



Freedom of Expression Institute (FXI)

PROGRESS REPORT OF THE ANTI-CENSORSHIP PROGRAMME

Reporting Period: February 2006 to July 2006

July 2006

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1. Executive Summary

The Freedom of Expression Institute has, over the past few years, noted and insisted that the struggle for freedom of expression in South Africa will take place mainly with regard to the struggle around socio-economic rights. This assertion has been proven correct by the events of the recent past and, for purposes of this report, during this reporting period when we have seen how closely linked are the denial of socio-economic rights with the denial of civil and political rights of people. The FXI, having noted this trend, has been in a process of reorienting its work to cater for the challenges of free expression experienced by, particularly, poor communities and individuals who are most vulnerable from a socio-economic sense as well as from the perspective of freedom of expression. Currently, then, the work of the Anti-Censorship Programme could be said to include two broad areas: 1) the “classical” cases of censorship as the FXI has been dealing with over the past 12 years – related to denial of free expression to the media, journalists and other individuals in different arenas, and 2) the denial of free expression to poor communities and movements, committees and organisations representing the poor. The latter usually means protecting and defending the right to gather, protest, march, publish, etc.

In terms of the protection of the freedom of expression of poor communities, the FXI has adopted a dual approach:

- Firstly, it is to defend these rights through advocacy, legal means, through the courts, etc. And,
- Secondly, it is to empower poor communities and organisations of the poor so that they might themselves be able to deal with these denials of free expression and with repression that they might face.

The second approach is particularly important when we realise that the scale of such denials of free expression is huge and spread out across the country and that the FXI is not able to service all areas across the country adequately in terms of its legal and advocacy work. Furthermore, if movements themselves were empowered so that they had legal committees / officers within their structures that can deal with legal issues, this would ensure a quicker turnaround time. The extent of the problem is vast and includes the denial of people to march, gather and protest, torture, assaults, unlawful arrests, detentions, etc. And, in most cases, those people that are so treated are from disadvantaged and poor sections of our community. The FXI has worked tirelessly to develop relationship with various movements, organisations and committees that have faced repression in the recent past and to assist them within the bounds of our mandate.

It should be said, however, that the FXI’s focus on working with organisations of the poor in no way diminishes the importance it places on its other work. Indeed, over the past year, we have noticed an increase in the instances of censorship related to the media, individual journalists, individual freedom of expression in the workplace, etc. Our work on this front continues as strongly as ever. An additional front that the ACP is very concerned about is the trend towards regulating and even constraining academic freedom and freedom of expression more generally at certain tertiary academic institutions. Over the past two to three years, this has affected both students and staff. At some institutions, the problem has become quite dire and requires ongoing monitoring.

This report covers both the above areas of work and will, in regard to the second area, also highlight the two approaches mentioned above for the period February 2006 to July 2006. Below is a summary of the cases we have dealt with in this period. While some of these cases have been concluded, others are ongoing.

The case of the Harrismith 13 is ongoing. The 13 iNtabazwe Township residents had been charged with sedition and public violence. 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, stood. Some of the trialists had 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, two workshops held in Harrismith. The withdrawal of sedition charges also followed the FXI's giving the case wide publicity. The case will resume in October 2006.

Another ongoing case is that of the more than 40 Landless Peoples Movement (LPM) activists who were charged under the electoral act for having an illegal gathering on the 14th April 2004. There have been several adjournments in the case and the magistrate also agreed to recuse herself – which caused further delays. The case goes back to court in August but the prosecution had indicated that it would withdraw all charges. 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 state has indicated that it might appeal this judgement.

The FXI dealt with a few cases relating to the Durban shack dwellers movement, Abahlali base Mjondolo. Abahlali has had problems with the eThekweni municipality not allowing them to march in the city. In February 2006, with the help of the FXI, Abahlali won an important court victory against the city, interdicting the city and the police from preventing their march from going ahead.

Another court victory around the right to protest and the application of the Regulation of Gatherings Act that the FXI secured was the case of members of the Soweto Concerned Residents (SCR) who were charged with holding a prohibited march. The magistrate ordered the acquittal of the two accused without even listening to the defendants' case.

These two court victories highlight the argument repeatedly made by the FXI that the Regulations of Gatherings Act is often being misapplied and sometimes abused by local authorities across the country in a manner that is unconstitutional and illegal. Unless local authorities and the police begin implementing the Regulation of Gatherings Act in a manner different from the way it currently is, the constitutional right to freedom of expression (as well as other rights such as the right to free association and speech) will be severely compromised and the space for expressing peaceful, non-violent dissent will rapidly be constrained. The result could easily be South Africa witnessing more deaths during protests and more sedition charges.

The cases of eThekweni and Johannesburg (as well as the earlier cases of Harrismith, Middelburg, Khutsong, etc) highlight the constitutional and legal dangers that exist with local authorities ignorant of the spirit and letter of the RGA being in positions where they can allow or deny basic civil and political rights. It highlights, too, the need for local authorities to be trained in what the RGA serves to achieve and how those objectives might be attained.

This concern was brought into sharp relief recently when the City of Cape Town passed a by-law which, while referring to the Regulation of Gatherings Act, subverts the Act in the provisions of the by-law and sets down regulations which violate the

Gatherings Act as well as the South African Constitution. The Legal Unit and ACP are currently writing a response to the by-law.

An issue that is becoming increasingly serious 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 played and continues to play 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. Recently, there was also a threat by a politician in Outdshoorn to sue journalists if they did not reveal their sources regarding financial irregularities in the municipality. The FXI commented on that issue and is following developments around it. 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.

Another protection of sources that the ACP dealt with was the case of two ex-Sowetan journalists who were subpoenaed to appear in court and testify against a witness based on an interview she had given to one of the journalists. The subpoena was subsequently withdrawn in a manner, we hope, will be precedent setting.

The case(s) of South Africa's former Deputy President, Jacob Zuma, raised a number of issues that the FXI had to respond to. These included Zuma's recent threats against the media and journalists (including a cartoonist), a pro-Zuma song being banned on an SABC radio station, the exposing of the identity of the rape complainant in the Zuma rape trial and, before that, the preventing of the media from attending a court appearance by Zuma. The FXI was inundated with calls for interviews, to appear on talk shows and, also, for guidance from a number of journalists.

The past six months has also seen intense engagement by the FXI with issues related to the public broadcaster, the SABC, and censorship. Most of these will not be covered in this report as they fall within the work of the FXI's Media and ICTs programme. However, there were a few censorship related questions that the FXI dealt with as well.

The public broadcaster issue that attracted the most attention in the past six months was the SABC decision to halt the screening of the documentary on President Thabo Mbeki as part of the SABC's "Unauthorised" series. The FXI played a role in lobbying the SABC and having ongoing discussions with both the SABC and the producers, advising the producers and attempting to organise a meeting of independent producers to discuss, more broadly, the question of the relationship between the SABC and independent producers.

Another SABC-related issue the ACP has dealt with is the allegations of an SABC "blacklist" of analysts that should not be interviewed on the news and current affairs programmes. The fiasco around this matter (following closely on the heels of the Thabo Mbeki documentary controversy) created much embarrassment for the SABC. The FXI lobbied the SABC, participated in a roundtable discussion on the matter, and assisted in drawing up a petition of regular SABC commentators who objected to the notion of the blacklist. The matter has not been resolved and the SABC has set up a commission of enquiry to look into it. The FXI has expressed its unhappiness about the two-person Commission, seeing that one of the two persons appointed is a

former CEO of the SABC and is currently part of an independent production company that does work for the SABC.

The case of Tuesday Night Live, another SABC-censorship issue, is ongoing. Tuesday Night Live was 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 has been assisting Tuesday Night with advice and continues to assist them in their attempts to negotiate with the SABC.

There were a number of 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), one with a private business concern (Super Spar, in the case of Vusi Sibeko) and the case of Charlene Smith and Patricia de Lille.

Desai had been 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 last Vice-Chancellor of UDW, Saths Cooper, had lifted the ban but the current Vice-Chancellor of UKZN had decided that the ban was still valid. The FXI had a number of interviews with and published articles in the media on the issue. The matter is set finally to be resolved in this week.

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 matter then went back to the bargaining council. The ACP assisted her with legal advice and tried to secure for her the services of counsel. Unfortunately, the FXI did not have the financial resources to see the case through to the end and Mkhwanazi-Xaluva had to obtain her own lawyers. She won the case in the bargaining council.

Desai's case was not the only matter that the ACP dealt with which involved the University of Kwazulu Natal. There were also the cases of the high-handed approach to a strike by staff and, a matter we are still dealing with, the issue of UKZN's electronic communication policy which violates students' and staffs' academic freedom as well as their right to privacy and dignity. The university hopes to use the policy to snoop on staff and student electronic communication as well as having access to all electronic documents.

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 FXI assisted Sibeko with legal advice and mounted a media campaign around the matter. The matter went to arbitration and the FXI's Legal Unit Head, Simon Delaney, was called by Sibeko's representatives as an expert witness. His testimony played an important role in the decision of the arbitration hearing, which reinstated Sibeko.

The Charlene Smith / Patricia de Lille case went to the Constitutional Court where the FXI appeared as *amicus curiae*. The case relates to the biography of de Lille, written by Smith, which names three women who are HIV-positive and exposes their HIV status. The three women are accusing de Lille and Smith of violating their rights to privacy and dignity. The FXI's concern is that the application by the three, if

successful, would have a chilling effect on freedom of expression of (non-media) individuals and we do not believe it is in the public interest for the common law to develop in the direction of criminalizing negligence by individuals – especially where such negligence is completely without malice, as in this case.

Of course, the FXI was very involved in commenting on the controversy surrounding the (not quite) publication of the Prophet Muhammad cartoons in South Africa. Much media work was done around the cartoon issue. And, the ACP also attempted to play a mediating role between the *Sunday Times* and the Muslim groups that had applied for the interdict against various newspapers.

The FXI has been forced, in the past year, to repeatedly question its status as a national (South African) organisation. Part of the reason for this is the role the FXI plays in regional, continental and international organisations. Indeed, the FXI plays leadership roles in the governance of organisations such as the Network of African Freedom of Expression Organisations (NAFEO) and the International Freedom of Expression Exchange (IFEX).

2. An Overview of the Anti-Censorship Programme

Following the recommendations of a 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 ACP has also been instrumental in setting up the Network of African Freedom of Expression Organisations (NAFEO).

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. The ACP has done a significant amount of work in the past few months with censorship issues related to the public broadcaster, the South African Broadcasting Corporation (SABC).

The need to continue to maintain a high profile for such a discourse and for the ACP to be vigorous in its activities, is underscored by two recent reports: Human Rights Watch's *World Report: Events of 2005* and Amnesty International's *Amnesty International Report 2006: the state of the world's human rights*. Amnesty notes incidents of "police use of excessive force against demonstrators" as a problem characterising some police action against gatherings (235). Human Rights Watch also lists "excessive use of police force" in South Africa as a matter of concern and points to police involvement in "violent confrontations with communities protesting against a lack of services" (135).

3. Overview of new and ongoing cases handled since February 2006

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

3.1 The protection of journalistic sources

Mail & Guardian

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 assumed very serious proportions in the case between the *Mail & Guardian* and Imvume. Imvume had 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 has also assisted the *Mail & Guardian* with its legal costs. (Imvume had initially refused us *amicus* status but subsequently reconsidered their position.) 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.

Ex-Sowetan journalists Bokala and Molakeng

In June, the state issued subpoenas to ex-Sowetan journalists Willie Bokala and Saint Molakeng. They were called to testify in the fraud trial of reflexologist Hilda Khoza. Molakeng interviewed Khoza about her assertions in 2001 for an article published in the Sowetan in 2001. Bokala was the Sowetan's Assignments Editor at the time. The article concerned assertions by Khoza at the time that Nkosi Johnson, who was dying of Aids, was not critically ill, but was in fact merely suffering from constipation. Johnson died the next day. The ACP issued media releases about the matter, arguing that both journalists had the right to protect their sources and should not be called to testify in the case. Earlier this month, the state prosecutor informed the two journalists that the subpoena had been withdrawn because the NPA did not believe in "calling recalcitrant witnesses unless absolutely necessary". We hope that this will be a trend with the NPA and that journalists will not, in future, be called to testify and reveal their sources if they refused to do so.

3.2 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 went before the General Public Service Sectoral Bargaining Council on the 21st February 2006. With the FXI not having the necessary finances to support Mkhwanazi-Xaluva, the ACP referred her to the Public Interest Litigation Services. Public Interest Litigation Services, however, did not take on the case and Mkhwanazi-Xaluva was left to find her own attorneys. The FXI also attempted to secure counsel for the case on a pro bono basis but was unsuccessful. Mkhwanazi-Xaluva won the case in the Bargaining Council.

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 but there is not movement yet in that process. At the same time, the four LPM members are determined to pursue a civil case against Simelane. The FXI continues providing legal assistance and advice to the activists.

Meanwhile, the state pursued 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 resumed in March 2006 and was repeatedly adjourned until June. The defence asked for the magistrate to recuse herself because the defence believed she was biased. She subsequently did recuse herself; the case was rescheduled for the 2nd August 2006, but the defence has been informed that the prosecution will withdraw all charges.

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. The police officers were tried and found not guilty.

In January 2006, the 13 appeared before the court in Harrismith. However, before the case began, the prosecutor informed them that the charge of sedition had been dropped. The case was adjourned to the 15 May 2006. Thereafter, it was adjourned to the 16th October 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 went to arbitration 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 also appeared as an expert witness when the matter went to arbitration and his testimony was key to the final judgment of the arbitration, which reinstated Sibeko into his position at Spar.

3.6 The SABC

The ACP has dealt with a few cases of censorship relating to the South African Broadcasting Corporation in this reporting period.

Thabo Mbeki Documentary

In May 2006, SABC 2 was due to flight a documentary on President Thabo Mbeki as part of its "Unauthorised" series. The SABC had advertised the documentary a number of times before the screening date. However, at the time when the documentary was to be broadcast, another "Unauthorised" documentary was repeated. The producers – an independent production company called "Broad Daylight Productions" – were not informed that the documentary would not be shown. The withdrawal of the documentary caused a major hullabaloo around the country and the SABC came in for severe attacks from the other media and commentators. The FXI met with the producers of the documentary, advised them on how to proceed and also issued media releases commenting on the SABC's censorship and questioning whether the decision to withdraw the documentary was politically-motivated. The FXI also participated in a media conference-cum-consultation called by the SABC to explain its position on the matter. In a strange twist, the Chief Executive Officer of the SABC, repeatedly referred to the FXI as "right-wingers" for our position. The SABC also claimed that the decision to withdraw the documentary was because it was defamatory. The FXI is currently in the process of briefing counsel for a legal opinion on a number of issues. Counsel has been requested to provide the FXI with an urgent opinion on the legal options available to Broad Daylight and the implications thereof, in the event that the SABC institutes legal proceedings for interdictory and / or declaratory relief in relation to the documentary production, or in the less likely event that it should become necessary for Broad Daylight to initiate legal proceedings. The legal opinion will also provide options for Broad Daylight in terms of copyright issues and what rights the producers have in terms of the documentary, being able to screen it publicly, etc. After some of the dust had settled, the SABC had agreed to meet with lawyers for the producers and find some way of moving forward on the issue.

SABC "Blacklist"

Following closely on the heels of the Thabo Mbeki documentary controversy was another matter the ACP dealt with: allegations of an SABC blacklist of analysts and commentators that should not be invited to comment on SABC news and current affairs programmes. Once the allegations emerged into the public domain, they caused tremendous embarrassment for the SABC. The FXI regarded the allegations of the existence of a blacklist as an extremely serious matter that could compromise the position of the SABC as public broadcaster. We lobbied the SABC on the matter, participated in a roundtable discussion about it and did a number of interviews regarding it. The roundtable discussion included a number of journalists, analysts and senior managers (including the CEO) from the SABC. The SABC has set up a two-person commission of enquiry which consists of Advocate Gilbert Marcus and Zwelakhe Sisulu. The FXI objected to the appointment of Sisulu since he had been

an SABC CEO in the past and because he is currently involved with an independent production company which produces material for the SABC.

A related issue to the blacklist question was that of SAfm current affairs anchor and talk show host John Perlman. In a strident interview with the SABC head of PR, Perlman claimed that such a blacklist did indeed exist. As a result of the interview, there was concern in the media sector that there would be disciplinary action taken against him. The FXI has offered its assistance to Perlman. However, he has declined, saying that he will wait for the outcome of the Commission. The FXI has also offered its assistance to any other SABC staffers that might want to use our services on this issue.

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 Officer of the SABC to address their concerns. He promised to get back to them with a proposal but no such proposal has been forthcoming. The FXI continues to consult with Tuesday Night and is attempting to help resume the discussions between their team and the SABC.

3.7 Abahlali Base Mjondolo

The FXI supported the Durban Shack Dwellers Movement, Abahlali Base Mjondolo, in November 2005, when 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.

In February 2006, Abahlali and its problems with the eThekweni Municipality again came to our attention. The municipality had again denied approval for an Abahlali march to take place in the Durban City Centre. The denial was clearly in violation of the constitution and of the Regulation of Gatherings Act. The ACP got very involved in the matter. We attempted to mediate between Abahlali, the municipal manager and the metro police. We also wrote letters to the municipal manager and issued media releases pointing out the illegality of the city's actions. All of this was to no avail and, as the date of the march approached, Abahlali was repeatedly stonewalled by the city. We finally advised Abahlali that the march was legal, that they should plan to go ahead with it and if they feared police intervention, to apply for an interdict against the police. The movement applied for and was granted an interdict on the morning of the march. The Durban High Court, in the interdict, instructed the police and the city not to interfere with the march and the judge ruled that the march had

never been illegal. The FXI's letters and statements which explained the constitutional right and legal position regarding marches and protests formed key arguments in Abahlali's case and helped convince the judge in favour of the movement.

3.8 SCR Regulation of Gatherings Case

Kanapy Moeketsi and Peter Jacobs were the convenors of a march of the Soweto Concerned Residents against prepaid water meters held in March 2005. A week after the march, they were both arrested. Police claimed they had been informed that the march had been prohibited. Their case was finally heard in court a year later, after nine postponements. The FXI had advised the defendants and the head of the FXI Legal Unit, Simon Delaney, represented them in court. After two days of trial, the magistrate decided not to hear the defence arguments and acquitted the men, saying that, according to the Regulation of Gatherings Act, every person had the right to gather and assemble.

The FXI has decided that, while addressing the issue of the implementation of the Regulation of Gatherings Act at the level of challenging individual decisions by local authorities, the matter also requires lobbying at the national level. The ACP is thus attempting to meet with the Minister of Safety and Security and the Minister of Local Government to impress on them the problem faced by groups that want to protest and call on them to use their national offices to effect changes in the implementation of the Act at the local level.

3.9 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. After the merger, Desai worked at the UKZN's Centre for Civil Society. On Desai's application 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 developed in the media around the case. Desai was subsequently made an offer by Rhodes University, which he took up. On the 12th May 2006, a faculty board at Howard College deliberated on the matter of Desai's application to be an honorary research fellow at the Centre for Civil Society. Despite the vice-chancellor's interventions with the committee, it selected him as a research fellow. This decision is set to be ratified on the 1 August 2006 by the university research committee.

3.10 UKZN and freedom of expression

While much public attention regarding UKZN was focused on the Desai matter, the constraining of academic freedom and freedom of expression in general at that university goes beyond that issue and will have to be addressed much more comprehensively. Other academics from UKZN, such as Richard Pithouse and Fazel

Khan, have also been under pressure from the university administration. What one infers from a close reading of events regarding these academics – who also have reputations as activists, as well as several on-the-record statements, is that these scholars are under attack for challenging power both inside and outside the university.

While the university community was still dealing with the Desai case, unions decided to hold a march on campus for a number of labour-related reasons. Unions were told that a march they were planning to have on the Westville and Howard College Campuses would be limited to small sections of the campuses. All academics were then sent letters by the university administration, informing them that if they were to strike, they needed to inform their “line managers”. The FXI assisted the academics and unions with legal and other advice and issued a number of statements expressing concern about the constraining of free expression at UKZN.

In April 2006, the UKZN’s Acting Director of ICT sent letters to academics and, it seems, students informing them of a new “Electronic Communications Policy” by the university which would apply (retrospectively) to all staff and students. Staff were asked to sign their acceptance of the new policy, in terms of which all staff and student electronic correspondence, internet browsing and other internet activity would be monitored. Further, the policy explained that all documents residing on staff and student computers would be subject to being accessed by the university’s IT department whenever the administration felt it necessary to do so. Also troubling was the letter’s instructing staff and students that the university would not allow any correspondence or documents on their computers that was regarded as “illegal content” (including material that was “pornographic, oppressive, racist, sexist, defamatory”). This poses a clear threat to academic freedom, freedom of research and freedom of expression and is an obvious obstacle to the ability of academics and students to have access to the widest possible material for research. The FXI is currently writing a response to the new policy and will circulate that response widely. Our concern is not simply for the UKZN but for academic freedom in South Africa more generally. We are concerned that the UKZN example might become one that is used as a precedent by other university administrations with political or other agendas and who want to make academic freedom subservient to those agendas. It is a matter the FXI will continue tracking throughout the country.

3.11 Jacob Zuma case and freedom of expression

Zuma song banned

The SABC’s radio station, Ukhozi FM, decided in January 2006 to ban from its airwaves a song that was supportive of Jacob Zuma. The move seemed clearly to be politically motivated. The FXI issued media releases about the matter and lambasted the SABC for taking politically-motivated action when, judging by the ratings, the song was very popular with the radio station’s audience.

Exposing the name of the rape complainant

During the course of the Jacob Zuma rape trial, Zuma supporters publicly revealed the name of the rape complainant of placards and burnt an effigy of her. Some also stoned a woman they suspected was the complainant. The FXI responded to these incidents, pointing out that the revealing of the name of a rape complainant in that manner was illegal under the Criminal Procedures Act. Also, the FXI argued, the effect of such exposure could easily be the silencing of the voices of future rape victims – already marginalized and traumatised. Thus, the FXI argued, those revealing the complainants name should be charged.

Zuma's attack on the media

On various occasions during the Zuma rape trial, his supporters and he had accused – either blatantly or subtly – the media of being biased against him. The charge was, in the opinion of the ACP, unjustified. The FXI issued statements defending the role of the media in the case and participated in a number of talk shows and interviews.

Earlier this month, Zuma issued letters of demand to a number of media which, he claimed, were biased against him and had defamed him. He was claiming damages for a total of R61 million. The list of media in Zuma's sights is: The Star, The Citizen, Sunday Sun, Sunday Times, Sunday Independent, Sunday World and Rapport, from radio Highveld Stereo. Cartoonist Jonathan Shapiro was also issued with a similar letter. The FXI responded to these accusations defending the media and individual concerned and defended their right to publish and not be sued by politicians.

3.12 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. The FXI issued statements defending Health-e's publication and pointing out that the defamation argument was both weak in this case and that the story by Health-e was in the public interest. Rath ultimately withdrew the case and the FXI welcomed that decision.

3.13 The cartoons

In February 2006, the Muhammad cartoon controversy hit South Africa's shores. In 2005, a right-wing Danish newspaper had published caricatures of the Islamic Prophet Muhammad, showing him as a terrorist and in various other ways that were offensive to the Muslim community. There were protests in various parts of the Muslim world and in other countries as well. Numerous newspapers and websites subsequently republished the cartoons, inflaming passions further.

In February 2006, some South African media covered the controversy and the protests that were taking place. The *Mail & Guardian* published one of the cartoons as part of a story explaining the reasons for the protests. No other South African newspaper had published them. Subsequently, the Jamiatul Ulama Transvaal – a Johannesburg-based Muslim clergy organisation, applied for and were granted an urgent interdict against a number of newspapers preventing them from publishing the cartoons. The ACP was inundated with calls for comment on the issue. We participated in more than two dozen interviews, talk shows, etc in this period and wrote two op-eds as well. The FXI position was that editorial control needs to remain in the hands of editors, and cannot be relegated to the hands to the courts. We therefore criticised the granting of the interdict and argued that editors should have been allowed to make their own decisions regarding publication of the cartoons.

The ACP also attempted to play a mediating role between the *Sunday Times* and the Muslim groups that had applied for the interdict against various newspapers, at the time when the emotions within the Muslim community were particularly strong and the *Sunday Times* was being boycotted by sections of the community.

3.14 Charlene Smith, Patricia de Lille and New Africa Books

In 2002, New Africa Books published a biography of politician Patricia de Lille, authored by journalist Charlene Smith. Three women were named in the book as being HIV positive. This stemmed from their participation in certain research conducted by the University of Pretoria. The women applied to the High Court for an urgent interdict to prevent the distribution of the book, claiming their right to privacy

had been violated. The defendants disagreed that there was a violation of privacy, arguing that the names of the women were a matter of public record because of their participation in the university trials and their agreement with the university that their names could be used. The court dismissed the claims against Smith and de Lille with costs, and awarded damages and costs against New Africa books. The three women then took the matter to the Constitutional Court.

The FXI was accepted as *amicus curiae* in the Constitutional Court on this matter. The FXI, as *amicus*, argued that freedom of expression was a fundamental value that needed to be considered in the case. A core component of the applicants' case was that the common law should be developed by the Court to allow all defendants – not only media defendants – to be held liable for negligence. The FXI argued that such a development would have a chilling effect on freedom of expression. Judgement in the matter has not been delivered as yet.

3.15 Cape Town By-law on “Prevention of Nuisances”

Earlier this year, the City of Cape Town passed a by-law called the “By-law relating to streets, public places and the prevention of nuisances”. The by-law lists a number of “prohibited behaviours” in the city and seeks to regulate, *inter alia*, begging, gatherings, public bathing and urination, nudity, door-to-door collections, parking, excavations and processions. A number of the provisions are problematic and could be regarded as unconstitutional, in the opinion of the FXI. However, a primary concern for us is that the by-law seeks to constrain gatherings and processions even more than the Regulation of Gatherings Act of 1993. In fact, the by-law contradicts and is in violation of the provisions of the Regulation of Gatherings Act. The FXI believes this is an extremely dangerous development where local authorities feel they have the power to pass by-laws that overrule legislation passed by parliament and, even, the country's constitution. The ACP and the Legal Unit are currently preparing a response to the by-laws in the form of an open letter to the Cape Town Mayor.

3.16 Icasa Amendment Bill

The FXI viewed the Icasa Amendment Bill, which was passed by the National Council of Provinces (NCOP) in December 2005, as seeking to make Icasa an extension of the minister and to bring the regulatory body under her political control. If this were to happen, it would not bode well for the independence of Icasa and would set a bad precedent for the independence of other constitutional bodies (Chapter 9 and others). The FXI did a massive amount of media work around the issue and wrote to President Thabo Mbeki, lobbying him not to sign the Bill into law. The FXI also consulted with and lobbied other organisations to also write to the president expressing the gravity of the Bill. We impressed on the president that the Bill was unconstitutional and, thus, should not be signed into law. In April 2006, the president agreed with the position about the unconstitutionality of the Bill and sent it back to parliament to be redrafted. A new draft was prepared and it was signed into law by the President. The new law is not completely satisfactory and the FXI, therefore, obtained legal opinion on its constitutionality. The opinion was that the Act was probably constitutional and we have decided not to pursue the matter.

3.17 Others

- The ACP offered to assist ANC members in the Buffalo City Municipality who were interdicted by the council for a march they had held and for a petition which threatened to make the municipality “ungovernable” and complained about the manner in which ANC councillors were chosen. The FXI also supported the ANC members' application to the Foundation for Human Rights for legal funds to defend themselves.

- The FXI responded to the proposal by Sports and Recreation Ministry advisor, Gideon Boshoff, that the old South African flag be banned from all Soccer World Cup matches in 2010. Our argument was that this would effectively proscribe the freedom of expression of a certain section of a population and could have the effect of suppressing a particular viewpoint – even if it is odious – without dealing with the viewpoint and its causes.
- Faizel Katkodia, a manager at Standard Bank, was called to a disciplinary hearing for sending out emails critical of the state of Israel to his private mailing list using the bank's internet resources. He has been charged of using the bank's internet resources in violation of bank policy and of bringing the bank into disrepute. The ACP has been advising Katkodia on this matter and will consider further assistance depending on the outcome of the third hearing which is scheduled for August.
- The South Africa Ports Authority has decided to invoke the National Key Points Act and attempt to have ports in South Africa declared as national key points. The FXI has responded to this by pointing out the dangers to freedom of expression, freedom to protest and access to information of the National Key Points Act generally and how the declaration of ports as national key points will constrain various forms of expression around the ports. The FXI is watching the matter closely.
- The FXI has responded to the nose stud case in Durban where a learner belonging to the Hindu faith was prevented by her school and the Kwazulu Natal Department of Education from wearing a nose stud to school, which, her mother argued, was a cultural / religious duty. The FXI is considering applying to be an amicus in the Constitutional Court case in the matter.
- Wardah Hartley is an SABC journalist who was hauled before a disciplinary committee for allegedly bringing the SABC into disrepute. After the SABC's radio station 5FM played a song that many Muslims would find objectionable – the song had the Muslim call to prayer, the *adhan*, in the background, Hartley sent out an email to a number of Muslim friends asking them to send letters of complaint to the SABC. The corporation felt slighted and decided to take action against her. Hartley's union representative approached the ACP for advice on how to approach the matter in the hearing and was assisted by the FXI's legal unit.

4. Freedom of Expression Network and Legal empowerment and training

As mentioned earlier, with the FXI's decision to reorientate the ACP from a reactive programme to a more proactive programme, the programme's work with social movements and, particularly, the empowerment of social movements in terms of legal issues related to freedom of expression, became a critical priority for the ACP. Largely through a grant from the Rosa Luxemburg Foundation, the ACP drew up a pilot programme to explore ways of developing a national Freedom of Expression Network. The purpose of the Network was envisaged to be the empowerment and training of social movement activists – especially leadership and members of legal committees – on legal issues and the creation of a network of solidarity among structures that have faced state repression and have been denied their freedom of expression in various ways.

Two workshops were held in Harrismith, bringing together social movements and residents associations in the Free State, providing legal training – particularly on the Regulation of Gatherings Act. A three-day national workshop was also held –

together with the Social Movements Indaba (SMI). The workshop served both as a strategy planning session and as a legal empowerment workshop.

The latter workshop brought together representatives of social movements, residents associations, crisis committees, etc from around the country. Many of these organisations had not even an acquaintance with each other. The workshop served as an important forum for networking among activists and as a forum for legal empowerment. The workshop ended with a number of resolutions, including the formation of a Liaison / Coordinating Committee with representatives from each province that was represented at the workshop. A report of the FXI-SMI workshop is attached.

The last workshop in the pilot phase of the programme will be held in Durban in August 2006. With the one-year pilot project having reached its conclusion, it is now envisaged that the development of the Freedom of Expression Network will take another five years.

5. 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 Abahlali protests is an 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 and the Minister of Safety and Security 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 Ministers' 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 drew up 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. The memorandum is yet to be signed.

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, media freedom, the Muhammad cartoons and hate speech, etc.

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.

8. Regional, Continental and International Activities

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

Network of African Freedom of Expression Organisations (NAFEO)

The FXI is a founding member of NAFEO 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 would host the network for the time being, and that funds will be sought from Unesco to employ a co-ordinator.

The conference agreed to establish a network that will seek fundamentally to 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 took place in February in Brussels. At this meeting, planning took place around the above-mentioned interventions, and the situation in the Democratic Republic of the Congo was added to the list. At this meeting a discussion ensued about the particularly strategic role of the FXI in relation to the network. It was noted that South Africa has an influential role to play in conflict monitoring and peace building on the African continent, and that as a result, holds a lot of sway in the Southern African Development Community (SADC) and the African Union (AU). The FXI could therefore use its proximity to the South African government to prevail on it to use this influence to address the media freedom situations in these conflict zones.

To this end, the FXI has been co-opted onto the co-ordinating committee of Nafeo, and will be assisting in pulling together a Nafeo General Assembly. Nafeo has since employed a co-ordinator, and has decided to focus on the following 'hotspots': Eritrea, Ethiopia, Gambia, Tunisia and Zimbabwe. A summary of key decisions is attached.

This work has seen the FXI becoming involved in more continental work, and has challenged the FXI to re-define its role to focus not simply on South African censorship issues, but on South Africa's contribution to reducing censorship on the continent. Meeting this challenge is a key focus area for the FXI in the coming years, which may well see the FXI's role as a purely nationally focussed organisation being reconsidered.

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 were put to the IFEX AGM in Brussels in February 2006, which the FXI attended. The AGM adopted the FXI's position and has, thus, redefined the understanding of freedom of expression within IFEX.

The FXI continues to serve on the Editorial Committee of IFEX, and has also been elected onto the IFEX Council. The Executive Director, Jane Duncan, also serves on a technical committee reviewing the relationship between IFEX and its host, the Canadian Journalists for Free Expression. The increasing demands on the FXI, and

particularly the Executive Director, to play a role in continental and international work should be noted, as it means that the FXI's work is also taking on an international dimension.

In the meantime, the FXI continues to contribute to the IFEX network, and its Alerts can be viewed at the following URL: <http://www.ifex.org/en/content/view/full/74/>

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. A pilot piece of research dealing with the Johannesburg municipality has been completed and the final report for the national research will be ready by the end of August. Funding for this research is being provided by the Global Opportunities Fund.
- *investigation into public protest*: tracks the large number of public protests that have enveloped the country. For the past three 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 analyses 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 a draft report has been completed. The final report will be ready by the middle of August.
- *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

The increase in incidents of censorship – in various forms – is on the increase in South Africa. On the one hand, the past year has seen increased attacks against the

media, with a number of media – especially smaller newspapers away from the large metropolitan areas – being sued for defamation or threatened with legal action. Former Deputy President Jacob Zuma’s action against a whole coterie of media at the same time is just the most sensational of these broadsides against the media in general. The other recent sensational instance of legal action against the media involved the Prophet Muhammad cartoon saga when two entire newspaper groups were interdicted from publishing something they had not even expressed an intention to publish.

There is also another disturbing trend in the making, in the silencing of the media and individual journalists: the attempts to force them to reveal their sources for various court cases. If this does become a national trend, it would lead to very deliberate forms of self-censorship by journalists and by editors.

But journalists and the media are not the only parties that are facing an erosion of their freedom to write and say what they want. A number of individuals in other capacities are also being so targeted: workers, managers, students. And many of these individuals are coming to the FXI for advice, legal assistance, capacitation on dealing with the media, etc. The FXI’s role, of course, is not simply of reacting to such requests for assistance. Recognising that it is the organisation’s responsibility to also seek out such instances and respond to them, particularly in ways that have greater impact than on individual cases, the FXI is particularly keen to use a combination of the ACP and its legal unit to set precedents in court – usually by acting as *amicus curiae*. This was our rationale for involving ourselves in the Charlene Smith / Patricia de Lille / New Africa Books case and for our considering an involvement in the Nose Stud case.

With the last mentioned case, we believe that the question of cultural rights (which is addressed by the constitution) will increasingly become an issue of contestation in South Africa. There have already been cases in the past few years of learners being prevented from wearing religiously mandated clothing and the matter needs to be dealt with at the Constitutional Court level rather than at the individual school level.

Extremely concerning for us in terms of the trend of fettering freedom of expression in South Africa is concerned, is that such constraining is increasingly taking place in academic institutions – targeting both staff and students. Staff and students in some institutions have even complained to the ACP that the freedom of expression environment at their institutions was more conducive to debate and greater academic freedom in the days of apartheid than it is today. It is an extremely worrying trend and one that the FXI will need to monitor carefully. It is likely to be an issue that will require a concerted proactive push from the FXI, with research, lobbying, capacity building and, perhaps, even court action.

As the FXI has been insisting over the past few years, the freedom of expression of expression environment in South Africa must be considered not only in terms of the media and individuals and their right to speak or publish but, also, in terms of the right of free expression of poor communities and their organisations. The ACP has thus been particularly concerned about the difficulties placed on movements in their attempts to obtain local authority cooperation for marches, protests and other such gatherings. For more than a decade, local authorities have been misinterpreting the Regulation of Gatherings Act in ways never envisaged by the drafters of the legislation and have, thus, been acting in ways that are illegal and unconstitutional. Hopefully, the two court victories around the Regulation of Gatherings Act that the FXI has been involved in will be the beginning of reversing this trend.

But the problem about such denials of freedom of expression is well entrenched and widespread. And it is not a problem that the ACP and the FXI's Legal Unit can deal with alone and in a reactive manner. Hence, the FXI's decision to focus on legal empowerment will, in the next five years, have significant impact in spreading the opposition to the illegal implementation of the Gatherings Act. The Freedom of Expression Network, which requires much more development and nurturing, is set to play a crucial role in this regard, with legal officers / committees and leadership in movements and organisations being able to deal with such violations in the first instance – without the need to involve the FXI.

The development of the FX Network – as network of social movements, residents associations, etc that is independent of the FXI – is an exciting possibility that could take forward the struggle for freedom of expression in leaps and bounds.

In general, however, the enthusiasm for medium and long term possibilities cannot blind us to the reality that, today, there is a sustained attack on freedom of expression: in the public broadcaster, the independent media, individual freedom of expression and the freedom of expression of poor people in particular. This sustained attack must be met by a sustained and tireless campaign to defend the constitutional rights of South Africa's citizens – particularly those of its most vulnerable and disadvantaged citizens.