



**FREEDOM OF EXPRESSION
INSTITUTE
MODULE SERIES**

**INTERNET FREEDOM AND
FREEDOM OF EXPRESSION**

IN SOUTH AFRICA



THE RAITH
FOUNDATION

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Preface

The FXI prepared this module on *Internet Freedom* in South Africa with the aim of providing basic insight on how internet freedom impacts on freedom of expression among individuals, communities, civil society and government in South Africa. In a rapidly changing civil-political and socio-economic environment, the internet has emerged as one of the primary mechanisms that influence and continue to redefine the practice of democracy. Internet freedom is therefore an increasingly important safeguard towards advancing not only freedom of expression but the broader issues concerning access to information but also its associated rights. This module highlights the evolving exercise of free of expression in a digital world and how this has an influence on open, accountable and sustainable democracy in South Africa. It is hoped that this module will form part of advocacy towards the promotion of policy and legislation strengthening the practice of internet freedom in South Africa and provide a template for other countries in the region as well.

Acknowledgements

This module was produced with support from the RAITH Foundation. The Foundation's vision of success is a just and fair society in which (a) people are aware of and able to exercise their rights and responsibilities and (b) organizations, the state, private sector and civil society are held accountable for their actions. The Freedom of Expression Institute extends a vote of thanks to the RAITH Foundation for funding this important contribution to the work of the Institute in promoting the right to freedom of expression. With this support, the Institute will continue to advocate and promote the exercise of freedom of expression; eliminating inequalities in access to information and other associated rights towards the realization of an open, accountable and democratic society for all.



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CHAPTER 1: INTRODUCTION

1.1 The Freedom of Expression Institute

The Freedom of Expression Institute (FXI) is a not for profit non-governmental organization which was established in 1994 to protect and foster the right to freedom of expression. The FXI's primary objectives are to fight for and defend freedom of expression; to oppose censorship; to fight for the right of equal access to information and knowledge; and to promote access to media and a free press. In taking on this broad public interest mandate, the FXI campaigns against any limitations imposed on these freedoms by the state, private sector or civil society through civic education, research, advocacy and litigation. It provides support in solidarity with those whose right to free expression is abused or denied. The Freedom of Expression Institute networks and engages with groups advocating for greater openness and transparency in government and campaigning for sustainable forms of democracy both locally and internationally. Additionally, the FXI campaigns for the freedom, diversity, representativeness, transformation and independence of all media.

1.2 Core Programmes

The FXI currently is engaged in the following programmes; Anti-censorship Programme, Access to Information Programme and Media & ICTs Programme. In this, the FXI performs the following specific rights based activities;

a. Litigation, legal advice and support

The FXI, through its Law Clinic, has provided easily accessible legal advice on freedom of expression including artistic freedom, academic freedom, freedom of the media and the rights of people to gather and protest. It has also built the body of law on freedom of expression by making use of high impact litigation and Constitutional Court cases that have assisted in defining more clearly the right to freedom of expression. This is an area where the FXI has had considerable success and has added in building the organisation's profile to enable it to advance its status as the leading organization on freedom of expression in South Africa.

b. Research and monitoring

The FXI has been involved in monitoring the development and implementation

of policy and legislation. The research focus of the FXI is critical in contributing towards the building of the body of knowledge and to raise broad public awareness on the right to freedom of expression. Past research work has been key in informing its advocacy and legal interventions. The research component also aims to produce information that is accessible to all sectors of the public be it academic research papers or popular education; thus serving to mainstream the issue of freedom of expression, and broadening and deepening the right.

c. Civic education, advocacy, lobbying and campaigns

The key strength of FXI has been its involvement in the development of policy and legislation pertaining to freedom of expression. It has assisted in developing the Constitutional provisions by making submissions on policy and legislation to government and Independent Communications Authority of South Africa (ICASA)¹. This area of work has been the legacy of the FXI and an area where it has been most successful. As a result of its lobbying and advocacy work, the FXI has become the lead organisation on the issue of freedom of expression and as such has become a respected organisation whose opinion, views and submissions are sought after by the state, media and other organisations in the sector.

1.3 Why this module was produced

This module was produced to provide insight into internet freedom in South Africa and the potential contribution it can make towards the advancement of freedom of expression. The module introduces and highlights the context of internet freedom.. It is hoped to guide discussion, based on established and international best practices for the development of a concise approach towards the promotion of internet freedom as a tool for free expression in the FXI's various legal, policy and advocacy work.

1.4 Who this is meant for

This module has been produced for any individuals and organizations (formal and informal) that have an interest in freedom of expression in South Africa and internationally. This includes individuals, social and community movements, community based

¹ The Independent Communications Authority of South Africa (ICASA) is the regulator for the South African communications, broadcasting and postal services sector. ICASA was established by an Act of statute, the Independent Communications Authority of South Africa Act of 2000, as Amended. ICASA's mandate is spelled out in the Electronic Communications Act for the licensing and regulation of electronic communications and broadcasting services, and by the Postal Services Act for the regulation of the postal sector.

organizations, religious affiliated organizations, women's groups, youth groups, LGBTI (AQ) and other minority rights activist groups.

1.5 What this module aims to achieve: Learning outcomes

This module is aimed at imparting knowledge of internet freedom in South Africa to the reader.

After reading this module, the reader must be able to;

- i) *Define internet freedom;*
- ii) *Understand the environment around internet freedom in the South African context;*
- iii) *Understand how internet freedom as a concept relates to Freedom of Expression;*
- iv) *Identify the challenges that are posed by the current legal provisions on internet freedom;*
- v) *Identify possible opportunities to advance the exercise of the right to free expression using the internet as a tool.*

1.6 Chapter Summary

Chapter one introduces the Freedom of Expression Institute as an organization that fights for and defends freedom of expression; the right to access information, and to oppose censorship. The module aims to give the reader an understanding of internet and the impact it has had on freedom of expression in South Africa.



CHAPTER 2: PROTECTING FREEDOM OF EXPRESSION

2.1 What is freedom of expression?

Freedom of expression relates to the liberty to be able to hold opinions and to impart and/or receive these as well as ideas and information to others in any form.

In the South African context the scope of freedom of expression is grounded on the Constitution of the Republic of South Africa (the Constitution), which makes provision of the right to freedom of expression as a fundamental right. Section 16 of the Bill of Rights delimits freedom of expression as it relates to;

- a. Freedom of press and other media,*
- b. Freedom to receive or impart information and/ or ideas,*
- c. Freedom of artistic creativity, as well as*
- d. Academic freedom and freedom of scientific research.²*

Freedom of Expression is the best way of attaining the truth, it advances the ability to criticise or converse one another without fear and allows us to get to the truth. It is a vital part of the democratic process as free debate about public issues facilitates the strengthening of a democracy. It is a manifestation of individual autonomy allowing for rational and un-coerced decision making.

Freedom of expression encourages everyone to tolerate the views of others and it protects the right of the dissenters. It is for these reasons that the right of Freedom of expression is regarded as an imperial right which is worthy of observance and protection in any free society.

2.2 What freedom of expression ensures

Freedom of expression ensures a society with a culture of critical conversation and tolerance in and around all aspects. This ensures if not respect, recognition of fundamental human rights and freedoms. Further to that when people are not barred from expressing their views the all-important discourse that is required to strengthen a democracy is facilitated.

² S16 (1) of the Constitution of the Republic of South Africa Act 106 of 1996

2.3 The importance of freedom of expression

The importance of free expression to a democratic society cannot be overstated and continues to be a point of advocacy for the maintenance of a healthy democracy. One of the most significant guarantees that freedom of expression provides is its allowance for all citizens to participate in their systems of governance. In essence, democracy is the rule of the people, by the people, for the people, as such; it is expression through communication or action that ensures that the will of all in society is communicated. This is achieved as this right provides a platform for such communication to facilitate the enjoyment of other rights such as civil-political and socio-economic rights.

One of its most important functions is that decision-making at all levels is preceded by discussion and consideration of a representative range of views. A decision made after adequate consultation is likely to be a better one which mirrors the opinions, interests and needs of all concerned, than a decision taken with little or no consultation.³

Freedom of expression is identified as one of the key elements of holding any government to account, through discourse it influences the manner in which the government affects the will of the people over which it governs. This is evident in the facilitation of freedom of expression through the right to protest. Groups are then able to make their grievances and concerns known to the government who it is hoped would listen to the voices of the people and take remedial action thereafter.

2.4 Can and should freedom of expression be limited?

As with all rights, the right to freedom of expression requires that it be exercised with the responsibility not to infringe on other rights. In South Africa, the Bill of Rights outlines this requirement that all rights be exercised within this limitation of responsibility to others.

Most legislation relating to freedom of expression has an express limitation inserted, that make it clear what free expression cannot extend to. The internal limitation within the South African Constitution is unique in that it is the only right within the Bill of Rights that contains an internal limitation clause. This is indeed attributed to the South

³ Dr Mark Cooray 'The Importance of Freedom of Expression' accessible at <http://www.ourcivilisation.com/cooray/btof/chap211.htm> accessed on the 22/01/2014

African history of apartheid which seemed to thrive on discrimination, hate speech and harassment. The writers thereof were cognisant of that history and the need to takes steps to highlight the responsibility that lies with the ever so important right to freedom of expression.

The South African constitution states that Freedom of Expression cannot extend to expression that enlists:

- a. *Propaganda for war;*
- b. *Incitement of imminent violence; or*
- c. *Advocacy of hatred that is based on race, ethnicity gender or religion and that constitutes incitement to cause harm.*⁴

This is to say that responsible exercise of free expression is such that it is within the confines of expression that does fall within section 16(2) of the Constitution.

The need to limit certain rights is due to the fact that careless exercise of the right may infringe on the rights of others and thereby become destructive as evidenced from the apartheid history of South Africa. It is prudent therefore that the right be limited.

2.5 Chapter Summary

Freedom of expression has been established as liberty to share, communicate, impart and receive ideas and information and is one of the key freedoms required to sustain a healthy democratic state. It is recognized to enhance or strengthen a democracy through the identification of the peoples will through what they express and how they express it. Like any right it is a right to be guarded, protected and most importantly exercised responsibly so as not to be destructive, and for this reason it is a right that is often reflected with inbred limitations that ensure it is exercised responsibly.

⁴ S16 (1) of the Constitution of the Republic of South Africa Act 106 of 1996

CHAPTER 3: WHAT IS INTERNET FREEDOM?

3.1 Internet freedom

For many countries, particularly developed countries, the internet provides the world with relatively inexpensive, accessible, easy-entry ways of sharing ideas and information. Internet freedom is the extent to which users can exchange ideas and share information given the restrictions permitted within the confines of the law (Figlioli, 2013). It highlights the interface between human rights, and regulations and restrictions enforced on the internet. In this sense, the less restrictive the policies and regulations, the more internet freedom there is in a country.

In highly authoritarian countries where sources of access to information are restricted through censorship of traditional media (newspapers, radio, television, etc.), the internet becomes an alternative source of information. The impact of internet use particularly through social networks has proved to be an effective means through which the public can hold those in authority to account.

3.2 The impact of the internet on freedom of expression

The advantages of the internet

As mentioned in the above statement, the internet facilitates freedom of expression by making information easily accessible and allowing free speech. The internet enables the access of any type of information one wishes to find within a matter of seconds. This can be done anywhere in the world making it the most effective means of communication among people who are in different countries and across continents. The internet makes it possible for businesses and companies to trade and carry out their transactions with their clients and customers. News travels fast on the internet; therefore it makes people aware of breaking news of weather, accidents and other important information. It most importantly allows people to exchange ideas and it promotes activism for enhancing freedom of expression. Verpeaux (2010) states that because the internet offers people the opportunity to disseminate human rights knowledge throughout the world and enables them to communicate in this way; in principle, there is no limit on the exercise of this freedom.



The disadvantages of the internet

Having identified its advantageous components, the internet has its limitations which consequently have led to the imposition of restrictions to its usage. It provides a platform for illegal or inappropriate materials to be posted and accessed by anyone. It also allows illegal downloads of music, videos, files and other copyrighted materials. This negatively affects the work of professionals in instances such as *plagiarism*. With increased usage, malfunctions of the internet and its programmes cause viruses to spread through downloads and other interactive activities causing computers or other devices to function abnormally or crash. Similarly, there are internet experts who are able to hack into other computer systems in order to access information such as bank details or passwords to steal from or incriminate people. For some countries, even more dangerous, classified information is accessed; hence restrictions are imposed.

Subject as it is to different legislative systems and to restrictions that vary from one country to another; the internet is not as universally present as it might be expected to be, especially in communist countries such as India, Pakistan or Ethiopia (Verpeaux, 2010). In places such as Europe, Verpeaux suggests that the limitations mainly concern sites that have information on racism or the *Holocaust*. Access to the web and freedom of expression are greatest in North America, where they are protected by the First Amendment to the US Constitution, to which the internet helps to give them more access than any other nation (Verpeaux, 2010). For countries which are not as privileged, the traditional non-governmental regional and international organizations which defend human rights and freedom of expression such as Freedom House, Open Society Initiative for Southern Africa (OSISA), Hivos International, Media Institute of Southern Africa, Human Rights Watch and the United Nations Educational, Scientific and Cultural Organization (UNESCO) strive towards consolidating and safeguarding internet freedom through improvements in prevention and protection of threats, policy and privacy. In these countries, the internet constitutes a new and important network which they can spread universally accessible information to expose violation of such rights and possibly introduce campaigns against the administrations responsible for imposing these restrictions.

How secure is the internet?

In UNESCO's (2011) report, 'freedom of connection, freedom of expression: the changing and legal and regulatory ecology shaping the internet', information was

presented on people who strongly or somewhat agreed that the internet is a safe place to express their opinions. Egypt, India and Kenya appeared to have had the highest percentages of people who strongly or somewhat agree that the internet is a safe place to express their opinions. Those who agreed the least were people in Germany and France, followed by citizens in highly filtered countries such as China and South Korea. On the other hand, some respondents strongly disagreed that the Internet should be a fundamental right of all people. Japan had the highest percentage rate followed by Pakistan and Kenya. Their findings further suggested that amongst the 26 countries sampled, the United States and Canada are also among the top scoring countries where people most strongly disagreed that access to the internet was a fundamental right of all people. These conclusions are evidence to the complex relationships between government policies and public beliefs and attitudes, an area UNESCO indicated is deserving of further research.

Further still, this study showed that discussions of internet governance most often suggest that there are major implications for freedom of expression as more controls are introduced; and have an influence on policy making and further present implications on the openness of the internet.

Monitoring the internet

Finding an appropriate way to regulate the internet has been difficult; in the past and presently (UNESCO, 2011). The search for new ways was not a priority in the past, given that it was not regarded as a serious threat to existing broadcasting and print media, as well as to telecommunications. The growing usage of the internet since 2000 has led to the internet being viewed as the future of Information and Communications Technology (ICT); therefore it is perceived as a technology that has disrupted traditional media and their business models in ways that threaten their business strategies and the regulatory regimes that govern them. This new position in which the internet finds itself leads to initiatives aimed at internet governance and regulation, which is a set of factors which have a bearing on freedom of expression. Besides these recent developments, access to the internet has been the major engine behind this technology of freedom, and the freedom of connection (UNESCO, 2011).

3.3 Internet access in South Africa

The internet being a global network and providing communication between millions of

interconnected individual computers and computer networks, has become a communication tool that is increasingly replacing the traditional forms of communication such as postal services and telefax machines through digital media such as e-mail. South Africa is no exception. Access to the internet is steadily increasing in South Africa; it rose from 34 percent in 2011 to 41 percent in 2012, (International Telecommunications Union, 2012).⁵ Nevertheless, it was found that access to the internet is unequal across income lines (Freedom on the Net, 2013). South Africa has five mobile phone companies: Vodacom, MTN, Cell-C, Virgin Mobile and 8ta; all of which are privately owned except for 8ta, owned by Telkom, a partly state-owned company. The costs of mobile telecommunication services and fixed line *broadband* are expensive, with South Africa's mobile affordability ranked 33rd out of 44 African countries surveyed by Research ICT Africa in 2012. Further observed was that there are hundreds of internet access providers (IAPs) in South Africa, with Telkom retaining a monopoly on fixed-line broadband access via *ADSL*.

Despite its expensive mobile rates which influence internet access and use; these findings suggest that citizens are able to access a wide range of viewpoints in South Africa, and there are no extreme government efforts to limit or manipulate online discussions. Important to note is that online content does not match the diverse interest of South Africa's society, especially with respect to the country's other official languages besides English. Radio and television continue to be the main sources of news and information for most South Africans, but there are increasing efforts to extend mainstream news outlets to online platforms. All major media groups now have an online presence. There are a number of political and consumer-activist websites, though the internet is not yet a key space or tool for social or political mobilization. Still, individuals and groups openly express their views via e-mail, instant messaging, chat rooms, and social media; while the South African *blogosphere* has become highly active in discussing issues such as HIV/AIDS, corruption, protests, and very recently, the highly publicized broadcast of the Oscar Pistorius trial. The internet, through mobile phones is increasingly used for political organization, as seen during the protests and activism against the controversial Protection of State Information Bill throughout 2011 and 2012, which still remains unsigned while the President seeks state law advisors' instruction on whether or not it is constitutionally sound. Meanwhile, as election period

⁵ The International Telecommunications Union is the United Nations specialized agency for information and communication technologies.

continues in preparation for voting this year (May 2014), the main political parties have developed online campaigns to attract young voters and are very active in social media.

A conclusion of the findings summarised by Freedom House show South Africa's rating with respect to internet freedom as follows:

- According to obstacles to internet access, South Africa scores improved from 8/25 in 2012; to 7/25 in 2013;
- According to limits on content, South Africa scored 8/35 in both years 2012 and 2013;
- And finally, with respect to violations of user rights, South Africa scored 10/40 in 2012 and declined to 11/40 in 2013;

*According to these findings, South Africa is free on the internet.

3.4 Restrictions and regulations for online expression

Internet freedom is increasingly becoming a topic of discussion among activists and organizations concerned with freedom of expression and human rights as a result of the controls and monitoring mechanisms being introduced on the internet. Many countries use content blocking and filtering on the internet in order to achieve a wide range of policy objectives. UNESCO (2011) states that most countries use a mix of existing media, telecommunications, national security, and internet-specific laws and regulations to justify restrictions on publishing, or access to online information. As such, it is important to remember that regulation often targets a particular type of action rather than a specific communication medium, addressing illegal acts regardless whether they are committed online or offline, such as defamation or fraud (UNESCO, 2011).

Some of these restrictions include: regulating voice over internet protocol (VoIP) such as Skype which has been blocked in some countries. This is a common practice in many African countries and other developing nations that depend on revenues generated by telephone companies. Indeed, many rapidly developing nations have been convinced of the value of liberalizing telecommunications in ways that support the internet, an example is that of China, which has used the internet as a means to support the economic development of key regions. Government policies have motivated the development and diffusion of the internet throughout its history as a means for

enhancing technological innovation in communication and information technology and services. This is an element of industrial policy in that it not only supports the development of new information industries and businesses, but also allows for innovation in all other sectors of society, from large industrial firms and agricultural enterprises, to the households, who use more efficient ways to use information and to communicate in everyday life and work. There is therefore potential from under- or over-regulation that might undermine the strength of the internet and its global distribution.

Controlling the internet is a vital aspect of internet politics and most countries have viewed some level of censorship as a valid means to protect a nation's interest, such as in online child protection, a key aspect of abuse of the internet. However, justification of reasonable targets of online censorship can vary significantly, depending on the actor, and the cultural or political character of the state in which it occurs. This consequently leads to problems of transparency and it is not clear from policy statements and law to what extent access to internet material is blocked.

On the other hand, censorship of print or broadcast material in most nations is often more publicly identified and debated because one can prove its existence. Transparency is also disadvantaged by the fact that not all governments take responsibility for monitoring online content by directly monitoring users. An increasing number of countries, including China and United Kingdom, have enlisted private stakeholders such as search engines and ISPs to operate as *proxies* in order to monitor online activities. In some cases, ISPs are strongly encouraged to use filtering systems. In other cases, service providers simply choose to offer *filtering* services themselves, even if they are not directed to do so by a governmental or regulatory authority. There are cases where ISPs require a licence to operate and compliance is easy to understand, although such self-regulation makes accountability and transparency harder to achieve (UNESCO, 2011).

Restrictions on freedom of expression online

It is commonly believed that the internet is an uncontrolled and unregulated way of communication. This is not accurate as we observe the fact that laws in the offline world (radio, television, newspapers and other publications) also apply to the online world. UNESCO has observed that online-user behaviour has become a focus of law and regulation in every country. There are many reasons why criminal behaviour is less well regulated online. Firstly, many of the simpler regulatory solutions that ap-

ply offline (*zoning*, age restrictions or proof of identity requirements) are harder to implement online. In addition, there is the problem of managing and organizing law enforcement resources online and also the complexity of comparing differences in online laws and regulations around the world. According to Freedom House, with global internet freedom declining, there are concerns of increase of laws, regulations, and directives to restrict online speech, there have been escalations in arrests of individuals for something they posted online, there have been legal cases and intimidation against social media users, and a rise in surveillance (Freedom on the Net, 2013).

Freedom House identified three particular trends in the forefront of censorship efforts. These included increased surveillance, new laws that restrict online speech, and arrests of users. But, despite these threats, civic activism has also risen bringing more positive developments. They found that surveillance grows considerably as countries upgrade their monitoring technologies; Edward Snowden, a former employee of the Central Intelligence Agency and Contractor of the National Security Agency has become the USA's most wanted person when he made revelations about the USA government's surveillance activities. Censorship was also found to intensify as countries pass new laws and directives to restrict online speech. More users are arrested and they face harsher penalties for posts on social media; and as activism grows, proposals for restriction are slowed down and positive change is promoted.

Besides the three general trends, Freedom House further identified 10 most common types of internet control among the 60 countries investigated. There are:

a) *Blocking and filtering*

Governments are coming up with more tools to block what they identify to be undesirable information on the internet. The censorship mainly targets child pornography, illegal gambling, copyright infringement, or the incitement of violence. Also increasing is the blocking of access to information related to politics, social issues, and human rights.

b) *Cyber-attacks against regime critics*

There are increased technical attacks to disrupt the networks that activists' online form; their communication is tapped into, and their websites are tampered with.

Some of these attacks have been reported to increase during election periods and they are becoming more sophisticated and harder to detect as activists try to protect themselves against this censorship.

c) *New laws and arrests for political, religious, or social speech online*

More internet users are being arrested, tried, or imprisoned for their posts on social networks, blogs and websites instead of simply blocking and filtering information that is seen as undesirable. More countries are passing new laws that criminalise certain types of political, religious, or social speech, either explicitly or through vague wording that may be interpreted in that way.

d) ***Paid pro-government commentators***

These commentators are hired by government officials to manipulate online discussions by trying to tarnish the reputation of government opponents, spread propaganda, and defend government policies when the discussions become intense.

e) ***Physical attacks and murder***

Governments and powerful non-state actors are increasingly resorting to physical violence to punish those who disseminate critical content, with sometimes fatal consequences.

f) ***Surveillance***

Many governments are finding ways to restrict internet freedom without being noticed, often by increasing their technical capacity or administrative authority to monitor individuals' online behaviour or communications. Democratic governments have enhanced their surveillance capabilities in recent years or have announced their intentions to do so. Although some *interception* of communications may be necessary for fighting crime or preventing terrorist attacks, surveillance powers are increasingly abused for political ends. This increased surveillance, particularly in authoritarian countries where the rule of law is weak, often leads to self-censorship, as users fear to risk repercussions by criticising the authorities online.

g) ***Takedown requests and forced deletion of content***

Many governments contact the content hosts of social media sites and request that the content be taken down. While take down notices can be a valid way of

dealing with illegal content when the right rules are in place, many governments and private actors are abusing the practise by threatening legal action and forcing the removal of material without a proper court order.

h) ***Blanket blocking of social media and other ICT platforms***

Given the increasing role that social media have played in political and social activism, some governments have been particularly targeting sites like YouTube, Facebook and Twitter in their censorship campaigns. As their knowledge and sophistication grows, some governments are beginning to move toward blocking access to individual pages or profiles on such services or requesting from the companies to disable access to the offensive content.

i) ***Holding intermediaries liable***

An increasing number of countries are introducing directives, passing laws, or interpreting current legislation so as to make internet intermediaries, whether internet service providers (ISPs), site hosting services, webmasters, or forum moderators-legally liable for the content posted by others through their services and websites. As a consequence, intermediaries in some countries are voluntarily taking down or deleting potentially objectionable websites or comments to avoid legal liability.

j) ***Throttling or shutting down internet and mobile service***

A few governments have used their control over the telecommunications infrastructure to cut off access to the internet or mobile phone service in a town, a region, or the entire country during particularly contentious events. In addition to complete shutdowns, some countries have used throttling, the deliberate slowing of connection speeds, to prevent users from uploading videos or viewing particular websites without difficulty.

The above restrictions on the internet and web may well be reasonable to certain extent; however, these technological advances do not therefore guarantee greater freedom of speech. There are many tools available and more are still in development. The validity of this control cannot be determined without making political and cultural choices about who should control what content in which ways, for what purposes, and with what level of transparency. This then poses the consideration of the

legal frameworks and motivations which impact censorship of political speech, copyright protection and eradication of child abuse further complicating the difficulty of how much the internet can be controlled. Ensuring freedom online should not be seen in competition with other goals, such as improving online security and privacy, as in the case of countries such as China (UNESCO, 2011). Ideally, the broader analysis should be considered in ways that could yield approaches which mutually reinforce a diversity of objectives and better solutions or guidelines must be found to balance these internet rights without undermining fundamental rights.

3.5 Restrictions for online expression in South Africa

As previously mentioned, online censorship legislation is difficult for countries to monitor because the internet has no national boundaries. Users easily access banned material from the internet hosted in other countries where the material is not banned. In South Africa, Internet Service Providers' (ISPs) liability on the internet is regulated by the Electronic Communications and Transactions Act (ECTA)⁶ which may limit their liability provided they meet certain requirements (Stein, et al. 2003). The following laws have impacted freedom of expression on the internet:

a. *General Intelligence Laws Amendment Bill (GILAB)*

In 2012 and early 2013, internet freedom in South Africa was threatened by the General Intelligence Laws Amendment Bill (GILAB)⁷, which aimed to legalize the extensive monitoring of communications known as *foreign signals intelligence* without judicial oversight in its original 2011 version.

b. *Protection of State Information Bill (POSIB)*

The Protection of State Information Bill (POSIB)⁸, if signed, makes it illegal to publish and access certain state information, affecting whistle-blowers in both

⁶ The ECTA provides for the facilitation and regulation of electronic communications and transactions; to provide for the development of a national e-strategy for the Republic; to promote universal access to electronic communications and transactions and the use of electronic transactions by SMMEs; to provide for human resource development in electronic transactions; to prevent abuse of information systems; to encourage the use of e-government services; and to provide for matters connected therewith.

⁷ The General Intelligence Laws Amendment Bill is the establishment of the State Security Agency as a body into which certain government's components are absorbed; to effect technical amendments to certain laws brought about by the abolishment of those government components; to effect certain other technical amendments to laws; and to provide for matters connected therewith.

⁸ The Protection of State Information Bill aims to regulate the classification, protection and dissemination of state information, weighing state interests up against transparency and freedom of expression

traditional and digital media, bloggers, and internet users.

c. Films and Publications Act (FPA)

A positive development has been the ruling of Constitutional Court after finding the 2009 amendments to the Films and Publications Act of 1996 unconstitutional, concluding that the requirement to pre-screen and classify publications, including those online, is an unjustifiable limitation on freedom of expression (Freedom on the Net, 2013). Before this Constitutional Court ruling, an art gallery successfully appealed the classification of the controversial painting of President Jacob Zuma known as “The Spear.” President Zuma and the African National Congress (ANC), the ruling party, had also pursued a court injunction to ban the painting and its digital representations from public display and dissemination online and their failed efforts only led to more widespread circulation of the painting and drew further attention towards the artwork.

d. Electronic Communications and Transactions Act (ECTA)

Under the Electronic Communications and Transactions Act of 2002 (ECTA), Internet Service Providers (ISPs) are required to respond to and implement take-down notices regarding illegal content such as child pornography, defamatory material, or copyright violations. Members of the Internet Service Providers Association are not held liable for third-party content that they do not create or select, though they can lose their protection from liability if they do not respond to take-down requests. As a result, ISPs often remain on the side of caution by taking down content upon receipt of a notice to avoid litigation, and the providers are not obligated to defend the rights of the original content creator if they believe the take-down notice was requested in bad faith. Meanwhile, any member of the public can submit a take-down notice, and there are no existing or proposed appeals mechanisms for content creators or providers. It has been suggested by the Department of Communications to improve this with a new ECTA provision that would allow a service provider to respond to the grounds of the complaint before acting upon the notice. With this, the complainant could then reconsider and decide to withdraw the notice or send a final take-down request that would obligate the service provider to act or lose its protection from liability. This proposed mechanism, however, still falls short of an actual appeals process. The government does not restrict material on contentious topics such as corruption

and human rights (Freedom on the Net, 2013).

e. Regulation of Interception of Communications and Provision of Communication-Related Information Act (RICA)

Concerning restrictions on anonymous communication, another piece of legislation, the Regulation of Interception of Communications and Provision of Communication-Related Information Act of 2002 (RICA)⁹, implemented in 2005, requires mobile subscribers to provide national identification numbers, copies of national identification documents, and proof of a physical address to service providers. An identification number is legally required when you buy any SIM card, and those who have an unregistered SIM card are required to register with proof of residence and an identity document. However, many people in South Africa do not live in formal housing, and this can be an obstacle to mobile phone usage. RICA also requires ISPs to retain customer data for an undetermined period of time and bans any internet system that cannot be monitored, although the Electronic Communications and Transactions Act of 2002 (ECTA) states that ISPs do not have an obligation to monitor communications on their network. Internet cafes are also not required to register users or monitor customer communications. While RICA requires ISPs to send questionable communications to a designated interception centre, it also explicitly prohibits the interception of communications, except with permission from a judge designated to rule on the practice. This is based on the Criminal Procedures Act, which allows law enforcement agencies to apply to a high court judge or regional court magistrate for mobile phone records or the location of a cell phone. RICA also requires judicial oversight and includes guidelines for judges to establish whether the interception is justified in terms of proportionality and narrowly defined standards (Freedom on the Net, 2013).

3.6 Challenges: Internet freedom in South Africa

The judiciary in South Africa is independent and has issued a few rulings protecting freedom of expression online in recent years. *Libel* is not a criminal offense, though civil laws can be applied to online content, and criminal law has been invoked on at

⁹ RICA is the law that regulates the interception of communications and associated processes such as applications for and authorisation of interception of communications.

least one occasion to prosecute against injurious material. Current threats to the traditional media in South Africa may have an impact on the internet sphere.

The Protection of State Information Bill (POSIB) was passed by parliament in 2013 and is yet to be signed into law once the President's state law advisors guide him on its constitutional validity. This law will impose criminal penalties on journalists who report on classified state information and on individuals who intentionally access leaked information, including internet users. Meanwhile, the revised version of the 2011 General Intelligence Laws Amendment Bill (GILAB) which was enacted in 2013 silently authorizes the interception of electronic communications known as *foreign signals intelligence* without a warrant.

While the South African Constitution guarantees freedom of the press and other media, freedom of information, and freedom of expression, among other guarantees, freedom of speech online is infringed upon with increased introductions of online restrictions. Trager and Dickerson (1999) have critiqued the freedom of expression section of the South African Constitution by stating that rather than incorporating absolutist language in protecting freedom of expression, it is made very clear that there is no such thing as an absolute freedom of expression. They further question why a constitution would state as a matter of fact that there will be no censorship and then continue to warn that exceptions could be found in the country's statutes.

Most notably, the Protection of State Information Bill (POSIB) which imposes sentences on journalists of up to 25 years for reporting on classified information (Freedom on the net, 2013). Opponents of the Bill such as the Right2Know Campaign continue to challenge the enactment of this law as it is expected to have a chilling effect on the media as well as on internet users who could face sentences of up to ten years in prison for intentionally accessing classified South African state information on whistleblower websites. According to Freedom House, despite explicit legislative provisions, an investigative report by the *Mail and Guardian* (a local newspaper) in 2011 found that 'state intelligence agencies can and do access citizens' private communications illegally, and that 'it is a common occurrence, especially in police crime intelligence'. According to the news report, the government conducts extensive surveillance of mobile phone conversations, SMS messages, and e-mails through the National Com-

¹⁰ NCC is a government agency that houses interception facilities and operates outside the boundaries of the law because it targets foreign signals intelligence, which is not considered under the purview of RICA.

munications Centre (NCC).¹⁰ According to other reports, the NCC has the technical capability and staffing to monitor both SMS and voice traffic coming from countries outside South Africa. Calls from foreign countries to recipients in South Africa can allegedly be monitored for certain keywords; the NCC then intercepts and records identified conversations. While most interceptions involve reasonable national security concerns, such as terrorism or assassination plots, the system also allows the NCC to record South African citizens' conversations without a warrant and is subject to abuse without sufficient oversight mechanisms. The General Intelligence Laws Amendment Bill (GILAB) in 2011 was proposed with the aim of regulating the NCC's activities and legalizing the monitoring and interception of foreign signals intelligence. Known as the supposed "Spy Bill," the 2011 version of GILAB allowed for any electronic communications originating from or passing through a foreign server such as emails on international platforms, Facebook, Twitter, and Voice over IP applications to be tapped without a warrant. Civil society groups voiced deep concern over the bill's many unrestrained powers and its infringement on constitutional rights. Signed into law in July 2013, a revised version of GILAB avoided concerns over the interception of foreign signals intelligence by not mentioning it altogether, this made its legalization open to question (Freedom on the net, 2013).

Still, concerns over the authorities' ability to illegally intercept private communications were further heightened in April 2013 when research conducted by Citizen Lab¹¹ revealed that two FinFisher¹² command and control servers were discovered on the partially state-owned Telkom network in South Africa. Such servers are used to retrieve data and user information including Skype calls, passwords and more collected by the spyware group. While Citizen Lab also found evidence of FinFisher being set up in other countries such as Ethiopia and Bahrain, the extent to which FinFisher has been implemented in South Africa and by what entities was unknown (Freedom on the Net, 2013). Meanwhile, ECTA provides for the creation of *cyber inspectors* people who are given the responsibility of monitoring and inspecting websites and information systems in the public domain for unlawful activities. The inspectors would be trained to inspect and confiscate computers, determine whether individuals have

¹¹ Citizen Lab is an interdisciplinary laboratory based at the University of Toronto, Canada and it focuses on advanced research and development at the intersection of Information and communication Technologies (ICTs), human rights and global security.

¹² FinFisher command and control servers are surveillance software which market the spyware through law enforcement channels.

met the relevant registration provisions, as well as search the internet for evidence of criminal actions (Freedom on the Net, 2013); yet another infringement upon freedom of expression and efforts to use the internet for citizen journalism exposing the issues that need to be exposed and discussed democratically. Generally, the reports seem to suggest that there have been no reports of extra-legal intimidation targeting online journalists, bloggers, or other digital technology users by state authorities or any other actor. In addition, politically motivated hacking attacks are not significant; however, South African government websites, including the police website, have been hacked from actors outside South Africa a number of times in 2013, and some of these problems remain unfixed. Meanwhile, spam and malware remain a significant problem in South Africa (Freedom on the Net, 2013).

3.7 Opportunities for advancing freedom of expression through the internet

Freedom of expression is a very critical human right that is necessary for self-development, societal development and it advances democratic rights and freedoms. The activists and organizations making efforts to research and report on internet freedom around the world are contributing significantly to prove how freedom of expression is being infringed upon with increased surveillance, arrests and possible deaths for free expression on the internet. In every state, national security is vital, however, the internet provides the world with opportunities to impact human development through means such as citizen journalism which supports traditional media and journalism when information about maladministration, wars, and many other injustices are shared with the world. These active citizenship efforts contribute significantly for the betterment of humanity through the right to freely express and exercise democratic rights that enhance transparency and accountability for the governments that need to assist their citizens' fight for justice; therefore, these rights must be protected.

3.8 Chapter Summary

In this chapter, the meaning of internet freedom was explained as the level at which an internet user may be able to use the internet with as minimal restrictions as possible given the possible adverse effects it threatens to pose at times. Restrictions are imposed on the internet with some governments being more restrictive than others; and most of these control measures develop from the dilemmas these governments face, that is, the need to trade commercially in global markets through making the internet widely and easily accessible, and the need to restrict their citizens from ac-



cessing information that may incriminate their national security. Nevertheless, when these controls are imposed, freedom of expression regresses.

South Africa is rated as being *free* with respect to freedom on the internet; however, this chapter illustrates the challenges that threaten freedom of expression through ways such as citizen journalism and the fight for human democratic rights. As the reader may have gathered, the issue of freedom of expression on the internet is highly contentious with currently little resolve as long as the restrictions and surveillance of internet use continue at the expense of freedom of expression. The fact that online restrictions are difficult to impose cannot be ignored when compared to other media such as television and radio; which give the misconception that the internet may well have no boundaries whatsoever. Therefore South Africa being rated as free on the net, must encourage the fight against developments that may hinder the freedom South Africa currently records. Such cases include the signing of the Protection of State Information Bill, the introduction of the RICA system on mobile devices and the alleged Finfisher spyware software monitoring citizens' online activities.

CHAPTER 4: FEEDBACK QUESTIONNAIRE

a. *What does freedom of expression mean?*

b. *What is internet freedom?*

c. *Does South Africa allow internet freedom?*

d. *Who regulates the internet in South Africa?*

e. *How can internet freedom advance freedom of expression?*



CHAPTER 5: GLOSSARY

1. **ADSL:** a data communications technology that enables faster data transmission over copper telephone lines than a conventional voice band modem can provide.
2. **Blogosphere:** personal websites including internet blogs.
3. **Broadband:** a high-capacity transmission technique using a wide range of frequencies, which enables a large number of messages to be communicated at the same time.
4. **Cyber inspectors:** These are officials appointed in terms of the Electronic Communications and Transactions Act, 2002 to monitor and report on unlawful activity on (or relating to) the internet.
5. **Filtering:** is the use of a program to screen and exclude from access or availability Web pages or e-mail that is considered offensive.
6. **Foreign signals intelligence:** is the interception and analysis of communications and other electronic signals.
7. **Holocaust:** an event or situation in which many people are killed and many things are destroyed especially by fire. It often refers to the killing of millions of Jews and other people by the Nazis during World War II.
8. **Interception:** the prevention of online content from proceeding or arriving to its desired destination.
9. **Internet-centric:** focus is central to or oriented towards the internet
10. **Libel:** the act of publishing a false statement that causes people to have a bad opinion of someone.
11. **Plagiarism:** the practice of taking someone else's work or ideas and passing them off as one's own.
12. **Proxies:** In computer networks, a proxy server is a server (a computer system or an application) that acts as an intermediary for requests from clients seeking resources from other servers. A client connects to the proxy server, requesting some service, such as a file, connection, web page, or other resource available from a different server and the proxy server evaluates the request as a way to simplify and control its complexity.
13. **Zoning:** this occurs when special "zones" are created online where it would be allowed for certain material to be made public and other zones that would not allow such material.

CHAPTER 6: REFERENCES

- Kamaldien, Y. (2012). *Censorship! Internet freedom in SA under attack*. <http://themediainline.co.za/2012/09/internet-is-the-least-free-of-all-the-media-in-south-africa/> Retrieved on 29 January 2014.
- Verpeaux, M. (2010). *Freedom of Expression: in constitutional and international case law*. Council of Europe.
- Freedom House. (2013). *Freedom on the Net 2013*. Freedom House. Johannesburg.
- Freedom House. (2013). *Freedom on the Net 2013: Full Report*. Freedom House, Johannesburg.
- Figliola, P. M. (2013). *Promoting global internet freedom: policy and technology*. <https://www.fas.org/sgp/crs/row/R41837.pdf>
Congressional Research Service, Retrieved on 05 March 2014.
- Dutton, W. H., Dopatka, A., Hills, M., Law, G. & Nash, V. (2011). *Freedom of connection, freedom of expression: the changing and legal and regulatory ecology shaping the internet*.
<http://unesdoc.unesco.org/images/0019/001915/191594e.pdf>
United Nations Educational, Scientific and Cultural Organization. UNESCO Publishing.
- International Telecommunications Union (ITU). (2012). *Measuring Information Society 2012*. Geneva: ITU-D.
http://www.itu.int/en/ITU-D/Statistics/Documents/publications/mis2012/MIS2012_without_Annex_4.pdf
Retrieved on 12 March 2014.
- Stein, P., Patel, S. & Tshepe, D. (2003). *Cyberlaw for civil society: a resource guide*. Open Society Initiative for Southern Africa. Cheadle Thompson & Hayson Inc.
- Trager, R., & Dickerson, D. L. (1999). *Freedom of expression in the 21st century*. Pine Forge Press.



BECOME A MEMBER OF THE FXN

The Freedom of Expression Network is a coalition of grassroots based formal and informal organizations in all 9 provinces within South Africa. It is an association of social movements, community based organizations and not for profit organizations operating in various fields with an interest in advancing freedom of expression as a facilitative right for the realization of open, accountable and sustainable democracy. The FXN maintains a strong and mutually beneficial relationship with the Freedom of Expression Institute which ensures lasting impact of the programmes implemented.

WHY JOIN THE FXN?

By becoming a member of the FXN, your participation will help advance the fight for freedom of expression and other related rights such as the right to access information, protest, association and assembly. The Freedom of Expression Institute believes that this is important towards the realization of a truly open, accountable and transparent government and sustainable democracy.

In addition; as a member, you will receive constant updates of FXI coordinated;

- Trainings,
- Consultative meetings
- Other events, and
- Newsletters

HOW TO BECOME A MEMBER

To join this growing network, please provide the following details;

1. Name of organization/ individual,
2. Location
 - Province, and
 - Town
3. Contact details (Provide at least 1 of the details below):
 - Cell number,
 - Telephone number, OR
 - E-mail address

Send the details above to the FXI through any of the following;

- Call: 011 482 1913
- Fax: 011 482 1906
- SMS: 072 655 4177
- E-mail: organiser2@fxi.org.za



FXI RESEARCH UNIT

The FXI research unit contributes towards building a body of knowledge and aims to raise broad public awareness on the right to freedom of expression. The research unit also guides and informs advocacy and legal interventions centred around freedom of expression. Through this work, the FXI aims to produce valuable information for the benefit of all sectors of the public including academic research, as well as popular education.

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