South Africa

National Overview 2016

by Raymond Louw
Chairperson: MISA South Africa

INTRODUCTION

High hopes that the repeal of the common law crime of criminal defamation – promised by the ruling African National Congress to take place in Parliament in April or May, 2016 – were dashed when the draft repeal Bill had not been submitted to Parliament by the year's end. Inquiries revealed that the Ministry of Justice postponed tabling of the Bill indefinitely because the repeal could raise the possibility of unintended consequences. No date has yet been set for the Bill's submission to Parliament.

The ANC's recently established legal research group that initiated the repeal process had declared that defamatory statements made through the media should not be considered a criminal offence and civil litigation should be used to pursue defamation claims. The continuing delay raised doubts whether the ANC intends to proceed with the repeal.

Though criminal defamation is infrequently used in South Africa, similar laws have been used and abused in many other African countries to stifle criticism of presidents and other political leaders. In those countries, many editors and journalists have been jailed – some for lengthy periods – on charges brought against them for publishing criticism of government policies and conduct.

Many charges have been trumped up while some have been based on allegations of publishing false news, where the arbiters of the falsity are government officials. South African journalists fear that in the climate of ruling party hostility towards the press the authorities could be tempted to try to curb the critical press with recourse to similar abuse of the criminal defamation law.

LEGISLATION

Draft Hate Crimes Bill raises alarm

Journalists' fears have been heightened by the publication in the closing months of 2016 of a draft Bill under the title of Prevention and Combating of Hate Crimes and Hate Speech.

Journalists and civil society organisations were dumbfounded by the content, which proposes sweeping inroads on freedom of expression and freedom of the media. Several organisations – among them the SA National Editors' Forum (SANEF), Freedom of Expression Institute (FXI) and PEN South Africa – have used the period provided for public participation to make highly critical submissions on the Bill.

The offences outlined in the Bill are framed extremely broadly, extending to conduct and speech normally regarded as irritating or even offensive but not meriting a criminal charge. The Bill impinges on what would be regarded as humorous commentary on the mores of society and has alarmed some comedians. While one comedian supports the Bill because too many people have "gotten away with a slap on the wrist for hate speech", three of his colleagues expressed grave concerns that the Bill is "too broad and very restrictive" and that it will prevent them from making critical jokes about the conduct of leading politicians and officials.

> South African journalists fear that in the climate of ruling party hostility towards the press the authorities could be tempted to try to curb the critical press with recourse to similar abuse of the criminal defamation law.

There are also fears that the Bill will stifle artistic expression, media analysis and critique of public figures, cartoons and other forms of political satire. It also opens opportunities to equate certain forms of expression to offences in terms of so-called "insult laws", an offshoot of criminal defamation laws.

"By means of any communication whatsoever…"
A key component of hate speech as defined in the Bill is an expression by any per-son who intentionally "by means of any communication whatsoever …. communi-cates in a manner that advocates hatred towards any other person or group of per-sons or is threatening, abusive or insulting towards any other person or group of persons…. and which demonstrates a clear intention …. to incite others to harm any person or group of persons whether or not such person or group of persons is harmed, or stir up violence against, or bring into contempt or ridicule, any person or group of persons."

The grounds on which "advocates" is based, relate to 17 human characteristics, including race, gender, sex, which includes intersex, ethnic or social origin, colour, sexual orientation, religion, belief, culture, language, birth, disability, HIV status, na-tionality, gender identity, albinism or occupation or trade. The concern here is that the characteristics are defined extremely broadly and encompass practically any conduct and extend far beyond the four characteristics stated in the Constitution. In addition to oral, written, illustrative, electronic and data communication, it extends "without any limitation" to "any gesture", "display", "expression", "visual or other de-scriptive matter" and "representation or reference".

These categories of hate speech extend to virtually any characteristic or activity of people. One of the dangers foreseen is the temptation it holds out for the authorities, including police officers and prosecutors, to base charges on almost any human emotion as expressed by facial or bodily expression or innuendo. Among the characteristics is the new category called "intersex", defined as a congenital sexual differentiation which is atypical to whatever degree – whatever that may mean.

> Journalists' fears have been heightened by the publication … of a draft Bill under the title of Prevention and Combating of Hate Crimes and Hate Speech which proposes sweeping inroads on freedom of expression and freedom of the media.

FREEDOM OF EXPRESSION

Dangers of censorship

Certain clauses in the Prevention and Combating of Hate Crimes and Hate Speech Bill, illustrate the major problem in trying to deal with hate speech. In defining it and taking action to prohibit it, the immediate consequence is intrusion into freedom of expression and the application of censorship. This is strongly opposed, by among others, writers and journalists. They believe that freedom of expression is a core value of a civilised and democratic society and that any curbs on hate speech will have the effect of preventing people from having access to the views and thoughts of others and thus limiting their freedom.

Hate crime is the commission of any offence under any law by a person motivated by prejudice, bias or intolerance towards the victim because of the characteristics – or perceived characteristics – that underlie the offence of communicating hate speech.

An important feature of hate speech is the necessity of proving that the culprit incited or brought about "harm" to the victim. This requirement is a cardinal principle laid down in the Constitution but the definition of harm is extremely wide and includes any mental, psychological, physical or economic harm.

The penalties for hate speech are severe. For a first offence, a three-year jail term or a fine, not defined but according to commentators likely to be heavy, can be imposed and for a second offence, the prison sentence can be ten years or a commensurate fine. In contrast, in Britain, the practice has been to impose a six months' jail term for a first offence. Punishment for hate crime is more variable being subject to legal and court jurisdiction but the severity of the maximum is even more daunting, extending in some instances to a life sentence.

Coupled with this is the reappearance in discussions of the ANC's policy-making committees that the ANC should give effect to the party's long-standing proposal that it initiate legislation in Parliament to set up a statutory Media Appeals Tribunal to supplement, or take the place of, the print media industry's self-regulating Press Council, which deals with public complaints about press reports.

The press is totally opposed to the tribunal, which, it is feared would be used to ex-ercise control over editorial content. Journalists are also conscious that the Protec-tion of State Information Bill, also known as the "Secrecy Bill" –, with

its provisions for censorship and heavy prison sentences – is still awaiting the signature of President Jacob Zuma to enact it into law, some three years after its passage through Parliament.

Other laws that continue to plague journalists are the National Key Points Act, which prevents publication of information related to security aspects of certain institutions and buildings; the Protection from Harassment Act – which despite the good causes it serves, can restrict journalists from gathering information by "staking out" the office or home of a person who refuses to answer questions over the telephone; anti-terrorism legislation called the Protection of Constitutional Democracy Against Terrorist and Related Activities Act; and the Promotion of Equality and Prevention of Unfair Discrimination Act.

MEDIA ENVIRONMENT

Press faces hostility from police, public and student demonstrators

Meanwhile, the press is confronting another issue that has taken on a more ominous character in the past year – the increasing hostility of the police and authorities towards the press, as well as violence towards journalists by people protesting against government policies and lack of service delivery.

Journalists and photographers covering the #feesmustfall protests across the country – protests directed at universities and other higher education institutions to not raise their fees, or not levy any fees at all on impoverished students – complained that they were intimidated and harassed by the police, security staff and the protestors.

Government leaders continue to call the press "the opposition" and adopt practices that obstruct the press and prevent the public from being informed. The press and many civil society institutions have been highly critical of the misrule, serious shortcomings in service delivery, ever-increasing levels of corruption and other deficiencies in government. In response, the government has resorted to attempts to cloak its activities in secrecy. Officials obfuscate or withhold information – including official reports that should be released. SANEF has continued to raise its concerns about police hostility towards journalists – including unlawful police actions such as deleting pictures from photographers' cameras – at meetings with the Acting National Police Commissioner, Lieutenant General Johannes Khomotso Phahlane.

As reported in the last year's STID, it was decided to compile a booklet outlining how journalists and police officers should behave at crime or incident scenes, especially towards each other. The booklet, distributed to journalists and the police, fits into a person's pocket so that it can be taken out and presented to the police or a reporter if there are complaints about one or the other misbehaving. It is uncertain how effective it is.

Journalists complain about people demonstrating in the streets attacking them, probably because they fear their pictures could result in them being identified by the police and charged in court. One of the worst instances was the outbreak of violence in Tshwane Municipality (Pretoria) in June, when there were violent disruptions over nominations for the office of the mayor in the municipal elections. Groups of residents took to the streets to voice their protests and violence broke out. A high level of hostility and intimidation was displayed towards journalists and photographers covering the unrest. A number were at-

tacked by demonstrators and police and photographers had their pictures deleted and in some instances their equipment taken away.

Media Sustainability

The media are still continuing to contend with the economic onslaught from the so-cial media which is putting pressure on the viability of newspapers and resulting in the worrying retrenchment of staff which has had a negative impact on the compre-hensiveness of news coverage. But the impact on circulations – and advertising revenue – has been spectacular. The circulation of the *Sunday Times*, once the country's biggest seller, is down to about half of the more than 500 000 copies it was selling some years ago. Most other papers are recording decreases in circulation. Some people predict the demise of newspapers, though others believe there will always be a niche market for the industry. The industry is struggling with counter-measures to deal with the situation but no one appears to have found a formula that works and improves profitability, though gains have been made in the electronic market place.

In addition to the unease among staff as a result of retrenchments resulting from the effects of social media, further staff distress has occurred in the major English-language newspaper houses following reports of a high turnover of editorial staff, among them editors, and allegations of improper management interference in the editorial conduct of newspapers. SANEF has expressed its concern over the dismissal of *The Citizen* editor Steven Motale over what he described as an issue of improper interference by management in editorial matters, and management seemingly ending internal disciplinary hearings.

> Government leaders continue to call the press "the opposition" and adopt practices that obstruct the press and prevent the public from being informed.

In October, Independent Media, publishers of a large number of major daily and Sunday papers, announced its withdrawal from the Press Council of South Africa, which administers a self-regulatory adjudication process of complaints of contraventions of the Press Code levelled against publications. Independent complained that in overhauling its structure after a lengthy and wide-ranging consultation process, the Council had scrapped a requirement that complainants consent to a waiver of their rights to institute private litigation against media houses, resulting in an unacceptable increase in the company's legal costs. The Council removed the waiver when advised by a retired Constitutional Court judge that it was unconstitutional.

Independent appointed its own internal Press Ombudsman and so-called Media Press Appeals Tribunal to receive and adjudicate complaints from the public about editorial content published in the group's titles, including The Star, The Sunday Independent, The Cape Argus, Pretoria News and Isolezwe.

SANEF said it believed self-regulation should be executed at arm's length by an independent regulatory mechanism like the Press Council and not by employees of media companies. To use an internal ombudsman as a replacement of independent arbiters was unacceptable and it called on Independent Media to rescind the decision. It has been noted that *Independent* – which has included a waiver clause in its tribunal structure – runs the risk of having its operation declared unconstitutional in light of the retired judge's advice.

SABC operations

During the year, the operations of the state-run *South African Broadcasting Corporation (SABC)* came under critical review by civil society organisations, among them the SOS Support Public Broadcasting Coalition and Media Monitoring Africa, critical staff members and interested parties. Some observers warned that the SABC was deviating from its declared role as a public broadcaster and was being turned into a state broadcaster, serving the interests of the ruling party as it was during the apartheid era under the National Party. Journalists sharply criticised an editorial instruction that visuals of violence and destruction of property during protest demonstrations were not to be broadcast and staff members said they were told not to use stories that spoke ill of President Jacob Zuma.

Eight staff members who objected to this departure from independent and public interest journalism were dismissed, later being dubbed the "SABC Eight".

Staff members spoke of the reckless reign of impunity and the culture of tyranny and fear, interference and censorship introduced by the Chief Operating Officer, Hlaudi Motsoeneng, who was found by the former Public Protector Thuli Madonsela to have lied about having a school leaving certificate when interviewed for a journalist's job at the SABC and when he was irregularly appointed to a senior position in the SABC with his salary being improperly raised. SABC staff also alleged that the SABC paid for the establishment of rival broadcaster *ANN7* and funded the daily newspaper The New Age's promotional events.

The Acting Group CEO of the SABC, Jimi Matthews, the most senior official at the corporation, resigned in disgust from the public broadcaster. In his resignation letter, in which he referred to the "corrosive atmosphere" inside the corporation, he also stated: "for many months I have compromised values that I hold dear under the mistaken belief that I could be more effective inside the SABC than outside…. What is happening at the SABC is wrong and I can no longer be a part of it".

The disclosures about the destructive management practices at the SABC resulted in civil society media freedom organisations and journalists holding pickets outside at the SABC offices in Auckland Park, Johannesburg, and Sea Point, Cape Town, on July 1 in protest against censorship and in support of the staff who protested and took a stand on journalistic principle. Motsoeneng denied there was a crisis and described the protests as a campaign to destabilise the public broadcaster.

South Africa 2016 violations & victories

January 8

Censored

The ANC announced that it had not invited senior freelance politics reporter Carien du Plessis to the party's 104th birthday celebration in Rustenburg because she had tweeted that among the guests would be "pantypreneurs" and "tenderpreneurs". The ruling party's spokesperson, Zizi Kodwa, who announced the ban, responded, "The ANC takes offence to these kind of derogatory remarks against women, we will take up this matter with yourself and employer."

She apologised and though SANEF described the "unfortunate and offensive tweet" as "beyond defensible commentary", it urged the party to rise above such regrettable utterances and allow even those who might have made offensive remarks to cover the party's anniversary celebrations. The ANC refused to rescind the ban.

February 22

Censored

Following a protest by the SA National Editors' Forum (SANEF) against what it con-strued as "dangerous remarks" by Economic Freedom Fighters party leader Julius Malema, threatening journalists employed by TV station *ANN7* and *The New Age* newspaper, and barring them from EFF functions, a Sanef delegation met with the EFF leadership. SANEF said it is unacceptable and a violation of the constitution for any political party to intimidate journalists and to publicly state that they cannot guarantee their safety.

The EFF claimed the two news operations were owned by the wealthy Gupta family and were not media because they were "nothing more than instruments of propa-ganda for the ruling party and funded by allegedly corrupt returns from government". The party was not prepared to reconsider its decision. SANEF said the EFF was entitled to its views about media owners, but should allow journalists to conduct their work without fear. The meeting ended without agreement but with an understanding that further meetings may be held in future.

February 24

Threatened

The South African National Editors' Forum (SANEF) asked the Independent Elec-toral Commission (IEC) and political parties to include fair treatment of the media in the declarations and pledges that political parties sign during elections. SANEF also asked political parties to protect journalists from political harassment and intimidation and start adhering to the electoral code of conduct even before the election date is promulgated as campaigns were already under way and journalists had experienced problems in some areas. SANEF condemned instances where bribes, disguised as "cool drink money" or "transport money", were offered to journalists in the past to cover the events of certain political parties.

April 4

Assaulted

SANEF requested an urgent meeting with senior police officers to place before them complaints about the conduct of the police during several incidents in which journalists were attacked while on assignment. SANEF alleged

that journalists were assaulted and kidnapped in the presence of police officers who allegedly either assisted the assailants or failed to intervene.

On April 2, following the funeral of anti-mining activist Sikhosiphi 'Bazooka' Rhadebe in a village near Mbizana, in the Eastern Cape, two journalists from *The Citizen*, Nigel Sibanda and Simnikiwe Hlatshaneni, who were photographing an area around the village where mining was planned, were attacked by an angry mob, armed with knobkerries, machetes, a spade and stones. The community is deeply divided over the mining project and Rhadebe is alleged to have been assassinated because of his opposition to the mine.

The attackers beat the journalists with the blunt end of a machete, knobkerries and their bare hands. Sibanda's camera was taken by the attackers and later confiscated by the police. He was critically wounded. Hlatshaneni, a woman, was dragged out of a car and hit over the head and on her shoulder with a spade and a machete. The attackers demanded to know what she was doing there and one of them was heard saying: "they want to tell people we killed Bazooka, that is why they are here."

They alleged police officers who arrived on the scene did not assist or stop the as-saults but took the wounded and some of their attackers in a police van to the police station instead of to hospital. Hlatshaneni, who had gained refuge in her car after she was assaulted, was ordered by police to return to her attackers and explain what she was doing there.

March 31

Detained

SABC journalist Jacques Steenkamp, investigating child prostitution in Mogale City, was accosted and kidnapped by alleged drug dealers who are alleged to operate the prostitution ring. They are alleged to have been in the company of police officers who assisted them. Steenkamp was held for a number of hours and only released after the group had withdrawn about R5 000 from his bank account.

April 1

Assaulted

Sowetan photographer, Tiro Ramatlhatse, who was covering a fraud case at the Molopo Magistrate's Court in Mmabatho, North West, involving about R18 million of North West University funds, was attacked inside the courtroom by spectators. He was rescued by a security guard.

SANEF condemned the attacks and expressed "extreme concern" at what appeared to be patent disregard by the police officers of their duty to protect members of the public including journalists.

April 14

Assaulted

Daily Sun photojournalist Samson Ratswana was brutally attacked by 70 people at the International Pentecostal Holiness Church (IPHC) in Soshanguve, north of Pretoria, on the evening of April 13 after responding to a call about fighting breaking out in the church. The crowd shouted "journalist, journalist" as they attacked him. Attempts by two Metropolitan police officers to rescue him failed when they were overpowered by the group. Ratswana was assaulted for nearly 30 minutes before he was rescued by a VIP protection unit officer. Sanef condemned the attack, commended the police for assisting the journalist and called on a church elder who apologised to hand over those responsible to the police.

South Africa 2016 violations & victories

May 27

Violation of Public Freedom of Expression/Access to Information

The SABC announced that it would stop broadcasting footage in news bulletins of "the destruction of property" during protests and demonstrations and immediately drew a barrage of criticism from media and civil society organisations, which ac-cused it of trying to sanitise news instead of acting in the public interest by reporting fully on what was happening in the community. Some likened the SABC's conduct to that of the apartheid government, which at one stage barred journalists from areas where protests were taking place. In July, civil society organisations appealed to the Independent Communications Authority of South Africa (ICASA), which directed the SABC to lift the ban. The SABC shocked viewers by taking the matter on review, which, however, failed. Despite this, the SABC stubbornly maintained its ban until it was forced by public pressure to lift it.

June

Assaulted

The South African National Editors' Forum (SANEF) expressed outrage over a series of violent attacks on journalists covering protests in the Tshwane (Pretoria) metropolitan municipality. Reporters from a number of media outlets were chased away by protesters, threatened with violence and physically attacked or intimidated by police officers on the scene. Sanef reported the following incidents:

- Power FM journalist Tshidi Madia was threatened and forced out of Soshanguve, north of Pretoria, on June 22 and told to leave Mamelodi on June 21 because she was reporting on the protests.
- eNCA reporter Jody Jacobs and camerawoman Noluthando Hlophe were robbed at gunpoint by a mob in Mamelodi after a live broadcast of the protests on the evening of June 22. Two men walked up to them and threatened to shoot them if they did not hand over their equipment. The journalists handed the robbers their camera, tripod and microphone.
- SABC journalist Horisani Sithole received medical treatment after his hand was bitten in Mabopane while he was trying to capture on camera a mob looting a spaza shop owned by a foreign national.
- News24 reporter Jeff Wicks was assaulted in Ga-Rankuwa on June 22 by a po-lice officer who wanted to prevent him from recording video footage of police shooting rubber bullets at protestors. Officers also confiscated his phone and instructed him to delete video and pictures.
- On June 21 Atteridgeville residents took the phones and video camera of EWN reporters Clement Manyathela and Kgothatso Mogale after threatening them with a brick. They were forced to delete all footage and were released after doing so.

- News24 reporter Karabo Ngoepe in Ga-Rankuwa had his phone confiscated by a police officer who forced him to delete pictures and video. The officer took pic-tures of News24's vehicle and threatened to "deal with" the journalist.
- A freelance photographer from AFP had his mobile phone stolen while taking pictures of the unrest in Mamelodi.

June 24

Censored / Violation of Public Freedom of Expression/Access to Information

The SABC suspended Economics Editor Thandeka Gqubule, Radio Sonder Grense Executive Producer Foeta Krige and senior journalist Suna Venter for objecting to an instruction during a news conference not to cover a protest organised by the Right2Know (R2K) campaign against censorship at the public broadcaster. On June 20, R2K led protests against SABC management in Durban, Cape Town and Johannesburg, over an editorial instruction banning the coverage of violent protests and for introducing new editorial policies that gave Chief Operating Officer Hlaudi Motsoeneng the final say on editorial decisions.

Eight other staff members who also objected to the new editorial policies were later dismissed. Five of them, Busisiwe Ntuli, Krivani Pillay, Jacques Steenkamp, Lukhanyo Calata and Vuyo Mvoko. The journalists, now called "the SABC Eight", challenged the SABC in court, which reversed the dismissals and seven of the eight were reinstated. Mvoko was on contract which was not renewed. A few days later the eight were the recipients of SANEF's Nat Nakasa Award, honouring their courage to speak out against censorship even in a climate of fear and threat.

The Sunday Times has reported that later some of the group were threatened, intimidated, tailed, had their houses broken into and ransacked, car brakes tampered with and in one instance shot at with ceramic bullets.

June 24

Censored / Violation of Public Freedom of Expression/Access to Information

Eight members of the editorial staff were dismissed by the television station *ANN7*, 12 staff members received final written warnings and another 11 received warnings after objecting to management conduct. They all objected to being named as parties to a company letter to four banks that had revoked banking services to the television station's owners, Oakbay Holdings, and they refused to attend a meeting at the company addressed by ANC Youth League President Collen Maine. The staff were variously charged with insubordination and intimidation and one was charged with calling a radio station to protest on air at the Maine meeting. Later in August, five of the journalists who had been warned were also dismissed.

South Africa 2016 violations & victories

September 29

Violation of Public Freedom of Expression/Access to Information

The Supreme Court of Appeal ruled that the censoring in February 2015, of videos of disorder and commotion in Parliament in the parliamentary broadcast service, which feeds national broadcasters, was unconstitutional. SANEF, Prime Media Broadcasting, and civil society organisations upholding freedom of the press had raised the issue in an urgent application in the Western Cape High Court, which ruled that the censorship was constitutional. The organisations appealed in the Supreme Court of Appeal, which made the unconstitutional ruling on September 29. The appellants hailed the court judgment "a victory for openness and transparency".

The censorship – which resulted in the video service showing only the face of the Speaker while disorder raged – followed the jamming of mobile phone signals at the opening of Parliament earlier that month. Parliamentary officials said the censorship was in line with its rules, which stated that unruly behaviour should not be shown. The appellants had also called on the Supreme Court of Appeal to declare the jamming of mobile phones unlawful and unconstitutional. Appeal Court Judge C H Lewis declared that "the rules and policy adopted by Parliament governing the broadcast of disorder in the Parliamentary Chamber violates the public's right to open Parliament and are unconstitutional and unlawful. The disruption of the cellphone signal….was unlawful".

September 29

Assaulted

Journalists covering the #feesmustfall campaign at the Doornkloof and Kingsway campuses at the University of Johannesburg on September 28 were attacked by private security officials hired by the university. In one chilling incident, a photographer was punched repeatedly on the head, hit with a stick in the stomach, and then pepper-sprayed at close range. A group of reporters were circled on Joe Slovo Drive, ordered to sit on the road and then pepper-sprayed. A photographer was also hit in the face with a plank-like object. SANEF expressed outrage at the attacks and complained to university Vice-Chancellor Dr Ihron Rensburg, who condemned the officials' conduct and promised to ensure that they would respect the right of journalists to do their work. SANEF also condemned the hostility of student leaders towards journalists. He also urged journalists to lay charges against the security officials.

November 10

Threatened

Two police officers called on 20-year-old second year student journalist Magnificent Ndebele between 1 and 2am at his university residence and without any warrant confiscated his equipment, including his mobile phone and laptop. They accused him of inciting violence and interfering with their investigation. They also warned him that his movements were being watched. A few days earlier Ndebele had witnessed and taken pictures of a confrontation between students and private security officials at one of the student residences, where one of the

students, Kelvin Baloyi, had been shot dead at point-blank range. SANEF condemned the harassment of Ndebele, which it viewed in the broader context of increasing police hostility and intimidation towards journalists. It called for the immediate release of his equipment.

November 29

Censored

The Citizen morning daily reported that Editor Steven Motale, who had been sus-pended from his duties earlier in the month, had been dismissed. He was accused of failing to "follow agreed-upon editorial procedures and to uphold his editorial duties" which had "led to an irretrievable breakdown in the relationship of trust and confidence between the editor and the publisher of the newspaper". Motale, who was reportedly dismissed without a hearing, claims he has had to contend with improper managerial interference in editorial affairs, including news content and processes to hire journalists. Publisher Eureka Zandberg denied that the content of stories published in the paper were at issue.