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FXI UPDATE

This newsletter is a continuation of the one produced by the Anti-Censorship Action Group, which merged with a sister organisation, the Campaign for Open Media to form the Freedom of Expression Institute on 27 January 1994.

FREEDOM OF EXPRESSION INSTITUTE OF SOUTH AFRICA (FXI)

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ANNOUNCING THE FREEDOM OF EXPRESSION INSTITUTE

"Pursuing Freedom of Expression to the maximum and keeping it that way"

We in the Freedom of Expression Institute believe there is a need for a powerful non-governmental organisation to act as a watchdog for freedom of speech and expression and to campaign for the widening of related rights, such as the right of access to official information. Such an organisation would also play an important civil society role in helping to formulate media policies for South Africa.

The need for such an organisation is rooted in the belief that South Africa is in an early stage of building a democracy and strong institutions are required to campaign for and uphold democratic values, and in this in stance, the values of freedom of speech and expression. We acted on our beliefs, and through a merger of the Campaign for Open Media (COM) and the Anti-Censorship Action Group (ACAG), launched the Institute on January 27, 1994 . In the words of Raymond Louw, who chaired the inaugural meeting: *"COM and ACAG regards this as a somewhat historic occasion because it represents*

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a milestone in the fight for freedom of expression in South Africa".

Describing the defensive role of journalists, writers, artists, actors, film makers and publishers during the struggle against apartheid and state censorship, he noted that now was a time for change. State repression and censorship had eased considerably and an interim Bill of Rights would soon become law.

"We are now out of the defensive barricades, out in the open on the attack against targets which were but mirages in the distance. I am talking about pursuing freedom of expression to the maximum and keeping it that way; crusading for freedom of access to information to enable freedom of expression to be really meaningful.

"It is all very well to have freedom of expression but it cannot be meaningfully exercised unless there is access to information, to the secrets that people in power wish to keep from others so that their positions cannot be assailed and they can maintain authority over others," Louw said.

He noted the gains made by COM and ACAG and others in trying to open the airwaves and wresting control of broadcasting from the state and political parties. Included among these was the independent process of selection of SABC Board members: *"Our efforts in bringing about substantial change in the structures of the SABC has been remarkably successful — though we are still to see whether the promise is borne out by the actuality. Whichever way one looks at it, to wrench control of the public broadcaster from the hands of the state which had moulded it into its public voice over 40 years, was no mean achievement".*

But Louw also cautioned that the need for vigilance was greater than ever before. *' Freedom of expression is never won; it is always a partial victory because there is always someone somewhere trying to censor, prevent freedom and maintain power".*

This edition of Update contains the keynote addresses delivered at the inaugural meeting of the FXI. The first, by Professor Mbulelo Mzamane, is entitled "The New Freedom of Expression": Mzamane is a published writer and scholar and has recently returned to South Africa after spending more than 20 years in exile. He is currently the Head of the Department of English and Comparative Literature at the University of Fort Hare. The second address, Freedom of Speech in the Age of Constitutionalism, is by attorney Norman Manoim. Manoim is also a member of the Executive Committee and was amember of Executive Committe of the Anti-Censorship Action Group. He specialises in media law and freedom of expression issues, andhas published articles on these and related topics.

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A new Freedom of Expression

Professor Mbulelo Mzamane

It is a great honour to be called upon to address this gathering. The significance of this occasion is spelt out most eloquently in a brief I was sent with my invitation, which I would like to use as my point of departure. We have come together to cement the merger of two organisations involved in campaigning for freedom of expression, namely the Campaign for Open Media (COM) and the Anti-Censorship Action Group (ACAG).

This represents a significant regrouping of civil society as we approach a new dispensation all of us trust has a great deal more to offer us than the discredited, moribund apartheid regime. There can, however, be no guarantees that we shall never again experience some measure of backsliding in the future. The need, therefore, for new structures rooted in civil society to help foster a new democratic culture is paramount. Democracy is a process and an ideal that requires careful and constant cultivation; nowhere can it ever be a complete and perfect product. In formally launching the new Institute we have come to offer a hand of partnership to democratic forces in our land, in a process that represents an unfolding of our culture of liberation. We congratulate COM and ACAG for their vision and proactivity, for their initiative that should be held up as a model for social transformation in our land.

"We strongly believe that there is a need for a powerful non-governmental foundation that not only acts as a watchdog for freedom of expression, but also [pro-actively campaigns] for the widening of related rights, such as the right of access to official information", a statement of motivation from the new Foundation reads. *"Such an Institute would play an important civil society role in helping to formulate media policies for South Africa."* We strongly endorse the statement. Transparency is a cornerstone for accountability in government. It is guaranteed by entrenching people's right to know. An urgent task of this organisation will be to help draw up new legislation that gives people reasonable access to information, that declassifies in due course even the most privileged informa-

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tion, a new Freedom of Information Act.

A problem that plagued colonial governments and, in many instances, their successors, too, was a crisis of legitimacy. Decolonisation without simultaneously conferring legitimacy upon new structures is often a recipe for perpetuating oppressive structures. Legitimacy derives not only from the fact of election on a popular mandate but also from continued responsiveness to needs as articulated by the general populace. We must press on to have the needs of those on whose behalf governments claim to act met. We must never allow euphoria to lull us to such an extent that we fail to realise that the demise of apartheid marks for us a second phase of struggle for reconciliation and reconstruction, for spreading the benefits of democratisation and development to even the most wretched of the earth. Legitimacy will come about when reasonable expectations are met; our ability to judge the performance of those in government stands in direct proportion to the degree of our access to crucial information in those areas that affect our lives; individually and collectively.

Another laudable sentiment is expressed by the organisers of this event in the following terms:

> *'At present there is still an intricate web of laws preventing important information from reaching the public...[a fact which points] to the willingness of the present government to still control what the public may know, and when they may know it. If pressure groups do not actively campaign to ensure the removal of such laws form the statute books, a new government may be sorely tempted to leave them intact. Thus, the first aim of the Foundation is to remove such censorship laws'.*

The point must be stressed that temptations should be removed from incoming and future governments. The point can be underscored with an example from Zimbabwe - not because there is a repressive regime in power in that country, but because we can all make mistakes. There seemed to be poetic justice when President Mugabe used laws promulgated by the Smith regime and its predecessors to plague former oppressors. In due course, however, those same statutes were then turned upon dissidents in his own government, who were themselves yesterday's liberators. Such repressive laws, including censorship laws, must, indeed, be removed from the statute books.

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Frankly, I am less concerned with the present government. In fact, I hope this may serve as my valedictory address to them, even as I feel like some character form Ralph Ellison's **Invisible Man**. The second aim spelt out by the new Institute, therefore, is very important: *"to ensure that a new government does not attempt to enact its own legislation to curb freedom of expression, ostensibly in the interests of national reconciliation, reconstruction and development."* The fear is real. In 1985 in Nigeria, General Buhari swept to power in a coup on new year's day. It was a most welcome coup, bringing to an end the most draining period to the treasury by a civilian regime Nigeria had yet known. Whilst the people were dancing in the streets, however, the country's new rulers were promulgating Decree Two to curb freedom of expression. It was a dark period in Nigerian history, precipitating yet another coup by General Babaginda. We must be careful of liberators who give with one hand and take away with the other.

The Institute's documents strike a key note in terms of their third aim, which is *"to educate and mobilise the public to resists any encroachments [upon] their rights to receive and impart information, ideas and opinions. Thus, facilitating a culture of democracy should also mean alerting people to their right to know, and encouraging them to assert this right; the Institute understands this is a critically important proactive educational task that it needs to undertake in the run-up to national elections, and beyond."* A most crucial aspect of the Institute's educational programme is their school's campaign. The objective of placing matters of censorship in the school's curriculum is one that needs serious canvassing, not only with the new school's authorities but also, and especially, with the teacher's organisations such as the South African Democratic Teacher's Union (SADTU) and the University Democratic Teacher's Union (UDUSA). In other words, the new Foundation must endeavour to forge links and work with other democratic structures in civil society whose objectives are similar to the Institute's.

On matters of education, however, we would want to see the new Institute go much further. There is no gainsay to the fact that South African journalism has matured in many respects and acquired a consciousness forged from the anvils of struggle. South African society as a whole suffers form miseducation, and journalists are no exception. Education, therefore, needs to encourage the sensitization of journalists to their country's cultural diversity as well as to the diversity of values and interests in our country. Our democracy is going to be fragile for a

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while, and we need to avoid causing aggravation to other cultural groups through reports on them in the media that are insensitive politically or culturally. This calls for education; it calls for education when two senior reporters in a well-known and respected paper situate the University of Fort Hare in the Transkei. Why should they care to get such mundane facts right? This is not intended as a commercial but editors and directors of media in general need to avail their personnel of such educational opportunities as are accorded by new structures like the Institute for the Advancement of Journalism. Those who operate the media cannot educate if they are themselves miseducated.

" The fourth aim is to campaign for freedom of information on a grassroots level, rather than simply focusing attention on the powers of state." We are all concerned by the propagation of political correctness even from liberation movements or "the affliction of intolerance" that plagues our communities. We are all diminished by succumbing or subscribing to such pressures. There must be no more events like Katlehong, where journalists become open game for snipers. However, we must also be careful not to mistake symptoms for the disease. At the heart of the conflict in South Africa lies power; and information confers power, control over information is related to control over people's lives. Indeed, *"it is vital that an anti-censorship campaign encourages people to campaign not only against state restrictions, but also against censorship or opposing viewpoints in their local civics, trade unions, schools and universities, political organisations, youth clubs and churches."* We must also realise, however, that the powerless naturally resent information that oppresses and disempowers. We must campaign, too, for the even distribution of power, and this may entail instituting a new order of information.

Many important assumptions by which we live remain uniterrogated in South Africa. Issues of what constitutes "information" and what is in the public interest must lie with those who control both the means of production of information and its dissemination. To stay forever outside the system of control is to live in perpetuity in the margins of society. It is thus crucial for the marginalised to construct their own vehicles for the upliftment and to participate in the process of redefinition all of this will necessarily entail. What is at issue is not their accommodation in some pre-existing order - such an order in the context of South Africa is bound to have its own existential problems that would need to be interrogated, too. What is at stake is control and that, of course needs to be reflected in the compo-

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sition of board rooms at all levels form ownership to dissemination. What is at stake then is the opening up of space for those previously excluded and its effective occupation by them.

At the core of the exercise in social transformation currently underway in South Africa is thus the need to reinterrogate existing power relations. The new information order would need to bring about a fundamental shift in these power relations and reactivate debate on the nature of knowledge itself in a bid to set up new and inclusive paradigms. The media in South Africa, sometimes subtly and at other times not so subtly, upholds existing peer relations through propagating a canon of exclusivity. A new information order would need to produce knowledge and information which are at the cutting edge in the cultivation of a counter-canon, a canon of inclusivity, which could in turn become the new orthodoxy that might be challenged in its own right. And so the dialectical approach that Socrates employed to challenge the dominant and often erroneous practice made of scholarship might again come to pay in transparent ways. This would imply a contestation of accepted epistemological parameters - a re-examination, in our case of what constitutes information and what is in the public interest - and perhaps an extension of existing media frontiers to horizons previously unknown. In the process, there must, inevitably be a locking of horns outside this castle of information - to collapse other metaphors from Franz Kafka and J.M. Coetzee - between the barbarians at the gate clamouring to enter and the besieged gatekeepers whose task has always been to determine who is admissable and on what terms. In the final analysis, the quest for a new order of information would involve cultivating epistemological democracy previously unknown in this land. I concur with the conclusion that, *"as it is difficult to mount a campaign against such a diffuse yet pervasive form of censorship, it is important for this programme to be strategic in where it focuses its attention."*

The Foundation's fifth and finally stated aim is *" to continue the role of actively influencing media policy developments to ensure the freedom, independence and diversity of media in South Africa."* The greatest form of in-built censorship is provided by the concentration of media ownership in the hands of a few with vested interests in the status quo. In addition, the racial basis of the media in South Africa is a serious constraint to attaining justice with equity. For those reasons, we must welcome developments at the Sowetan, where a group of prominent black businessmen have acquired controlling shares in the country's largest

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daily newspaper from the Argus group monopoly. But we must go further: we can eliminate race control without ever challenging the class basis of the new order. It will become important, therefore, for the government of the day, through intermediaries of non-governmental but democratic groups like the Institute, to promote the freedom, independence and diversity of media in South Africa by subsidising without patronage community control of some sectors of the media.

I must mention, even if in passing, the all-important issue of language in the media. The media has short changed the public on this issue, which requires vigorous debate. Instead we have had little more than sneers and jeers from the media on the proposed language policy, which are no substitute for analysis. The new Institute must revisit the subject, examine the dynamics that propel such publications as Ilanga lase Natal and Imvo Zabaantsundu. Pertinent research is called for. It may well be that we may then discover that language must be a crucial concern to those, like ourselves, preoccupied with dissemination of information, with education, with democracy, and with development.

In the final analysis, what we need jointly to foster and to cultivate or consolidate is our unfolding culture of liberation. A culture of liberation has been unfolding in South Africa, which stands at the polar end of the moribund, life-denying culture of exclusivity and disempowerment. It is dynamic, capable of transplanting its roots into new soil made fertile by the blood of a people schooled in the art of sacrifice and struggle. It is inclusive, life-giving and empowering. It is already providing the infrastructure for the new South Africa. We are all called upon to join hands to build the new emancipationist culture of upliftment. This occasion is an important trend setter in cultivating a participatory democracy in shaping our country's future for the benefit of all.

We welcome the formation of the new Freedom of Expression Institute. Our expectations are high and you dare not flounder. We offer our hand in partnership. Congratulations! Power to your voices! Power to your elbows! Amandla!

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FREE SPEECH IN THE AGE OF CONSTITUTIONALISM

Norman Manoim

We exist at the moment in a strange interregnum, between an old order where speech was regarded as privilege, not a right and a new order under a bill of rights where speech will be regarded as a right but subject to any number of potential constraints on that right, whose ambit is presently a matter for speculation until the legislator and the constitutional court address the problem. At the moment in South Africa it seems that anything goes - not because proponents of free speech were finally victorious but because the old era has died passively leaving nothing in its place.

So you can hear public speakers call for "civil war", "kill a farmer, kill a boer" with impunity (with only journalists who have the te merity to report on them facing the prospects of jail) and then after a full day's fare at the hustings, you can go home and read your favourite soft porn magazine quite lawfully without having to pull it out of a brown paper bag. The law of defamation aside, free speech seems to be surviving at least for the moment.

We would be living in a fool's paradise if we think that this will continue into the new era. The new Chapter on Fundamental Rights in our Constitution (as our bill of rights is called) will be like a new toy to politicians, judges and academics alike, who will all doubtless be inspired to experiment with new forms of social engineering in dealing with the vexed problem of speech. If history is anything to go by, regulating the content of speech has been the pet soft option of many in power, who in trying to appear to do something about society's seemingly insoluble social problems like violence, racism, oppression of women and state security, find it easier to impose a gag than embark on more expensive solutions to these problems.

Since not all of you are lawyers it may be necessary to digress briefly about what

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a Bill of Rights with judicial review means. The Bill of Rights exist as a minimum standard by which to test all laws of the country. Those laws which the court regards as violating the fundamental rights in the constitution will be declared invalid, or invalid to the extent that they violate those rights. In other words, had we had our present Bill of Rights in the dark days of apartheid legislation with a properly functioning judiciary, all the apartheid legislation would have gone from the government printer and then to the shredder, via the court. The most famous such constitutional provision, which you will have heard of whether you read the Harvard Law Review or only watch Hollywood soaps, is the First Amendment to the United States Constitution which dates back to 1791. Its beauty is its simplicity, it says no more than that "Congress shall make no law ... abridging the freedom of speech or of the press...."

Any English speaking layperson reading this provision and not party to almost two hundred years of judicial wisdom of the United States Supreme Court in interpreting this provision, would think that it is "open season" in America as far as speech is concerned. This is of course not true. Judges have 'divined' meaning in the First Amendment, which the ordinary mortal would never find from reading the text. Whole categories of speech remain unprotected by the First Amendment despite no express mention of this. In the words of the Court they are "the lewd and obscene", "the profane", "the libelous" and "the insulting or fighting words, those which by their very utterance inflict injury or tend to incite an immediate breach of the peace". The American courts further do not protect people who have knowingly lied, defamatory statements uttered with actual malice and certain species of what is called commercial speech. Indeed there is no society on this planet in which free speech is absolute. If it were you could never convict anybody of fraud or hiring a hitman to kill somebody else.

Our new constitution is modelled more closely on the Canadian Charter than the American one. Ours likewise guarantees freedom of religion, belief, opinion and expression. We further, following the designs of more modern constitutions have a clause giving an individual a right of access to state information insofar as it is required for that person to protect or exercise his/her rights. The inclusion of such a provision has meant a significant advance on our past. Unfortunately for us it flatters only to deceive: its narrow construction may mean that it will not be the doorway to open government many hoped it would be. Nevertheless we still require a Freedom of Information statute to give flesh to the constitutional provi-

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sion. Can we still hope that a government once in power will give us an Act that will allow ordinary citizens to delve into the interstices of State?

What awaits us however are the interpretations that will be given to the limitation clauses that come at the end of the Bill of Rights. Since many of the guaranteed rights do not always live happily side by side, for instance the right to freedom of expression will conflict with a right to privacy or a right to dignity, the courts require some guidelines in resolving the dilemma. The Bill of Rights provides that rights entrenched in the Bill can be limited by laws that are "reasonable and justifiable in an open, democratic society based on freedom and equality" and which do not, "negate the essential content of the right in question". It is here that a very interesting feature of our Bill of Rights emerges. The courts are enjoined to interpret far more strictly, in other words more easily reject, legislation impinging on freedom of expression that relates to "free and fair political activity" but need be less strict about the rest. What is the significance of this rather tortuous legal chicanery? It appears to mask an important political compromise. Expression that is not political eg. that is pornographic or obscene, or lewd will be subject to less protection than political speech.

The type of thinking that political speech is to be given more value than other types is by no means a unique South African invention. People who assert that the purpose of free speech is to allow the free flow of communication between citizens and the state on matters of their self-regulation believe that type of speech is sacrosanct, but feel a lot less passionate about protecting the rest. The problem with this approach whilst it has some philosophical appeal is that what is political is by no means clear-cut. The well known feminist expression from the seventies that "the personal is political", comes to mind immediately. One fears that courts in South Africa, given our background in suppressing rather than encouraging speech will interpret 'political' very narrowly to mean something which is the subject matter of a Government Gazette. What they will make of the phrase "free and fair" in relation to political activity in the section is even more disturbing. Indeed some of the most profound political statements might be gestures which many would regard as objectionable and hence not free and fair. Would you be able to say "fuck the draft" (a phrase that the US Supreme Court ruled constitutionally protected) or "burn the flag" or depict what many would regard as obscene caricatures of leading politicians.

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In the interpretation section of our constitution, Courts are called upon to promote the values of an "open and democratic society based on freedom and equality" when interpreting the provisions of the Bill. Furthermore we also have a clause guaranteeing equality and outlawing discrimination on the basis of race, gender, sex, ethnic or social origin, etc. What will be the effect of these clauses read with the limitations clause I have already referred to. In the Canadian Constitution freedom of expression can also be qualified by reasonable limits justifiable in a democratic society. It also has an equality clause and a preamble outlawing discrimination in its Charter of Rights. On this basis Canadian courts have held recently that criminalising certain types of hate speech was lawful and in the Butler case upheld the conviction of a distributor of obscene videos. It is a fair interpretation of our Act, that speech interests could be subordinated to equality in the same way that laws which outlaw hate speech and pornographic and obscene material, if we follow the Canadian precedents. In the interpretation section of our Act, courts are enjoined to consider comparative foreign case law.

There is a considerable constituency concerned about the effects of pornography and hate speech, which believes that in the race between freedom of expression and equality, freedom of speech comes second. They argue that if certain kinds of commercial speech could without much philosophical difficulty have been subordinated in the interests of commerce, why shouldn't hate speech and pornography be subordinated in the battle for equality. Is it, they mischievously ask, only because the market is considered too important? Whilst this logic appears at first blush to be compelling, it is not necessarily so. Most commercial speech that has been found to be outside constitutional protection, relates to downright lies be they fraud statutes, or securities exchange regulations, and it has long been the view of most theorists that lies do not deserve protection.

On the other hand what may fall into the category of hate speech for instance may be the daily stuff of a nation's political dialogue. No better example in the world exists than South Africa. From the PAC to the AWB, from National Party ideologues to ANC Youth League members, from Ulundi to Umtata not too many phrases are uttered which might not contravene even the most narrowly constructed race hatred statute. If the statute is cast too widely, all politicians may end up in jail. (A social utility that may well prove beneficial.) If it is cast too narrowly attorneys general will be appearing daily on national television explain-

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ing why X was charged and Y was not, to a bemused populace who will perceive that political favour and not the principles of interpretations of statute as the guiding force behind such decisions. The result is that not only the legal system but the legal form gets discredited.

Further, too many of these statutes have had absurd results. The experience in the United States and Great Britain has been that members of oppressed racial minorities and not jack boot Nazis have been the most frequent defendants in these cases. In Canada a customs statute was used to delay the import of a biography of Nelson Mandela on the basis, so the officials reasoned, that such a book would encourage hatred of white South Africans. In South Africa we too had similar legislation applied liberally to opponents of apartheid, except in those days we called such laws Security Legislation and not Hate Speech Regulation.

Regarding pornography, feminists themselves are concerned about the pro-censorship position of many in the movement. Thelma McCormack for instance, in discussing the Butler judgement, says "I want to challenge the idea that the imagery of women in pornography, which the court describes as de-humanising and degrading, is related to equality. On the contrary I will suggest that the enemy of women's equality is our mainstream culture with its image of women as family-centred". She goes on to say that "censorship overprotects women and circumvents the essential journey towards self-discovery and the repatriation of our own minds and imaginations". She asks the question "does state supported censorship, further our dependency on a patriarchal state and disempower us?"

The situation is further complicated by the fact that there is a difference of emphasis between feminists who favour censorship and puritan moralists. The feminists would describe pornography as sexually explicit material depicting women as enjoying or deserving some form of physical abuse which has the purpose and effect of producing sexual arousal. The moralists on the other hand would go further and proscribe all forms of sexually explicit material as well as material not meeting a mythical community standard of decency, which they would regard as obscene. The cast of their net is much wider than that of the feminists and indeed most legislation on these issues caters to both concerns. The other danger of this kind of legislation is that it feeds into elite notions of culture. Many statutes whilst outlawing pornography and obscenity, whatever those labels may mean,

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allow artistic value to be a redeeming feature. Artistic value means what could be hung on the walls of the Johannesburg Art Gallery as opposed to what gets sold in soft-cover version at your corner cafe. Implicit in this notion is that the upper classes with their education and erudition can handle a bit of strong stuff whilst the lower classes, unable to control their libidinal energies will be aroused easily by such salacious material into wanton abandon. How unfortunate that in the name of equality eugenics is resurrected. There is no doubt that hate speech and pornography can be hurtful to many victims of such speech. The problem is that society is obsessed with a legal solution to the problem. We tend to ignore the important effects civil society has in dealing with offensive speech. As an example the Mokaba cause celebré. Soon after an outcry from newspaper editorials, politicians, etc. his organisation repudiated the slogan, and he too after the odd hiccup was constrained to distance himself from its literal meaning. Sanity prevailed. On the other hand attempts to prosecute him have proved clumsy and thus far unsuccessful.

Interpretations of constitutional provisions are frequently a product of their time. The same First Amendment that we know today lived happily side by side with a Sedition Act until 1801, a law that would not embarrass our former Terrorism Act for its draconian reach. Yet by the 1970's, the tide had gone completely the other way. In Brandenburg vs Ohio involving the prosecution of a Klu Klux Klan member for advocating racial and religious bigotry, the Court held that advocating that people should violate the law is only punishable if the advocacy is "directed to inciting or producing imminent lawless action and likely to incite or produce such action". Peter Mokaba there is still hope.

At the same time the Court made a significant inroad into the constricting confines of the laws of defamation. In New York Times vs Sullivan the Court held that a public official is prohibited from recovering damages for defamatory falsehood relating to his official conduct unless he proves that the statement was made with actual malice, i.e. with knowledge that it was false or with reckless disregard of whether it was false or not. We would earnestly hope that given our new Bill of Rights the constitutional court will resurrect the interests of freedom of speech in defamation law from the recent ravages of our Appellate Division. Present law makes no special distinction for public officials. A newspaper which publishes defamatory material of an individual, public or private bears the onus of proving

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truth. The distinction between this and the Sullivan position is not a mere curiosity of interest only to academic lawyers. It is the difference between a newspaper deciding to run the risk of running a major expose and risk severe financial loss, if not closure, or erring on the side of caution and perhaps never bringing to light of day another Watergate, Muldergate or any other like 'Gate' in the future.

State power is not always malign when it comes to freedom of speech. Only those who seek to ignore the effects of the market in creating huge concentrations of media power dismiss issues of access to the media. The famous phrase "the freedom of the press exists only for those who own a press" is telling indeed. Modern concerns with freedom of expression see the state having a positive role in guaranteeing a forum for viewpoints which might otherwise not be heard because of lack of access to media resources. Such a provision exists in our Bill of Rights which says that all media finances under the control of the state shall be regulated in a manner which ensures impartiality and the expression of a diversity of opinions.

In the United States two apparently contradictory judgements exists on the point. In one case involving a Miami newspaper, a candidate sought to invoke a Florida statute entitling candidates' rights to reply to a newspaper's charges assailing their character or official record. The newspaper, which was the only major paper in the town which refused to grant this candidate a right of a reply, said that the Florida statute was unconstitutional. The matter went to the Supreme Court who agreed that the statute did violate the First Amendment. The court said that a newspaper is more than a passive receptacle for news comment and advertising. The choice of material to go into the newspaper, whether it is fair or unfair, constitutes the exercise of editorial control and judgement. In this crucial process the government has no role to regulate.

Yet the opposite conclusion was reached in a case concerning broadcasting. Here a person who had been maligned in a radio interview to which he was not party demanded a right of reply. The station refused and after a complaint to them, the Federal Communications Commission ordered the station to give a right of reply. The court said that in view of the scarcity of broadcast frequencies, the government's role in allocating those frequencies and the legitimate claims of those unable without government assistance to gain access to those frequencies, for expression of views, the FCC had been entitled to order a right of reply.

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Some believe that rights of reply should be restricted to election period only. Others believe that enforcing a right of reply may in fact kill speech, because faced with an enforced right of reply journalists might be less willing to cover controversial stories.

Further challenges remain for us as well in other areas, for instance should journalists have a privilege not to disclose information or confidential sources to court, the so called "shield laws" that exist in certain states in America, should we have a Freedom of Information Act and if so how far should it reach into the murky affairs of the state.

As will be seen from this Cook's tour of freedom of expression issues, each one is fraught with its own difficulties and minefields. . Few people out there have a general concern about free speech. Most only become converted briefly when the problem affect them directly. There is little doubt that in weighing up the pros and cons of what we should be doing in the future there is a great need for an organisation like this one to enter that heated debate and even though the missiles will be thrown our way, perhaps we can throw one or two back.

Resolution of the inaugural meeting of the Freedom of Expression Institute

The founding meeting of this Freedom of Expression Institute commits this organisation to all the objects and aims stated in its constitution, but emphasises in particular its constant commitment to oppose ALL forms of censorship and to extend support to all victims of censorship, irrespective of whether it agrees with their views

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