

**S A National Editors' Forum, with the Faculty of Humanities at
Wits and the Institute of Advancement of Journalism**

**Speech by Professor Kader Asmal to mark
SANEF's Commemoration of Black Wednesday
at the University of the Witwatersrand, 19 October 2010
on**

Freedom of Speech is Life Itself: The International Experience

Ladies and Gentlemen,

Acclaimed and award-winning author Salman Rushdie, who is no stranger to the controversies that often accompany debates on freedom of expression and free speech, had the following to say with respect to free speech: *'Free speech is the whole thing, the whole ballgame. Free speech is life itself'.*

We come from a past where those in our society who suffered banning orders, who fought an oppressive state machinery that sought to violently crush the very essence of freedom of expression, belief and opinion understand all too well that 'free speech is life itself'.

We come from a past which those of us who were the framers of a new constitutional dispensation vowed we would never again allow any Black Wednesdays or free speech or expression 'black-outs' to blot our landscape ever again.

We consequently charted a course for a future that would be hallmarked by a set of new values that would seek to protect and promote freedom of expression, belief and opinion as the full and final repudiation of the

evils that hallmarked our beloved country. Yet again, free speech is life itself!

As we look back on our country's apartheid history it is fair to say that the freedom of the press has a chequered history of banning, government manipulation and dishonour– a chequered history which a new constitutional dispensation was tasked with relegating to the recesses of sordid memory only.

As we look back at Black Wednesday and the banning of The World, Weekend World and Pro Veritate it is worth reminding ourselves that we have left those dark days behind in principle and also as a matter of principle when we committed to live in the light of a new constitutional democratic order -an order where the Constitution entrenches and protects freedom of expression ⁱand a free press and entrenches a specific right of access to information.ⁱⁱ

This right to access to information is further entrenched, albeit subject to some highly problematic exemption clauses, in the country's Promotion of Access to Information Act which sought to give content to the constitutional right enshrined in section 32 of the Constitution, and interestingly in the same section guarantees freedom of the press.

Our country embarked on protecting freedom of expression constitutionally and legally as we prized it as one of the greatest liberties and essential ingredients to a vibrant and consolidated democracy. We prized it as a key liberty just as John Stuart Mill did. He said of free expression: *'Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties.'*

Indeed when one looks back at the history of the evolution of the right to free speech/expression it is nearly always associated with great political change or a complete alteration of prevailing beliefs. The modern concept of freedom of speech/expression is closely tied to the European Enlightenment. England's Bill of Rights of 1689 explicitly granted 'freedom of speech in Parliament' whilst the Declaration of the Rights of Man and of the Citizen adopted during the French Revolution in 1789 explicitly affirmed free speech as an inalienable right in Article

11: 'The free communication of ideas and opinions is one of the most precious of the rights of man. Every citizen may, accordingly, speak, write and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law'.

And then, there was the First Amendment to the U.S. Constitution, which has applied the widest meaning to freedom of expression.

Through the work of John Stuart Mill we recognised that freedom of speech is a multi-faceted right that goes beyond the right to express and disseminate information and ideas and embraces the right to seek information and ideas; the right to receive information and ideas and the right to impart information and ideas. It should therefore be clear that any discourse on freedom of speech/expression immediately touches on a whole host of ancillary freedoms: the freedom of belief, freedom of opinion, freedom of association, academic freedom etc. As Mill said it is the liberty that lies at the heart of many other liberties without which they would not be liberties at all.

We, the framers of our new Constitution, therefore did not only embark on crafting a unique constitutional right and protection in domestic law, we realised that we were crafting a protection that locks itself tightly into a proud history and into a contemporary global network of enshrined human rights and protections that sought to elevate freedom of speech/expression as a core universal human right.

The right to freedom of speech is recognized as a human right under Article 19 of the Universal Declaration of Human Rights and recognized in international human rights law in the International Covenant on Civil and Political Rights (ICCPR). The ICCPR recognises the right to freedom of speech as the 'right to hold opinions without interference. Everyone shall have the right of freedom of expression'. Furthermore freedom of speech is recognised in European (Article 10 of the European Convention on Human Rights), inter-American (Article 13 of the American Convention on Human Rights) and African (Article 9 of the African Charter on Human and People's Rights) regional human rights law.

Given our struggle and our achievements it was therefore with great sadness that I read Freedom House's Freedom of the Press 2010 annual report in May this year which stated that there were no countries with a fully free press in Southern Africa for the first time in 20 years with both South Africa and Namibia being downgraded from 'free' to 'partly free'.

In a press statement that accompanied their report they recorded the following opinions with respect to South Africa: *'After exhibiting steady improvements since the end of apartheid, South Africa has been consistently ranked 'Free' by the survey since 1995. Recent years, however, have seen a number of worrying trends, including more hostile government rhetoric toward the media, increasing political interference in the editorial independence of the South African Broadcasting Corporation (SABC), the use of gag orders and other legal mechanisms to restrict reporting, and concentration of ownership in the print and broadcast sectors. In 2009, further encroachments on the independence of the SABC and the passage of the controversial Film and Publications Act resulted in a negative score change of two points, which moved the country's status to Partly Free.'*

As you will notice from the fact that this report and press release was launched in May its negative verdict pre-dates the release of the draconian Protection of Information Bill, the scurrilous arrest of Sunday Times journalist Mzikazi Wa' Afrika that was thrown out of court in August, and the spectre of the Media Appeals Tribunal which the ANC NGC endorsed for further Parliamentary scrutiny.

I note reports following this weekend's meeting between SANEF and the government that the prospect of a statutory media appeals tribunal may be relegated to the side-lines in favour of a more pro-active approach with regard to self-regulation on the part of the print media industry.

But we must turn to the perennial question: when does self-regulation degenerate into self-censorship?

Such an approach could be consistent with the ANC NGC's decision to move the MAT discourse to the Parliamentary precinct where a robust discussion on self-regulation may be more apposite than a brow-beating

session about the prospect of a MAT. However, the issue highlights a broader tension and discourse which has been of concern to me all along as events have unfolded. This tension and discourse was also present in the scurrilous and high-handed arrest of Mzilikazi wa'Afrika earlier this year.

It is the tacit discourse of fear and self-censorship which stalks all these debates about media behaviour and possible control mechanisms whether they are to be in the private (self-regulation) or public (MAT prospect) realm.

It is in this regard that the case of wa'Afrika is particularly important. Mazilikazi wa'Afrika has been doing what all investigative journalists have to do – following every detail of an increasingly murky and dangerous political drama that has unfolded in Mpumalanga province where tenders and intrigue have led to the deaths of various role-players.

When wa'Afrika was questionably arrested he was subjected to both a dubious prosecution, which was rightly summarily dismissed, as well as possible unconstitutional treatment during the course of his arrest and detention. Subsequently Mr. Wa'Afrika could easily have self-censored his activities having been brow-beaten by a rather hair-raising experience or he could simply step right back into his journalistic ethos and continue to pursue the truth. He chose to do the latter and produced another headline about the dubious circumstances surrounding the death of Mpumalanga politician James Nkambule who may have been poisoned.

This is the nature of the tension when intimidatory tactics breeds an atmosphere of fear of persecution of one form or another which results in self-censorship which may be more effective than the actual censorship that may or may not be present in a statutory form such as the new Film and Publications Amendment Act and the draft Protection of Information Bill which currently contains no public interest exemption provisions. It is this very prospect of a 'fear instrument of persecution' (the putative MAT) which would clearly result in self-censorship which

makes debates on responsible self-regulation all the more crucial in the aftermath of SANEF's meeting with Government. There are a number of examples of debates on self-regulation, for example the PCC (Press Complaints Commission) in the UK, where the self-regulatory Ombud has had to answer some awkward questions about self-regulation and where these bodies have had to craft reforms in order to ensure their relevance and to ensure that statutory controls are not seen as preferable to a robust system of self-regulation.

It is, in fact, a little known fact that George Orwell wrote a specific preface to his great work *Animal Farm* entitled 'The Freedom of the Press' in which he complains about self-imposed British self-censorship and how the British people were suppressing criticism of the USSR, their World War II ally: *"The sinister fact about literary censorship in England is that it is largely voluntary. ... Things are kept right out of the British press, not because the Government intervenes but because of a general tacit agreement that 'it wouldn't do' to mention that particular fact."* The preface contains a response from a possible publisher of *Animal Farm* who had sought to opinion of the Ministry of Information who complained about the direct correlation with the narrative of Russia's political evolution and to the use of pigs as a ruling caste which the Ministry found troubling. It is perhaps the most supreme form of irony that a preface on the Freedom of the Press has not survived the publication process as the preface has not been published with most editions of the book. So you see, ladies and gentlemen, self-censorship and the forces that conspire to ensure its evolution are equally dangerous.

When we look at the history of the evolution of free speech/expression globally and indeed in its formalisation in our own country where it did not exist until the new constitutional dispensation heralded its arrival in 1996 with the advent of our new Constitution it is clear to see that societies that freely impart and receive ideas build strong democracies and those who do not fail to do so. Our own history and sadness that is the commemoration of Black Wednesday proves this point beyond any shadow of a doubt.

But we equally have a recent and striking example of this distinction between free and non-free societies in the controversy that surrounded the awarding of this year's Nobel Peace Prize to Chinese author and activist Liu Xiabo. Whilst the Chinese government issued strong condemnations of the prize and of the Nobel Committee a group of Chinese Communist Party elders issued an open letter to the Chinese Government calling for a reform of the 'invisible black hand' of censorship (the Communist Party's Central Propaganda Department) that stalks the Chinese society and for a system of post-publication controls to replace the pervasive pre-publication ones.

Whilst the letter is not a blanket call for an unbridled new culture of free speech it highlights the tension that builds up in societies that fail to substantively embrace free speech in practice for reform and change.

The letter highlights the tension that exists between the Chinese constitution of 1982's protection of free speech and the host of laws and regulations that undermine it in principle saying: 'This kind of false democracy of affirming in principle and denying in actuality is a scandal in the history of democracy'.

As we reflect on recent events in our country it is worth asking the question whose responsibility it is to protect free speech given the veritable cottage industry of new movements and NGOs that have chosen to rise to this challenge.

It is my contention, and it is partly bolstered by observing this weekend's meeting between SANEF and Government, that it is our collective responsibility, but note that the Bill of Rights states that it is the duty of the Government to *protect* these rights, not to minimise them.

But no self-regulation must surrender the core element of a free press – its right to determine its own opinions and to record the facts.

Neither must there be a continuing element of those who have changed to self-regulation to meet the needs or prejudices of economic or political power.

It is our collective responsibility for if it is possible to step back from the brink of potentially harmful laws and/or regulations that could create for us the kind of 'false democracy' of which the Chinese Communist Party elders so eloquently speak in their open letter and which would be a repudiation of our very own struggle for freedom by confronting challenges head-on together asking and answering one another's' tough questions as we once did then we can ensure and secure free speech and free expression rights for successive generations. But then it must be a challenge to which we all rise honourably, honestly and with our integrity foremost in our intentions and uppermost in our minds when we address these complex questions.

I'd like to conclude in the words of George Washington and with more than a mere momentary recall of the past from which we come and the values we sought to protect and entrench in the new order: 'If the freedom of speech is taken away then dumb and silent we may be led, like sheep to the slaughter.'

Who can fight the persistent calls to respect freedom of the press from Nelson Mandela?

We have managed through our sacrifice of blood, sweat and tears to secure a precious new dispensation that rightly placed freedom of speech and access to information as lodestars of a new order. We cannot and must not allow any denigration of these core beliefs that were so dearly won. Societies that engage their citizens freely and that ensure that they engage as freely as possible are societies that prosper. Societies that fail to do so may prosper for a while but they live on borrowed time as pressures for change, reform and societal upheaval build up. We would do well to remember that as we recall Black Wednesday and the system which it symbolised.

ⁱ **16. Freedom of expression**

1. Everyone has the right to freedom of expression, which includes
 - a. freedom of the press and other media;
 - b. freedom to receive or impart information or ideas;
 - c. freedom of artistic creativity; and
 - d. academic freedom and freedom of scientific research.
2. The right in subsection (1) does not extend to

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- a. propaganda for war;
 - b. incitement of imminent violence; or
 - c. advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.
 - d.

ⁱⁱ **32. Access to information**

- 1. Everyone has the right of access to
 - a. any information held by the state; and
 - b. any information that is held by another person and that is required for the exercise or protection of any rights.
- 2. National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.
- 3.