PEN International and South African PEN

Contribution to the 13th session of the Working Group

of the Universal Periodic Review

Submission on the Republic of South Africa

24 November 2011

1. PEN International and South African PEN 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 document focuses on encroachments upon freedom of expression in South Africa.

Introduction

2. After almost 50 years of government-imposed censorship in South Africa, the democratic election of 1994 ushered in a new era of openness and transparency and led to the adoption of a progressive, rights-based constitution in 1996. Freedom of expression is guaranteed under article 16 and access to information is guaranteed under Article 32 of the constitution. South Africa is also bound by Article 19 of the International Covenant on Civil and Political Rights and Article 9 of the African Charter on Human and People's Rights.

3. South Africa currently enjoys a vibrant press that holds public officials to account and publishes unpopular views from its diverse population. The country has also produced some of the world's most recognized literary luminaries, from Nobel laureates Nadine Gordimer and J.M. Coetzee to best-selling authors such as Zakes Mda. However, this efflorescence of journalistic and creative freedom has not gone unchallenged, and PEN is concerned about a number of recent developments that suggest the need for vigilance to protect these admirable gains in freedom of expression.

Threats to Freedom of Expression

The Protection of Information Bill

4. Like several other human rights and free expression organizations, PEN was particularly alarmed by the introduction of a Protection of Information bill in the South African legislature in 2008. The Protection of Information bill, or "Secrecy Bill", would undermine both transparency and accountability from the government by establishing a broad classification system that grants "organs of state"—some 700 to 1,000 government bodies—the ability to protect information that meets a loose set of criteria. The bill also imposes draconian punishments upon people who possess or release classified information, with certain sentences carrying up to 25 years of imprisonment. Media and human rights organizations have criticized the bill as overly broad; noted the lack of a "public interest" defense for releasing classified information; and deplored the severe punishments imposed under the current text.

5. At the time of this writing, the Protection of Information bill passed in the National Assembly of parliament on 22 November 2011. It still must be approved by the Council of Provinces and be signed into law by President Zuma, among other procedures. The bill has gone through several drafts as part of the legislative process since its introduction in 2008, but certain provisions remain with troubling implications for freedom of expression. The bill would punish those "harboring" or "concealing" a person who has divulged classified information with a sentence of up to 10 years—a punishment that could have a devastating effect upon newspapers and editors who rely upon confidential sources for new stories. Similarly, failure to report the possession of classified information to the police—which could endanger journalists and their sources—is punishable by five years imprisonment. In other words, the bill in its current form would punish whistleblowers, silence investigative journalists, and criminalize editors who republish classified information.

6. The Secrecy Bill also contains clauses that seem to promote freedom of expression on their face and yet are overridden by other clauses. The section on General Principles states that the Act must "have regard to freedom of expression" and "access to information" and it must also "be consistent with Article 19 of the International Covenant on Civil and Political Rights and have regard to South Africa's international obligations." However, the most recent text of the bill, put forward in May 2011, states that these obligations and principles must be balanced against "the security of the republic, in that the security of the republic may not be compromised," seriously weakening, if not nullifying, the free expression principles that precede it.

<u>Positive steps</u>

7. PEN notes that pressure from civil society—particularly the Right 2 Know Campaign and the South African National Editors Forum—strongly voiced concerns about the bill and forced the government to delay a vote of approval. Recent versions also removed

several harmful restrictions, such as a clause that would have allowed the government to classify "commercial information", which would have directly impacted the transparency of public tenders and bidding processes.

8. Despite these improvements, the bill that passed in the National Assembly should be drastically amended or repealed in its entirety. The government promised to consider civil society input but the rapid passage of the bill meant that several civil society meetings were canceled and the meetings that did occur did not allow enough time for legislators to incorporate suggestions into the text of the bill. It is accepted that the government, like all governments, has the right to maintain secrecy over certain items of information that may affect national security, but these items should be defined as narrowly as possible.

9. PEN is concerned by two other existing pieces of legislation. 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.

10. Similar to problems with the Secrecy Bill, 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. This section of the act has not yet been invoked to force disclosure but remains in force so nothing prohibits the government from doing so.

Media Appeals Tribunal and the Film and Publications Act

11. Equally troubling to PEN are the free expression implications of the ANC's proposed statutory "Media Appeals Tribunal" that would regulate the press with a body composed of so-called "independent" persons.

12. No details about the mission, conduct or punitive powers of the Media Appeals Tribunal have been released, but there are hints from ANC spokespersons that it would be comprised of civil society and government-selected representatives and have the power to fine publications and individual journalists for false or misleading information.

13. The existing Press Council of South Africa is comprised of an Ombudsman and an Appeals body that entertain complaints about false or misleading information, libel, and other abuses by the press. The Ombudsman can publicly censure parties at fault, although it cannot impose criminal sentences or civil penalties such as fines. The Council utilizes the voluntary South African Press Code to guide the media in its programming. The Press Ombudsman received 213 complaints in 2010, a remarkably small number given the plethora of news items published every single day in the country.

14. The proposed Media Appeals Tribunal ignores an important distinction between ethics and regulation. The Press Council administers an ethical framework that does not supersede the law. Media in South Africa are already subject to the regulatory regimes of trespass, libel and defamation—as well as other offenses which apply to all citizens—that are administered by the judiciary. A politically appointed Media Appeals Tribunal would therefore undermine an independent press. It could also result in the collapse of the voluntary Press Council system because newspapers accused of breaching the code would be forced to submit to two adjudication processes.

15. While the Press Council claims that it regularly revises the South African Press Code every five years, it also conceded that government pressure coincided with its current review. This included a new clause related to investigating individuals and a blanket ban on plagiarism. The Council invited the government to suggest changes to the code but no practical provisions were received.

16. Ignoring protests by journalists and lawyers, the government incorporated the principle of prior restraint into legislation when it introduced amendments to the Film and Publications Act (Amendment Act 3 of 2009) that would impose oversight over subjects—including child pornography, indecency, and propaganda for war—for all print and trade publications with the exception of the daily and Sunday publications of six approved media houses.

17. PEN welcomes the October 2011 decision by the Gauteng High Court (14343/2010) to rule the amendments to the Film and Publications Act to be unconstitutional, once again demonstrating the importance of a separate and independent judiciary.

Defamation, censorship, and harassment cases

18. PEN has also followed with concern a trend toward bringing defamation and libel cases that threaten authors and publishers with potentially crippling court costs and legal fees and burden them with prolonged legal processes. Such suits can have a chilling effect upon writers and publishers who decide to censor their own speech in order to avoid civil penalties.

19. Especially troubling in this regard are defamation suits filed by the President of South Africa himself. In the past five years, President Jacob Zuma has filed 11 defamation suits seeking R49 million ($6.1 million) in damages for everything from musical parodies to photography.[1] In the most widely publicized of these cases, President Zuma sued the editors of the *Mail & Guardian* and *Sunday Times* newspapers and the cartoonist Jonathan Shapiro, who goes by the pseudonym Zapiro, in response to several political cartoons. The President's ability to muster significant legal resources in an effort to curtail the expression of a political cartoonist sends a powerful signal about the government's tolerance of criticism, and runs counter to the widely-accepted principle that public officials are legitimate targets of satire and parody.

[1] Khethiwe Chelemu, "Zapiro claim is Zuma's 11th", *Times Live*, 15 December 2010.

20. The Protection from Harassment Bill threatens to restrict journalists from gathering information. When public figures or alleged criminals refuse to answer phone calls to meet with the press, journalists investigating criminal activities or corruption occasionally wait near an official's residence to question the person. This bill would enable a person to receive a court order against the journalist or newspaper, including phone calls.

Positive Steps

21. PEN notes that the South African judicial system is responsible for hearing defamation suits and remains independent from the executive and lawmaking branches of government under the 1996 constitution. Important precedent was created in 1998 by the landmark case *National Media v. Bogoshi* (579/96) that provided for a reasonableness defense to defamation, taking into account the nature, extent, and tone of the speech at issue. (However, the burden of proof remains on the defendant.) Damages have also been reduced by the Supreme Court of Appeal in key cases, a welcome step.[2] These guiding rulings represent an important bulwark against the abuse of defamation claims, but the underlying chilling effect upon speech remains. PEN eagerly awaits the outcome of the Zapiro proceedings as an indicator of judicial independence in the country.

Hate speech

22. Finally, PEN notes with concern that a recent high court decision may have fashioned an overly broad definition of hate speech in South Africa. Section 16 of the 1996 Constitution governs hate speech in conjunction with the Promotion of Equality and Unfair Discrimination Act (no. 4 of 2000). Importantly, an exception is made for "fair and accurate reporting in the public interest or publication of any information".

23. In 2010, ANC Youth League leader Julius Malema sang an apartheid-era song entitled, "Awudubula (i) bhulu / Dubula amabhunu baya raypha", which loosely translates as "Shoot the Boer."[3] The Gauteng High Court held that the song constituted hate speech under the Equality Act and the judgment further prohibited the entire ANC party from singing the song at any public or private meeting. However, the legal grounds upon which the court decided the case—which lessens the requirement for actual incitement to inflict harm—may be overly broad and ambiguous, blurring classes of protected speech.[4]

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[2] Dario Milo, "Defamation is part of the package when you live in the limelight", *Sunday Times*, 9 July 2006.
[3] "Boer" translates as farmer, but also connotes an Afrikaner or Afrikaans-speaking conservative person.
[4] Pierre de Vos, "Malema judgment: a re-think on hate speech needed", 12 September 2011. Available at http://constitutionallyspeaking.co.za/malema-judgment-a-re-think-on-hate-speech-needed/ (accessed November 2011).

24. PEN applauds the decision by the South African Human Rights Commission to hold public dialogues about the song, but cautions against extending the reach of the hate speech clause.

The Open Government Partnership

25. In September 2011, South Africa joined the Open Government Partnership, a multilateral pact promoting state openness and transparency. The partnership requires each participating country to commit to one of several "Grand Challenges". South Africa committed to Grand Challenge 1 (Improving Public Services) to improve service delivery. However, participation in the partnership also offers an opportunity for the country to commit to Grand Challenge 2 (Increasing Public Integrity), which requires measures that "address corruption and public ethics, access to information, campaign finance reform, and media and civil society freedom." This Grand Challenge would provide a viable opportunity for South Africa to champion freedom of expression.

PEN commends

- South Africa's progressive laws and constitution related to free expression;
- South Africa's vibrant press and civil society;
- the efforts by the South African National Editors Forum (SANEF) and the Right2Know campaign to halt or amend the restrictive and unconstitutional Secrecy Bill;
- the independence of South Africa's judiciary in hearing libel, defamation, and censorship claims;
- the judiciary's vigilance in responding to hate speech; and
- South Africa's participation in the Open Government Partnership.

PEN recommends

- 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;
- that the government does not proceed with the ANC request that it introduce legislation providing for a statutory Media Appeals Tribunal and instead allows the Press Council to continue its voluntary ethical stewardship of the media;
- that the judiciary upholds South Africa's legal obligations for freedom of expression by protecting parody and journalistic inquiry;
- that the legislature and judiciary ensure that hate speech laws do not become overbroad by ignoring the constitution or international standards relating to incitement to inflict immediate harm;

- that the government, civil society, and international bodies scrutinize pending legislation to ensure it does not infringe free expression; and
- that South Africa commits to Grand Challenge 2 (Increasing Public Integrity) under the Open Government Partnership in September 2012.