



The Anti-Censorship Programme

Fifth progress report to the Open Society Foundation for South Africa

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1. Executive summary

Besides the many challenges that the programme has continued to deal with prior to and during the current reporting period, we are pleased to announce that there has been progress in regards to some of the matters in which we have intervened in the recent past. These matters relate mainly to cases of the state's use of legal mechanisms to frustrate the work of social movements, as well as the unlawful use of force by police officers to disperse peaceful gatherings and demonstrations. In addition, there is the matter of torture by police against certain members of the social movements that we reported on in our last progress report in September. In this regard, it is gratifying to note the recommendations of the police watch dog body, the Independent Complaints Directorate (ICD), which has recommended that legal action be taken against one of the police officers fingered by members of the Landless People's Movement as being responsible for their torture.

To begin with, it is pleasing to note that the long-standing case of public violence and intimidation laid against members and activists of the Khayelitsha Anti-Eviction Campaign was dropped by the state on 20 October 2004. The dropping of these charges also meant that the restrictive and patently unconstitutional bail conditions imposed against the members (which among other things prevented them from meeting with each other and participating in assemblies and demonstrations) have fallen away. The Anti-Censorship Programme (ACP) had provided financial support for legal counsel to challenge the unconstitutionality of these bail conditions.

Similarly, the ICD announced on December 20 last year that it had completed its investigations into the fatal shooting by police of Teboho Mkhonza, during a peaceful public demonstration in the township of Intabazwe, in Harrismith in the Free State on August 30. The ICD recommended that three police officers be charged with murder, alternatively culpable homicide, and several counts of attempted murder. Furthermore, the ICD body urged that disciplinary action be taken against the named police officers and that under no circumstances must members of the police force be allowed to use bird shot and buck shot in crowd management and control operations.

Public protests have continued unabated in several poor townships in the Free State Province as the residents demand delivery of basic services and accountability from their elected leaders. For example in Phomolong near Hanneman, the residents took to the streets on February 7 and blocked roads demanding that the Free State government address their grievances. The previous week, police had used rubber bullets to disperse a group of protestors taking part in what they (police) termed to be an "illegal march" in the same township.

These developments are of extreme importance to the ACP because as we have pointed out in the past, the real terrain of struggle in relation to the exercise of the right to freedom of expression in South Africa, is the agitation for social and economic rights. We are keeping a watchful eye on the unfolding events in the Free State.

The third area of progress noted during the period under consideration was the recommendation made by the ICD in January 2005, that one of the police officers cited by the four LPM activists for torturing them, be charged with intent to cause grievous bodily harm. We welcomed this development but expressed our disappointment at the fact that it had taken an inordinate amount of time to complete the investigations only for the ICD to recommend that one out of almost five police officers fingered by the LPM activists be charged. It is also frustrating to note that the State is still pursuing its charge of unlawful assembly against the more than forty-LPM members arrested on Election Day, April 14 2004.

We also need to mention the hate speech complaint laid by a member of the Freedom Front Party to the South African Human Rights Commission (HRC) against Mangaliso Kubheka, the national spokesperson of the LPM. Initially, the Commission found Kubheka guilty of hate

speech and recommended that he issue an apology. However, after the active intervention of the ACP, the matter was re-opened afresh and culminated in the HRC's letter of 20 December 2004 in which the commission stated that it could make no specific finding against Kubheka as there was "a major dispute of facts". This is clear demonstration that the ACP's intervention played a major role in reversing a decision, which had obvious far-reaching implications on Kubheka's right to free expression. We are still attending to this matter.

International solidarity has brought certain successes in the work of the programme as well, and especially in regard to the Harrismith shooting matter and the LPM members torture case discussed above. Amnesty International's (AI) London office has been instrumental in urging the state to take the necessary steps to address these and other matters, and letters of concern from its members in countries such as France, Germany, Austria, the Netherlands and Canada, have been sent to top government officials in South Africa.

Regarding other matters and cases captured in this report, we have once again noted the increasing censorship against community media and particularly community newspapers, in several regions of the country. For example there is the outstanding case of *Die Hoorn* a small community newspaper published and distributed in the town of Oudtshoorn in the Western Cape, which was condemned by the local municipality as "biased and one sided". The Municipality then took a decision not to place any further advertisements with the newspaper, neither would it invite the paper's reporters to its sessions. The ACP sent a letter to the municipality in August asking it to reverse the decision and in our last communication with the paper's editor in early March 2005, we were informed that the Council has decided to hold a roundtable discussion with him in order to explore ways of settling the dispute.

There are also two matters that have been brought to the attention of the ACP in which two local community newspapers, *The Orange Farm Vision* and *The Developer* have been sued for defamation. In the two cases, the threats for legal action seem to have receded after the ACP intervened directly with the complainant's lawyers pointing out such action was unwarranted in the face of the papers' right to freedom of expression.

Another area of concern relates to the growing spectre of censorship under the guise of protection of intellectual property, particularly copyright and trademarks by big corporations. In this regard, we report about the long running case of Justin Nurse and his T-shirt manufacturing company "Laugh It Off" which has been sued for trademark infringement by brewing giant South African Breweries (SAB) International Ltd. This case was ultimately heard in the Constitutional Court on 8 March and judgment reserved. FXI, which was represented by advocates Gilbert Marcus SC and Anthony Steyn made written and oral submissions before the court arguing that Laugh It Off's "Black Labour, White Guilt" should be seen as parody against SAB's "Black Label, Carling Beer" trade mark.

The Institute went on to point out that South Africa's Trade Marks law gives a virtual monopoly to the holder of copyright, a situation that must now be changed because this law unjustifiably truncates an individual's right to comment on, criticise or lampoon a registered mark. The case has been covered extensively in the media, as evidenced by the press cutting annexed to this report, and FXI's role and participation as *amicus curiae* (a friend of the court) prominently mentioned. We are awaiting the decision of the court with great expectation.

The second case in the current conflict between intellectual property and the right to freedom of expression relates to the "Hellkom" website, which has now been sued by South Africa's telecommunications giant Telkom for copyright infringement. Telkom is asking for R5, 000,000. The programme will provide as much support as possible to the site and its owner Gregg Stirton, which will include media publicity as well as the possibility of joining the case as *amicus curiae*.

Finally, the programme is continuing the implementation of other activities such as its education and training workshops with community radio stations and the campaign for legislative amendment. The programme has also undergone an evaluation process out of which recommendations have been made for its restructuring in order to make it more effective, efficient and sustainable.

2. Overview of ongoing and new cases handled since March 2004

(Author's note: Many of the ongoing cases as well as some of the new activities captured in this report can be obtained from the ACP's earlier reports which are available online at: <http://www.fxj.org.za/allframes.htm>. Hard copy versions of the reports are available on request from FXI's offices)

2.1. The Khayelitsha Anti-Eviction Campaign case

All the charges preferred against the Khayelitsha Anti-Eviction Campaign activists were dropped by the state on 20 October 2004 and consequently the accused were set free.

2.2. The case of Justin Nurse

Nurse made an appeal to the Constitutional Court and his case was heard on 8 March 2005. FXI also applied to and was admitted into the case as *amicus curiae* (a friend of the court) in support of Nurse's right to parody the South African Breweries' (SAB) "Black Label, Carling Beer" logo. The institute grounded its arguments on Nurses right to parody SAB because the brewer had opted to place a particular brand identity with certain images, virtues and values in the public domain, and this identity must be open to "critique, ridicule and caricature." Furthermore, FXI stressed that SAB should not and must not be made to "enjoy...special immunity from the spoofing and criticism that is generated by its own choice of branding."

The court's decision is expected in the next few months.

2.3. The "Hellkom" case

After an apparent retreat by Telkom from instituting legal action against the "Hellkom" website, in June 2004, the communications monopoly giant went ahead in November 2004 and sued the owner of the site not, surprisingly, on the basis of trademark infringement, but on allegations of copyright violation and defamation. The ACP has teamed up with Gregg Stirton, the owner of this site and is currently exploring modalities of giving wide publicity to this case besides mounting a legal strategy in his support.

2.4. LPM Matters

2.4.1. LPM members torture case

In January 2005, the Independent Complaints Directorate (ICD), the police's watch dog body, recommended that one of the officers named as being among those responsible for the torture of the four LPM members on 14 April 2004, be charged with assault with intent to cause grievous bodily harm. FXI welcomed this development but expressed its disappointment at the lengthy period of time it had taken to complete the investigations. The institute also signaled its deep frustration at the fact that the investigations had taken a whole nine months only to culminate in the ICD recommending that one, out of the almost five police officers mentioned by the LPM members, be charged with assault.

2.4.2. Mangaliso Kubheka and the hate speech allegation

This case was re-opened afresh after Kubheka, with the assistance of the ACP, sent his response to the Human Rights Commission (HRC) regarding the allegations of hate speech leveled against him. In a letter dated 20 December 2004, the commission informed Kubheka that it could not bring the case to a finality because it had:

"Explored all the possible avenues, using its available resources and come to the conclusion that it is not well positioned to make a specific finding on this matter. This is primarily so because of a major dispute of facts"

The ACP is still considering the implications of this disturbingly ambiguous position adopted by the HRC since the commission neither finds Kubheka guilty nor innocent of the hate speech allegation thereby leaving him in a limbo. We are in discussion with Kubheka and will soon make a decision on whether to seek better clarity and definite standpoint from the HRC.

2.5. Matter of 'Die Hoorn'

There has been slow progress in regards to this matter and in a telephonic conversation with the proprietor of the newspaper in the second week of March, he indicated that the Oudtshoorn Municipality had decided to have a joint meeting with him in order to discuss the problem. The Municipality has also resumed placing small advertisements with the paper which is a welcome development given its initial stance not to have any dealing whatsoever with the publication. We will await further developments in the matter.

2.6. Shooting of demonstrators in Harrismith

Amnesty International's London office has taken an active interest in this case after the ACP brought the matter to its attention. The lobby group is currently preparing an action plan on the case. Meanwhile, on 20 December 2004, the Independent Complaints Directorate (ICD) announced that it had finalised its investigations into the shooting and recommended that three police officers be charged with murder, alternatively culpable homicide, and several counts of attempted murder. In addition, the ICD urged the South African Police Services to take disciplinary action against the named police officers, and advised that bird shot and buckshot should never be used in crowd management and control.

FXI welcome this development and in a media release lauded the ICD for its recommendations. However, the institute indicated that it was disappointed at the then exceedingly slow pace of investigations into the LPM torture case and wondered whether the slow reaction had something to do with the LPM's "unfavourable political orientation" as a social movement.

2.7. Matter of "The Orange Farm Vision" Newspaper

"The Orange Farm Vision" is a small community newspaper published and circulated in Orange Farm, a poor black, semi-urban township 40 kilometers South of Johannesburg. In October 2004, the paper was sued for defamation of character after it published an article in its edition of 15 July-15 August 2004, alleging that one of the community members had been denounced by several children as an "evil leader". The complainant threatened to take legal action unless she was paid the sum of R100, 000.00 in damages.

When this matter was brought to the attention of the ACP by the paper's proprietor, the programme sent a letter of concern to the complainant's lawyers arguing that the threats of legal action were inappropriate as such a move was likely to lead to the shattering of the newspaper. The ACP urged the complainant to seek other "alternative, accessible and mutually beneficial" methods of resolving the matter. We have since learnt that there has been no further demands or legal process from the complainant's lawyers and we may conclude that the intervention of the ACP played a role in checking this momentum. This matter will remain open in the ACP's files in case legal action is commenced at some future date.

2.8. Matter of "the Developer" Newspaper

Like "*The Orange Farm Vision*", "*the Developer*" is a small community newspaper serving the small business community of Soweto and Kliptown in Johannesburg. In January, its publisher/editor and one of the residents of Kliptown who had been quoted by the newspaper, approached the ACP with a request for help after a Mr. Eric Chauke sued them jointly and severally for defamation. Chauke alleged that due to certain articles published by the newspaper in December 2004, "his good standing in the community [had] been impaired [and] moreover, the same articles had the effect of causing financial prejudice to [his] business."

The ACP consequently sent a letter to the complainant's lawyers urging that such threats of legal action were likely to have a "chilling effect" on the newspaper, and that the complainant should instead seek an alternative resolution of the dispute. No further action has been taken against the newspaper since then.

3. Campaign for legislative amendment

This campaign is geared for implementation during the remaining six months period of the ACP's current funding phase. As stated in the last progress report (September 2004), certain aspects of the campaign have already commenced such as the meeting in August last year with the editor of the Mail and Guardian. In addition, the ACP, in conjunction with the Social Movements Indaba held a three-day National Anti-Repression workshop in November during which the programme presented the findings of the legal opinion of the constitutionality of the Regulation of Gatherings Act (205 of 1993).

One of the key recommendations made by participants at the workshop was that the ACP should release a simple and user friendly guide to the Gatherings Act. This will enable social activists and movements to understand how to use the Act in practice during the giving of notices for public marches, discussions with local authorities and the conduct of gatherings and demonstrations.

As part of its challenge against the Gatherings Act, and other censorious law, the ACP will bring on board a wide but carefully targeted array of progressive organisations including social movements and media unions when targeting censorious laws. The campaign is meant to proceed well into the next three years of the programme's activities.

4. Education and training workshops with community radio stations

Due to capacity constraints, these workshops were not hosted in the remaining four provinces of the country-Gauteng, Mpumalanga, Eastern Cape and Free State between October and December 2004 as initially planned. Moves are however in place to continue with the training in the course of this year, but a fundamental change in the form and content of the training is set to take place. For example the ACP evaluation conducted between 2003 and 2004 has recommended that the workshops should be designed in such a way that they can capacitate the trainees rather than being merely a 'service provider' platform for the identified constituencies.

Some of the changes that the programme is seeking to introduce at the end of the current training phase include widening the target audience to include critical groups like social movements, academic institutions, government departments, local authorities and the mainstream media. The training material will also be expanded so that participants can examine a number of the key concepts such as media in promoting democracy, sustainability of community media and civil society's role in defending and advancing the right to freedom of expression. As recommended by the evaluator, the education and training will be designed around the concept of knowledge sharing, information dissemination, capacity building and empowerment.

5. International engagements

The ACP head participated in the fifth edition of the World Social Forum in Porto Allegre, Brazil from the 24th to the 31st of January 2005. His participation was based on his role as the acting director of the FXI and also as a deputy to the head of the Access to Information Programme who could not make it to the Forum due to work commitments.

During the forum, the ACP head participated in a wide range of seminars and workshops on freedom of expression, human rights and socio-economic justice. He was also involved in a number of public activities such as marches and demonstrations, besides writing daily articles for "*The African Flame*", the journal of the African Social Forum.

7. Evaluation and restructuring of the ACP

Between 2003 and 2004, an organisational development expert conducted a comprehensive evaluation of the ACP with a view to identifying and highlighting its successes, failures and challenges. This evaluation was based on a number of significant indicators such as media reports, interviews with partners and other stakeholders, and discussions with victims of censorship. It examined the primary as well as secondary activities of the programme, its internal and external environments and the strengths, weaknesses, opportunities and threats that confront the work of the ACP.

One of the key findings of this evaluation is that the programme has, in a short space of time established itself as the leading organ of its kind in the country. The evaluation however also found that due to its rapid growth and as a result of the rising load of activities handled on a daily basis, the programme has been constrained to play a largely reactive rather than proactive role when tackling censorship. It is upon the basis of these findings and in a bid to improve the work of the ACP, that the evaluation has made the following seven key recommendations¹: -

- That the programme strives to strike a balance between its reactive and pro-active work. This should be achieved by among other things, increasing human capacity within the programme and initiating sustainable pro-active work with community organisations, trade unions and social movements;
- That the programme carefully prioritises the freedom of expression cases it takes up for action;
- That the programme develops a comprehensive media strategy;
- That the programme examines how it can embark on a substantive study of the impediments facing freedom of expression in the country;
- That the programme, in its current work with the social movements, community organisations and trade unions, shifts from its "service provider role", to a skills transfer and capacity building mode;
- That the programme creates synergies and begins, where necessary, to work closely with other programmes within the FXI; and lastly,
- That the programme develops its own fundraising and finance management skills.

¹ Pages 4-5 of the Evaluation Report.

The above recommendations are critical to enhancing the work of the ACP in its interaction with the external free expression environment inside as well as beyond South Africa.

The strategic aim of this shift is to have the programme move from its hitherto reactive "fire-fighting mode" or "service provider role" to a largely educating, capacitating and empowering role. It is our hope that this will enable victims of censorship to be able to respond adequately to instances of violation of their right to free expression, without the necessity of the ACP's continuous intervention. Additionally, we view this as the best way to deal with the problem of rising censorship in the country since the programme has realised that it cannot be able to tackle this challenge alone given capacity and resource constraints.

8. Conclusion

There are many lessons that the ACP has learnt in its two and a half years of work in the field of freedom of expression in South Africa. One of those is that a well informed public, which understands the profundity of the right to freedom of expression in the daily discourse of society, stands as perhaps the best bulwark against censorship. In this sense, an expanding assembly of individuals able to articulate and defend their right to free expression offers one of the most effective mechanisms for checking the tide of onslaught against freedom of expression from either the state or private sources.

It is out of this realisation that the evaluation of the ACP has urged the programme to embrace a strategic shift in regards to its work and move out of its largely "reactive, fire-fighting" mode to a "proactive, sustainable" role. This will entail capacitating and empowering those sections of the society most at risk from acts of censorship and especially the social movements, community organisations and trade unions. Building and maintaining a sustainable and efficient programme also means prioritising the freedom of expression cases that the ACP handles, undertaking a comprehensive study of the impediments against free expression and establishing a well considered media strategy.

All these factors have been considered and used in informing the proposed restructuring of the Anti-Censorship Programme. It is for this reason for instance that the programme proposes to get into the new area of research, which hitherto it has not undertaken. Similarly, knowledge sharing, skills transfer and capacity building will underpin all the education and training work undertaken by the ACP in future. Lobbying and campaigns against censorious legislation or acts of censorship with major implications for the country's free expression environment will also entail the active participation of key strategic allies and fraternal organisations, rather than the ACP alone engaging state institutions or other offending sources of censorship.

