

PEN South Africa, PEN Afrikaans and PEN International

Contribution to the 27th session of the Working Group of the Universal Periodic Review Submission on the Republic of South Africa

22 September 2016

1. PEN South Africa, PEN Afrikaans and PEN International welcome the opportunity provided by the Office of the High Commissioner on Human Rights to comment on the climate of human rights in South Africa. This submission focuses in particular on the context of freedom of expression in the country since the last Universal Periodic Review (UPR) on 31 May 2012. This submission follows the shadow report submitted by PEN South Africa and PEN International to the 2nd cycle of the United Nations Universal Periodic Review, dated 20 November 2011.¹
2. The submission made several recommendations in particular concerning the Protection of State Information Bill, popularly known as the Secrecy Bill. The recommendations read as follows:
 - ‘That the Secrecy Bill be withdrawn to incorporate civil society input and address such concerns as a public interest defense; lessening the amount of state organs that can classify information; eliminating or lessening certain punishments; and adding protections for publications, including editorial and journalistic staff;
 - or, if the legislative process fails to revisit the Secrecy Bill, that the Constitutional Court scrutinize the bill to ensure that it is constitutional.’²
3. The stakeholder coalition notes with regret that during the second cycle of the UPR, South Africa merely noted all 11 recommendations pertaining both directly and indirectly to Freedom of Expression from Austria, Canada, the Czech Republic, Germany, Norway, Poland, Portugal, Sweden, Switzerland, and the United States of America, nine of which focused on the problematic ‘Protection of State Information Bill’.
4. While South Africa continues to have a vibrant press and civil society, the stakeholders note that, in the period under review, there has been a decline in some areas of freedom of expression. The reasons for this deterioration are multi-faceted and complex and this submission will illustrate some of the causes.
5. The coalition welcomes the 2015 announcement by the South African government to remove criminal defamation from the statutes of the country and hopes that this signals a firmer commitment to strong protection of the rights to free expression and of the press in South Africa by its government. PEN continues to monitor the status of the proposed bill closely and urges the South African government to take all necessary steps to repeal criminal defamation and insult laws and to provide leadership on the African continent to help remove similar laws on the books in other countries.
6. The coalition also welcomes the acceptance by South Africa’s Film and Publication Board (FPB) of a proposal by South Africa’s Press Council that complaints against

¹Available at http://www.pen-international.org/wp-content/uploads/2013/05/PEN-International_South_Africa_UPR_2011_submission.pdf

² Ibid.

items published on the internet and social media could be adjudicated by the Press Ombudsman if both complainant and defendant agree.³ The Press Council amended its Press Code to provide for online complaints and hearings.⁴

7. While recognizing the steps taken by the South African authorities, this submission shall address the following key freedom of expression concerns:
 - a. **Legislative and Regulatory Concerns**
 - i. **Freedom of expression context in South Africa**
 - ii. **South Africa's legal obligations relating to freedom of expression**
 - iii. **Steps towards decriminalizing defamation**
 - iv. **The Freedom of Information Bill**
 - v. **Cybercrimes and Cybersecurity bill**
 - vi. **Media Appeals Tribunal**
 - vii. **Other restrictive legislation**
 - b. **South African Broadcasting Corporation (SABC) – Public Broadcaster and public protests**
 - c. **Film Board**
 - d. **Violence against journalists**
 - e. **South Africa's failure to uphold free expression standards at the Human Rights Council**
 - f. **Recommendations**

A) Legislative and Regulatory Concerns relating to freedom of expression

i) Freedom of expression context in South Africa

8. The pernicious effects of the evils of apartheid are still affecting South African society today as the former government's stranglehold on information and communication was so nearly complete that it still has devastating effects on how some ordinary citizens understand their own rights to data, information and feedback from their elected officials.
9. For most countries, history plays a pivotal role in what is deemed permissible, what can be protected and what is 'unconstitutional'. In South Africa, very similar considerations need to be taken into account. There are centuries of slavery, colonialism, racism and apartheid history that have shaped the physical, societal and psychological structures of the country. It is because of this that recent incidents of 'racist speech' have again sparked heated discussions about the legal and acceptable levels of free speech.⁵

ii) South Africa's legal obligations relating to freedom of expression

10. The rights to freedom of expression and right to information are protected in South

³ "Film and Publication Board recognises authority of Press Council to regulate online press content," (10 July 2015), *Media Source Africa* <http://www.mediasourceafrica.com/articles/1077#!film-and-publication-board-recognises-authority-of-press-council-to-regulate-online-press-content>

⁴ "Press Council takes up online media complaints," (17 March 2016), *The Media Online* <http://themediainline.co.za/2016/03/press-council-to-now-monitor-online-media-too/>

⁵ See for example the Penny Sparrow case, "Penny Sparrow fined R5 000 for racist rant," (12 September 2016), Giordano Stolley, *IOL news*, <http://www.iol.co.za/news/crime-courts/penny-sparrow-fined-r5-000-for-racist-rant-2067166>

Africa under Article 19 of the International Covenant on Civil and Political Rights and Article 9 of the African Charter on Human and Peoples' Rights.

11. South Africa is bound to protect freedom of expression and its corollary rights, as enshrined under Section 16 of its Constitution. The provision which safeguards privacy, section 14, is also pertinent, especially given recent technological advances and the shifting landscape of electronic communication. Section 15 protects an individual's right to belief and thought. Section 30 protects the right to language and culture.⁶ There are limits to expression in the Constitution, including: limits on the right to defame others; it is a criminal offence to incite others to commit crimes or to commit fraud by lying to others in order to benefit from it. Section 89(2)(c) of the Electoral Act precludes any registered political party or candidate from publishing any 'false information' with the intention of influencing the conduct or outcome of an election; and the Equality Act regulates hate speech.⁷

iii) Steps towards decriminalizing defamation

12. PEN welcomed the announcement in September 2015 in South Africa by the ruling African National Congress (ANC) that it planned to remove criminal defamation from the common law. The ANC's legal research group declared that defamatory statements made through the media should not be considered a criminal offence. In the words of one media law expert, this move was 'one of the most significant events in our recent history of free speech and media law'.⁸
13. The ANC defined defamation as the act of intentionally making untrue statements about another person which damages his or her reputation. Though sparingly used in South Africa, throughout the rest of the continent ruling parties have used criminal defamation and so-called insult laws to stifle criticism of presidents and politicians by editors and journalists by trumping up charges against them and imprisoning them.

iv) The Freedom of Information Bill

14. Nine recommendations made by Austria, Canada, Czech Republic, Germany, Poland, Portugal, Sweden and the United States in the last UPR with regards to freedom of expression related to the Freedom of Information bill, including to ensure it complies with both domestic and international law and the need to engage civil society, activists, NGOs and media to seek common ground on the Bill. The Czech Republic urged South Africa to remove excessive penalties for publication of classified information and the inclusion of a public interest defence.⁹

⁶ Constitution of South Africa, 1996, available online at

<http://www.constitutionalcourt.org.za/site/constitution/english-web/ch2.html#top>

⁷ On the Criminalisation of racist and other bigoted speech," (5 January 2016), Pierre De Vos, "Constitutionally Speaking," <http://constitutionallyspeaking.co.za/on-the-criminalisation-of-racist-and-other-bigoted-speech/>

⁸ "The case against criminal defamation," (24 September 2015), Dario Milo, *Mail & Guardian*, <http://mg.co.za/article/2015-09-23-the-case-against-criminal-defamation>

⁹ Recommendations were as follows: 'Continue amending and improving the project of the Protection of State Information Bill as this law, in the form proposed to the Parliament earlier this year, has the potential to undermine the right to access to information and freedom of expression under the pretext of national security and national interest' (Poland); 'Engage civil society, activists, NGOs and media to seek common ground on the Protection of State Information Bill' (United States of America); 'Safeguard the

15. Despite these recommendations, since 2011 the Secrecy Bill has continued to be pursued by South African authorities. It was passed in November 2011 in the National Assembly and amended and passed by the National Council of Provinces in 2012. The amended bill itself was approved by the National Assembly in 2013 and sent to the Presidency for its enactment into law. Since that time, the President has sent it back to Parliament for some minor changes, and the revised version has been awaiting the President's signature for almost two years.
16. It is widely expected that if the President does sign the bill into law, many civil society actors would call for its immediate referral to the Constitutional Court.¹⁰ Despite the fact that there have been both major and minor changes to the text in its process of revision, and some of the recommendations of civil society were heeded, PEN still believes that some of its provisions do not meet the litmus test of constitutionality.

v) Cybercrimes and Cybersecurity bill

17. The 2015 Draft Cybercrimes and Cybersecurity Bill (B-2015)¹¹ has the potential to negatively impact on freedom of expression and impose wide-ranging controls over people who use the internet.¹²
18. In a letter to the Department of Justice on the issue, PEN South Africa argued that the Bill contains grievously unacceptable features and therefore should be withdrawn and redrafted afresh with inputs from civil society. PEN requested that the Bill be reformulated in such a way that it achieves the protections sought in the safest way and which takes into consideration the freedom of expression clauses in the Constitution and protection of the public interest. It also emphasized its hope that as the Bill is processed through the National Assembly there will be public hearings at which civil society would be accorded an opportunity to put forward their views.¹³

freedom of the press, through the abrogation of the Protection of Information Bill,' (Germany); 'Ensure that the Protection of State Information Bill and other statutory measures do not violate the right to freedom of expression or unduly impede access to public domain information,' (Canada); 'Amend the draft bill on the Protection of State Information so that freedom of press is not curtailed in a disproportionate manner,' (Switzerland); 'Reconsider the Protection of State Information Bill to ensure its conformity with ICCPR, in particular by removing excessive penalties for publication of classified information and the inclusion of a public interest defence', (Czech Republic); 'Consider suspending the enactment of the Protection of State Information Bill, approved last November,' (Portugal); 'Remain a promoter of freedom of expression, at national and international levels, and to review the current text of the Protection of State Information Bill,' (Sweden); 'Ensure that the Protection of State Information Bill, when adopted, fully complies with international human rights law,' (Norway)

¹⁰"Info Bill will harm Press Freedom: Sanef" (3 May 2014), *SABC*,

<http://www.sabc.co.za/news/a/0834a58043dc6d4aa34ca3f0c0fe2c4c/InfoundefinedBillundefinedwillundefinedharmundefinedPressundefinedFreedom:undefinedSanef-20140305>

¹¹ Cybercrimes and Cybersecurity bill, Draft for Public Comment, [B—2015],

<http://www.justice.gov.za/legislation/invitations/CyberCrimesBill2015.pdf>

¹²"Submission on the Cybercrime and Cybersecurity Bill," *Research ICT Africa*, 14 December 2015

http://www.researchictafrica.net/publications/Other_publications/2015_RIA_Submission_to_Cybersecurity_and_Cybercrime_Draft_Bill.pdf

¹³"PEN South Africa Concerned About Draft Cybercrimes and Cybersecurity Bill", (14 December 2015)

<http://www.pen-international.org/centresnews/pen-south-africa-concerned-about-draft-cybercrimes-and-cybersecurity-bill/>

vi) Media Appeals Tribunal

19. Many of the concerns outlined in PEN's previous UPR submission in regards to the Media Appeals Tribunal remain unresolved.¹⁴ As outlined in the 2011 submission, the ANC's proposed Media Appeals Tribunal would regulate the press with a body composed of so-called 'independent' persons, and would be comprised of government-selected representatives with the power to fine publications and individual journalists for false or misleading information. Journalists fear this will open the door to state control of the press. While plans for a Media Appeals Tribunal have not been taken forward so far, it remains a threat.

vii) Other restrictive legislation

20. PEN also remains concerned by The National Key Points Act and the Protection of Constitutional Democracy Against Terrorist and Related Activities Act. As PEN also outlined in its 2011 submission, The National Key Points Act, introduced during apartheid to protect against sabotage and violent attacks by liberation fighters, designates certain government structures and locations to be 'key points' that must be classified for security reasons. The National Key Points Act has been used to censor reports about government property and prevents journalists from investigating the use of taxpayer money or corruption. For these reasons the National Key Points Act still remains a concern, though it has not been invoked as readily in the last year as in the past.

21. Similarly, the Protection of Constitutional Democracy Against Terrorist and Related Activities Act contains provisions that would force journalists to disclose facts in their possession or reveal confidential sources of information.¹⁵ While the section of the act has not yet been invoked to force disclosure, it remains in force and nothing prohibits the government from doing so.

B. Freedom of expression and assembly: South African Broadcasting Corporation (SABC) Public Broadcaster and public protests

22. The laws governing the running of the state broadcaster are crucial to the protection of the press and of freedom of expression and in keeping the public informed as the majority of people in South Africa rely on TV and radio for their news and information. The government has a duty to ensure that all civil servants – including those that run the SABC – uphold the law and the Constitution.

23. In a statement dated 26 May 2016, the South African Broadcasting Corporation (SABC) announced that it would no longer provide coverage of public protests. In its statement, the broadcaster explained that it condemned recent acts of public and private property vandalism and had made a decision that it would not show footage of people burning public institutions, like schools, in any of its news bulletins.¹⁶

¹⁴ PEN International and PEN South Africa (24 November 2011), "Submission on the Republic of South Africa",

http://www.pen-international.org/wp-content/uploads/2013/05/PEN-International_South_Africa_UPR_2011_submission.pdf

¹⁵ Ibid.

¹⁶ "SABC won't show footage of damaged property during protests," (27 May 2016), SABC, <http://www.sabc.co.za/news/a/d99218004ce9545882d0bb271348019a/SABC-wont-show-footage-of-damaged-property-during-protests--20160527>

24. The South African National Editors' Forum (SANEF) immediately released a statement condemning this move, describing it as 'censorship on a slippery slope of Mount Everest proportions'.¹⁷
25. Following this announcement, the SABC suspended and dismissed eight SABC journalists for contravening the order against covering public protests. The first three were suspended for covering a protest against the ban, allegedly for protesting at a news conference against an order prohibiting them from covering a Right2Know protest outside the SABC headquarters in Auckland Park, Johannesburg. The journalists were voicing a protest at a routine discussion of the news coverage of the broadcaster, one of a number of robust discussions over news coverage that take place daily at broadcasting studios.¹⁸ All of the seven journalists under contract as permanent staff were ordered to be reinstated by the Labour Court in July 2016. One other, who was a freelancer, was not reinstated.¹⁹
26. In the past few months, SABC has continued to face mounting criticism over the censorship order it has imposed. On 1 June 2016 the Complaints and Compliance Committee of ICASA (Independent Communications Authority of South Africa) heard a complaint by three NGOs - The Trustees of the Media Monitoring Project Benefit Trust, the Freedom of Expression Institute and the SOS Support Public Broadcasting Coalition – that the order was unlawful as it breached a number of laws and professional codes relating to the conduct of the SABC news services. ICASA's ruling, delivered on 11 July 2016, was that the broadcaster was obliged to recant its ban. The seven journalists have taken the public broadcaster to the Constitutional Court over its broadcasting ban and its refusal to comply with the ICASA ruling.²⁰ On 20 July 2016, SABC announced that it would reverse its ban.²¹ As of mid-September 2016, it was unclear whether SABC was complying with the ruling in practice.²²

C. Film and Publication Board

27. While the FPB accepted a proposal by the Press Council that complaints against items published on the internet and social media could be adjudicated by the Press Ombudsman if both complainant and defendant agree and the Press Council amended its Press Code to provide for online complaints and hearings, PEN remains greatly concerned about the Films and Publications Amendment Bill

¹⁷ 'SABC to stop showing destruction of property on TV news bulletins', (27 May 2016), *SANEF*, available online at <http://www.sanef.org.za/news/entry/sabc-to-stop-showing-destruction-of-property-on-tv-news-bulletins-may-27-20/>

¹⁸ "PEN SA Demands the Immediate Reinstatement of Fired SABC Journalists," PEN South Africa, 20 July 2016, <http://pensouthafrica.co.za/pen-sa-demands-the-immediate-reinstatement-of-fired-sabc-journalists/>

¹⁹ "SABC 8 journalist 'released' with immediate effect", 14 September 2016, Lizeka Tandwa, *News24*, <http://www.news24.com/SouthAfrica/News/sabc-8-journalist-released-with-immediate-effect-20160914>

²⁰ "SABC 'releases' litigating journalist before end of notice period," Genevieve Quintal, *BusinessDay*, 14 September 2016, <http://www.bdlive.co.za/national/media/2016/09/14/sabc-releases-litigating-journalist-before-end-of-notice-period>

²¹ "SABC agrees to lift violent protest ban," 20 July 2016, *ECR Newswatch*, <https://www.ecr.co.za/news-sport/news/sabc-agrees-lift-violent-protest-ban/>

²² "SABC denies it banned footage of protests," Genevieve Quintal, *BusinessDay*, 20 September 2016, <http://www.bdlive.co.za/national/media/2016/09/20/sabc-denies-it-banned-footage-of-protests>

currently under discussion in parliament²³ and the revised regulations of the Film and Publication Board (FPB) which would allow the FPB to control statements, messages and other views expressed on the internet and in online media. These moves could result in restraints on freedom of expression by the public at large.²⁴

28. The FPB's move can be seen as part of a world-wide appraisal of the effects of an uncontrolled internet environment and is aimed at regulating the online views of bloggers and users of Twitter, Facebook, YouTube and other social media.²⁵
29. The FPB relates its proposals to the need to protect children from exposure to disturbing and harmful content and to curb the advocacy of racist ideologies but PEN and many non-governmental organisations in South Africa regard the proposed FPB regulations as draconian and call for their withdrawal.

D) Safety of journalists

30. In addition to the situation facing journalists at the SABC, PEN is also concerned with the safety of journalists throughout the country – working in both public and private newsrooms – to be able to deliver quality and informative news without undue influence or pressure.
31. There have been instances of journalists being harassed by state actors in the period under review – including false arrests for coverage of police action – as well as facing physical danger due to crime or malicious attacks whilst covering stories. Such incidences include the confiscation by police officers of footage of protests, despite it being within the journalist's legal rights to record police action. In other instances, journalists have been physically followed, and had their telephones tapped, or their emails hacked whilst covering important stories.²⁶

E) South Africa's failure to uphold free expression standards at the Human Rights Council

32. South Africa also largely failed to utilize its membership at the United Nations Human Rights Council to support resolutions that would have helped the promotion and protection of human rights in various countries, most notably in North Korea, Syria, Sri Lanka, and Iran. The state's voting record on country specific

²³ Films and Publications Amendment Bill (B37-2015), <https://pmg.org.za/bill/613/>

²⁴ "The Film and Publication Board's 2016 regulations for online content (revised regulations)- FPB's online regulations," Briefing: What's wrong with the FPB censorship Bill and FPB's online regulations, *Right2Know*, (25 May 2016), <http://www.r2k.org.za/2016/05/25/films-publications-bill-internet-censorship/#new>

²⁵ "PEN South Africa Condemns Film and Publication Board's Plan to Control the Internet", PEN South Africa, (30 July, 2015,) <http://pensouthafrica.co.za/pen-south-africa-condemns-film-and-publication-boards-plan-to-control-the-internet/>

²⁶ See for example, "South African reporters attacked covering protests, broadcaster suspends journalists", *Committee to Protect Journalists*, (24 June, 2014), <https://cpj.org/2016/06/south-african-reporters-attacked-covering-protests.php>; "News24 reporters assaulted, intimidated by cops during Tshwane unrest," Jeanette Chabalala, *News24*, (22 June 2016), <http://www.news24.com/SouthAfrica/News/news24-reporters-assaulted-intimidated-by-cops-during-tshwane-unrest-20160622>; "Police illegally tapped journalists phones: report," *Sapa*, (18 August, 2013), <http://www.timeslive.co.za/local/2013/08/18/police-illegally-tapped-journalists-phones-report>; "PEN South Africa Alarmed at the Number of Journalists Arrested by the Police While Carrying Out Their Reporting Duties," PEN South Africa, (12 Dec 2012), <http://pensouthafrica.co.za/pen-south-africa-alarmed-at-the-number-of-journalists-arrested-by-the-police-while-carrying-out-their-reporting-duties/>

situations and some rights issues has been considerably disappointing. For example, at the March 2014 session, South Africa sought to weaken a resolution on the right to peacefully protest jointly with Russia, Ethiopia, Saudi Arabia, Egypt, and China.

33. Contrary to its stance in repeatedly supporting resolutions on Palestine, South Africa abstained on the votes of all other country situations, including on North Korea, Syria, Sri Lanka, and Iran. Despite country resolutions playing a key role in shedding light on abuses and giving a stronger voice to victims, South Africa has justified its actions by arguing that it does not support the council's work on country-specific situations because such measures and resolutions are perceived as highly politicized and divisive.
34. South Africa also initially failed to support the candidacy of the Committee to Protect Journalists (CPJ) at the Human Rights Council in May 2016, which PEN believes was inconsistent with the country's Constitution.²⁷

F) Societal Bias Against Indigenous Languages and Hair

35. Recent bouts of protest by, especially, black female students in South African schools, have highlighted some deep-seated biases entrenched in South Africa's education system, carried over from the days of apartheid. While black females were the most vocal in their protest over hair regulations that did not allow them to be proudly African, a broad-based protest against restrictive language use and quite militaristic hair rules, resulted. Of huge concern was that some students mentioned that they were fined for using their own languages, which is any language other than English, in school.²⁸

G) Recommendations

In light of these concerns, the coalition makes the following recommendations to the South African government:

- ensure the Freedom of Information Bill meets the standards and requirements of both the South African Constitution and of the country's commitments to international statutes and treaties before it is passed into law;
- ensure the public broadcaster, the South African Broadcasting Corporation, meets its legal and moral obligations to provide access to information and to enable the freedom of expression of all;
- provide adequate training to ensure that all law-enforcement agencies fully understand the legal protections afforded to members of the press, and their responsibilities in enforcing them;

²⁷ "UN committee denies media accreditation to press freedom group," *Associated Press at the United Nations*, 26 May 2016, <https://www.theguardian.com/world/2016/may/26/un-denies-media-access-committee-to-protect-journalists-press-freedom> South Africa later changed its stance and supported CPJ's candidacy.

²⁸ 'We're fined R10 for speaking Xhosa' Lisa Isaacs, (5 September 2016), *IOL*, <http://www.iol.co.za/news/south-africa/western-cape/were-fined-r10-for-speaking-xhosa-2064416>

- Amend the Cybercrimes and Cybersecurity Bill so that it achieves the protections sought in the safest way, taking into consideration the freedom of expression clauses in the Constitution and protection of the public interest;
 - Schedule public hearings at the National Assembly during the passage of the Cybercrimes and Cybersecurity Bill at which civil society can put forward their views;
 - Repeal criminal defamation and 'insult' laws, making defamation and insult a civil offence, and provide leadership on the African continent to help repeal similar laws in other countries;
 - Amend the Film and Publication Board's regulations and the Films and Publications Amendment Bill to ensure that regulation of the internet and online media do not unlawfully restrict freedom of expression and the free exchange of ideas;
 - Drop proposals to introduce legislation providing for a statutory Media Appeals Tribunal and instead allow the Press Council to continue its voluntary ethical stewardship of the media;
 - Amend the National Key Points Act and the Protection of Constitutional Democracy Against Terrorist and Related Activities Act to ensure that they are fully compatible with South Africa's obligations under international law to protect freedom of expression;
 - Promote the highest standards of human rights in its foreign policy, including at the UN Human Rights Council;
 - Investigate allegations of restrictions in the education system against use of indigenous languages on school premises and codes of appearance including hairstyle and ensure that students are able to express themselves freely.
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