

# The State of Free Access to Information and Freedom of Expression Trends in South Africa and Internationally

Paper for GAELIC (Gauteng and Environs Library Consortium) Copyright Workshop at Technikon SA in Johannesburg, South Africa, 7 October 1999

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## Introduction

Let me first thank you for giving me the opportunity to contribute to this very important debate on copyright and related issues.

However, I think I should first outline the scope and parameters of the IFLA/FAIFE committee to which I am a member. I was nominated to serve on this committee by our national library association.

The establishment of IFLA/FAIFE was inspired by article 19 of the United Nations Universal Declaration of Human Rights which states:

"Everyone has the right to freedom of opinion and expression, this right includes freedom to hold opinions without interference and to seek and impart information and ideas through any media and regardless of frontiers. These rights has been confirmed by the African charter on Human and peoples rights (Article 9) and many other international conventions. The subject of access to information and freedom of expression came on IFLA's agenda as a result of increasing infringement on free expression and the free flow of information in many parts of the world and the resultant limitations on the ability of libraries and librarians to the serve needs and interests of their users.

The mission of IFLA/FAIFE is as stated in the resolution adopted at the Copenhagen General Conference in 1997. "to advise IFLA on matters of international significance to libraries in regard to IFLA/FAIFE issues, including, but not limited to:

- Censorship of library materials
- Ideological, economic, political, or religions pressures resulting in limitations on access to information in libraries.

The priorities within this work are:

- promote freedom of access to information and freedom of expression as fundamental human rights which are vital cornerstones of the mission of libraries to be gateways to knowledge in support of human rights, peace, democracy and development.
- be the leading organization in responding to attacks and limitations on libraries, seeking support and assistance of other organizations.

- support and assist other organizations which are addressing other relevant issues which may indirectly affect libraries and librarians.

The statement on libraries and intellectual freedom release by IFLA/FAIFE on 25 May 1999 asserts that a commitment to intellectual freedom is a core responsibility for the library and information profession.

South Africa is emerging from a society that has been deeply censored. It is now enjoying basic rights and freedoms that many other countries may take for granted. South Africa for the first time is enjoying a constitutionally protected right to freedom of expression and access to information. This is a highly significant development. Yet, while a great deal of attention has been focussed on ensuring these rights at a constitutional, legislative and government it is very difficult to say to what extent the value of freedom of expression is recognized "on the ground" and to what extent people will defend it on a day-to-day level, and more broadly on a citizen-to-government level.

The right to freedom of expression straddles numerous aspects of democratic society in a manner quite unlike other fundamental rights we enjoy. It encompasses the rights to freedom of speech, media, academic inquiry and artistic endeavour. It extends to and can conceivably be regarded as essential to other fundamental rights such as freedom of choice, religion, conscience, association, protest, and political freedom. It include the right of access to information and the right to receive and impart information. Both the right of access to information and freedom of expression forms the backbone of many vital institutions and activities of civil society.

In undertaking an audit of freedom of expression, one is mindful that over the past few years, the right to freedom of expression, and many of its component parts, have featured in numerous public debates. It proves that while this right has been entrenched in our constitution it remains controversial. The controversy includes the issue of abuse and the question of whether a fundamental human right such as freedom of expression can be abused and how. On the other end of the debate is the question of limitations, and the cautionary note as expressed by MP Patricia de Lille, "...how will we know when the limitations we set are in themselves abusive? " The debate reflects a necessary tension that comes with the growing maturity of our democratic nation as people and institutions embrace the rights they have attained, and others are brought in step with the realities of our constitution. It is this reality which is of most concern when doing an audit of freedom of expression

It is now over two years since our new constitution was adopted and enacted in law. South Africans chose an exemplary constitution. For the majority of South Africans the rights we enjoy were hard won, and should be cherished. An audit of freedom of expression and access to information in South Africa a few years back would have taken us down a dark alley of violations and infringements.

## **Access to Information**

As I have already stated access to information is a fundamental human rights enshrined by the constitution in the Bill of Rights. The Bill gives everyone the right of access to any information held by the state, and any information that is held by another person and that is required for exercise or protection of any rights. Ever since the installation of a democratic order in South Africa, government implemented numerous steps in law and practice that lend themselves to greater openness and transparency and allow citizens greater access to information. The public disclosure of the financial interests of members of Parliament is a habit that is being inculcated by Parliament itself through its rules, while the finance ministry has taken upon itself to transform the budget process in an unprecedented manner allowing for greater public participation and consultation on the manner in which taxpayers money is being disbursed. Parliament continues to implement innovative steps to improve public access to its proceeding, including special television access. Today we can see MP's calling each other a Chiwawa or even a mental case that needs serious

rehabilitation without defamation lawsuits ensuing.

The Open Democracy Bill, which was published in the government gazette in October last year, if accepted by law, will provide a legislative framework for citizen's right of access to government information. It marks a significant break with the past and will alter radically the relationship between government and citizen. The overall objective of the bill is to establish good governance that is free of corruption and accountable to the public. Part of achieving this is to empower the public effectively to scrutinize governmental decision making processes that affect them, hence the access to information and open meeting sections of the bill. These two sections are subject to certain limitations but generally citizens have the right to access information held by a government body, in so far as this can be done without jeopardizing good governance, personal privacy, commercial confidentiality, law enforcement, legal proceedings, international relations and defence and security.

The next crucial aspect about the bill is the protection it affords the citizen against or a private body abusing information held on her/him. The citizen is able to demand that government or private body alter any personal information held on the citizen and which the citizen deems to be incorrect, while the citizen also has the right to know what the information is being used for or to whom the information will be furnished. The final crucial aspect of the bill is the "whistleblower" clause aimed specifically at preventing potential corruption in government departments. A whistleblower is a person who in good faith, reasonably believes that he/she is disclosing evidence of a contravention of the law, corruption or dishonesty or serious maladministration in government. The bill offers protection for whistleblowers by prohibiting the dismissal, suspension, demotion, harassment, intimidation or unfavourable change of conditions of employment of such a person.

The Bill has been hailed as the most progressive in the world. However, while South Africa compared to many third world countries looks promising there are no laurels on which to rest yet.

## **Freedom of Expression**

The new constitution of the Republic of South Africa (Act 108 of 1996) states the following in Section 16 (1):

"Everyone has the right to freedom of expression, which includes:

- Freedom of the press and other media
- Freedom to receive or impart information or ideas.
- Freedom of artistic creativity; and
- Academic freedom and freedom of scientific research.

Besides the constitution the approach of government to the issue of freedom of expression is underpinned by various other pieces of legislation and practices of state and governmental institutions such as the Judicial Services Commission, the Independent Broadcasting Authority, the Public Protector, the Auditor-General and many others. It should be acknowledged though, that there will always be a temptation on the part of those in positions of authority to treat their activity as confidential, that is only too unfortunate if things become. We should constantly guard against this.

Possibly the greatest challenge to freedom of expression is in the courts in the area of defamation. However, the ruling on defamation by the Appellate Division of the Supreme Court on the so called Bogoshi judgement in favour of the newspaper "City Press" is a vital decision for the maintenance and expansion of media freedom in South Africa. It has removed unfair burden of legal liability on the media, which has inhibited its ability to exercise freedom of expression in South Africa. The ruling by judge by Mr. Justice JJF Hefer, with the concurrence of four fellow judges, also represents a victory for the freedom of expression principles contained in South Africa's constitution and overturns previous Supreme Court and Appellate Division decisions which had severely restricted

the media in its role as a public watchdog. The judge pointed out that in South Africa freedom of expression had not been given sufficient weight especially in regard to the role of the press when considered against the competing value of the reputation of plaintiff and ruled that "it would be wrong to regard either of the rival interests as more important than the other" He accordingly rejected the need for material to be proved true in all respects and found that the media had to prove that it had not been negligent in publishing the material. His forceful affirmation of the role of the media in society in which he stated, "we must not forget that it is right, and indeed a vital function of the press to make available to the community information and criticism about every aspect of public, political, social and economic activity and thus to contribute to the formation of public opinion.

Of particular concern was the attack on black journalists on a number of occasions who were accused of being unpatriotic because they were open with their criticism of government. However, there have been fewer of these attacks lately which I believe is a sign of growing maturity government/press relations

However, the dismal state of freedom of expression in the rest of the SADC region suggests a hardening of political attitudes. The detention and torture of two reporters in Zimbabwe. Ray Choto and Mark Chavunduka, shows a scant regard for the rule of law. Zimbabwe's record on human rights has been sadly lacking but in the area of freedom of expression it is almost non-existent. The flow of information has consistently been hindered by the iron grip of government on the broadcast media and much of the popular press. It has taken this incident for that government to reveal just how extreme its intolerance of press freedom is. The latest move by the Swaziland authorities to arrest the Time Sunday editor amounts to an assault against press freedom in the region generally.

The Swazi authorities resorted to one of the oldest censorship tricks in the book, namely to use defamation law to bash an offending editor over the head.

However South Africa still suffers from the affliction of informal censorship. Kwazulu-Natal is most heavily affected, where people are still killed on the basis of their political affiliations. The extent of informal censorship is difficult to quantify: it will take a great deal of time to reverse the climate of fearing to speak out that has been inherited from more violent and repressive times. It is also unclear to what extent the ordinary "man in the street" is conscious of freedom of expression and its importance: this will clearly have an impact on an organised attempt to resist attacks on free speech. There is a crying need to develop, through educational work, a culture of freedom of expression and transparency, so that people will be empowered to defend their newly-won rights.

## **Conclusion**

There can be no doubt that South Africa is enjoying more freedom of expression and access to information than it has done for many decades, even centuries. However, there is still a need for more vigilance. It seems that a lot of public debates must still be encouraged on these issues so that they can actually penetrate the "grassroots" level. The other challenge we are facing is to address the censorship effects that flow from huge numbers of people not having adequate access to the means of receiving and producing information. This great need presents possibly the most daunting, yet diffuse, challenge to ensuring that freedom of expression and access to information are rights owned and practices by all

## **Notes**

- The constitution of South Africa, Act 108 of 1996
- On the occasions of World Press Freedom Day, Freedom of Expression Institute : <http://fxl.org.za>
- The Open Democracy Act Draft Bill, Government Gazette 18381 no 1514 of 1997
- Statement by Freedom of Expression Institute on "Bogoshi" Judgement, Press Release,

<http://www.fxl.org.za/press/1998/2.10.98.0.htm>.

- Brite, J.J, An ethical perspective on the right of access to Information, Meta-Info Bulletin, Vol 7, no 2.
- Louw R, The challenges of Communication by Government and Business in South Africa, 1996, 2
- Submission on the Open Democracy Bill, Freedom of Expression Institutes, [www.fxl.org.za/intro296.htm](http://www.fxl.org.za/intro296.htm).
- Independent Broadcasting Authority Act 153, 1993.
- Information flow in Africa "a trickle, the star of 12 November 1997
- Birth of a new Government Communications Order; [www.gcis.gov](http://www.gcis.gov).