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Conference theme: Towards Media Diversity

Topic: Freedom of Expression v Censorship

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Preamble

Comrades, colleagues and friends:

Before embarking on the hazardous journey of evaluating and contrasting the right to freedom of expression as opposed to censorship, I think the wisdom of the constitutional court on how we should handle this difficult relationship is apposite. The court has warned that;

“Having regard to our recent past of thought control, censorship and enforced conformity to governmental theories, freedom of expression — the free and open exchange of ideas — is.... all the more important to us in this country because our democracy is not yet firmly established and must feel its way. Therefore we should be particularly astute to outlaw any form of thought control, however respectably dressed.” (*S v Mamabolo [ETV, Business Day and the Freedom of Expression Institute Intervening]*, para 37).

Introduction

It is a basic principle of human rights, that for a robust, vibrant and active democratic society to exist, individuals must be given the leeway to form and express opinions and ideas on a wide range of matters even when these expressions are deemed to be controversial.

Freedom of expression and its mortal enemy censorship, co-exist in an extremely fractious relationship, with the former basically striving to push the limitations imposed by the latter, while the latter attempts to circumscribe the boundaries to which the former should exist.

The tension between the right of individuals to say what they will, on the one hand, and the limitations against that right, on the other, will form the subject of my inquiry this morning.

Defining terms

What is freedom of expression?

Expression comes from the word “express”, and it means different things to different people. Its basic formulation however is that it is the act of representing or making known a person’s thoughts or feelings, in words or by way of gestures or conduct. Loosely defined, it is the ability of people in society to say or do what they feel like, in the form, which they like.

What I think is rather interesting is that society’s regulation of what people say or express and the way in which they do it, determines in turn, how people become “impressed” or influenced and the manner in which they react. Surprisingly though, people hardly talk about the right to be impressed. If every person has a right to expression, then the corollary to that right is that every person too should have a right to be impressed.

Nonetheless, the one thing that both expression and impression have in common is that they relate to an individual’s interaction with the external environment but in different ways. Expression is the outward projection of an individual’s internalised world, while impression on the other hand, is the inward projection of that external world. Society has battled for ages to determine the precise nature and ambit of the outward projection of the human mind.

What is censorship?

Put bluntly, censorship is the act of determining how individuals in society can or should be impressed, and in turn therefore, how they should behave. It can however also be interpreted as the act of assessing and determining the viability of certain ideas or communications. Since the rise of the nation state, it has more commonly been associated with official activity, its most portent form being the traditional government censor who examines printed or electronic material before its release for public consumption.

In the democratic world presumably, this erstwhile state monster is largely extinct, but censorship has not by any means been eliminated. On the contrary, it continues to exist in much more subtle forms and guises, and its effect in general is to decree the way individuals in society should enjoy and exercise the right to express themselves.

The constitution, freedom of expression and censorship

Unfortunately, our constitution does not provide us with a basic definition of what freedom of expression is. It has instead elaborated on the various components that make up the right to freedom of expression. Section 16 of the constitution states that-

- (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.

However, the freedoms identified above are not absolute and they are limited in a number of important ways. Firstly they do not, as section 16(2) of the constitution cautions, 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.

Secondly, freedom of expression may also be restricted in a manner, which complies with the requirements of section 36 of the constitution. The test for such limitation is that it must be reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom, taking into account a number of factors including the nature and extent of the proposed limitation.

We therefore need to understand that censorship is not *per se* unconstitutional, it can continue to exist as long as it complies with the criteria laid down by the constitution. Whether or not we agree with this constitutional framework is a different argument altogether. But having recently emerged from a very repressive past, it must be appreciated that there is a wide diversity of voices and ideas in South Africa, contesting the very notion of whether freedom of expression should even be constitutionally limited in the first place. We at the Freedom of Expression Institute have taken an unequivocal stand that we are opposed to all forms of censorship.

Balancing the tension between the right to freedom of expression and limiting those rights in the interests of individuals and society in general, has become a test of strength for the country's judicial system. In a rapidly growing body of jurisprudence, courts have endeavored to accentuate the widest possible interpretation of the right to freedom of expression, while at the same time giving probity to other core rights in the constitution.

For instance, the constitutional court, which is the highest judicial tribunal in the country, has observed that the right to freedom of expression is part of a web of 'of mutually supporting rights'. The court has identified these other contiguous rights as including the freedom of religion, belief and opinion, the right to dignity, the right to freedom of association, the right to vote and to stand for public office, and the right to assembly.ⁱⁱ

But then, it is also recognised and accepted that the right to freedom of expression competes with other basic freedoms such as the right to dignity and privacy. Freedom of expression cannot be used to override other rights, freedoms and values that a democratic society seeks to engender. It must therefore be constructed in such a way that its own enjoyment determines and is also to an extent determined, within the existing spectrum of other basic rights.

Let me now turn to some specific aspects of freedom of expression and their contest against the limitations circumscribed by censorship.

Media freedom and censorship

Protection of media sources

Media plays a critical role in shaping the ability of individuals to participate effectively in the normal life of a society. It is out of such recognition that the right of the media to operate freely without interference is constitutionally recognised and protected as part of the core freedoms in section 16 of the constitution. It has been said that the manner in which the media carry out their constitutional mandate has a significant impact on the development of a democratic society (**The Holomisa Case**).ⁱⁱⁱ

Nevertheless, media still comes under severe strain due to a number of factors, but mainly as a result of the existence of censorious legislation, the threat of defamation and the activities of public and private entities.

Presently, one notable restraint on the right of the media to operate freely relates to section 205 of the Criminal Procedure Act (No. 51 of 1977). This is the (in) famous ‘reveal your sources’ clause. It empowers a judge or magistrate, at the request of a prosecutor, to subpoena any person to give information, which they hold and which is necessary for the ‘administration of justice’ and the ‘maintenance of law and order’. A person who fails to comply with the requirements of the subpoena is liable to imprisonment for a term of up to five years (More of this section will be discussed below).

This particular section, which is one of several bequests from the previous regime, was a much-favored weapon by apartheid practitioners to stifle press freedom and political dissent. It has been condemned as “an intimidatory piece of legislation masquerading as criminal law, designed to inhibit the expression and publication of certain points of view, and to save the police from having to collect information for themselves.”^{iv}

Journalists and those of us who support greater press freedom argue that the presence of this provision interferes unjustifiably with the right of media practitioners to operate freely and its chilling effect is likely to deter many journalists from pursuing information fearlessly. Its most severe effect is that sources of information can dry up or journalists could become exposed to danger and threats to their life if they are perceived to be informing and collaborating with the police.

Unfortunately, in our view, even the South African National Editors' Forum (Sanef) appears not to see matters this way. The forum has entered into an understanding with the Department of Justice and also Safety and Security that they will cooperate with the National Director of Public Prosecutions where subpoenas are issued against journalists. The only presumable safeguard is that Sanef will first be consulted before a subpoena is issued.

We consider this to be quite disturbing, bearing in mind that journalists will increasingly be forced to weigh the consequences of pursuing certain information, and knowing full well that their editors are likely abandon them when the police come beckoning.

Defamation

It has been said that the common law of defamation "lies at the intersection of freedom of speech and the protection of reputation or good name."^v The threat of defamation weighs heavily on the minds of journalists, editors and publishers because legal costs and damages are exorbitant and they will be reluctant to publish things that may result in litigation.

In the recent past however, defamation has come under increasing constitutional scrutiny and though the court has held that the common law of defamation is not inconsistent with the constitution, an important dimension has been added to the normal defenses of justification, privilege, fair comment, truth and public interest. Defendants, especially the press, can now argue that the publication of certain information was reasonable in all circumstances, a ground developed by the Supreme Court of Appeal in the *Bogoshi* Case,^{vi} and cited with approval by the Constitutional Court in the *Holomisa Case*.

Freedom of expression and censorship legislation

There still exists a wide array of legislation inherited from the apartheid era that the state is occasionally making use of, in order to circumscribe the right to freedom of expression.

In 1994, the FXI in conjunction with the Centre for Applied Legal Studies (CALS) of the University of Witwatersrand conducted an audit (updated in 2000), of legislation infringing on freedom of expression in the country. This audit identified a variety of laws, which impinge on the right of individuals to receive or impart information and ideas. They include for example-

- The Protection of Information Act (84 of 1982);
- The Defence Act (44 of 1957);
- The Armaments Development and Production Act (57 of 1968);
- The Criminal Procedure Act (51 of 1977); and,
- The Magistrate's Courts Act (32 of 1944).

Clauses, which limit the right to freedom of expression, are also being introduced in new legislation. For example section 10 and 12 of the Promotion of Equality and Prevention of Unfair Discrimination Act (4 of 2000) purports to regulate hate speech, while several

sections of the Promotion of Access to Information Act (2 of 2000) set grounds upon which access to information may be refused.

Similarly, the Protected Disclosures Act (26 of 2000), which is meant to safeguard whistleblowers, provides for very stringent circumstances in which it is appropriate to make disclosures, and in certain circumstances, an employee will not be sure whether he or she is committing an offence by disclosing particular information.

We must also take cognisance of the potential threat to freedom of expression posed by draft legislation such as the Interception and Monitoring Bill (2001) and the Prohibition of Hate Speech Bill. Most importantly, we must be vigilant against the ramifications of the now shelved Anti-Terrorism Bill (2000), particularly in light of post-September 11th events and the so-called war against terror.

Censorship trends in South Africa today

In the last few years, we have witnessed an upswing in censorship in South Africa, and it is becoming increasingly certain that more and more limitations are being imposed on the right to freedom of expression. This censorship is taking place at both state and private sector level.

On average, we handle about two to three cases of censorship every week, and these range from journalists being threatened for writing 'contentious' articles, to the banning of songs because they are 'obscene'. We have also come to the aid of individuals who have been threatened with legal action supposedly for copyright infringement. Below, I'll briefly highlight some of the cases in which we have intervened or which we have become aware of in the course of our work.

- **The Benny Gool case**

The most publicised case involving state attempts to interfere with media freedom, is that of the bid to force journalists to testify in the murder trial of Pagad members. This resulted from the August 1996 murder in Cape Town of Hard Livings Gang leader Rashaad Staggie.

Various media organisations were issued with subpoenas to appear in Court and testify on behalf of the state. Benny Gool, a former chief photographer for the Cape Times was also subpoenaed to testify on 14 May 2001, but he refused to comply citing the fact that as a journalist, this would compromise his ethics and his ability to operate as he will be seen as an extension of the police. He also argued that that to testify in court would put his life in danger, bearing in mind that a large number of witnesses relating to the case had been killed.

The state ultimately decided not to pursue his evidence and finally the case was dismissed owing largely to a major public campaign launched by the FXI and other media bodies to defend him.

- **The Vanderbijlpark community and Iscor**

In February this year, Iscor applied for and was granted a gagging order by the Johannesburg High Court prohibiting its employees and residents of Vanderbijlpark from communicating with the media on any matter connected with a case, which the community has filed against Iscor for serious pollution of their environment.

Ostensibly, the community also supported this move but discussions held between the FXI and community members have established that Iscor coerced the residents into accepting the order on the threat of bringing a motion for dismissal of the case, if they did not concede.

Undoubtedly, this order is a serious transgression of the right to freedom of expression, because it has violated not only the right of the community to receive and impart ideas, but also the right of the press and other media to investigate and publicise the matter. The public has also been denied the right to be informed about the proceedings and the matters in dispute in Vanderbijlpark.

- **Mbongeni Ngema's song "*Amandiya*"**

If there is one thing which has captured the minds (not the hearts apparently) of the majority of the people in this country for the past few months, then it is Mbongeni Ngema's song "*Amandiya*". To date, the question still being debated is whether or not this song amounts to "Hate Speech".

It's opponents have contended that it vilifies and demeans the entire Indian community, while its supporters and defenders argue that the writer is merely expressing the feelings of the common Zulu man and woman on the streets and townships of Durban.

In this cacophony, salient issues relating to, on the one hand, an individual's right to freedom of expression, and on the other, a restriction of that freedom in the interests of other people's dignity and privacy appear to have been lost.

Unfortunately, this confusion has not been made less intractable by the decision taken by the Broadcasting Complaints Commission of South Africa (BCCSA), and the Film and Publication Board (FPB), to ban and restrict the song respectively.

Putting Ngema's intention of writing the song on one side, a major problem, which has attended both press and public debates, relates to the way in which the lyrics are to be translated and interpreted. For instance the BCCSA relies on an expert translation of one of the lines which it then interprets as a call to "courageous men" to be "delegate[d] to the Indians", while the FPB interprets the same line as a call to "brave men" to "confront Indians".

Obviously, the way a delegated group of Zulus would engage the Indians is very different from the way another group would have to “confront” them. The question therefore is, which of these two positions is the correct translation and interpretation?

Another interesting point is the way both the BCCSA and the FPB understand the preamble to the song. The former finds that Ngema shows good faith when he says that his intention is to begin a constructive dialogue that could lead to reconciliation between the Zulus and the Indians. The FPB on the other hand thinks that here, Ngema is trying to be clever so as to conceal his real intention, which is to inflame relations between the two communities.

There is still a third point and one that has not been engaged with sufficiently. This relates to the argument made by the South African Human Rights Commission that the song is “*offensive to... feelings of sections of the population*”, contrary to the Code of Conduct of the Broadcasting Complaint’s Commissions’, as well as the Code of Conduct of the Independent Communications Authority of South Africa (Icasa).

This “offensiveness” criterion needs to be treated with a great deal of circumspection because it has a dubious and notorious history. It was extensively used by the apartheid regime to stifle political dissent and it was repealed from the statute books in 1993 in order to facilitate a robust political climate on the eve of the 1994 elections. Nonetheless, it has survived and found its way into the codes of conduct of the BCCSA and the Icasas.

What is crucial in any event is that in April 2002, the Constitutional Court, in the *Islamic Unity Convention Case* ruled that this particular section is unconstitutional because it “impermissibly limits the right to freedom of expression”^{vii}

While the debate played itself out in the public gallery, *Amandiya* eventually appeared before the court and on 10 June 2002, the local division of the Durban High Court granted a temporary interdict against Ngema and Universal Music ordering them not publish, market, distribute or sell the song. This order was subsequently set aside on June 28 by a different judge.

In setting aside the interdict, the judge pointed out that though the song is clearly racist, and though the complainant has argued that it is likely to provoke attacks against Indians, he had on the contrary found no reference to any incident of violence, which occurred as a result of its words. Again and most importantly, he stated that in spite of the fact that racist speech must be condemned and avoided, it is not of itself prohibited by the Constitution.

According to the hate speech clause, advocacy of racial hatred must simultaneously be accompanied by an identifiable incitement to cause harm and this certainly is not the case with “*Amandiya*”.

- **SABC and the lovelife advert, Umhlobo Wenene FM and “We Makoti”**

Last week, The SABC banned an advert on HIV/AIDS by LoveLife featuring renowned comedian Pieter-Dirk Uys, allegedly because its language is “obscene”. The offending words in Afrikaans are “... *want Afrikaanse kinders naai ook...*”

Similarly, *Umhlobo Wenene*, an SABC public service radio station based in Port Elizabeth, has banned a Kwaito song “*We Makoti*” by artist Siviwe Macozoma apparently because its Xhosa lyrics, are “sexually explicit”.

After we complained about these acts of censorship, we received a reply from the SABC saying that it has the right to remove material which, at its sole discretion, it considers to be contrary to its editorial code, editorial integrity and corporate policy. It also stated that it did not feel that bad language serves a more useful purpose than other forms of expression. Umhlobo Wenene has faxed us a letter denying having ever banned the song.

The question though is, if these policies are already in place, why did the advert and song slip through in the first place? That notwithstanding however, obscenity as a limitation to the right to free expression is not mentioned anywhere in section 16 of the constitution. It is highly doubtful that it would pass the rigid test required by section 36 as well.

Conclusion

Let us not forget the lessons of history because it is but a short walk down the slippery slope into the dark past. As time goes by, the temptation to censor and clamp down on ideas and forms of expression, which we do not agree with will become too hard to resist. The continued presence of apartheid-era censorship legislation in the statute books, the introduction of more censorship clauses and the increasing intolerance being depicted towards the various forms of expression should serve as sufficient warning.

I thank you.

Notes:

ⁱ The Writer is the coordinator of the Anti-Censorship Programme at the Freedom of Expression Institute in Johannesburg.

ⁱⁱ *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (5) BCLR 433 (CC), para 26.

ⁱⁱⁱ Constitutional Court in the case of *Fred Khumalo and Others v Bantu Holomisa*.

^{iv} Christopher Merret, *A Culture of Censorship: Secrecy and Intellectual Repression in South Africa*, 208.

^v *Argus Printing and Publishing Co Ltd v Esselen's Estate* 1994 (2) SA 1 (A) at 25 B-E.

^{vi} *National Media and Others Ltd v Bogoshi* 1998 (4) SA 1196 (SCA).

^{vii} *Islamic Unity Convention Case*, (supra), para 51.