



## **Freedom of Expression Institute (FXI)**

***FIRST PROGRESS REPORT TO OPEN SOCIETY FOUNDATION  
OF SOUTH AFRICA FOR CONTRACT 02315***

***for the period August 2005 to July 2006***

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***Prepared by the Anti-Censorship Programme of the FXI***

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## 1. Executive Summary

At the risk of repetition, we need to note that the FXI's constant insistence in the past few years that the main terrain of struggle in respect of the right to freedom of expression in South Africa is in the realm of the struggle around socio-economic rights, particularly the delivery of basic services. Events during the period under review in this report bear testimony to this fact. As do the statistics provided in parliament by the Minister of Safety and Security, Charles Nqakula, that there were almost 6,000 protests all over South Africa in 2005. Close to one-sixth of these were illegal and the bulk of them were regarding service delivery. The injustices and inequalities of the past continue to plague South African society and issues of basic civil and socio-economic rights continue to haunt the poor.

Government's failure to deliver basic services to a wide range of people across the country has led to widespread protest action by concerned citizen groups. These groups, emerging sporadically around social issues, have rallied concerned citizens formations into popular mass-based social protest action. The state response has, in many instances, been intolerant and suppressive of such action. In some cases, protestors have been assaulted, detained or charged. Most of these protestors belong to some or other social movement, residents' association or crisis committee and, seeing that police action is resulting in the denial of the right to free expression, the FXI has been developing a close relationship with a number of social movements.

We have been dealing with a number of such cases in the period under review; some of them are ongoing cases while others are new.

The case of the Harrismith 13, who were charged with sedition, is ongoing. The accused appeared in court in January 2006, having just been informed that the sedition charges were withdrawn. The other charges relating to public violence, however, stand. Some of the trialists have also been subjected to various forms of harassment from police, including, in one instance, a physical beating. The ACP is assisting the trialists through legal advice and through, thus far, one workshop held in Harrismith. The withdrawal of sedition charges also followed the FXI's giving the case wide publicity.

Another ongoing case is that of the more than 40 Landless Peoples Movement (LPM) activists who have been charged under the electoral act for having an illegal gathering on the 14<sup>th</sup> April 2004. The case of Superintendent Simelane who was accused of torturing LPM members and charged with assault with intent to do grievous bodily harm (following a recommendation by the Independent Complaints Directorate (ICD)) was, however, dismissed by the magistrate for lack of evidence.

The other major case of denial of the right to protest that the FXI involved itself with was that of the Foreman Road shack dwellers' march in Durban. Despite following the correct procedures for notification of a march, in terms of the Regulation of Gatherings Act, they were not allowed to march and then, when the march did take place, were attacked by police firing live ammunition. The ACP intervened through letters to the eThekweni Municipality, media releases and legal advice to the shack dwellers movement.

All of these protests and the manner in which they have been dealt with by local authorities and the police have quite serious implications for the upcoming local government elections. Protests around service delivery are expected to increase in the run-up to 1<sup>st</sup> March. And protests are likely to take place even on election day.

Local authorities could respond to these in a manner that is completely unconstitutional, violates the right to free association and free expression and is contrary to the Regulation of Gatherings Act. Unless local authorities and the police begin implementing the Regulation of Gatherings Act in a manner different from the way it currently is, protests on election could be completely outlawed, once again constraining the space available for expressing peaceful, non-violent dissent. Consequently, South Africans could witness more deaths during protests and more sedition charges.

Another (new) case that the ACP dealt with that relates to the elections is that of the Greater Middelburg Residents' Association (GMRA). The Steve Tshwete Municipal Council had denied the GMRA the use of municipal venues for its electioneering campaigning and for any other events. Following interventions by the FXI, the Council relented and has now granted access to municipal venues to the GMRA.

The cases of the GMRA, the Harrismith 13 and the many other recent protests around service delivery and provincial demarcation highlight how easy it is for basic civil and political rights to be trampled on in small towns and rural areas. And how such violation can easily disappear under the radar.

Another major issue that the ACP has been dealing with in the past six months is the question of journalists' right to protect their sources. The issue was brought into sharp relief by the case of the *Mail & Guardian* and the civil and criminal cases brought against it as a result of its reportage on the "Oilgate" scandal. The FXI has played a critical role in supporting the *Mail & Guardian* with advice and legal costs and by being *amicus curiae* in the civil matter. The matter has not yet been resolved. But, whatever the outcome will be, it will have severe repercussions for the media in this country. Considering the cases already mentioned together with the *Mail & Guardian* matter, there is a rather disturbing indication of the South African state becoming increasingly intolerant of dissent – whether on the streets or in the media. It is a trend that organisations like the FXI will have to pay very careful attention to.

The ACP also responded to the violation of the freedom and independence of the media, when journalists were banned from the court appearances of former Deputy President Jacob Zuma.

A media-related issue that landed on the FXI's desk and which involves the public broadcaster, was the case of Tuesday Night Live, an LGBTI radio programme which had been broadcasting on Radio 2000 until the price they were paying for their slot was drastically increased. With Tuesday Night unable to pay the new amount, their show was pulled off air. The ACP assisted Tuesday Night with advice and will assist them in their negotiations with SABC.

The increasing threat to freedom of expression in South Africa is further emphasised by the two other matters in which the ACP was involved: the Monitoring and Interception Act and President Thabo Mbeki's comments about the financing of African NGOs. The FXI responded to both of these, highlighting the unconstitutionality of the Act and criticising the threat posed to the independence of civil society organisations in the latter case. As far as the president's comments on funding for NGOs was concerned, the FXI did media work on the issue, raising the danger with the kind of comments that he had made and explaining how such comments could have the effect of censoring the work of NGOs across South Africa and Africa as a whole. The FXI and other NGOs had also proposed an indaba between the NGO sector and the presidency to discuss the matter.

There were three matters of individuals that the FXI handled in the past six months. Two of them were grievances with public institutions (the University of Kwazulu Natal, in the case of Ashwin Desai and the Office of the Presidency, in the case of Thoko Mkhwanazi-Xaluva) and one with a private business concern (Super Spar, in the case of Vusi Sibeko).

Desai was prevented from being considered for a position at the university based on a banning order against him by the former University of Durban-Westville. The ban had been lifted by the last Vice-Chancellor of UDW, Saths Cooper, but the current Vice-Chancellor of UKZN decided that the ban was still valid. The FXI had a number of interviews with and published articles in the media on the issue. There is, as yet, no resolution to the matter.

Thoko Mkhwanazi-Xaluva, former Director in the Office of the Rights of the Child (ORC) was fired by the Presidency after she had claimed that a consultant to the ORC was guilty of sexual harassment. The consultant, according to Mkhwanazi-Xaluva, was a friend of Minister Essop Pahad. After being reinstated by a bargaining council arbitrator, she was again fired, this time for having spoken to the media about her earlier matter. The ACP assisted her with legal advice and secured for her the services of counsel.

Chief shop steward at Super Star, Milnerton, Vusi Sibeko was suspended for having published an article in the newsletter of the Democratic Socialist Movement where he exposed bad working conditions and salaries of workers at Super Spar. The matter will go to arbitration and the FXI remains involved in it.

## **2. An Overview of the Anti-Censorship Programme.**

Following the recommendations of the review process that FXI had undertaken, the Anti-Censorship Programme is developing a more pro-active approach and one that is able to assist communities and organisations more ably, rather than only the reactive, more individualistic and legalistic approach. Thus, the FXI is increasingly dealing with the denial of the right to protest, march and organise. In doing this, the FXI wants to also:

- build solidarity and support among various stakeholders,
- build capacity and awareness that will sustain political actions and yield results.
- help develop collective leadership and ownership of issues.

These principles are intrinsically interlinked and mutually reinforcing, and should not be confused or conflated. Each one is significant for the success of the other.

Direct and indirect responses to censorship remains a key aspect of the work of the programme. This has taken a variety of forms – including direct liaison with victims of censorship, giving advice to such victims, direct targeting of the sources of censorship and publicising instances of censorship through local, regional and international media. The ACP has also used the International Freedom of Expression Exchange (IFEX) network to publicise instances of censorship and to call for solidarity from fraternal organisations across the globe. A milestone was reached when the IFEX conceded that freedom of expression and association take different dimensions according to history, culture and levels of socio-political development and it needed to be understood within particular contexts. In addition, the programme will, where necessary, strive to use prompt legal interventions to defend individuals whose right to freedom of expression has been constrained, be it at the instance of the state or through private persons or institutions, where censorship has been

identified as posing a critical challenge to free expression, include state repression, the stifling of dissent within the trade union movement and censorious activities against community media.

The programme is particularly concerned about the questionable use of the Regulation of Gatherings Act (No 205 of 1993) by local authorities to restrict the right of those wishing to assemble, demonstrate, picket or petition organs of state, including the local authorities themselves.

Since its establishment in July 2002, there is a wide range of activities that the programme has embarked upon in line with its foundational objectives. These have been carried out through the direct trouble-shooting of censorship cases, campaigning for legislative reform, the holding of freedom of expression education and awareness workshops, and engaging in publicity actions around the work of the programme through conferences, seminars, workshops and radio and television interviews.

It has been especially by way of active engagement of free expression issues through the media and public forums that the programme has raised the profile of the censorship discourse in South Africa to a significant degree.

### **3. Overview of new and ongoing cases handled since August 2005**

Below are the cases the ACP handled from August 2005 to January 2006. More detailed information regarding any particular case may be obtained from reports published to the FXI's website (<http://www.fxio.org.za>) or in hard copy from the FXI office.

#### **3.1 *Thoko Mkhwanazi-Xaluva case***

Thoko Mkhwanazi-Xaluva is a former director in the Office of the Rights of the Child (ORC), based in the presidency and reporting to Minister Essop Pahad. In June 2003, Mkhwanazi-Xaluva was dismissed by the Presidency for, she claims, having blown the whistle on sexual harassment by a consultant to the ORC who, she says, was a friend of Pahad. The matter was referred to the General Public Service Sectoral Bargaining Council, which reinstated her in November 2003. She was dismissed again for interviews she had given to the media regarding her initial dismissal. The FXI got involved because this was a case of censorship of an employee and because we believe that she should be protected as a whistleblower and not disadvantaged because of it. The ACP assisted Mkhwanazi-Xaluva with advice on how she might proceed with the matter. The matter will go before the General Public Service Sectoral Bargaining Council on the 21<sup>st</sup> February 2006. The FXI has referred Mkhwanazi-Xaluva to the Public Interest Litigation Services, which will assist her with securing the services of attorneys. The FXI, in the meanwhile, has secured Advocate Mark Wesley as counsel for Mkhwanazi-Xaluva.

#### **3.2 *The Mail and Guardian and Protection of journalistic sources***

The issue of whether or not the courts should have the authority to compel journalists to disclose their sources remains hotly contested on ideological and political grounds. Even within the media fraternity, the views are divided. This issue recently assumed very serious proportions in the case between the *Mail & Guardian* and Imvume. Imvume has been demanding that the *Mail & Guardian* be compelled to divulge its sources for its articles about the "Oilgate" scandal and the accusations made therein

about Imvume. The *Mail & Guardian* claimed that the state, through Imvume, had supported the ANC election campaign to the tune of about R11 million. Two cases were filed against the M&G: a civil case by Imvume and a criminal case. The FXI filed an *amicus* intervention in the civil case and is also assisting the *Mail & Guardian* with its legal costs. (Imvume had initially refused us *amicus* status but subsequently reconsidered their position. They are yet to give us that undertaking in writing. The FXI, the South African National Editors' Forum (SANEF), the Media Institute of Southern Africa (MISA) and the Media Workers' Association of South Africa (MWASA) pooled resources for the civil case to challenge Imvume's assertion that the information was improperly obtained and that the *Mail & Guardian* must be forced to reveal its sources. Subsequently, the state issued a section 205 subpoena to the *Mail & Guardian's* internet host, M-Web, in the process of investigating a contempt of court charge against the newspaper.

The FXI issued several media releases and has given many radio interviews on this matter. The matter is still pending, with none of the cases having reached a conclusion. The FXI has secured some funding from the Network Media Programme of Open Society Institute to continue dealing with this matter. The FXI has also called on the Ministry of Justice to amend the Criminal Procedures Act to recognise the fact that journalists have a 'just excuse' not to reveal sources. The ACP and the South African National Editors' Forum (SANEF) met with the Ministry of Justice to discuss our call. Simon Delaney, by agreement between FXI and SANEF, had drawn up an amendment to the current legislation and this was submitted to the ministry. The Ministry asked for further research into international trends around source protection.

### **3.3 Election Day torture allegations by LPM members**

In the run-up to the 2004 national elections, the Landless People's Movement (LPM) initiated its "No Land, No Vote" campaign. On Election Day, 14 April 2004, LPM held a legal protest in Thembalihle. When LPM members gathered for the protest, police violently arrested and detained them overnight. The ACP hired a legal counsellor, who assisted with the release of the members. They were later charged with holding a political activity on election day contrary to section 108(a) of the Electoral Act.

Four LPM members – Ann Eveleth, Maureen Mnisi, Samantha Hargreaves and Moses Mayekiso – claimed that members of the Crime Intelligence Services (CIS) physically tortured Eveleth and Hargreaves and used violence, harassment and intimidation against Mnisi and Mayekiso. The four laid charges with the Independent Complaints Directorate (ICD). In January 2005, the ICD recommended that CI Unit Head Superintendent Simangaliso Patrick Simelane, be charged with assault with intent to cause grievous bodily harm. His trial was in August 2005 but the case was dismissed for lack of evidence. The prosecutor has indicated his intention to appeal the judgement. At the same time, the four LPM members are pursuing a civil case against Simelane. The FXI continues providing legal assistance and advice to the activists.

Meanwhile, the state is pursuing its case against the LPM members and the ACP has been providing them with media support, publicity and international solidarity to ensure that their plight receives as much attention as possible. This case began in October 2005. The court has already heard both the state's and defence's arguments. The defence's application for the dismissal of the charges (because of a lack of evidence) was rejected by the magistrate. The case resumes in March 2006. The LPM case has critical relevance for the 1<sup>st</sup> March local government elections. How will the police deal with protests that are likely to take place on election day? Will such protestors be arrested and face the same kind of treatment that the LPM

members faced two years earlier? The ACP is currently considering the possibility of dealing with this question at the level of legislative reform by proposing amendments to Section 18(B) of the Electoral Act so that it may allow protests to occur on election day.

### **3.4 Harrismith protests**

On 30 August 2005, 17-year-old student Teboho Mkhonza died shortly after police fired into a crowd of protesters in iNtabazwe Township near Harrismith. The demonstrators, who were unarmed, were protesting at the municipal council's failure to provide basic services to the impoverished community. According to film, witness and forensic evidence, the police opened fire with birdshot, prohibited for use in controlling crowds. The police gave no warning and fired as people fled. Thirteen demonstrators were arrested and were charged with sedition – the first time since 1994 that such a charge has been used – and with public violence.

The FXI assisted the accused with legal and other advice and held a workshop in Harrismith for the accused. The FXI also gave a number of media interviews on the issue. In particular, the FXI highlighted the danger of using the very serious charge of sedition in the context of a public protest. The charge is reserved for people that are intent on overthrowing the state and to use it against protestors (many of whom belonged to the ruling party) set a bad precedent by which the state could deal with dissent, the FXI argued.

In December 2004, the ICD recommended prosecution of three officers for murder and attempted murder and disciplinary action against the officers for a breach of standing orders on the use of force and firearms. In January 2006, the 13 appeared before the court in Harrismith. However, before the case began, they were informed by the prosecutor that the charge of sedition had been dropped. The case has been adjourned to the 15 May 2006.

### **3.5 Vusi Sibeko vs. Spar**

Vusi Sibeko was chief shop steward at Super Spar in Milnerton. He was suspended on the 8 November 2005, pending a disciplinary hearing set for the 10th November 2005 and charged with gross misconduct over an article that he wrote for *Izwi la Basebenzi*, a periodical published by the Democratic Socialist Movement. Sibeko had, in the article, accused Super Spar Milnerton of bad labour practices and of not paying workers the minimum wage as determined by the Department of Labour. The majority of the workers joined a union after Sibeko's intervention to prevent a worker's arbitrary dismissal. Sibeko appeared before a CCMA conciliation hearing on the 23 January 2006; Spar, however, was not present. The matter will now go to arbitration, most likely at the end of February. The ACP provided legal advice to Sibeko, wrote to Spar to present legal perspectives on the dismissal and gave a number of interviews on the matter. Our Simon Delaney will appear as an expert witness when the matter goes to arbitration. as The FXI will remain involved with this case.

### **3.6 Tuesday Night Live**

A group of LGBTI activists in Johannesburg had approached the SABC with the proposal that they could produce a radio programme addressing issues of gay rights. They were referred to Radio 2000, which gave them a slot on Tuesday evenings. The programme was called "Tuesday Night" and began broadcasting in November 2004. Tuesday Night was asked to pay for the airtime, which they did. In August 2005,

Radio 2000 decided to increase the charge for the show by 100% to move the show to a later time slot. This did not suit Tuesday Night and they subsequently went off-air. FXI was then approached to assist with getting the show back on air. FXI advised the group on how they could take forward the discussion with SABC. The ACP assisted them with 1) developing a better understanding of public broadcasting and the mandate of the SABC; and 2) advice on lobbying the SABC so that they could get another slot, preferably on SAfm. Given the levels of homophobia in South Africa, the ACP felt that the SABC should welcome such a programme and should offer it free-of-cost. The FXI also issued a media release on the matter. In November 2005, the group met with Dali Mpofu, Group Chief Executive of the SABC to address their concerns. He promised to get back to them with a proposal.

### **3.7 Greater Middelburg Residents Association**

The Steve Tshwete Local Municipality had taken a decision in 2004 to bar the Middelburg Concerned Residents' Committee from the use of any Council facilities. This, after an allegedly violent protest by members of the Committee. The charges against the Committee were subsequently withdrawn, but the ban remained in force. The Committee later merged into the Greater Middelburg Residents Association. In the middle of 2005, the Municipality refused to grant permission to the GMRA to use any council facilities, based on its 2004 ban on the Middelburg Concerned Residents' Committee. The GMRA had, by then, expressed its intention to field candidates in the March 2006 local government elections and the ban, therefore, hampered its ability to participate in the elections.

The FXI was approached in July 2005 by GMRA chairperson and former mayor of Middelburg, Benjamin Mokoena, for assistance. The ACP wrote to the mayor of the Steve Tshwete Municipality and also to the Provincial Electoral Officer asking that the ban be rescinded and the GMRA be allowed to freely campaign. Following our intervention, the ban was lifted by the Council.

A recent development in this matter is that members of the GMRA, especially members of Mokoena's family, have faced certain harassment from members of the local ANC, including the mayor. This includes demonstrating outside the houses of Mokoena's family members and hurling verbal abuse at them. The GMRA has laid charges against the alleged perpetrators. The ACP continues to watch the situation carefully and plans to have a workshop in Middelburg on questions of freedom of expression.

### **3.8 Foreman Road shack dwellers march**

In November 2005, the eThekweni Municipality banned a march that was due to take place by the Foreman Road shack dwellers, protesting against a lack of housing and service delivery. The banning was in violation of the Constitution as well being in violation of the Regulation of Gatherings Act. The FXI issued media statements on the matter, wrote to the Municipality expressing our position and made legal assistance available to the shack dwellers if they needed it. The march did take place and was put down by police, allegedly firing live ammunition at protestors.

### **3.9 UKZN and the ban on Ashwin Desai**

In December 2005, Durban academic and activist, Ashwin Desai, was prevented from taking up a position at the University of Kwazulu Natal by the Vice-Chancellor, Prof Malegopuru Makgoba. The problem dates back to 1996 when, on the eve of the

merger of the University of Durban-Westville – where Desai was an academic – and the University of Natal to become the UKZN, he led a bitter struggle unifying staff, students and workers at the university against retrenchments and fee increases. Desai apparently agreed to an out-of-court settlement at the time with the then vice-chancellor, excluding him from the University of Durban-Westville campus in return for charges relating to his activities being withdrawn against him.

The next vice-chancellor, Saths Cooper, overturned the settlement and reinstated Desai, as he apparently did not want to deny the university an academic of Desai's calibre. After the merger, Desai worked at the UKZN's Centre for Civil Society. On applying for the new position, Makgoba ruled Desai out of the running on the basis that the ban was still in place, but that the council could rescind the ban if Desai made written representations to it.

Public opinion and academics from around the world mobilised behind Desai and a bitter struggle has developed in the media around the case. While much public attention has been focused on the Desai matter, others from UKZN, such as Richard Pithouse and Fazel Khan have been under pressure as well. What one infers from a close reading of recent events, as well as several on-the-record statements, is that these scholars are under attack for challenging power both inside and outside the university. And unions have been told that a march they are planning to have on the Westville and Howard Ollege Campuses will be limited to very small sections of the campuses. The FXI has issued media statements and published articles on the question of the constrained academic freedom at the UKZN.

### **3.10. Jacob Zuma case and freedom of expression**

#### *Media gagged*

Former deputy president, Jacob Zuma, appeared in court on rape charges in the first week of December 2005. The police, however, barred journalists from the Johannesburg Magistrates Court's Court 9. The media were also not allowed access to the docket. The FXI joined SANEF and the Media Institute of Southern Africa in releasing statements arguing that the area commissioner had exceeded his powers. The FXI also accused the police of being in dereliction of tier duty when they allowed Zuma's bodyguards to manhandle a photographer.

#### *Zuma gagged*

The SABC had intended making Jacob Zuma its Newsmaker of the Year for 2005. However, in the middle of December 2005, the public broadcaster suddenly decided not interview the former deputy president. The decision outraged Zuma and his supporters. The SABC countered that it had decided to interview Zuma before he had been charged with rape and after the charges were brought, an interview with him would violate the *sub judice* rule. The FXI gave interviews criticising the SABC for violating "the universally accepted broadcasting principle" that once someone was slotted for an interview, it was never changed and accused the SABC for toeing the ANC line.

### **3.11 Monitoring and Interception Act**

The Monitoring and Interception Act has been in operation since September 2005. The law allows the monitoring and interception by the state of various forms of communication between people. The Department of Justice claims it was aimed at

organised crime networks. The ACP raised objections to the Act, on the basis that it was a violation of Section 14 of the Constitution, which protects the privacy of the individual and, in terms of which, the privacy of peoples communications may not be violated.

### **3.12 NGOs and foreign funding**

In October 2005, President Thabo Mbeki questioned independence of African NGOs when he was speaking at the conference of the African Peer Review Mechanism. He accused and attacked NGOs for being manipulated by foreign donors and for, allegedly, fulfilling the agendas of such donors. A number of South African NGOs were angered by the attacks by the president, which seemed to tar all NGOs with the same brush. The comments threatened not only the independence but the very survival of NGOs in Africa. The FXI issued media releases on this issue and was interviewed by a number of media on this question.

### **3.13 Health-e News**

Matthias Rath, the controversial German doctor who is also an Aids dissident, sued Health-e News Service, two of its employees and a freelancer for defamation because of a series of stories broadcast by Health-e about the Rath Foundation.

A fall-out from the Health-e case was the conflict of interest issue related to Christine Qunta, whose law firm represented Rath and who is also Deputy Chairperson of the SABC. The FXI argued in the media that it was a conflict of interest for someone to be on the board of an organisation that professes to support freedom of expression while she represents a client in a case where he is seeking to compromise free expression.

### **3.14 Others**

There were several other instances in which the FXI either was called for comment by the media or issued media releases. These include the following:

- The high court ruling that the media could not disseminate information it had about the risk of pebble-bed nuclear reactors. The information was given to the media by Earthlife Africa, which had been given it accidentally by Eskom's attorney.
- A complaint against Radio 702 talk show host, Tim Modise, for allegedly supporting a guest's claim that garlic and lemon could improve the health of an HIV positive person.
- The Gay and Lesbian Alliances's complaint to the BCCSA regarding the term "moffie" used in an Mnet soapie.
- The Zimbabwe government's seizing of the passport of Trevor Ncube, publisher of the *Mail & Guardian* and other newspapers.

## **4. Campaign for legislative reform**

At the time when the programme commenced its operations in July 2002, the FXI had, through the financial support of the Netherlands Institute for Southern Africa (NIZA), already commissioned a practising attorney to give it an analysis of the most pressing laws that violated the right to freedom of expression in South Africa. This commission also required the expert to suggest mechanisms and make recommendations for either amending or repealing these laws. This project was completed in early 2003 and the ACP has begun a campaign aimed at redressing the identified laws.

The campaign involves a two pronged strategy: firstly a direct engagement with state institutions such as the Department of Justice and Parliament, and secondly a litigation process.

With the Minister of Safety and Security having reported in Parliament that 881 illegal and 5085 legal protests had taken place in South Africa in 2005, the manner in which the protest aspect of free expression is dealt with by South Africans and the South African state becomes crucial. Unfortunately, 2005 indicates that state organs – particularly at the municipal and police level – have not managed this right appropriately and constitutionally. The handling of the Foreman Road protest is one example.

Thus, from the perspective of anti-censorship action, the ACP has identified the Regulations of Gatherings Act as, in the current context, the primary piece of legislation requiring reform. Problems with the Act include the way the Act itself is crafted – in the pre-1994 period – as well as the manner in which it is implemented. While the Act requires to be amended to allow greater freedom for gatherings, even its current provisions, it has been found, are not being respected by local authorities and by police. Many police do not even understand the basic difference between “notification” and “application for permission”.

The ACP plans to deal with the question of the Gatherings Act in two ways. Firstly, the FXI is determined to proceed with a test case challenging the constitutionality of the Act. With the increase in the number of protests around the country, we might not have long to wait. Secondly, the FXI is planning a meeting with the Minister of Local Government in order to come to an agreement about how the Act, as it currently exists, should be implemented by local authorities and to obtain the Minister’s assistance in alerting local authorities to proper procedures in regard to the implementation of the Act.

The FXI is also keen to continue its campaign around the question of the protection of sources and other legislation that make the media vulnerable and could force them to censor themselves. To this end, the FXI and SANEF have signed a memorandum of agreement in terms of which a workplan has been drawn up so that various pieces of legislation that compromise free expression, and therefore need to be amended, will be investigated.

## **5. Education and awareness on the right to freedom of expression**

The ACP held a Free State workshop in Harrismith in December 2005 in order to create awareness on issues of freedom of expression and the rights of communities to express themselves, particularly with regard to their right to protest. A follow-up workshop is being planned for the Free State. A similar workshop is also planned to be held in Mpumalanga.

A mini-conference is being planned by the FXI and the Social Movements Indaba, to be held in March 2006. The conference will focus on issues of freedom of expression. A component of the conference will be a workshop to train paralegals in various social movements on constitutional rights regarding free expression and on the Regulation of Gatherings Act.

These activities are part of an FXI programme to set up a national freedom of expression network. Such a network will link communities, social movements and NGOs around the country that have faced repression and a denial of their right to

free expression so that they could be empowered to be able to deal with such issues themselves and provide support to each other. For the ACP, this is part of our effort at moving away from a reactive form of work to a more proactive one. Part of the funding for the setting up of the Network is being made available by the Rosa Luxemburg Foundation.

## **6. Media Activity**

A considerable amount of work has been done in this area and the programme has consequently become very well established in the public domain. As a result, the ACP is regularly called upon by the media to comment on matters that relate to freedom of expression and to make presentations in seminars, workshops and conferences.

The programme has received coverage, on average, about fifteen times a month in the print and electronic media on a variety of subjects including hate speech, contentious news and information, popular forms of expression such as graffiti, new legislation affecting free expression and media freedom.

In addition, the programme has been an active participant in seminars, workshops and conferences, both locally and internationally. Through these public events, the programme has articulated its standpoints on a wide array of issues such as limitations to freedom of expression, media and democracy, and the implications of the "war against terror" on freedom of expression.

## **7. Regional, Continental and International Activities**

The ACP has also been involved in initiatives beyond South Africa's borders. These are as follows:

### ***Southern African Social Forum***

In September 2005, three members of the FXI staff attended the SASF and presented a session on developing a regional response to Anti-Terrorism legislation. The need for civil society organisations to develop such a response was raised some time ago by SASF participants, in view of the SADC-wide counter-terrorism measures being adopted by countries in the region. Given the FXI's experience in relation to the South African Act, the Institute was approached to host a discussion.

### ***Network of African Freedom of Expression Organisations (NAFOE)***

The FXI is a founding member of NAFOE and, in October 2005, we attended its launch. The conference included 42 participants from 33 organizations dedicated to freedom of expression and media freedom in Africa. The conference was hosted by the Media Foundation for West Africa (MFWA), in partnership with Media Rights Agenda (MRA), Media Institute of Southern Africa (MISA) and Journalists en Danger (JED). In addition to the formation of the network, it was agreed that the MFWA will host the network for the time being, and that funds will be sought from Unesco to employ a co-ordinator. A long-term strategic plan and short term targets will also be identified.

The conference agreed to establish a network that will seek to fundamentally change over the next decade the environment for freedom of expression in Africa. Already

the network has intervened in the deteriorating free expression environment in Ethiopia following that country's highly contested elections. Interventions are also being discussed in relation to the media freedom situation in the Gambia and Eritrea. A follow up planning meeting will take place at the IFEX conference in Brussels in February.

### ***International Freedom of Expression Exchange***

The FXI chairs the editorial committee of IFEX. The FXI has had a long-standing discussion with the IFEX Clearing House about its interpretation of freedom of expression which, in the FXI's view, has been unconsciously biased towards media freedom. As a result, FXI Action Alerts that the Institute has attempted to have circulated on the network have been rejected on the basis that they deal with the violation of the right to assembly, rather than the right to freedom of expression. For poor communities, more popular forms of expression, such as gatherings, are often used because as they constitute the most accessible forms of expression. It is, therefore, especially important to protect these rights as they are often the only forms of expression available to these communities. The FXI made these arguments to the Clearing House, leading to a decision to review the Editorial Guidelines of IFEX.

The Editorial Committee had a teleconference to discuss the matter, and agreed that a memo will accompany the Editorial Guidelines, to act as a guide for the Clearing House in deciding which Alerts to issue and which to reject. The memo makes it clear that where there are demonstrations that are prevented because of their expressive content, this should be considered a freedom of expression violation, and should therefore be circulated on the network. The FXI is pleased with this decision, as it has led to a situation where a broader interpretation of freedom of expression has been adopted, leading to FXI Alerts being circulated that cover violations of the right to demonstrate. This should mean that a more holistic picture can be built up of the freedom of expression situation in different countries. These changes are to be put to the IFEX AGM in Brussels in February 2006, which the FXI will be attending.

## **8. Research**

Most of the work of the ACP requires a fair amount of research in order to:

- deepen and strengthen the analytical capacity and value of its interventions,
- lead to more informed lobbying and advocacy, including the investigation of alternative policy
- provide policymakers with viable alternatives and comprehensive policy positions and submission based on empirical evidence

The FXI is currently involved in a few research projects that will bear fruit in future activities of the programme. These are:

- *research on the Regulation of Gatherings Act*: this nationwide research project involves social movements across the country to look at the implementation of the Act by the police. This follows complaints that the police are biased against certain social movements. The research will provide substance for any test case the FXI might launch against the Act, as well as provide a basis for meeting with the Minister of Local Government. Also, the research could inform a training programme around the Act for civil society organisations and police. Funding for this research is being provided by the Global Opportunities Fund.
- *investigation into public protest*: will track the large number of public protests that have enveloped the country. For the past two years there has been a

noticeable increase in the incidence of protest action, particularly around questions of the delivery of essential basic services. Debates around what sparks such action have been raging for quite a while. Using Harrismith as a case study, the research aims to analyse the causes and effects of such protests. It is hoped that case studies from other parts of the country will follow. The research is funded by the CCS and is almost completed.

- *the lack of freedom of expression at South African Universities*: the FXI has been inundated with complaints from university students who claim that university authorities are clamping down on freedom of speech and association. The FXI is currently raising funds for a research project that will investigate the various codes of conduct, regulations and procedures of universities to determine whether they are consistent with the Constitution and the Bill of Rights. Based on the findings, the FXI will consider facilitating a capacity building project for students and university administrations to help nurture and promote a democratic culture in universities.

## 9. Conclusion

With almost 6,000 protests having taken place in South Africa in 2005, it is clear that South Africans are keen to exercise their constitutional rights to gather, associate and express themselves. What is disturbing, however, is that most of these protests are against the lack of social delivery by the state and, especially, the various municipalities. Of great concern to the ACP is the fact that one-sixth of these protests were illegal and that some were regarded as illegal because local authorities and police refused to acknowledge notification by the protestors (as required by the Regulation of Gatherings Act), claiming the right to 'give permission' and, therefore, refused to allow the protests to occur.

The number of these protests is unsurprising when one considers that 203 out of 284 municipalities are unable to provide sanitation to 40% of their residents; nearly a million people still use the bucket system and five million people have no access to sanitation. And, that only 3.2 million households have access to prepaid electricity and 300,000 households have access to metered electricity. Thirty-seven municipalities cannot provide any free basic electricity whatsoever. Thirty six percent of the population have no access to water, either in their dwelling or in their yard, while 3.7 million people (or 8% of the population) have no access to water at all.

With local government elections set for the 1st March and with service delivery not showing signs of improving the above situation drastically in the near future, this year seems to be set for more of the same: more protests, more denials of the right to protest, more repression of protests. The work of the ACP is certainly cut out for it.

The ACP is setting out deliberate medium- and long-term strategies to address the problem of its being only reactive. The cases dealt with in the second half of 2005 and its plans for 2006 – particularly in regard to the beginning of the process of setting up of the national freedom of expression network – bear testimony to this. Not only will the network link up aggrieved communities who have been denied their right to free expression, it will also provide the training to activists so that they themselves understand their rights in terms of the constitution and relevant legislation.

Further, the ACP's plans to address the failings of the Gatherings Act is another indication of its proactive mode. In attempting to, on the one hand, have the Act amended to facilitate the right to gather and protest and, on the other hand, to call on the Minister of Local Government to direct local authorities to implement the Act

faithfully (and offering FXI resources to assist with educating local authorities about the Act), the ACP is trying to create a situation where many of the violations of the right to free expression we have seen in 2005 do not occur in the future.

At the same time, violations of the right to free expression in the workplace – both in the public and private sectors – will have to be dealt with, as will the violations of academic freedom.

In the long-term, a culture of freedom of expression must be engendered within South African society. Doing that requires multi-faceted work: from lobbying for legislative amendments to providing legal services at the time when protestors are attacked by police.