a safe space for reasoned discussion of the issues highlighted by the UCT-Rose incident:

PEN South Africa has to make a response – issues like this one are at the heart of our work – and this issue has occupied the board and served as a lightning rod for a robust, thoughtful and invigorating debate between colleagues I respect and admire. We have discussed at length the nature of free speech, academic freedom, asymmetries of power and access in the context of South Africa's history and its complex and fractious present moment of radical re-imagining.

Freedom of speech carries with it the reciprocal obligation to listen. Many hold the view that free speech is a political and conceptual frame without which it is difficult, if not impossible, to defend the rights of individuals to say things that are disruptive, critical and

unsettling with safety. There are others who feel a more nuanced view is needed, that content – i.e. the nature of the speech that is defended – is important, as is context and history.

These discussions have been challenging and complex. Complexity takes time. South Africa and its universities are at a critical juncture in terms of defining themselves and how their freedoms of exercised. I have given this a great deal of thought – ably assisted by the members of the board.

It is for that reason that we are making use of the discursive space that PEN holds, an interrogative space in which members of the board and PEN members and members of the wider community can contribute to this discussion that goes to the heart of our identity as writers and as citizens.

The next newsletter will be in three weeks' time. At that point we will publish a range of opinions on this matter. All of us are fully committed to the principle of free speech and to academic freedoms but this seismic event has made all of us – me especially – consider how one takes this debate forward. How one ensures reciprocity and generosity of thought in a world increasingly riven by polarised views and a refusal of the views of others.

I look forward to your responses and to the conversation that will – I am sure – be very heated at times.

In the PEN South Africa newsletter dated 1 September 2016⁷¹, Margie Orford wrote the following summary of discussions and

responses that PEN had received on the issue – all of which are available on PEN's web site.⁷²

This unusual and disturbing event caused heated public discussion, including a response from the Academic Freedom Committee and pieces by Index on Censorship, Kenan Malik, David Benatar, Justin McCarthy, Mohammed Jameel Abdullah, Nathan Geffen and Pierre de Vos.

This debate – and the range of opinions expressed – were reflected in the deep and at times difficult conversations that the board of PEN South Africa had around our responses to the 'disinvitation' of a speaker whose views and whose actions are controversial and, to some people, deeply offensive.

This is a vital and highly complex conversation about free speech and academic freedom. It is a conversation that address its limits, its value, and its definitions in a world that is, both within the academy and without, grappling with how to hold the conversations that we need to have in order to shape a future that is inclusive, tolerant of diversity, and which addresses the great asymmetries of power and access that distort the world in which we live.

In order to honour this discussion, in order to hold that discursive space and to give the time needed to think through

these issues that go to the heart of our identities, our freedoms, and our ways of being together, I invited PEN South Africa members to [respond to this issue](#).

The essays published here are impassioned and thoughtful. The views are diverse and nuanced. Together they bring a vitality and an energy that will, I hope, inform the work that lies ahead of us as this part of an ongoing debate that needs principled thought each and every time such issues confront us.

My own view, as a writer and as a journalist, is that the principle of free speech – especially at a university, especially in South Africa's developing and often fractious democracy, especially in this troubled world of ours that is so filled with conflict and intolerance – is vital and should be defended. I am convinced that free speech is a principle that has sufficient tensile strength and responsiveness to provide a protective frame for the many women and men who express views that go against the grain. I believe too that the principle of dialogue, of discussion, of listening is equally important. I am persuaded that how this is done – in this context and at this time – needs thought, consideration and flexibility. For this I am indebted to my colleagues and fellow writers. This discussion is held in that spirit. I thank all of you who have taken the time to think and to write.

THE RESPONSES ARE LINKED BELOW:

1. [The Freedom to Rescind: Universal Freedoms, Freedom of Expression and](#)

[Academic Freedom – Reflecting on the events surrounding UCT's 2016 TB Davie lecture by Gabeba Baderoon and Nadia Davids](#)⁷³ – Gabeba Baderoon

is a poet, academic and journalist and is a member of the PEN SA Board. Nadia Davids is a writer, theatre-maker and scholar and is on the PEN SA Board.

2. **Raymond Louw Comments on UCT's Decision to Disinvite Flemming Rose⁷⁴** – Raymond Louw is the Vice-President of PEN SA and is a veteran journalist and media freedom activist.
3. **Albie Sachs: UCT Needs to be a Paragon of Tolerance⁷⁵** – Albie Sachs is an author, activist, and former Constitutional Court justice.
4. **Paul Trewhela: The Disinvitation of Flemming Rose is a Disgraceful Act of Effective Censorship⁷⁶** – Paul Trewhela is an author, journalist, activist and historian.
5. **Jacques Rousseau on UCT's Disinvitation of Flemming Rose⁷⁷** – Jacques Rousseau is an author, academic and activist, who was serving as the Chair of the Academic Freedom Committee during the time these events unfolded.
6. **Flemming Rose and Academic Freedom by Elisa Galgut⁷⁸** – Elisa Galgut is a poet and teaches in the Department of Philosophy at the University of Cape Town.
7. **Today's Lecture Has Been Cancelled by David Attwell⁷⁹** – David Attwell is an author and Professor of English at the University of York.
8. **Freedom of Speech by Gillian Godsell⁸⁰** – Gillian Godsell is a senior lecture at the Wits School of Governance.

9. **Let's Talk – Freedom of expression and the right to offend⁸¹** – Margie Orford spoke about the issue on **Salaamedia** with Farzanah Adam, an Islamic scholar, and journalist Azhar Vadi.
10. **"Academic freedom at the University of Cape Town^{82"}** by Jacques Rousseau.
11. **Free Speech and Islamic Thought by Farzanah Adam⁸³** – Farzanah Adam, also known as Umm Abdillah, is an Islamic scholar, radio presenter and media contributor.

SABC: PUBLIC BROADCASTER & PUBLIC PROTESTS

In May 2016, the COO of the South African Broadcasting Corporation (SABC), Hlaudi Motsoeneng, announced a 90 per cent quota for local programming.⁸⁴ The significance of this move can be better understood when the role and reach of the SABC is fully explained:

The SABC is the most important news institution in the country. Although there is significantly more competition in the broadcasting market than there was in 1994, the SABC remains the leader.

The top six most popular radio stations in the country are SABC stations, with isiZulu language station Ukhozi FM as the front-runner with 7.5 million listeners daily. SABC 1 and SABC 2 are the most popular television stations. SABC 1 has an audience share of 75.4% and SABC 2 of 70.4%. Free-to-air competitor e.tv is at 65%. For many lower LSM (or lifestyle measurement) listeners and viewers the SABC stations are the only stations they have access to.⁸⁵

Although the move raised concern, a subsequent executive directive at the SABC served to elicit condemnation and legal action. In a statement dated 26 May 2016, the SABC announced that it would no longer provide coverage of public protests.

In its statement, the broadcaster explained that it condemned the acts of public and private property vandalism and had made a decision that it would not show footage of people burning public institutions, like schools, in any of its news bulletins.

We are not going to provide publicity to such actions that are destructive and regressive. [...] The SABC's Chief Operations Officer, Mr Hlaudi Motsoeneng, stated that, "It is regrettable that these actions are disrupting many lives and as a responsible public institution we will not assist these individuals to push their agenda that seeks media attention."⁸⁶

The South African National Editors' Forum (Sanef) immediately released a statement⁸⁷

condemning the statement, describing it as "censorship on a slippery slope of Mount Everest proportions":

The announcement by the SABC that it would henceforth not broadcast footage of "destruction of property" during news bulletins is unfortunate and shocking. Whilst it is every media house's prerogative to formulate editorial policy about what to publish or broadcast, such policy, in line with the public mandate of media, has to be in the public interest. [...]

This country has been here before, when the apartheid regime blamed media and particularly TV cameras for the spreading nationwide uprisings of the time. It ended with the police barring journalists from areas where protests were taking place. A picture of false peace was being manufactured. The SABC followed the government dictate at the time.

They failed then to mislead and hide information as people lost all confidence in the news provided by the SABC and instead turned to newspapers and foreign media for a true picture of what was happening. The SABC changed from being the mouthpiece of government when democracy dawned, and this unfortunate decision returns the broadcaster into a past it should not be associated with. [...]

... the decision constitutes clear censorship. Some have argued against it, citing issues from there being too much violence on TV to asking us to think about how we cover violence. These are legitimate questions but are also red herrings, where the decision is not to

debate or discuss or allow for nuance but simply to censor.

Like the apartheid censors of old, the decision as vague and sweeping as it is doesn't allow for discussion but a Verwoerdian approach that encourages journalists to censor first and think later. It is censorship on a slippery slope of Mount Everest proportions.

The next crisis that hit was the suspension and subsequent firing of eight SABC journalists for contravening the order banning the coverage of public protests. When the first three were suspended (for covering a protest against the ban), PEN South Africa released the following statement:

PEN South Africa has expressed a strong protest at the suspension of three senior South African Broadcasting Corporation (SABC) journalists apparently for protesting at a news conference at an order prohibiting them from covering a Right2Know protest outside the SABC headquarters in Auckland Park, Johannesburg. [...]

The Right2Know protest was directed at the recent decision of Chief Operating Officer Hlaudi Motsoeneng to ban picture coverage of public violence such as the torching of public buildings, among them schools, and buses.

The South African National Editors' Forum (Sanef) said it was shocked by the suspension of the three journalists. It stated: "Sanef urges the SABC to immediately lift the suspensions of these journalists. Journalists in a constitutional democracy have a right to express themselves freely." [...]

PEN South Africa joins Sanef in its call for the release of the journalists who were voicing a protest at a routine discussion of the news coverage of the broadcaster, one of a number of robust discussions over news coverage that take place daily at broadcasting studios. PEN South Africa also calls on the SABC to drop the ban on protest picture coverage which constitutes strict censorship which is unacceptable conduct by a public broadcaster supported by taxpayers' funds.

In the meantime, the SABC continued to face mounting criticism over Motsoeneng's censorship order. On 1 June the Complaints and Compliance Committee of Icasa (Independent Communications Authority of South Africa) heard a complaint by three NGOs – the Trustees of the Media Monitoring Project Benefit Trust, the Freedom of Expression Institute and the SOS: Support Public Broadcasting Coalition – that the order was unlawful as it breached a number of laws and professional codes relating to the conduct of the SABC news services.

Icasa's ruling, delivered on 11 July, was that the broadcaster was obliged to withdraw the ban. In an analysis of the ruling, News24 provided the following breakdown of the 22-page ruling:

- The SABC decision prohibited, in absolute terms, that the burning of public property be shown on television. That is a matter of public interest;
- Even if it were true that the SABC decision was not traditional pre-censorship, the order blocks information of a certain kind categorically, which, according to a similar 2009 court precedent regarding images of a sexual nature, was declared

unconstitutional by the Constitutional Court;

- Section 6 of the Broadcasting Act "enjoins the SABC to encourage the development of South African expression by providing a wide range of programming that offers a plurality of views and a variety of news, information and analysis from a South African point of view, and advances the national and public interest";
- The SABC's decision places an absolute ban on a subject. A subject, as such, may never be blocked from SABC television or radio – South Africa is not, as in the apartheid era, a dictatorship. The Broadcasting Code does, indeed, place certain limits on the screening of violence, but that Code may only be applied under certain provisions. This provision clearly does not provide for an absolute ban on violence;
- The SABC is subject to the provisions contained in its own licenses. In terms of its licence conditions, the SABC is required in the production of its news and current affairs to: meet the highest standards of journalistic professionalism and practices;
- The SABC's decision in the matter amounts to a categorical blocking of the public's right to information, in conflict with the Broadcasting Act and the public interest, the Constitution and the licence conditions of the SABC;
- The SABC's decision in the matter amounts to a categorical blocking of the public's right to information, in conflict with the Broadcasting Act and the public interest, the Constitution and the licence conditions of the SABC;

"Our conclusion is that the SABC has acted outside its powers in taking the decision as published in the 26 May statement.

"Ultimately, one of the core values in terms of our Constitution is legality and the decision of the SABC did not comply with this central constitutional value."⁸⁸

The SABC at first refused to comply with the Icas decision, but then indicated it would abide by the order.⁸⁹ It reinstated seven of the eight journalists – all except one who was employed as a contractor rather than a full-time employee. The case of that journalist has been since taken to court.

On 20 July 2016, the SABC announced that it would reverse its ban.⁹⁰ As of mid-September 2016, however, it was still unclear whether the SABC was complying with the ruling in practice.⁹¹

When asked by The Conversation whether the SABC could be salvaged, Kate Skinner, of the

SOS: Support Public Broadcasting Coalition, emphasised that the national broadcaster is a "public resource".⁹² Noting that the lifting of the suspension of its journalists was important, Skinner also pointed out the importance of the role of the SABC board:

They [civil society organisations and the South African Communist Party] have called on parliament to reconstitute the board on an urgent basis. They have demanded that the minister of communications be fired for colluding with Motsoeneng and allowing new editorial policies to be passed illegally. And they have called for a presidential commission of inquiry. These are important demands.

In the long term, however, the Broadcasting Act must be repealed. We need new legislation that better protects the independence of the SABC and ensures more public funding.

FILM AND PRODUCTION BOARD

In July 2015, the Film and Publication Board (FPB) accepted the Press Council of South Africa's proposal that complaints against items published on the internet and social media be adjudicated by the Press Ombudsman – if both complainant and defendant agree – and the Press Council amended its Press Code to provide for online complaints and hearings.

However, PEN remains greatly concerned about the Films and Publications Amendment Bill currently under discussion in parliament⁹³ and the revised FPB regulations, which would allow it to control statements, messages and other views expressed on the internet and in online media. These moves

could result in restraints on freedom of expression for the public at large.⁹⁴

The FPB's move can be viewed as part of a worldwide appraisal of the effects of an uncontrolled internet environment and is aimed at regulating the online views of bloggers and users of Twitter, Facebook, YouTube and other social media.⁹⁵

The FPB relates its proposals to the need to protect children from exposure to disturbing and harmful content and to curb the advocacy of racist ideologies, but PEN and many non-governmental organisations in South Africa regard the proposed FPB regulations as draconian and call for their withdrawal.

SAFETY OF JOURNALISTS

In addition to the situation facing journalists at the SABC, PEN is also concerned about the safety of journalists throughout the country – working in both public and private newsrooms – and their ability to deliver quality and informative news without undue influence or pressure.

There have been instances of journalists being harassed by state actors in the period under review – including false arrests for

coverage of police action – as well as facing physical danger while covering stories owing to crime or malicious attacks. Such incidences include police officers confiscating footage of protests, despite it being within the journalist's legal rights to record police action. In other instances, journalists have been physically followed and had their telephones tapped or their email hacked while covering important stories.⁹⁶

SOUTH AFRICA'S FAILURE TO UPHOLD FREE EXPRESSION STANDARDS AT THE HUMAN RIGHTS COUNCIL

South Africa largely failed to utilise its membership of the United Nations Human Rights Council to support resolutions that would have helped the promotion and protection of human rights in various countries, most notably in North Korea, Syria, Sri Lanka and Iran. The state's voting record on country-specific situations and rights issues has been considerably disappointing. For example, at the March 2014 session, South Africa sought to weaken a resolution on the right to protest peacefully, jointly with Russia, Ethiopia, Saudi Arabia, Egypt and China.

Contrary to its stance of repeatedly supporting resolutions on Palestine, South Africa

abstained on the votes of all other country situations, including on North Korea, Syria, Sri Lanka and Iran. Despite the fact that country resolutions play a key role in shedding light on abuses and giving a stronger voice to victims, South Africa has justified its actions by arguing that it does not support the council's work on country-specific situations because such measures and resolutions are perceived as highly politicised and divisive.

South Africa also initially failed to support the candidacy of the Committee to Protect Journalists (CPJ) at the Human Rights Council in May 2016, which PEN believes was inconsistent with the country's Constitution.⁹⁷

SOCIETAL BIAS AGAINST INDIGENOUS LANGUAGES AND HAIR

In the second half of the year, there were bouts of protest by, especially, black female

students in South African schools have highlighted some deep-seated biases entrenched in South Africa's education system, carried over from the days of apartheid. While black females were the most vocal in their protest over hair regulations that did not allow them to be proudly African, a broad-based protest against restrictive language use and quite militaristic hair rules resulted. Of huge concern was that some students mentioned that they were fined for speaking their own languages, which are any languages other than English, in school.⁹⁸

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