



**Mpumalanga Provincial Government  
Press freedom day celebration  
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**The right to freedom of expression v  
Censorship: Where do we strike a balance?**

By Simon Kimani Ndung'u<sup>i</sup>

**Preamble**

Comrades, colleagues and friends:

Before embarking on the hazardous journey of evaluating and contrasting the right to freedom of expression with 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 brief presentation 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.

### **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 is freedom of expression. It has instead elaborated on the various components that make up this right. 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 body 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.<sup>ii</sup>

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 nurture. It must 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.

## **Media freedom and censorship**

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**).<sup>iii</sup>

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.

For instance government is increasingly resorting to restrictive legislation inherited from the apartheid era to restrain the media from reporting about “sensitive” matters such as the controversial arms deal. State institutions and the private sector have also joined this bandwagon and are using the law of defamation to limit the ambit of a free and vibrant media. Much more recently, journalists have been subjected to attacks, harassment and intimidation for reporting unfavorably about the activities of certain individuals.

It is especially because of this ominous rise in censorship at both public and private spheres that the media and civil society in South Africa should become more astute and vigilant to defend its territory. Companies and corporations have been known to withdraw their advertising contracts with media houses for reporting unfavourably about their activities.

But threats against media freedom are not only coming from the outside, they are also originating from within the media sector itself. At the end of July, the SABC banned an advert featuring re-known comedian Pieter-Dirk Uys allegedly because its language was “obscene”. In the same month, an SABC station was reported to have banned a Kwaito song because its lyrics were deemed ‘offensive’.

A worrying and dangerous trend that seems to have emerged post September eleventh is the tendency by many governments to restrict media freedom under the guise of national security and the war against terrorism. Increasingly, the media has found itself constrained by clauses which determine how information is to be acquired and disseminated.

The second piece of legislation, which raises a very worrying spectre for press freedom is the Interception of Communications Bill. This Bill allows for the monitoring and interception of communications whether in printed or electronic form, and prohibits any kind of communication that is incapable of being monitored and intercepted. In other words, the state will lawfully tap into correspondence, news, faxes, speeches, visual images or sounds between individuals and organisations in South Africa almost at will.

The prospect of abuse and the violation of individual rights including the right to freedom of expression and privacy will no doubt be exceedingly high. Journalists may soon find themselves stuck between a rock and hard place as whatever information that they may obtain in their ordinary news gathering activities may be intercepted, and if not intercepted, the state could lawfully force them to reveal it.

### **Concluding remarks**

For a vibrant press to exist, a healthy and enabling atmosphere must be encouraged and fostered by the state and society in general. It is a matter of great concern therefore that the many gains secured after a long and protracted struggle for an independent and critical media in South Africa, are slowly but surely being whittled away. The press needs to reflect on its role in a changing society and once again move to the forefront of protecting and advancing the right to freedom of expression.

Censorship has no place in a democratic society like ours and the protection of other rights must not be used as an excuse to violate the ability of each individual to express himself or herself freely. These rights enjoy equal prominence and must therefore be elevated to the same plane, not some of them at the expense of others.

I thank you.

### **Notes:**

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

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

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