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About the FXI

The Freedom of Expression Institute (FXI) is a non-profit organisation that was established on 27 January 1994. The aim of the organization is to protect and foster the right to freedom of expression as an enabler of access to civil, political and social, economic rights. The FXI derives its mandate from s16 (1) of the South African Constitution:

Everyone has the right to freedom of expression, which includes –

- ◆ *Freedom of the press and other media;*
- ◆ *Freedom to receive and impart information or ideas;*
- ◆ *Freedom of artistic creativity; and*
- ◆ *Academic freedom and freedom of scientific research;*
- ◆ *The right to demonstrate and protest to express views.*

Featured Article

Provisions of the Regulations of Gathering Act declared unconstitutional

On 24 January 2018, the Western Cape High Court delivered a landmark judgment ruling that section 12(1) (a) of the Regulations of Gatherings Act, 205 of 1993 which criminalises the failure to notify authorities of a demonstration as unconstitutional.

On 14 and 15 June 2017, the Social Justice Coalition, a Khayelitsha-based non-governmental organisation brought the application against the Minister of Police and the City of Cape Town on behalf of 20 of its members that were arrested following a peaceful protest concerning poor service delivery in their community outside the office of the mayor of the City of Cape Town, arguing that the provision in the Regulation of Gatherings Act limited the right to protest which was not reasonable and justifiable in an open and democratic society.

In March 2018, the Minister of Police petitioned the Constitutional Court to challenge the outcome of the Western Cape High Court.

The Constitutional Court is yet to issue directives on the matter.

The FXI intends to apply to the Constitutional Court to for leave to intervene as an amicus curiae.

Governance at the South African Broadcasting Corporation

In the matter between the Support Public Broadcasting Coalition (SOS), FXI and the trustees for the Media Monitoring Project vs the SABC, Minister of Communications and Hlaudi Motsoeneng, the courts found in favour of SOS and curbed the powers of the minister to appoint and remove board members at the SABC.

The key issue in this matter regards the independence of the SABC and the powers that govern the institution. It has been argued by SOS and FXI that due to the influence of the SABC over democratic principles and institutions and its constitutional right to maintain public interests, that there should be no political interference at the SABC. It was found that there was improper ministerial interference in the SABC board, regarding the

appointment of Hlaudi Motsoeneng. In the report for the ad hoc committee into the SABC board enquiry into the fitness of the SABC board, it was found that the previous minister of communications, Ms Muthambi, unlawfully interfered in the affairs of the SABC board by amending the memorandum of incorporation of the SABC, giving her authority over the appointment, terms and conditions of appointments and the suspension and discipline of three executive directors of the SABC.

Judge Matojane found that the amended memorandum of incorporation of the SABC was inconsistent with the Broadcasting Act 4 of 1999, in that approval of the minister was not required for the appointment of the executive members of the board. The Broadcasting Act was specifically enacted to govern the affairs of the SABC to the exclusion of ministerial interference. The judgement also states that the minister will have no right to veto decisions taken by the SABC board. An application for leave to appeal the decision was brought forward by the minister. Judgement as of the 6th of December has been suspended pending the leave to appeal, this means that the power to appoint the executive still rests with the minister.

In March 2018, the Minister of Communication indicated that it would apply for leave to appeal the decision of Judge Matojane. The FXI, together with the SOS Coalition and the Media Monitoring Project will be opposing the application for leave to appeal. The date for application for leave to appeal is yet to be publicised.

Upcoming hearing on Hate speech – Jon Qwelane v the South African Human Rights Commission

On 29 March 2018, Jon Qwelane, in the case launched by the South African Human Rights Commission and in which FXI is amicus curiae will be applying for leave to appeal the judgment of Judge Moshidi delivered on 18 August 2017.

In 2009, after several complaints the SAHRC brought an application in the Equality Court challenging the statements Jon Qwelane made in an article published in the Sunday Sun entitled “Call me names but gay is not okay” on 20 July 2008. The article was

accompanied by a cartoon of a man marrying a goat. The court heard that his column was harmful and hurtful to

the gay and lesbian community. Jon Qwelane has been ordered to write an apology which must get the same reach as his initial comments. Jon Qwelane has applied for permission to appeal, which is scheduled for the 29th of March 2018.

The FXI Law Clinic provided expert opinion as amicus curiae in the Jon Qwelane hate speech case in March 2017. The objective was to assist the court in the adjudication of hate speech matters in order to more clearly define the parameters of speech that does not enjoy constitutional protection. FXI argued against the limitation of free expression as there is no hierarchy of rights and the right to freedom of expression should enjoy equal protection alongside the rights to dignity and equality. FXI highlighted that the state has a reciprocal duty to actively promote equality in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act as there has been disproportionate emphasis on unfair discrimination and restricting legitimate forms of expression. FXI argued that the protection granted by the

right to free expression extends even to speech that may be hurtful, offensive or insulting, provided that it

does not violate s16(2) of the Constitution.

The Old Flag

“Is it time to criminalize displays of the old flag?”

The Nelson Mandela Foundation submitted an application to the Equality Court that gratuitous and unwarranted displays of the old South African flag constitute hate speech, unfair discrimination and harassment based on race as they believe that a number of people do not understand that apartheid constitutes a crime against humanity. The Foundation believes that the law must be used to discourage the use of the flag. They have monitored incidents of the flying of the old flag, such as the Black Monday demonstration, a protest against farm attacks and killings which have persuaded them to act. The foundation believe that the flag has only educational use and is a symbol of oppression and serves no artistic, journalistic or public interest. In public debates with Afri-forum, a leading figure in the Black Monday protests, the foundation has argued that displays of the flag demonstrably compound the pain experienced by millions of black South Africans who suffered under apartheid and continue to struggle under its legacy. Afri-forum have



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argued that the flag should not be unlawful as it was a part of history. The foundation has likened the use of the flag to Nazi Germany and the swastika saying that the symbol is oppressive and hateful. Countries like Germany, which is also a progressive constitutional democracy with a painful past, have passed laws specifically criminalising gratuitous displays of Nazi symbols, as they signify only oppression, hatred and holocaust.

Inxeba –The protection of artistic expression

In the protection of artistic expression, the North Gauteng High Court dismissed an urgent application brought by the Council of Traditional Leaders of South Africa (Contralesa) and Man and Boy Foundation to interdict the screening of Inxeba, an art film depicting a love story between two young men, against the backdrop of the initiation process in the Xhosa ethnic group. Contralesa and the Man and Boy Foundation contended that the art film was an inaccurate and offensive depiction of Xhosa culture. They contended that the movie should contain a disclaimer by traditional leaders that the movie is not a true reflection of events at initiation schools. They

stated that the film reveals scenes of explicit nudity and homosexuality, which is not in keeping with traditional practices. As a result the Film and Publications Board, which had assigned a 16LS classification on the movie, gave an X18 rating. This meant it could only be screened in adult shops as pornography.

The filmmakers have argued that the banning and classification of the film infringes on the right to creative art and freedom of expression. Inxeba has won 20 awards of excellence internationally and within South Africa. The filmmakers and the Film Publications board have now reached an agreement to allow the film to be screened until the full matter is heard in court on the 28th March.

Film and Publications Amendment Bill

Parliament has approved the film and publications amendment bill, which will be passed through the National Council of Provinces before signed into law.

The bill extends the power of the Film and Publications board to classify online content. The Board will be able to investigate and prosecute individuals for messages or

communications posted online following a complaint. There are concerns that the Film and Publication Board will be able to block non-compliant distributors at an ISP level, thereby controlling the online information the general public have access to. The problem is that the FPB now have the power to classify and potentially ban films, games and other content.

The proposed legislation raises issues of censorship on the internet and whether or not and the extent to which a regulatory body ought to regulate in light of a constitutional democracy.

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Prevention and Combatting of Hate Crimes and Hate Speech Bill

On 13 March 2018, the Cabinet approved the Prevention and Combatting of Hate Crimes and Hate Speech Bill which makes hate crimes and speech

criminal offences. The bill, which initially covered hate crimes is to make provision



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of hate speech as well. Critics of the bill, say that people will be unfairly prosecuted for simply insulting others and consider the bill too broad and vague in its definition of what constitutes hate speech,

infringing on freedom of expression and freedom of

the media. Persons found guilty of an offence under the proposed bill ranges from three years for a first offence to ten years for a second offence. The bill will be open for public comment and debate.

Events

On 22 March 2018, FXI hosted a round-table discussion on “The parameters of hate speech”. A report on this discussion will be published in our next newsletter.

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