

HELEN SUZMAN FOUNDATION

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Profiles



Pamela Stein

Pamela Stein is a partner at Webber Wentzel Bowens . Her areas of expertise include all aspects of media law, defamation, privacy and information law, internet law, telecommunications and broadcasting regulatory law, constitutional and administrative law. Her clients include a cross section of publications and broadcasters. Pamela has been named a leader in her field in the Chambers Global Guide 2008 , an independent listing of the top lawyers in 175 countries. Pamela regularly writes on legal issues affecting the media and is the co-author of A Practical Guide to Media Law which will be available next year. Pamela also practices employment law , and has been appointed an acting judge of the Labour Court on a number of occasions.



Richard Calland

Richard Calland is associate professor in public law at the University of Cape Town and director of its Democratic Governance & Rights Unit. He is also Executive Director of the Open Democracy Advice Centre. Calland is a political columnist for the Mail and Guardian newspaper; His last book, Anatomy of South Africa: Who has the Power?, was published in late 2006.



Henry Jeffreys

Henry Jeffreys is a well-known and respected South African journalist with extensive experience both locally and abroad having served Beeld and Die Burger newspapers for many years and various international publications including the Sacramento Bee.

He has served in various capacities in civil society as an Executive Director at the Urban Foundation and National Business Initiative (NBI), as a Trustee at the National Peace Accord Trust, as Executive Director at the Funda Centre and numerous others. He was elected Founding Chairman of the South African National Editor's Forum in 2003.

Henry holds a Post Graduate Diploma in Public Policy and Development Administration (awarded with distinction) from WITS University in 1994 and a Master Consultant Certificate in Business retention and expansion from Business Retention and Expansion International, Albuquerque, New Mexico (USA) awarded in 1997. He is and is a Qualified Local Economic Development Facilitator of the National Business Initiative (NBI).

He has been awarded numerous scholarships and awards in the United Kingdom and United States during his extensive career as a journalist, most recently as a Nieman Fellow at Harvard University in 2005.

Henry is currently the Editor of Die Burger and Deputy Chair of SANEF (South African National Editor's Forum).



Na'eem Jeenah

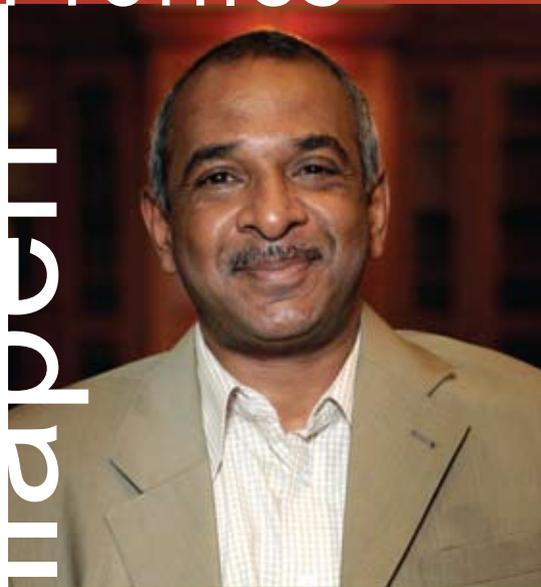
Na'eem Jeenah is the Director of Operations at the Freedom of Expression Institute, an NGO which focuses on questions of censorship and free expression. He is currently pursuing a PhD in Political Studies and is a well-known activist on issues of international solidarity and socio-economic justice. Na'eem is also an author, journalist and community leader. Na'eem is often interviewed by various media on issues related to freedom of expression, Islam or the Muslim world, South African politics, the Middle East, Islamic Feminisms and various other issues that are his areas of research. He writes for a number of publications and reports for a network of radio stations in the US.

JEFFREYS

NA'EEM JEENAH

Profiles

REPORT



Jody Kollapen

Mr Jody Kollapen is the Chairperson of the South African Human Rights Commission (SAHRC), a constitutional body set up in terms of Chapter 9 the South African Constitution to protect and promote human rights. He was appointed by President Mandela on the recommendation of Parliament and reappointed for a second term by President Mbeki.

He has a B.Proc degree and LLB degree from Wits.

He practised law in Pretoria, South Africa from 1981 to 1992 focussing on public interest law and during this period he represented a number of persons prosecuted in terms of apartheid laws.

He joined Lawyers for Human Rights, a leading human rights NGO in 1992 and served, as its National Director from 1994 until 1995.

He was requested by President Mandela to be part of a panel entrusted with the task of interviewing and making recommendations on persons to be appointed to the Truth and Reconciliation Commission.

He is presently chairperson of the Equality Review Committee, serves on the boards of various human rights bodies (including the Human Rights Foundation and Legal Resources Centre) and lectures and publishes widely.



Raenette Taljaard

Raenette Taljaard is the director of The Helen Suzman Foundation. Taljaard, a former DA MP, served as Shadow Minister of Finance from 2002 and was a member of the Portfolio Committee on Finance. She also served on numerous other parliamentary committees, including the Standing Committee on Public Accounts during the arms deal investigation.

Taljaard lectures part-time at the University of the Witwatersrand's School of Public and Development Management and locally and abroad on the regulation of private military and security companies.

Taljaard is a Yale World Fellow, a Fellow of the Emerging Leaders Programme of the Centre for Leadership and Public Values (UCT's Graduate School of Business and Duke University), a Young Global Leader of the World Economic Forum, and an ALI Fellow of the Aspen Institute.

Taljaard holds a BA in Law, RAU (University of Johannesburg), a BA (Hons) in Political Science, cum laude, RAU (University of Johannesburg), an MA in Political Science, cum laude, RAU (University of Johannesburg) and an MSc in Public Administration and Public Policy, cum laude, London School of Economics and Political Science.

Taljaard publishes widely.



HELEN SUZMAN FOUNDATION

*Media Freedom:
Regulation or New Shackles?*



OPEN SOCIETY FOUNDATION FOR SOUTH AFRICA



Introduction

The Fourth Estate's freedom requires eternal vigilance. The previous year – 2007 – has become etched in the South African memory as the year the media confronted various challenges and obstacles. These ranged from the controversial Film and Publications Amendment Bill to the litigation about the Sunday Times' coverage of the Minister of Health and its aftermath which included some concerning developments with respect to the freedom of the press.

These developments included the prospect of an arrest of the Editor of the Sunday Times and/or senior journalists, the statements published by key civil servants after a court order clearly and carefully sought to balance the Minister of Health's right to privacy and the public interest raising questions about their respect for the judiciary and the threat of government's advertising revenue being withdrawn from the Sunday Times raised by the Minister in the Presidency, Essop Pahad. All these events increased the volume on the prospect of a new statutory regulatory body to be created – a Media Appeals Tribunal (MAT). This flurry of activity also sparked more debates when Koni Media launched a bid for then Johncom Ltd. (now Avusa Ltd).



Introduction

The ANC's 52nd Conference in Polokwane adopted a strongly-worded resolution on 'Communications and the Battle of Ideas' which called for such a MAT to be created. After meetings with SANEF in 2008 it seems the immediacy of an MAT being established is no longer of such a high priority but the debate about media freedom, competition, ownership, censorship and indeed the establishment of a party newspaper for the ANC have not died down.

Whilst the Media Appeals Tribunal – irrespective of the legal configuration which such a form of more rigid regulation may take – might not be established, various debates about the freedom of the press continue to rage and new statutes and draft legislation, including the new Protection of Information Bill and remaining enactment of the Films and publications Amendment Bill will continue to raise the spectre of possible interference with the freedom of the press.

Whilst 2007 may have been a particularly daunting year for press freedom in South Africa it seems clear that it remains a precious arena of our democracy worthy of protecting. Whilst the Fourth Estate may be imperfect, and never seeks to claim otherwise, efforts to bridle it will equally be deeply undemocratic and flawed.



Chairperson

“The past year has been a challenging one for the South African media. We have seen various legislative moves, including the Film and Publications Amendment Bill, that have raised concern in the journalistic community.”

We are happy to launch this year’s series of roundtables with a very important topic: media freedom – the regulation, or the possible future regulation, of the media, and the prospects of a media tribunal, and the various debates inherent in a self-regulated industry, or a potentially regulated industry. Whether that takes the form of a media tribunal or a different kind of institutional structure still remains to be seen, and it is still the subject of considerable and brisk discussion.

The past year has been a challenging one for the South African media. We have seen various legislative moves, including the Film and Publications Amendment Bill, that have raised concern in the journalistic community. We have seen issues emerge around the Ministry of Health and the Minister of Health, related to the right to dignity and the public interest. and how these competing issues are to be measured. Issues of media ownership have emerged.

So there have been a number of flashpoints where various issues of media freedom have not only grabbed headlines, but certainly grabbed the attention of those of us in civil society, and in the halls of Parliament and academia, and even in the legal fraternity, who watch these matters very closely. I

have assembled an esteemed panel of South Africans who have very clear views on many of them. We have Na’eem Jeenah of the Freedom of Expression Institute; Jody Kollapen, the Chair of the Human Rights Commission; Pamela Stein, who is a Senior Partner at Webber Wentzel Bowens and practises media law; Richard Calland from IDASA [Institute for Democracy in South Africa]; and Henry Jeffreys, Editor of Die Burger and Vice-Chair of SANEF [South African National Editors Forum]. I look forward to a very robust discussion.





“So there have been a number of flashpoints where various issues of media freedom have not only grabbed headlines, but certainly grabbed the attention of those of us in civil society, and in the halls of Parliament and academia, and even in the legal fraternity, who watch these matters very closely.”





Na'eem Jeenah

Let me start by saying that I think all forms of regulation of the media are shackles, so whatever kind of regulation we're talking about, there will be shackling in the media. The question is whether these shackles are acceptable, desirable, useful, necessary. It would be difficult to say that we should have a completely unregulated media. I'm not sure that too many people would agree to that. I think that the need for regulation would fall into two broad categories. One is that we need regulation in order to protect the professional integrity of individual journalists, individual media, as well as of the journalistic profession itself. Secondly, we need regulation to protect the public from excesses that the media could engage in. Some of this might sound a bit provocative, but I hope you'll see where I'm coming from.

In talking about media regulation, we need to divide the media in two. We need to talk about the electronic media and the print media separately, because the electronic media are based on a restricted resource. Frequencies, for example, are a restricted resource. They're not endlessly available, and hence they need to be allocated in some kind of way, so some kind of regulation is necessary. Furthermore, in terms of the electronic media, regulation is necessary in order to ensure diversity, which is extremely important. In South Africa, the electronic

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media are already regulated through ICASA [Independent Communications Authority of South Africa]. We might ask whether this regulation actually works in terms of the objectives I've mentioned. Is ICASA independent, particularly from government? We believe that it is not completely independent, particularly from the Minister of Communications. And of course the biggest media house in South Africa is the SABC, and so the question arises about whether the public broadcaster is itself independent – and here I think of two areas of independence: from government, but, secondly, from commercial interests. When you have a public broadcaster which derives 80% of its funding from advertising, and only 2% from the government, then the question of its independence is very relevant.

If we talk about the print media, the regulation is different. We do not have an ICASA-type body, as there isn't a question of limited resources. The print media are self-regulatory. So you have the Press Council, the press ombudsman, who fulfils those responsibilities of providing some form of regulation, as well as the fact that many print media houses have their own in-house ombudsman. This is, of course, also the case for all other media. There is, in a sense, oversight by the courts. If you feel that you've been defamed by a particular article in a newspaper you are entitled to go to court. Of course, the newspaper might come to the FXI [Freedom of Expression Institute] for assistance and support, and we'll prob-

Wa'eem Jeenah

ably give it. In South Africa today it's quite difficult to win a defamation case in court. That being said, our Minister of Finance won an interdict last week without the defamation case even coming to court yet, but that's another matter.

We believe that these forms of regulation are sufficient as far as the print media are concerned. Certainly there have been a number of criticisms over the past year or so about print media, particularly from politicians. Whether those criticisms might be valid or not, the regulation that exists is, we believe, sufficient to keep the print media doing what it is supposed to be doing.

A word that is often used in the discourse on media and media freedom is "responsibility". Many of us have a kind of knee-jerk reaction when the notion of responsible media is raised, and I can very well understand why. But there is a bit of a difference if you hear the term "responsible media" from someone like Essop Pahad, or if you hear it from someone from a social movement in Orange Farm in Johannesburg. I raise the issue of responsible media partly because the term has often been used in the past year or so in order to suggest that greater regulation of the print media, in particular, is neces-

sary. It is the kind of term that's been used in the discussions on the Film and Publications Amendment Bill, which sought, in its first version, to subject all media, including the print media, to prepublication censorship – because we can't allow our media to expose our children to pornography. They are irresponsible in doing so, they need to be regulated, hence even to the extent of prepublication censorship. So we need to think about the notion of irresponsible media very carefully.

Let me end with the point that when I said I think that the self-regulatory mechanisms that exist for the print media are sufficient, I was referring specifically to regulation in terms of content. There's another aspect of regulation which we in the FXI believe is necessary, and that is some form of regulation in terms of ownership. We believe that freedom of expression is not served by the vast majority of the print media in South Africa being owned by three media houses. Diversity, which is an important ingredient of freedom of expression, is not served by such a monopolistic media environment. Certainly the MDDA [Media Development and Diversity Agency] can play a role in assisting with diversification, but that hasn't been entirely successful thus far.





“It’s important that we have this discussion, because we should recognise that the media often shape the public agenda, and not necessarily in the public interest.”

Jody Kollapen

Jody Kollapen

It’s important that we have this discussion, because we should recognise that the media often shape the public agenda, and not necessarily in the public interest – sometimes in the interest of a medium, or sometimes in the interest of a section of the public, or sometimes in the interest of the shareholders. It’s important to place that on the agenda [as a reason] why we need to have media that are accountable. I’m not speaking of legal accountability, I’m speaking of the accountability that former Chief Justice Ismail Mahomed referred to when he said that we are all bound by the constitutional contract, which presupposes some fidelity and loyalty to the Constitution, and the question we must ask is how the media construct their relationship with the Constitution, and how the industry discharges, in a sense, that portion of the constitutional contract it’s bound by.

Secondly, I think it’s evident in South Africa today that almost on a daily basis we deal with the contestation of rights, whether we’re talking about the right of association versus the right of equality, in the context of the Forum for Black Journalists, or whether we’re talking about the right of a Jehovah’s Witness parent to religion and the child’s right to have a blood transfusion. The idea

of contestation is not a bad one. The Constitution provides, in a sense, the rules and balances for that contestation. So I am a bit concerned that we see this current debate as a sinister attempt by the ruling party to clamp down on the media. In the absence of any evidence, I think we should proceed to have this debate in the same way as we have other debates about the contestation of ideas, and how human rights come into contact with each other. We find solutions. So what we should talk about is the balancing of rights. The problem, often, is that everybody has their favourite right, and they want to defend that right at the expense of other rights. So religious communities, on Section 32 of the Constitution, say religious communities have the right to organise and establish their own associations, but they ignore Section 9 of the Constitution when they say, as religious communities, they think gays and lesbians should be consigned to hell. I don’t think we have the luxury of making those choices, in terms of the Constitution. As Ismail Mahomed said, this is a constitutional contract, and we’ll obviously have to navigate ourselves through it.

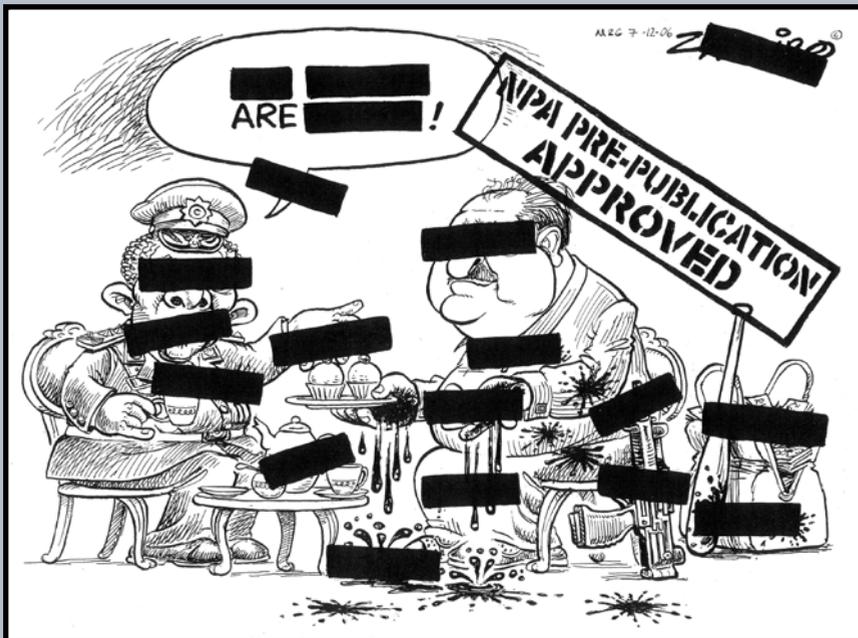
Clearly the media rely on Section 16, media freedom, freedom of expression, and I think that’s important. But I think, in the context of South Africa, human

dignity, equality, are just as important, and those are not just constitutional rights, they are constitutional values. They are found in Section 1 of the Constitution, that the Republic of South Africa is founded in the following values: human dignity, achievement of equality, and the advancement of human rights and freedoms. One of the problems is that we sometimes seek to elevate media freedom above those values. Justice Kriegler, in the e-TV versus Mamabolo judgment, said that in South Africa freedom of the media or freedom of expression is not a pre-eminent right, and we have to debate how it relates to other rights of equality and human dignity. And I think we have to look at the ANC's resolution, the idea of the media tribunal, in that context. I have looked at the resolution. I'm not in favour of the media tribunal, but I think we must look at two aspects of that resolution honestly and openly. The one is to strengthen the human-rights culture embodied in the principles of our Constitution, and I think few can argue with that. The second is what it calls the balancing of human rights in line with Section 36 of the Constitution, and they say this especially relates to the need to balance the right to freedom of expression – freedom of the media – with the rights to equality, privacy and human dignity. I don't think that's constitutionally objectionable. I think the mechanism

that they propose to balance them may be a problem, but we need to ask whether currently that balance exists. While we can reject the idea of a tribunal, we need to ask whether current mechanisms to deal with these issues are sufficient and adequate.

I want to suggest that, perhaps, if we're arguing that self-regulation is the way to go, we need to be quite honest about the shortcomings in the current self-regulation system, rather than simply saying, "There's a wolf at the door, and let's concentrate on getting rid of the wolf" – while not looking at our own house.

I think two aspects of the code are perhaps in need of review. The one is that the code focuses quite exclusively on Section 16 of the Constitution. It then proceeds to deal with discrimination and hate speech, and clearly makes provision that the press should avoid discriminatory or derogatory references to race or colour, but it doesn't speak about human dignity, equality or privacy. You might ask, why the selective focus on race and hate speech, important as they are in the context of current South Africa, and in the context of history? There may be an argument that the courts should be revisited to ask, in advancing the role of the media, whether regard should not be had, in a sense, to the values and the intelligence of a society based on equality



Jody Kollapen

and human dignity. I would hope that the media wouldn't want to reject such an argument outright, that they'd want, perhaps, to engage in a discussion on whether indeed the issues of equality and human dignity should not also form part of the press code, in the same way as non-discrimination and hate speech do. I'm not in a position to understand the selection of discrimination and hate speech, and the rejection of other values and other rights. Maybe someone can explain it.

I think the second feature is the issue of whether the code would benefit from being located within the values. I think it's useful that it starts with Section 16, but then I think it would benefit from a discussion about locating it within the broader value system underpinning the entire architecture of the Constitution.

Thirdly, I think we should ask whether the role of the ombud should purely be reactive, acting on complaints, or whether we should give the ombud a proactive mandate on his or her own initiative to investigate matters. If the Human Rights Commission had to rely exclusively on the complaints industry, we would be driven by the complaints we receive from people who are well resourced and educated, and lose out on a major portion of the fault lines in our society. So giving the press ombud a proactive role

would be useful, because I think we need to improve efficiency, and the mandate and the broad architectural values within which the press ombud's going to work. Not to refute the argument of a tribunal – that's the wrong reason – but to ensure that if we are serious about self-regulation, then it cannot simply be a slogan, it must be real and substantive. On paper, yes, citizens have the right to go to court, but we all know that very few citizens can afford to go to court. The Legal Aid Board doesn't support civil litigation in general terms, and it costs and arm and a leg to go to court. So courts are important in terms of developing a jurisprudence, but, with respect, they're not really accessible to ordinary citizens. Media houses have much easier access to court than ordinary citizens. In the imbalance of power in South Africa we need to be serious about using this opportunity that has been gazetted by this resolution to reflect on the press ombud, and how we can improve those mechanisms. It serves a very useful end in itself that we see the media, as an important institution in society, as being bound by the constitutional contract, perhaps not in legal terms, but certainly in moral and ethical terms. The media also have a duty to advance the values of this Constitution. As I read the press code, there are major gaps with regard to, in a sense, facility between the code and the values in this Constitution. I think there's a space to cross.





Jody Kollapen



“There is, high up there in the mind of editors all the time, the law of defamation – the requirements that facts have to be true, that they have to be in the public interest. There’s a very high awareness among editors of the right to privacy and when privacy can be invaded, when it’s justified. ”

Pamela Stein

I’m going to bring a very lawyerly approach to this, unfortunately, but I want to start by saying that one can’t say that the media are not properly regulated at the moment. As a lawyer I deal with media houses every day, and there are numerous statutes which prohibit reporting on various matters. There is, high up there in the mind of editors all the time, the law of defamation – the requirements that facts have to be true, that they have to be in the public interest. There’s a very high awareness among editors of the right to privacy and when privacy can be invaded, when it’s justified. I deal with sub-editors on a daily basis in checking stories, and I can tell you right now that there is total regard to all those laws, and they want to stay within them. There’s not a decision to be reckless, and publish and be damned. That’s my first point. We’re not in a vacuum at the moment. There are a lot of laws out there. There’s a lot of common law out there, and in my experience the press is highly aware of it.

The next thing that I want to raise is this body that the ANC has proposed. What exactly is it? What is it going to do? What are its powers? I have only managed to come up with how it’s being described in the press as a statutory media tribunal accountable to Parliament, but that’s nonsensical. No tribunal can ever be accountable to Parliament. I mean, ICASA reports to

Parliament, but ICASA is not accountable to Parliament. A tribunal is, by its very nature, an independent entity, so it could never be accountable to Parliament ... [intervention by unidentified speaker: It is under Section 9 of the Constitution] ... But accountable in what way? Well, that we need to discuss.

Are the decisions of the tribunal accountable? Must the tribunal decision-makers come before Parliament and explain their decisions? Is it accountable in that sense? Mention has been made of the Broadcasting Complaints Commission. That tribunal’s decisions are not accountable to Parliament. Maybe the body as a whole has a reporting function to Parliament, but nobody can interfere with those decisions.

I also want to mention that once you enter the realm of a statutory body, you’re certainly not going to exclude the courts. As a natural consequence of it being a statutory body, it becomes subject to the supervision of the High Court on how its powers are exercised. So immediately you are opening the door to an endless round of reviews, ending up in the Constitutional Court. That’s what happens with a lot of the other tribunals that operate in our society.

The next question is: what is this tribunal going to regulate? Is it going to regulate ethics? Is it going to regulate law? Can it

really overlap, and can it really regulate issues that are really for the courts to determine? For example, has there been an invasion of privacy? If so, is it justifiable under our Constitution? Is the public interest element met, and, if there has been an invasion of privacy, what is the consequence for the invader? Is it going to be a damages claim, or akin to a damages claim? What is the penalty?

There is an overlap between ethics and law in relation to media, but there are also a lot of separate issues between the two. An example is the question of right of reply. It seems to me that internationally a lot of press councils and ombuds seek to enforce the right to reply. That right has really only recently come into our law, through the Bogoshi decision and the reasonableness defence. Prior to that, if a newspaper published a story and it could prove that the facts were true and in the public interest, it wasn't required to give the subject right of reply, so right of reply was an ethical consideration. It has crept into our law now through the National Media Ltd and Others v Bogoshi decision.

The Constitutional right to dignity incorporates the rights to reputation and to privacy, which are all very clear rights in our law. The Constitutional Court has, time and again, said neither of those rights trump each other. It would be a very, very serious contention for our law, for our jurisprudence, for a tribunal, or for the codes of the tribunal, to stipulate that the

right to privacy trumps the right to freedom of expression. I'm not sure if I've read it correctly, but I seem to pick up that that was one of the foundation principles of the tribunal. In fact, in most instances, when the courts have had to decide those two competing rights, as they have in many decisions, the only issue that the decision turns on is whether it is in the public interest, and which is the best forum to decide what is in the public interest?

It also has to be noted that the proposal for a statutory media tribunal is not uncommon in many democratic societies. It's arisen many times in the history of the Press Commission in United Kingdom, and I think at least three times since 1917, when it was first introduced, there have been judicial investigations into whether a statutory press tribunal should be established. The same in Ireland, the same in Canada. There's an absolute prohibition on invading privacy in France in respect of reporting, even in respect of public figures, so I don't think the hysteria around it is overly justified. It happens elsewhere.

But I want, again, to ask what the powers of this tribunal are going to be, because we have to be careful about that, and how they interact with the powers of court. I'm extremely doubtful, having looked at the jurisprudence in the Constitutional Court in relation to the competition between dignity and privacy, and freedom of expression, that a media tribunal which will ultimately result in a restriction on reporting would meet the Constitutional test, if it were to be tested.





Prof Richard Calland

“So the real challenge for all of us, and for the press, is to work out what the relationship is between human dignity and freedom of expression – in particular, the notion of a free press.”

B I’m not a journalist, not an expert in this field, and I am, in fact, not so much wearing my IDASA hat tonight as a new hat, as Constitutional Law Associate Professor at UCT [University of Cape Town]. I was going to talk briefly about the state of the law and freedom of expression, but in fact Jody has covered most of that. I’ll simply say that the point about non-elevation is a very clear, now, statement of South African jurisprudence, and it’s something we have to work with whether we like it or not, and that includes the press. And it’s a principle that I would subscribe to wholeheartedly. Why should the media enjoy an elevated right? What is it about free speech that should elevate it above any other particular right? Why does it have, in so many people’s eyes, this core connection with democratic values? Indeed, the South African Constitution is quite clear, as Jody says. Human dignity, as an underlying value, trumps all rights, in a sense – or, rather, all rights have to operate in a framework that serves that value. So the real challenge for all of us, and for the press, is to work out what the relationship is between human dignity and freedom of expression – in particular, the notion of a free press.

I wasn’t going to be hostile in my approach to this question, but the other lawyer offered, in her first point, this rather extraordinary testimony to the excellence of media in South Africa, which I found very hard to believe. I

think the rather rosy picture of the professional excellence of the profession is thoroughly unjustified, and it can only breed a climate of complacency, not to say arrogance, about that profession. Now, all professions must face regulation. All trades must face regulation. Again, what is special about the media that it should enjoy some elevated or different position so far as their rights are concerned? I don’t want to attack the media. I understand, of course, the importance of good journalism to public discourse, to the public good that we call freedom of expression, and the intellectual competition of ideas, and the importance of the media in holding people in power to account. Of course, I subscribe to all of that. I suspect everyone in this room recognises those points, and indeed some of my best friends are journalists. But we must begin to be more serious in our recognition and understanding of the responsibility of media, because all professions, all bodies that enjoy some element of control, some element of place in the public sphere, have responsibilities as well as rights. And it seems to me so often to be the case that the media is able to enjoy that privilege without any full recognition or acknowledgement of its responsibilities.

I think the media tribunal is a lame-duck idea. I don’t think it has wings, and having heard the Deputy President of the ANC [African National Congress] and Pallo Jordan speak to the National Editors Forum about a month ago, it seemed absolutely clear to me

that they had no real appetite for this particular idea, that it was an idea that has been barely thought through, that it can probably be listed in the column of ideas that had everything to do with the political moment of last year, and which, in the fullness of time, will probably fall away. And that's probably a good thing, because I suspect that such a tribunal, even when it's thought through, would add little to the bigger questions that I, along with others on this panel, have tried to introduce to this evening's debate.

I'm glad that the first speaker raised the question of control and ownership of press, because I'm always completely bamboozled by the idea of the free press. Free of what? Of whom? Most press [organisations] are privately owned by people who have a responsibility in law to deliver dividends and to maximise profits for their shareholders. So what is free about that? We must be clear about that. Of course there is the public media – in the sense of state-owned media. It's a different kettle of fish. And there are genuinely independent media houses, and one must also distinguish those. But I think we need to be far more intellectually rigorous about the question of the free press. It's thrown around as a sort of band-aid that will cover up any misdemeanour or irresponsibility or lack of professionalism.

A third and final point is an attempt to try to extract from this debate some broader points about the state of our rights, the state of our Constitution, and this is a criticism not of the media, but of every sector. There is clearly an emerging trend, in my view, of sectors being too blinkered in their approach to their own issues and their own rights, and failing to see the rights and the ambit of accountable governance that serves all

of us. One example that's close to my heart is the right to access to information. That's something I've spent a lot of time working on. I happen to believe it's fundamental to democracy, very important for human dignity – the power of acquiring information so that you hold people to account, so that you can press for the other rights, other social and economic rights, in particular. But the media's attitude to the access to information right has been that it's too complicated, and it's too slow, and it doesn't seem to work very well for us, and then to abandon the right. They have failed to see that, pushed properly, realised properly, it could be a very powerful tool, not just for them, but for all citizens, to help hold government to account. Again, I've picked on the media, which is perhaps unfair. All of us, in every sector, ride our own hobby-horses and fail to see those rights that we should be building, protecting, defending for the benefit of all. That's the phase that I think this country's entered, a sort of second transition, a mini-transition. It lacks the grand narrative. It lacks a player, such as Mr Mandela, at the centre of it. It lacks the sexiness, and it lacks as much international attention, but it may be almost as important as the first transition of the mid-'90s. I suspect that historians in 50 years' time will say this was the period when the Constitution of South Africa was protected, defended, built in a sense that made it durable for the long haul, not those happy, glamorous sunlit days of the mid-'90s. This is where the real work has to be done, and all of us need us to acknowledge, accept and act on that responsibility, and work together to build a positional order and rule of law that will work for all of us for a very long period of time to come.





Henry Jeffreys

“I want to start by making the point that there can be very little doubt that the media in South Africa are free, and are very free. And the freedoms that we enjoy today cannot in any way be compared with the state of the media in the era that came before democracy.”

I want to start by making the point that there can be very little doubt that the media in South Africa are free, and are very free. And the freedoms that we enjoy today cannot in any way be compared with the state of the media in the era that came before democracy. We are, in fact, about the freest media in Africa. A report from an American institute that deals with press freedom just marginally put Mali and Mauritius above South Africa on their index for press freedom on the continent.

My second point is that the public discourse in South Africa is in a very healthy state, and this has precisely got to do with the way in which the media were opened up upon us achieving democracy. I don't think people stand still long enough to think seriously enough about the explosion that we've had in the media world as we know it, and here I'm referring particularly to the journalistic media. We've gone from a few newspapers on the Afrikaans side of the spectrum and a few more newspapers on the English side – I don't know how many, tens and tens of daily publications throughout the country. The airways have been opened up quite significantly. If you want to feel the pulse of this society, just call in to any of the many, many talk shows, and you can hear people

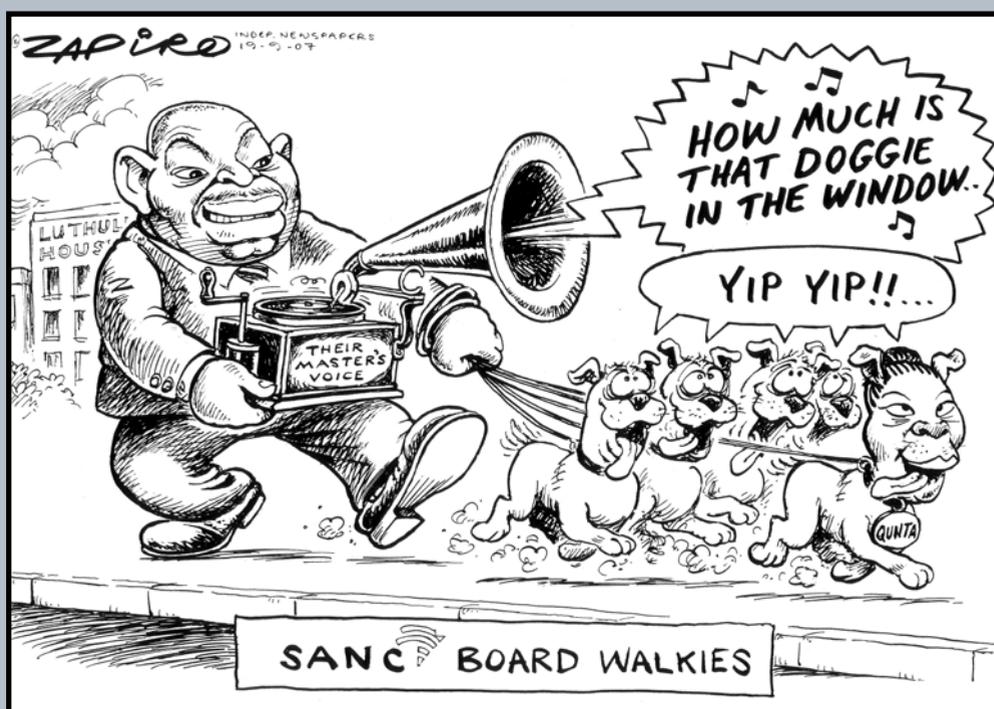
exercising their right to freedom of speech and demanding information from officials in private-sector operators and, of course, from government. And the media that I'm a part of, the journalistic media, are very much a part of that – not to my liking – these days. We are too often part of why there are issues on the airways or in publications, where we become news creators as opposed to disseminators of news.

The second point is that right from the start there have been quite close ties between the media and the new government; not to the extent where we broke down the necessary wall that should exist between us, but we were all aware that we're in the middle of a democratic revolution and none of us knows where it will lead to, and we need to talk to each other continuously. So in 2002 there was a huge meeting with the full Cabinet, two days – I don't know of any other institution that has ever been allowed two full days of discussion and discourse with the President of the country and his full Cabinet. Last year we had a similar discussion with the Cabinet in Pretoria, and these, I can promise you, are open and frank and robust discussions, just to allow us to understand where we are coming from, and what our relative roles are in the broader society.

It's true to say that of late – and this I think you can trace directly back to the difficulty that the ruling party has in sorting out its own internal difficulties – things have been different. You can trace the serious anger, the concerns about the media, directly to the difficulties within the ANC about the succession debate, etcetera.

I want to highlight two things which I regard as really serious threats to media freedom in the country at the moment, and the ANC's investigation into a media tribunal is one of those threats. It is now called an investigation into the idea of a media tribunal. I think in our discussions with the Deputy President of the ANC, Mr Motlanthe, about a month ago, which Richard referred to, we were not convinced that the idea of a statutory media tribunal would be good for press freedom and media freedom in general in the country. In our interactions with the ANC we vigorously tried to disabuse them of this idea, because we don't think that it will serve media freedom, in terms of both how it is described in the Constitution, and the related rights that the Constitution contains.

I also want to put on the record that if you talk to any editor today and ask, "What is your ideology? What is it that you stand for? Where do you stand in the political spectrum?", I think you will probably find that they would say, "Our ideology is constitutionality." In the old days the paper that I now edit used to have, just beneath its masthead, "Organ of the National Party". That was its ideology. That's where it stood. On the other side of the spectrum, I think Helen Suzman probably had a direct line to all the then liberal editors in Johannesburg or in Cape Town. The media have moved on and gone beyond that, and I think what our role is largely about these days is defence of the Constitution. Obviously, as with other parts of society, we are very jealous about those sections of the Constitution that deal with our position in society, and that is media freedom and the freedom of expression clauses contained in the Constitution. But that is not at the expense of, or with disregard to, the rest of the Constitution, and how the rights in the Constitution affect the whole of society. So I think it's simply not true that editors are only about elevating the rights of



Henry Jeffreys

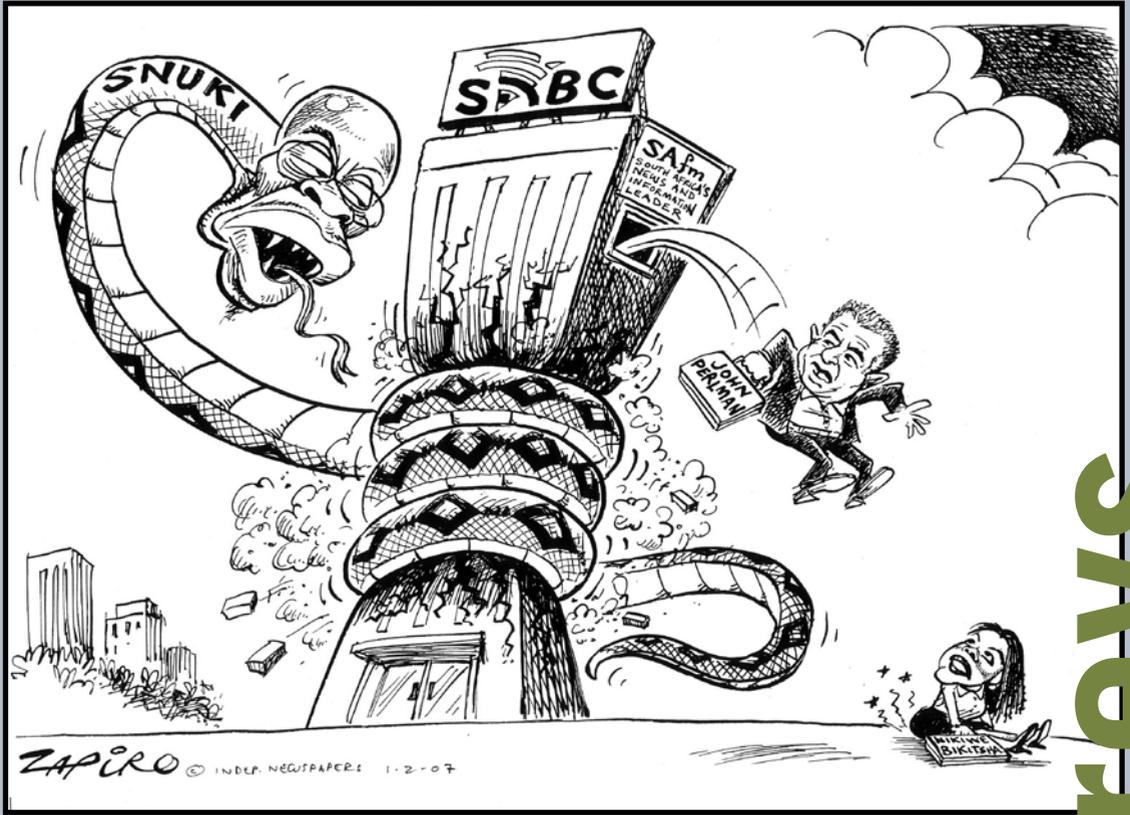


media freedom and freedom of expression above all the other rights. I think if you go, especially, to what I would call the mainstream newspapers, you would find that in editorials this is where editors are coming from; they are defending the rights enshrined by the Constitution. When we go up against government, when we go up against the bureaucracy, those are the rights that we are trying to defend. So if I get asked that question, my ideology, in terms of the take of my newspaper, is constitutionality, and constitutionality in terms of how it concerns the full population of South Africa.

The second threat is a piece of legislation which has been referred to, the Films and Publications Bill, which is currently in front of Parliament and which, unfortunately – I think, all the signs seem to be there – will go through Parliament and end up being signed by the President largely in its current form. This is a very, very dangerous piece of legislation for media freedom. For all their good intentions, the writers of this bill ended up with quite a disaster. And for all our engagements with parliamentarians on this bill, we simply are not being heard.

This thing has all sorts of intentions that were not there originally. We all agree that the fight against child abuse and pornography and all of these things should be fought, and the media is, in fact, a very strong part of that. But I don't think the message is coming through hard enough to the legislators that we're dealing here with [a piece of legislation] that should have been scrapped or sent back to the law advisors, to say bring this in line with constitutionality. Certainly, if it goes through, it will have to go through the whole way to the Constitutional Court, where I think it will be tested.

So as far as I'm concerned, we have free media. We're not in a society where the government, when it disagrees with someone, closes down newspapers or bombs printing presses, as we see elsewhere in the world. The media are in a good state. I do think that the problems of the media, and the fact that the media are in the public mind, in the way they are now, have a lot to do with the problems of the ruling party, which they can't sort out. They're looking for scapegoats and the media are a handy scapegoat.

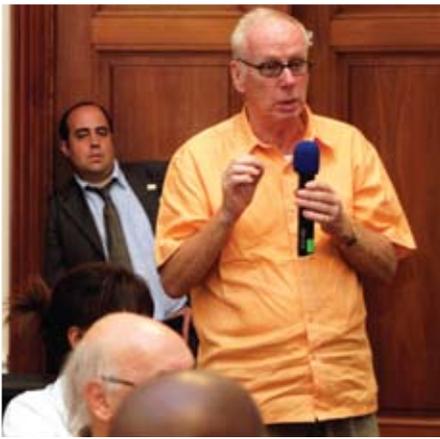


Henry Jeffreys

Questions & Answers

Question One: (Unidentified speaker) Any statutory moves that stifle or interfere with investigative journalism, and go in the direction of prepublication scrutiny worries me deeply. I wonder whether the whole issue of this initiative by the ANC does not have something to do with the fact that the ANC and its senior members are generally critical of how some of the newspapers, be it the Sunday Times or the Mail & Guardian, are supporting investigative journalism. I see it as a first step towards throttling those initiatives.

Question Two: (Prof Kader Asmal) It's very tempting to discuss the state of journalism in South Africa. I think that the Helen Suzman Foundation should discuss it. I'm very struck by Jody Kollapen's very balanced approach, to say, let's deal with the issues before us rather than high horses. Do you know why [the Minister of Finance] got that interlocutory remedy against Terry Crawford-Browne? The right to dignity. It's in the first clause of the Constitution. You're not balancing this with freedom of expression, for God's sake, really. It's a foundational thing. Calling someone a crook and a liar and a cheat, a corrupt person, should be prosecuted. When I made my valedictory speech I went out of my way to say you must support press freedom, not because the Constitution says so, because it's essential for democratic order. And I do believe that we should protect the Constitution, and defend its values. That's the important thing. The American government has appointed and embedded journalists all over the place. In Britain they still have the D-notice. You do not publish anything to do with state security, as determined by the British government. There is no statutory basis for that. They have a Bill of Rights, believe it or not, but it doesn't have



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the same status as our Constitution has. It's very important to remember that, and that is why I think that the issues put before us are very important.

The primary issue is in fact the remarkable role of the press in moulding, influencing, cajoling. I have no doubt, before you became editor, Mr Jeffrey, that the wonderful Principal or Vice-Chancellor of Stellenbosch University was driven all the way from here to the backwaters of Newcastle University, because of the Die Burger's vindictive approach to him. Don't tell me newspapers don't campaign. But we have to be clear about the distinction between fact and opinion. I have no time for the tribunal, although I've looked at the Irish ones very carefully. I've lived there. They have a very strong ombud, but they have a press council at the same time and it doesn't stifle [the press]. The important thing is that we ought to recognise that the ANC is the only major party that doesn't have the automatic support of a newspaper. I remember I was asked by the Namibian government to speak about the setting up of a SWAPO newspaper. I said the only people who'll buy the newspapers are people who want to brown-nose everybody and they won't be circulating it. It'll hole up cupboards in civil servants' offices. So even the Norwegian and Swedish governments don't have party newspapers now, but that does not mean the Dagens Nyheter in Sweden will not, by and large, support the SPD [Social Democratic Party]. The Daily Mirror will support the Labour Party in Britain, by and large. I don't believe that there should be a newspaper set up by the ANC. I think it's a disaster. but the important thing, therefore, is how we address the issue of balancing rights.

It's not self-evident that freedom of expression has priority over the right to dignity, by the way. I believe people in public life, not politicians I mean, much more important people than



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a puny minister – people in public life must have very thick skins about their reputation. That is why, I believe, the Supreme Court of the United States, with a small case originally, [decided that] unless there is malice, you should have no action of any kind. In the particular case of Crawford-Browne, it's quite clear that there was malice against the Minister of Finance.

Another point is that it's very important that there should be no publication without checking of information. The standard of journalism is so poor that the average age of reporters in service is about three or four year's maximum. It's remarkable. You don't have senior political commentators. Where are they? Where are there ones who can, in fact, really understand and explain exactly what is happening – what happened at Polokwane for example – rather than adopting partisan positions. Now I think that's very important in relation to the pornography bill. The constitutional implication is a very important element in that, because every bill has a constitutional implication. That should be spelt out in the memorandum. When that memorandum goes to Parliament, and the constitutional implications [section] says "none", it's not true, and they can't get away with that. Now you let them get away with it. Where are your journalists writing that?

The second point is that the two bills you are talking about came from the public service, civil service. I must tell you, I know Mr De Klerk, Mr Manuel and I looked at every piece of paper that came before Cabinet. It's true, we did that. A minister can do that, and some of them are very technical areas too, and therefore I think it's very important that what should happen is before a bill is presented to Parliament there should be public discussion. All bills should be in the public domain for at least a month, before the inquiries are conducted. That's a legitimate thing to ask. It's usually the normal rogues' gallery who will make the submissions, particularly if they go to attorneys and attorneys write their submissions for them, and it's important, therefore, that the public should know the implications. When it goes to the Portfolio Committee it's too late to amend. Too many vested interests. You know, the Chairpersons of the Portfolio Committees like their role nowadays. The Chairpersons like it very much that they are in charge rather than the Minister, and there've been cases where, in



fact, the Executive had to intervene very late in the day. The Constitution says the Executive is in charge of policy. So I'm all for this discussion. Nothing is self-evident in this matter, and, in the end, we're also talking about the fact that there are enormous bottom lines involved. "What's the bottom line?" I'm very passionate about quality in newspapers, because the higher the quality, the greater the acceptance of the disclosure taking place. So I end by saying, investigative journalism is vital for a democracy; absolutely. But I think you should do it in the context: "We have to still prove the validity of our existence".

ANSWERS

Mr Jeenah: Much of what Professor Asmal said I agree with, and I want to emphasise that I think that, certainly for us as the Freedom of Expression Institute, one of our great concerns is that the quality of journalism in South Africa is extremely low. The quality of investigative journalism is virtually non-existent, both in the broadcasting and the print media. I think it's very weak. The average age of journalists in the public broadcaster is probably in the early twenties. There are no mentors. There are no senior people around. That, added to a whole range of other political and other kinds of agendas, means that the journalism you receive from the public broadcaster is very weak. If we look at print media, particularly black journalists these days, they go off into public relations, advertising, communications or government, and so the quality of journalism is very weak. Maybe Henry will correct me if I'm wrong, but there aren't decent mentorship programmes. There aren't decent in-service training programmes to continue the training of journalists, and there aren't enough incentives, in various kinds of ways, not just financially, to keep journalists in journalism and allow them to develop the kind of experience [they need]. So today what passes for investigative journalism is a collection of quotes from analysts. I know, I'm one of the analysts that often gets talked to. But that's not investigative journalism, and I think that that is possibly a bigger threat to journalism in this country than some of the other things that are often mentioned.

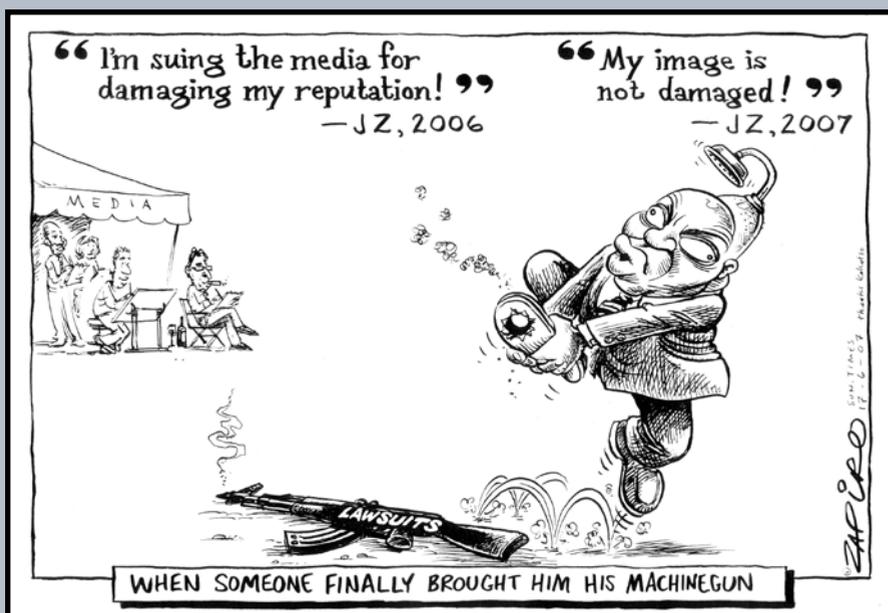
MR KOLLAPEN: I think the issue raised by Professor Asmal is important in terms of locating what the primary purpose of journalism is. The press code says the primary purpose of journalism is gathering and distributing news to serve society by informing citizens, enabling them to make informed judgments. And then we must raise the question whether what the media is doing has a synergy with what is in the broad public interest and the national interest. Not the interest of the ANC, but the national interest. Clearly, in the context of South Africa [that means] the issues of inequality, of the genesis of poverty and what drives poverty – the role of business in exacerbating poverty. We often say poverty is a problem, but the problem is not poverty. The problem is wealth and greed, but the media don't talk about those issues. So we need to ask frankly whether the media is in fact advancing the public interest, and how we get the media to do that.

The second point is the issue of values. I hold no brief for the Health Minister, but when I see a headline “thief and a drunk” and the most grotesque photograph you can find accompanying that story – it may be factually correct, but do you need a headline like that to tell the story? Or is that the headline that sells the papers? You can't regulate it, and I don't want anybody to say, “This is the headline you choose.” That, in a sense, is where the responsibility lies. If Mondli [Makhanya] were here I would have liked to have talked to him about that.

Lastly, on the juniorisation of the media. It's become so bad that what happens is that we are not held accountable. If we say today we're going to do something, I would expect in a week's time the media to be on my back, asking: “Have you done it?” What happens if in three weeks' time there's another similar incident? In the back of my mind I would say, “Oops, they're going to ask me about what we did about the first incident.” We haven't done it, and they don't ask at all, and so you breathe a sigh of relief, because you're not being held accountable. But we're a public institution. Lastly, an anecdote. I was in a meeting one day, and [a reporter]

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called my house consistently and my wife said I wasn't at home. After about six calls the journalist was exasperated – I think because they told her you've got to get a sound bite – and she said: "Mrs Kollapen, don't you maybe want to tell us what you think about it?" That's a ridiculous example of juniorisation, but it actually happens.

Question three: (Mr Fakir of Stellenbosch University) I think there's an over-reaction on the part of the dominant political party because, if we were to examine media coverage over the past ten years, there's a general tendency of scepticism about anything the dominant party does. The press has become almost the voice for minority parties, against a party that is seen to monopolise the levers of state power, and is very instrumental in passing a lot of political decisions that the opposition views as affecting the interests of business, of particular minorities, and so on. You get the impression that certain opinions are favoured above others. I also think that if you were to look at much of the substance that feeds the media, a handful of policy think-tanks dominate opinion, and feed opinion to the media, and that's another angle to this debate. In '94, the ANC had a number of think-tanks. They've all either been weakened or are non-existent. At that time they could provide counterpoints in the balance. I think there's a need, perhaps, for some revival of counter-views. I think part of the reaction is almost a loss of voice, and the ability to influence the media, because the media in a sense has kept the circle of opinion to a few handful of columnists and some think-tanks that provide the kind of sceptical narrative that we see dominant in the media. I think that's the big challenge.

Question four: (John Mattison) I do media regulation for the United Nations and others in Asia and the Middle East mainly, these days, but I've been involved for so long in South Africa that listening to some of these conversations is a bit frustrating. When I was President of the journalists' union in 1979, we took management to a tribunal because of juniorisation of the journalists, and of course it's mostly got worse since then. Arthur Chaskalson was our arbitrator, and he gave us quite a good judgement, but not quite good enough to stem the tide.

And I must, come to the defence of Pamela Stein on this question of accountability. When I was a councillor at the IBA [Independent Broadcasting Authority] it was accountable to Parliament, but in practice the Department of Communications tried to cleave accountable control from the IBA. I suppose we didn't stand on our rights for accountability directly to Parliament enough. I think you were correct in saying that ICASA, now, is not accountable to Parliament for its adjudications. I think is the key point you were really trying to make. To go on to the point about Trevor Manuel's case against Terry Crawford-Browne, in fact I think that's a case where the system has worked well. Terry Crawford-Browne made defamatory remarks about Trevor Manuel, as far as one can see, and the judge has intervened. When I sued the Sunday Times and won my case for defamation against them, it was because



Questions

their practices of investigative journalism were very loose and faulty, and they had to pay up and apologise repeatedly. Since then, it is my understanding that the Sunday Times has made the rules much, much stricter, and much more careful. The question I'm going to ask is to what extent are the Manto Tshabalala-Msimang headlines responsible for this uprising of interest in creating a tribunal? Because, in fact, I think the blame there has to go to – not Professor Asmal – but to his colleagues in Cabinet, who have known all along that she was a drunk and a thief. I've spoken to Cabinet ministers who've admitted it, and it was not the best-kept secret in the world. The question is whether the Sunday Times wasn't dying to be sued for defamation, and will never be sued for defamation, because the material stands up. We can debate about the headline, and that, I think, is a question of taste and very difficult to judge. But it comes about because an increasingly egregious situation has arisen in South Africa, where you have a Cabinet minister of this calibre allowed to continue. To end off, my question is, to what extent is that case the cause of this need for a tribunal, which then talks about pornography and all sorts of other issues, but in fact they want to stop things like that – which, of course, will never get past the Constitution, and never get past the courts.

Question five: (Herbert Hirsch) I'm not a journalist and I'm not a lawyer. I am a liberal South African and I come from that point. In an ideal environment, I would like to start from a point of zero regulations. We don't live in an ideal environment, so one accepts that some regulation is desirable and necessary. I would like to suggest that if one [talks about] "responsible journalism", the word "responsible" needs to be defined very, very carefully, because otherwise we're just looking at censorship. The suggestion by Mr Jeenah, that one of the ways of regulation might be to eliminate an environment of monopolistic control of the media, might well be a route that could, and maybe is, being pursued. That would in itself create competition and different viewpoints. The other point I think needs to be focused on is with regard to the media tribunal and other tribunals, including, for instance the appointment of the SABC Board. By way of example, how is the board appointed? Who decides how it is appointed? How can one eliminate political bias, whether it's by the ANC now or by some future other-party government? The principle is the same. It should be really neutral, and I think that is an area that those of you who are more involved in this could well examine, and see if you could come up with a solution.

Question six: (Mpume Mkhabela) I work for the Sunday Times, but I'm not representing the Sunday Times. I speak individually, as a journalist. I must say at the outset that I was intrigued by the Professor's remark that he finds it strange that there isn't a single newspaper in South Africa that, as he put it, "automatically supports the ANC". I think it's a good thing, just as no newspaper automatically opposes the ANC. I think the move towards a coalition of interests, towards a common agenda of serving the Constitution as the core ideology, is a good thing.

The question has to be raised, provocatively, whether the thinking on the tribunal is triggered by political events, particularly in the ANC. And then, is it meant to protect the political elite, whoever they are? You have a free press precisely because it checks on the very same elite that has the power to run things. They've got public power to decide on policy, and therefore it is expected from society that their behaviour should be exemplary. That justifies the continued existence of a free press, bringing me to the point that Richard has raised: free from what? The free marketers might point out that a free market economy is free from the constraints of being managed by other people or other entities, ostensibly or presumably on behalf of the broader public, when in fact we know that people want to protect their [own] interests. So I think that that question is valid. Is the existence of the tribunal supposed to protect the elite, or is it supposed to allow the media to function in such a way that the elite, because of the power that they exert in society, are brought in check? I think that must be the debate. On the issue of the juniorisation, I was having a discussion with Prof [Asmal] when I was doing his profile, two weeks ago. One of the things he pointed out was the juniorisation of the civil service and of the legislature, and his concern was that most of the good people tend not to stay in these very important institutions. In his view, those that are employed in these very important institutions should derive pride, and actually serve, and they must see that as service to the public and gain experience, and as a result improve the service they render. It is clear that this issue of juniorisation is not an isolated thing. It's not a journalism thing per se. I think it's a function of the society in transition more generally. The issue should not be about mourning, it should be about what should be done to deal with it. Just one example: this afternoon in Parliament, a member of the opposition raised a question about what is



being done about a story that appeared in the Sunday Times that exposed about a couple of flashpoints in the Eastern Cape, where children are starving and they can't even access their basic income grant because there's no transport to go to apply for the child grant. A Deputy Minister firstly denied the report, and cast aspersions on its truth. She didn't say she will investigate the matter, but that it's "not my issue". The province will take care of that. I found it alarming that even in Parliament, there was no follow-up on that matter – just as much as Kollapen says there are issues that journalists raise, and there are no follow-ups forthcoming from junior journalists. I think she should have been taken to task [by members pointing out that] this is a national function. Issues of poverty are quite at the centre of government policy.

I think this debate is like the old classical economics theory debate. There were those who believed in the totally free-market economy, and when that was later discredited, other people argued for moderate government intervention, and now, with the latest book of Greenspan, the classics seem to be back again. There's talk of the developmental state, which the SABC's trying to translate into what they call developmental journalism. But as the events of Polokwane have shown, developmental journalism, as far as I'm concerned, would have been the harshest form of reporting about government service delivery – not about a ribbon-cutting kind of journalism.



Answers

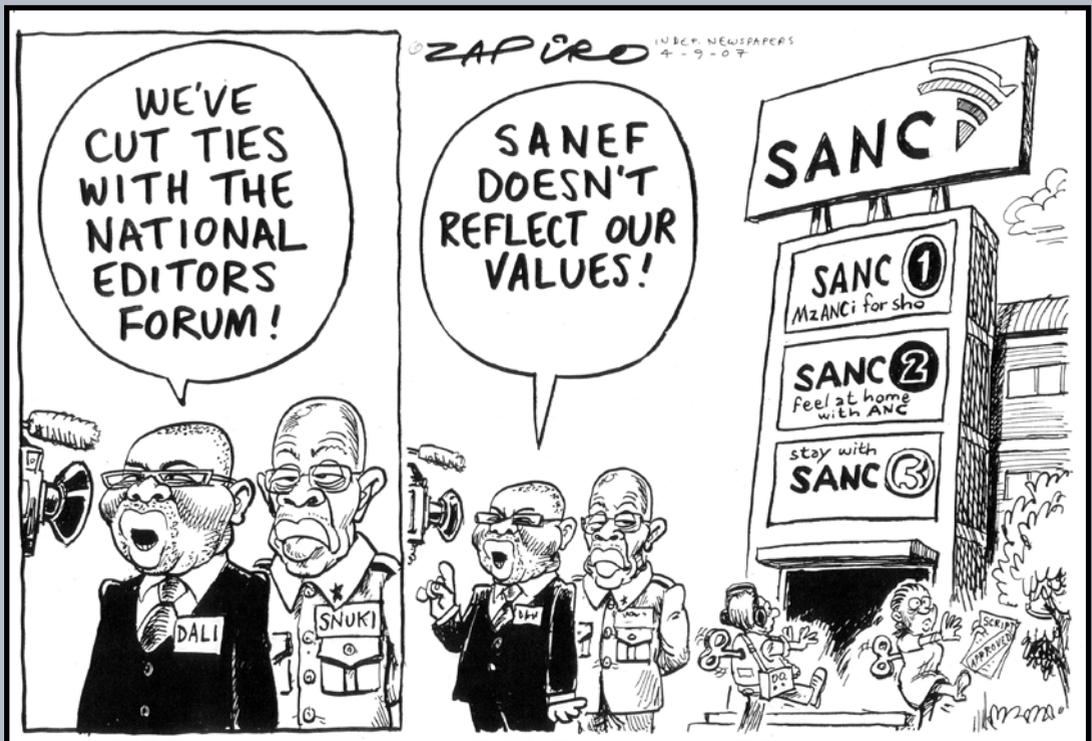
Question seven: (Mr Phekonyane) Mine is a question of vocabulary. Passion. Is the media so passionate about investigative or whatever journalism in nation-building, and is the ANC passionate enough to introspect, self-investigate and say we have dishonest people? You understand what I'm trying to say? Where do we go as a nation? Passion.

ANSWERS

Mr Jeffrey: In many instances, [journalistic] experience had to make way for the things that we needed to do in order for us to deliberately change the nature of our newsrooms. This is not a complaint. It's a reality of managing news rooms every day, and I can assure you that editors are grappling with this. The other thing is the whole way in which the media environment is changing around us, and moving forward into the 21st century, with all the pressure on the printed product coming from technology and electronic platforms. The media has to adapt to that, and we understand very well that probably our only competitive edge lies in the field of quality investigative journalism – for the moment, because I think even that will come under threat in time to come from the electronic sphere. So certainly in

my group, and also in other media groups, there's huge investment, one, in the development of journalists, and secondly, to create the capacity to embark on investigative journalism. The bottom-line thing is very interesting. In one of the meetings we had with government, Mathatha Tsedu commented to President Thabo Mbeki, "You put in place a market-linked economy, and then you come and complain when media owners want to maximise profit, which is what a market economy is all about." Perhaps it's not the answer you're looking for, but all around the world, what we understand a free independent media to be is a profit-driven media. There's talk now about the ANC wanting to start its own newspaper. Welcome to the club. Come and see whether you'd be able to pump money into this thing. And the only way in which you can make the money is if the journalism is okay, because, unlike politicians who go to the polls every four or five years, we go there every day, in respect of daily newspapers, and every week, in respect of weekly newspapers. Our readers vote with their pockets, and it's a tough world out there. But largely we're okay in terms of people trusting the media, and still looking at the media, and largely the printed media, to provide them with the information they need to make sense of their lives.

MR CALLAND: The real issue is pre-publication scrutiny, pre-publication banning. Any attempt to increase the ability of powerful people to pre-scrutinise, pre-ban journalism is a no-no. That is where you fight and you defend, and that is the key thing. No media appeal tribunal, statutory or otherwise, could ever have that power, in my view. It wouldn't be constitutional, and so we can work and not worry about that. It'll be fine, and indeed the trajectory of the jurisprudence in this country around prepublication censure is a positive one since the e-TV/Midi TV case last year. The international journalism association described it as having revolutionised prepublication scrutiny in this country. Up until then there'd been a series of cases – the Mail & Guardian was the main victim of late-night decisions on a Thursday night, usually by – another example of juniorisation – junior acting judges panicking at the last moment, introducing conservative interdicts against the newspaper. Now they won't be able to do that constitutionally, thanks to the Supreme Court of Appeal. I'm not being complacent about it, but the trajectory is positive on that front.



Secondly, in response to Mr Hirsch's, I think, challenge as to concrete ideas, I think any new regulation, any new structure or institution should address the question of right to reply. Defamation, as a legal remedy, is, and has always been, here and elsewhere, a rich person's remedy on the whole. If poor people get abused by or exploited by newspapers or the media, it's very hard for them to get a remedy. So a tribunal that permits a right to reply would be one thing worth exploring. The question is whether it would provide a better model than the current ombud self-regulation model, and I think the press has to defend that model, if that's what they want. They have to make the case for it and convince all of us that it works well, fairly equitably, and in line with the constitutional values, as we discussed earlier. Penultimately, it's interesting to hear it's market competition which is now driving the new investment in investigative journalism. It's not because investigative journalism is valuable in and of itself, it's the fact that if we don't do it the internet press will wipe us out. Be that as it may, one welcomes that fact. You need owners who are prepared to invest. In the 1980s, pre-Murdoch, the Sunday Times in Britain, under the great editorship of Harold Evans, had something called the "inside team", four or five journalists. Sometimes they wouldn't file for five weeks or two months, but they had editors and owners who were prepared to invest in them to do that. There's nothing like that in South Africa, and that's what we need.

Lastly, on Kader Asmal's point, do we really want a situation where newspapers tell voters how they should vote the next day? I don't think so. In Britain, The Telegraph would tell you, vote Tory tomorrow. The Guardian would say, on this hand, on this side, on that side, well, on balance, probably you should vote Labour, and The Sun would tell you, if Labour wins the last one out turn off the lights. How did that help anybody? How did that serve the public interest? So I think that in the more nuanced situation, where newspapers are generally supportive of the ANC, frankly, they don't need to say, "We support the ANC." They are very supportive on the hard stuff, on macro-economic policy. Trevor Manuel has had an extremely comfortable ride over the last ten years. Perhaps rightly so.





Answers



MS STEIN: I think it's quite harsh to say that there are no investigative journalists at work in our media. The Oilgate exposé was a major piece of investigative journalism that happened in the past few years. The Chancellor House exposé was also very good investigative journalism.

On the issue that John Mattison mentioned about accountability, what I understand, from what I've been reading, the notion of a tribunal that has an adjudicative function being accountable to Parliament is just a nonsensical proposition, so I wasn't quite sure what was going to be accountable to Parliament. But certainly a tribunal that is given powers to adjudicate rights cannot be accountable to Parliament.

MR KOLLAPEN: Henry's raised the issue of transformation, and I think we may have seen considerable transformation in terms of the demographics. I'm not sure if we've seen a transformation in terms of values, and for me that's the important one. To give you an example of how, sometimes, the media can be so sloppy and irresponsible in terms of reinforcing perceptions: a major newspaper in Tshwane ran a headline: "Illegals arrested, luxury vehicles recovered". Anybody reading that headline would form a conclusion. Then the first paragraph said: "Pretoria police last night arrested 31 illegal immigrants and also recovered luxury vehicles worth R2 million, in two separate operations." When you then speak to the public in Pretoria they say, "These illegals are responsible for stealing the vehicles."

The second point: there hasn't been much discussion on the existing press code, and I certainly think it's deficient in many respects. I think it's incumbent upon the Human Rights Commission to begin a serious discussion with the press ombudsman about how we can revise the press code, not in any kind of dictatory way, but saying that this press code is useful stuff, but it's out of sync with the values in this Constitution to the extent that it ignores the issues of dignity, equality and the values in the Constitution. Certainly we'd want to do that. And John, I don't know if anybody's responded to your question, but I think that [Tshabalala-Msimang] headline raises a larger question: the issue of whether we are sensitive enough to culture. You'll recall when Tony Yengeni, and I hold no brief for him either, did the thing with the bull. The white media, by and large, cried foul, but at the same time people were hunting for the sake of pure pleasure, and there was no focus on that. But here's a guy who does it for pleasure, but in the name of culture, and there's an outcry. I think that issue needs to be examined as well.

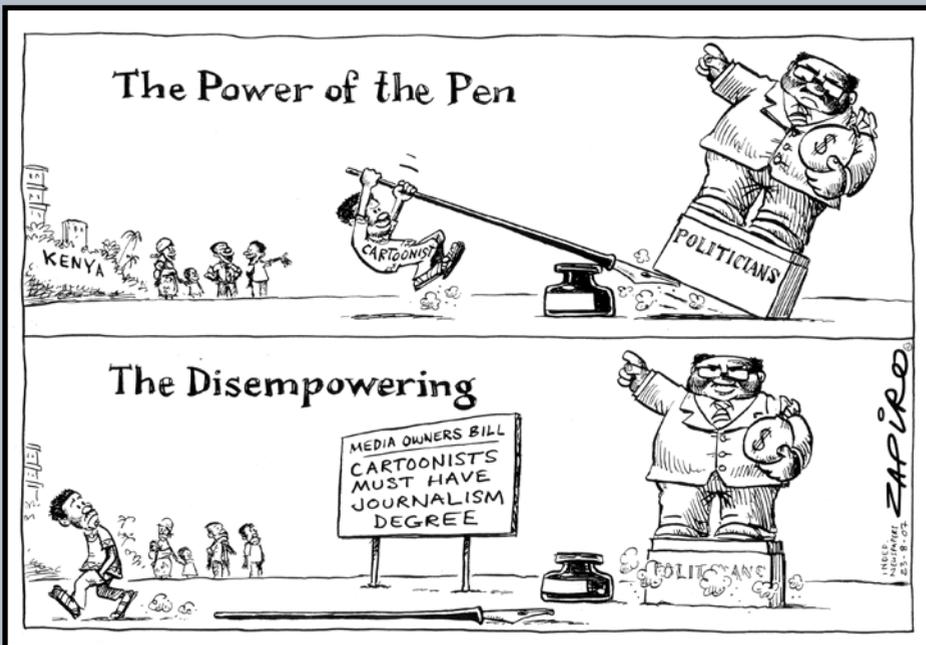
MR JEENAH:

I think in this kind of discussion we need to create a distinction between what we're talking about in terms of media regulation and legal avenues, and ethical issues. They are two separate issues, and we need to deal with them separately.

One of the consequences of this debate about the media over the past couple of years has been entrenched positions: media becoming very defensive about their freedoms, etcetera, and their critics becoming very adversarial about their criticism. We could go on all night about the kind of questions that were raised about certain headlines, for example. We haven't had sufficient debate on those kinds of questions which really go to ethical issues. We spend far too much time dealing with the legal issues and tribunals, and those kinds of things.

Secondly, much of the discussion this evening has, I think, focused on some of the bigger media. Many of the complaints we deal with as the FXI are from smaller media, from community media. They don't have access to courts because they can't afford it. When they get threatened by a political or religious or business leader in that community, "I'll sue you if you print this story", they don't even think about going to court. So they just censor themselves, and will continue to censor themselves. So what we're talking about in terms of the bigger newspapers, and how they have bags of money that can be used, let us extend that to think of smaller and community media, which in many ways do great work – sometimes, you know, great work that the bigger media are unable to do.

My third point – and I know I'm harping on this – is that we often get told by journalists that there's a kind of solid wall between editorial and commercial interests in the newspapers. Unfortunately, it's not true. I think Henry kind of admitted that it's not true. That wall needs to exist. We even have a situation where Blade Nzimande, the leader of the Communist Party, uses the fact that this wall doesn't exist to appeal to the owners of a newspaper to discipline the editor. I think that that really is low, but the fact is that editors and journalists are not immune from commercial interest, and that means that we don't have a free media.



Media coverage

THE STAR, 17 MARCH 2008

Press freedom – a balancing act

COMMENT

RAENETTE
TALJAARD



Observers wonder whether the appetite in the ruling party for creating a media appeals tribunal is waning

In his parting words to Parliament recently, former veteran ANC MP Kader Asmal shared this key insight with his fellow MPs about Chapter 9 bodies and the media in furthering oversight and accountability: "These are countervailing bodies. So is the press. We are sometimes too sensitive to criticism – in the press or by civil society."

"Obviously, we are as annoyed as any of you at misconceived, inaccurate or tendentious criticism, and I have voiced my annoyance, sometimes even anger. However, what would be wrong would be any attempt at intimidation of the press, or any threat to curtail press freedom – not because the constitution protects press freedom but because it is a vital element of our democracy. We must cherish it."

Asmal has already shown that he will work to further these values in his new role as an academic and active participant in civil society. But it is crucial that we all catalyse debates around questions vital to the life-blood of our democracy as they emerge. Civil society has a unique role to play in this process.

It is with these words and sentiments in mind, and the ongoing discussions around the possible establishment of a Media Appeals Tribunal, that the Helen Suzman Foundation convened its first of the Quarterly Roundtable Series this year to probe the question: "Media Freedom: Regulation or new Shackles?" with a panel discussion.

This included Richard Calland (Institute for Democracy in South Africa), Henry Jeffreys (Die Burger/South African National Editor's Forum or Sanef), Pamela Stein (Media Law, Webber Wentzel Bowers), Jody Kollapen (Human Rights Commission) and Na'eem Jeenah (Freedom of Expression Institute).

The past few years and months have undoubtedly been a tumultuous period for the South African media.

Highlights of this tumult have included the unprecedented ways in which the media was used by various "counter-insurgency" tactics of different camps during the succession proxy wars in the ANC in 2007, the continuing threat of pre-publication censorship of print media present in the Film and Publication Amendment Bill currently, and controversially, in closed-door hearings in Parliament and the threatened ownership change at Avusa with a mooted Komedia bid late last year.

Another highlight would be the meeting of ANC president Jacob Zuma with the Forum of Black Journalists.

Equally significantly, the ANC has recently announced its intentions to con-



sider launching its own newspaper to vie for space in the marketplace, repeating its often stated concern that the mainstream media does not reflect the diversity of views in society.

In the context of these various challenges, the ultimate challenge – the prospect of a statutory institutionalised Media Appeals Tribunal or similar structure (the detail is still a little vague and under investigation) emerged as a mooted policy idea at the ANC's June 2007 policy conference. A call for the investigation of such a structure was adopted at Polokwane with a committee of the ANC currently probing it.

This structure would apparently be created to plug the perceived "gaps" that exist in a largely self-regulated industry – print media – while most other forms of media are regulated by the Independent Communications Authority of SA.

The 52nd Conference Resolution on the establishment of a Media Appeals Tribunal calls for the principle and the modalities for implementation to be probed.

While it appeared to be a virtual certainty that such a structure would be created, and the investigation of its creation is ongoing, it is questionable whether the appetite for it to be established is as prevalent as it was last year with the tidal wave of Polokwane subsiding somewhat.

Die Burger's Jeffreys made the poignantly eloquent point that the calls for its creation ran in parallel with the intensity of media coverage and scrutiny of the succession struggle and ongoing internal battles in the tripartite alliance and that calls for it could subside now that the Polokwane battle's first scenes are over.

The countervailing argument is that advocates of the idea may increase their volume if or when internal political strug-

gles intensify again.

A meeting earlier this year between Sanef and ANC deputy president Kgalema Motlanthe and head of the ANC's communications committee Minister Pello Jordan made observers wonder whether the appetite for creating such a new structure – whether statutory or not – could wane.

At the meeting Motlanthe's emphasis was that the initiative aimed merely to "strengthen self-regulation", and that the operative words for the investigation were "feasibility" and "desirability" of such a tribunal.

It seemed clear from the quarterly Roundtable panel discussion that it would be preferable for the appetite for a tribunal to wane but that this does not displace some legitimate concerns about the weighing of rights and the freedom of the press – a matter well canvassed in South African jurisprudence, as Stein reminded the audience.

At the Roundtable, SA Human Rights Commission Chairperson Jody Kollapen made an insightful contribution to the debate, which contained a policy kernel that can and must potentially be discussed.

He pointed out that we often get fixated on tension between the press freedom enshrined in the constitution and the right to dignity but that the freedom of the press is actually in a contextual network of the entire configuration of rights in the constitution.

This appears to largely comport with the ANC's approach adopted at Polokwane in substance but not necessarily in form: "The ANC must promote the school of thought which articulates media freedom within the context of the South African Constitution, in terms of which the notion that the right to freedom of expression should not be

FINDING THE FRAMEWORK: Human Rights Commission chairperson Jody Kollapen recently suggested the press code be aligned to constitutional values.

PICTURE: SANDILE NDOLOVU

elevated above other equally important rights such as the right to privacy and more important rights and values such as human dignity."

While the ANC appears to favour the pursuit of this objective through the possible creation of a tribunal, debatable as it is, Kollapen suggested a more thought-provoking alternative balancing act that would leave press freedom and self-regulation intact in substantive terms. But that would call for innovation and improvement of the current self-regulatory and self-checking mechanisms.

He proposed that the press code (and the machinery that currently oversees it, including the press ombudsman) would need to be revised against the bedrock of constitutional values enshrined in the bill of rights and more closely aligned.

While this would not be easy, it could be important to explore the suggestion and to see whether the code can be enriched and a new breed of young journalists nurtured to take the constitution as their founding philosophy.

Indeed Jeffreys pointed out that most editors in South Africa today would answer that this was already their philosophical credo and no party-political line takes precedence in editorial policy over this bedrock principle.

Herein lies the rub and the debate – building a culture where all concerned take the constitution and its values as a departure point, politicians and journalists alike – is a formidable societal challenge that can only build the power of the fourth estate and the responsibility of those in public life to lead public lives that comport with the constitutional values in substantive ways.

As Calland correctly pointed out, any discussion about the role of the media in our society must be aimed at improving the standard of reporting, and not censoring journalists.

What seems abundantly clear from the discussion is the fact that any discourse about the media must be weighed in the context of the tensions that exist between the freedom of the press and the constellation of rights in the bill of rights – tensions that can be smoothed out in the daily conduct of politicians and influential public figures and the manner of reporting.

Creating new structures to regulate this relationship can only lead to a minimisation of the space and role of a robust fourth estate in building democracy and a sense of civic values.

■ Raenette Taljaard is the director of the Helen Suzman Foundation.

'Lame duck' media tribunal unlikely to get off ground – expert

NATASHA JOSEPH

THE IDEA of a statutory media appeals tribunal, mooted for discussion at last year's ANC conference in Polokwane, is "a lame duck" and is unlikely to get off the ground, says a constitutional law expert.

Richard Calland, an associate professor of constitutional law at the University of Cape Town and an Institute for Democracy in South Africa (Idasa) analyst, was one of five

panelists at a round-table discussion hosted by the Helen Suzman Foundation last night.

Last month, ANC Deputy President Kgalema Motlanthe told the South African National Editors' Forum (Sanef) that party leaders had been mandated to investigate the possibility of a tribunal.

The resolution also suggested that Parliament establish the tribunal to "guarantee the principle(s) of independence, transparency, accounta-

bility and fairness".

Calland said the idea of a tribunal was part of last year's "political moment".

He questioned why the media should enjoy "elevated rights" that saw press freedom trumping constitutional rights to dignity – with people in all sectors, not only the media, believing that their rights were paramount.

South African Human Rights Commission (SAHRC) head Jody Kollapen said that

all professions or individuals had their "favourite right" and sought to protect that right above all others.

Kollapen said all South African media should be "accountable to the Constitution ... and Constitutional values".

Other speakers included Na'eem Jeenah of the Freedom of Expression Institute and Sanef vice-chair Henrey Jeffreys.

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Relevant articles

BUSINESS DAY, 19 MARCH 2008

Before ANC hits its own headlines

THE African National Congress (ANC) has reopened discussion on starting its own newspaper – and that's not necessarily a bad thing. The ruling party's national executive meeting last weekend tasked a committee led by Arts and Culture Minister Pallo Jordan to resurrect a plan the ANC bounced



ANTON HARBER

around in the early 1990s. Then it did not have the money to start its own newspaper and there was hostility to the idea. Now the signs are that it has the money. But one might ask if this is a wise way to dispose of it.

In principle, there is room for a paper owned and controlled by the ruling party. If such a newspaper is going to give more column centimetres to important ANC matters that are neglected by the media, as spokeswoman Jessie Duarte has said, then it can give space to material for which the commercial media does not always have space.

New newspapers are almost always a good thing. They create jobs, push up the demand for and remuneration of journalists, and open up new public spaces. But they are difficult, expensive beasts, especially if you do not have the existing infrastructure of printing and distribution, or you are unable to share costs with other ventures.

A party-owned newspaper is likely to appeal only to a core of ANC cadres who want to keep abreast of the finer points of ANC policy on water or housing, to cite the examples used by Duarte. If the ANC believes it can produce a paper that competes with the commercial media for eyeballs, then it is deluding itself.

THE ANC will be going against international trends. In most countries, and certainly in open democracies, newspapers have moved away from central party control to do what newspapers do best – operate as independent entities free to challenge authority and do the things ruling parties are seldom comfortable with. This is true even of countries with a long history of partisan newspapers, such as Sweden.

The truth is that party newspapers do not produce great journalism. At their best, they might produce competent reporting and an inside track on government thinking but great journalism comes from those who go where ruling parties and governments do not want them to go – those who probe, ask questions and shine light into dark corners.

Of course, we have a long history of party-controlled newspapers in SA. The Afrikaans papers were for years the playthings of the National Party and this led them into a deep credibility crisis. It was only when some editors began straining at the party leash in the 1980s that they became even vaguely interesting. Even then, what they said and covered was constrained and you had to go elsewhere to understand what was really happening in the ruling party.

The Inkatha Freedom Party controls Ilanga newspaper, but that is not where you would go if you wanted to know the interesting stuff going on in Mangosuthu Buthelezi's party. And if it has interesting stuff on the ANC, its credibility is thin.

The great danger, however, is that government advertising might be abused to prop up a party publication. There has already been a threat to use government advertising to pressure the media, so an ANC paper would present a major problem if there were not a clear mechanism to ensure that government advertising went only where it was most effective at reaching its audience, and could not be used for political effect. This should be written into law.

I suspect the ANC can achieve a lot more by improving its general communication through the mass media. It could expand its website, develop a better working relationship with the commercial and community media, withdraw "deployed cadres" from the SABC and get the government to lower communication costs so that more people can get internet access.

A newspaper might just be a distraction from these real communication tasks.

■ Harber is *Caxton Professor of Journalism at Wits University.*

MEDIA/Thami Mazwai

Why ANC newspaper puts the cart before the horse

WHILE the ruling party's intention to start a newspaper is justifiable, is it not putting the cart before the horse?

The idea of an African National Congress (ANC) newspaper – to sell the party's vision of development issues in civil society's market of ideas – has been mooted for some years. Incidentally, it is not only loyalists that want the publication. Substantial portions of the black community (read intelligentsia) have also supported the idea as, rightly or wrongly, they believe "black issues" do not receive enough attention in the media or are relegated to the background in the name of inclusivity.

US intellectual Noam Chomsky makes the point in *Necessary Illusions: Thought Control in Democratic Countries*, that a few years ago the Brazilian Conference of Catholic Bishops launched a campaign for the democratisation of the media. The bishops argued that the major TV networks and multinational media companies concentrated on the upper classes and did not reflect the lives of ordinary people. More grassroots participation was needed in the public debate, they said. Participation by blacks in public discourse via this publication is also what the ANC has in mind.

But wait a moment. Not so long ago, the ANC bemoaned the fact that the country's media was highly concentrated. This is real and the situation is getting worse. There are three media giants – Media 24, which is the biggest, Avusa and Caxton. Independent Newspapers owns the bulk of the daily newspapers in the main centres but opposition is coming from Avusa, and if newcomer *The Times* can upstage titles in the Independent stable, it could mean a worsening of the situation. As if this were not enough, these major media houses are also taking stakes in smaller publishing houses to grow their printing and distribution businesses.

The dominance is worsened by the vertical integration in the media, in which the major media houses print and distribute the titles of competitors and smaller publishing houses. This is widespread and, in terms of printing and distribution, independent publishers are virtually being priced out or subsidise publications owned by the major media houses. This persists despite protestations against the situation.



This has led to a number of small black-owned publishing houses disappearing and the independent black voice vanishing from the media landscape. To suggest that editors in the country are now mostly black misses the point. It takes more than a black editor, however strong, to change the culture and character of any publication. Hence the *Sunday Times* under Mike Robertson, and now Mondli Makhanya, is perceptually what it was during the days of Joel Mervin, Tertius Myburgh and Brian Pottinger. Other national publications do not necessarily reflect "black passions" in the

national debate. This leads to the sad situation in which no newspaper can be said to truly express the soul of the black majority.

The only institution capable of ensuring that various communities in our diverse society enjoy the freedom to have their views and passions ventilated is the government, and this means the ANC, which is the ruling party. Thus, the party has a responsibility to clean out the concentration rather than want to be part of it, especially when three major challenges face it when it starts its publication and one, sustainability, directly relates to the issue of concentration.

The ANC would need very deep pockets to start a publication, daily or weekly. It is worse when the publishing house will be a one-title outfit. The ANC can learn from the late daily, *ThisDay*. This newspaper was a good read but was smoked out of the market by the concentration described above. It had to be printed and distributed by its competitors. This meant its competitors, despite confidentiality clauses and the like, knew of its major stories beforehand and could work on good follow-ups for later editions. It could not compete on exclusive stories.

The two other challenges are

integrity and credibility. The journalists on an ANC publication will want to protect their integrity and show they are not lapdogs. They will be more strident in challenging the organisation with their comments and stories, which is what journalists did when they worked on Anglo American-owned publications. Will this be fair to the ANC and reader, when the comment or column is influenced by ownership or is based on someone proving his or her independence? Also, the journalists on the paper will want to trump other journalists on the basis of "inside information". To what extent will the ANC tolerate journalists in its employ publishing exclusives on the basis of leaks from "comrades" on its national executive and national working committees?

The third is credibility. This will be the toughest nut to crack for the new publication. It will take a long time, if ever, to convince readers that the stories or comment in the publication are not in pursuit of ANC objectives. It will also take something extra to make sceptical ANC members believe their own publication. This will be worse when there are schisms in the organisation, as there were last year before the ANC's national conference. In the light of this credibility gap it will not be remiss for members to test the credibility of their publication through what *The Star* or *The Times* publish.

Editorial integrity and credibility depend to a large extent on editorial independence, so these last two issues can be summed up in a question: to what extent will the ANC give editors free rein?

Finally, there is nothing wrong with the ANC starting its own publication and it will hopefully take account of the above. But, let it first clear the concentration and create an enabling environment in which the free flow of ideas and information is not held hostage by big media houses. This environment will enable smaller publishing houses to flourish. This will result in the emergence of new publishers and titles. These could be better suited and more credible to stimulate debate around the country's development agenda than the ANC itself. At the end of the day, there is more value in an "ANC friendly" than an "ANC owned" publication.

■ Mazwai is director of the University of Johannesburg Centre for Small and Medium Enterprise Development.

Relevant articles

BUSINESS DAY, 10 OCTOBER 2007

Time of watching, waiting for SA media



ANTON HARBER

THE tone of the African National Congress's (ANC's) new media policy proposals, to be discussed at the party's national conference in Polokwane in December, is captured by the document's title: Communications and the battle of ideas.

The document, which emerged from the recent policy conference, is shaped by the view that "the ANC is faced with a major ideological offensive, largely driven by the opposition and individuals in the mainstream media".

This feeling of embattlement informs the document, and is in danger of infesting the whole of SA's vibrant media setup. The criticism the government faces, the document suggests, is beyond normal debate because it is an "offensive against our movement" and one part of a bigger "global offensive against progressive values and ideas".

The ANC's outlook and values (defined in the struggle terms of the 1980s, in phrases such as collective rights, values of caring and community solidarity and a developmental state) has to weigh in against "the mainstream media's ideological outlook" (defined as neoliberalism, market fundamentalism and a weak and passive state). This suggests, rather simplistically, that the ANC's ideals remain pristine despite more than a decade of access to wealth and power, and the private media presents a single, unified block of opposition to the transformation project. Neither of these notions hold up to scrutiny.

More worrying, this kind of thinking does not discriminate between acceptable criticism, discussion and debate, and the actions of the country's enemies (whoever they are). It lumps everyone together in a lazy, sloppy and potentially dangerous way. The party's critics are at one with the country's enemies. The real threat to media freedom, they suggest, is not the state but commercial interests and "the pursuit of profit", which are "impacting negatively on editorial quality". In particular, they bemoan the "increasing concentration of ownership, control and content" in a small number of powerful companies.

THE proposals to deal with this are by and large positive and benign, involving measures to boost media diversity and encourage community-based media. They propose strengthening government communications, encouraging the creation of progressive media houses, taking practical steps to influence and engage the output of the creating, media, academic and intellectual communities, giving more support to community media, and working with editors to improve journalistic skills.

On the SABC, the document raises the fact that previous party resolutions on the funding of the public broadcaster have not been implemented. The ANC reiterates its call for more public funding to free the SABC from its commercial constraints.

The ANC seeks a media that promotes national consensus, pride and unity and deepens democracy. As you might expect from a ruling party that has felt the sting of close media scrutiny in recent months, words such as "watchdog" are absent. The sting in the document comes in one line, calling for an investigation into "the need or otherwise for a media tribunal", which would address the weakness of the media's self-regulatory system and the need to protect the rights of all South Africans. This joins recent angry protests that freedom of expression rights are trumping individual rights, such as privacy and dignity.

The nature of this intended tribunal is not clear in the document. Is it to be an ANC tribunal, a government tribunal, or an independent one? What will be its power and scope? The South African media certainly knows about commissions of inquiry into the media that purport to be independent, having faced a series of them under apartheid, all of which were designed to put pressure on the media and encourage journalists to fall into line to encourage more unity, national pride and consensus.

The ANC document seems torn between a gentle approach based on "progressive forces ... contesting the space and the public discourse more broadly" and those who want to intervene more aggressively through a tribunal. As this document translates into conference resolutions, we shall see which view gains precedence.

■ Harber is Caxton Professor of Journalism at Wits University. The ANC's media policy proposals are the subject of a colloquium to be held at Wits on October 24. For details, see www.journalism.co.za.

Apartheid-era restrictions still apply 30 years after *The World* and *Weekend World* were banned

Pressure builds on freedom of the press

Chantelle Benjamin

Chief Reporter

THIRTY years after the apartheid government banned two black newspapers, *The World* and *Weekend World*, many commentators say journalists are still restricted in SA's new democratic order.

Despite having one of the most progressive constitutions in the world, SA lags in media freedom — in no small measure because many of the apartheid laws set up to control the media remain in force.

Media freedom is in the spotlight after recommendations by the African National Congress (ANC) that government control of the media be tightened, and possible legal action against the editor of the *Sunday Times* and a journalist over the medical records of Health Minister Manto Tshabalala-Msimang.

Dario Milo, media law specialist at Webber Wentzel Bownes, says: "While there have been many positive media freedom developments in recent years, in many areas the legal landscape remains substantially restrictive of media freedom."

"There is a vast amount of legislation that restricts publication with no inbuilt recognition of the need to balance the right being asserted against the freedom of the press."

Milo is one of the legal experts who has raised concerns about parts of the controversial Films and Publications Amendment Bill now before Parliament.

Among the apartheid-era laws restricting the media which remain in force are the National Key Points Act, the Defence Act, the Protection of Information Act and the Criminal Procedure Act.

"All of these, as well as the National Prosecuting Authority Act, do not contain the exception allowing media to report on issues if it is in the public interest," he says.

"The result is that an editor or journalist with information of crucial public concern on, say, a military or defence matter, faces criminal prosecution if they go with the story."

"This constitutes a significant chilling effect on the publication of material that voters are entitled to know."

Some of the provisions of the



In one of the darkest days for South African media freedom, *The World* and *Weekend World* newspapers were banned 30 years ago today. *The World's* editor, Percy Qoboza, was arrested by security police on the same day (pictured).

controversial section 205 of the Criminal Procedure Act have been relaxed but it is still possible for courts to imprison any person who refuses to disclose information relating to a criminal investigation. This could include naming a reporter's source.

The best known case in this regard involves the unsuccessful efforts to compel Cape Times chief photographer Benny Gool to provide information on the death of alleged druglord Rashaad Staggie.

Victoria Bronstein, professor of law at the University of the Witwatersrand, says in a document submitted to the African Peer Review Mechanism by the South African National Editors' Forum (Sanef) last year, that laws that conflict with the Promotion of Access to Information Act have "implicitly been repealed", but "so long as they remain on the statute books any conflict would have to be resolved on a costly case-by-case basis."

She says many statutes, such as the Magistrate's Court Act and the Criminal Procedure Act, give judicial officers the discretion to hold hearings behind closed doors.

"There are other areas of the law that remain in a state of schizophrenia," says Milo. "Defamation law now permits a defence of reasonableness, but damages awards are increasing and urgent interdicts often

prevail."

Milo says privacy law does not yet give the media adequate guidance on how to balance a public figure's legitimate right to privacy with the public's right to know.

A recent ruling by the Supreme Court of Appeal, that received little attention has important implications for the sub-judice rule, which prevents the publishing of information that may prejudice a judge or jury hearing a case.

In this case, e.tv refused to show a documentary on the murder case of baby Jordan-Leigh Norton to the director of public prosecutions before it was aired.

The appeal court found that prohibition on publication of material relating to forthcoming criminal proceedings was permitted unless it could be shown that "publication might cause substantial prejudice to the trial", which it could not in this case.

"This ruling is bringing us closer to English law with regard to the sub-judice rule, but we are

still behind England and the US, particularly with regard to defamation law in the US," he says. "We still have stricter rules here than in England, and they have a jury system."

The idea that media should be part of nation building and less critical of the government is gaining momentum, which worries media experts.

The SABC cut its ties with Sanef last month over Sanef's decision to support the Sunday Times coverage of the health minister, in which she was called a drunk and a thief.

This followed reports that the ANC had drawn up a discussion document for its December conference on media regulation.

The document considers whether remedial measures are necessary to protect and promote the constitutional right to dignity and privacy.

Bronstein says in a recent report: "Over the past decade the right to freedom of speech has been rigorously upheld by the

higher courts but in the lower courts and tribunals freedom of expression invariably loses out to dignity and equality."

"It seems that although there is a symbolic deference to free speech, there is a growing quasi-legal tendency to erode its importance. Underlying the idea that speech is not actually that important, appears to be the belief that SA is still fragile and that individual South Africans cannot be relied upon to exercise any type of discernment."

Anton Harber, professor of journalism at the University of the Witwatersrand, says his concern with the ANC document is a proposed media tribunal to address the weakness of the media's self-regulatory system.

"South African media certainly know about commissions of inquiry into the media that purport to be independent, having faced a series of them under apartheid."

All of them were designed to put pressure on the media and encourage journalists to fall into line to encourage more unity, national pride and consensus," says Harber.

Milo says the aim of media freedom is not to allow editors to publish anything that takes their fancy "but any restrictions on the right to publish need to be carefully assessed to determine whether they are important enough to override the right to publish."

"If we dilute the strong protection that media freedom should enjoy, we risk undermining the democratic project to which we are committed."

Relevant articles

BUSINESS DAY, 25 OCTOBER 2007

ANC defends move on 'media bias'

Thom McLachlan

Media Correspondent

THE African National Congress' (ANC's) proposed media tribunals would explore "certain biases" within the industry such as those that excluded broader public participation and a wider diversity of views, says ANC information head Smuts Nkonyama.

The tribunals would not, however, replace self-regulation within the industry, Nkonyama said.

"When you juxtapose (public participation) against self-regulation, there is little space for the public to enter into the discourse," Nkonyama said yesterday at a colloquium hosted by Wits University.

This is not, however, stated in the policy document which mentions only the need to set up a tribunal to "address" and "investigate" the prevailing self-regulatory dispensation.

Nkonyama had earlier said to delegates at the colloquium the ANC believed there was a "very strong emphasis (in the mainstream media) towards upper-market mentality". He expressed doubt in the media's standpoint that it was "ideologically neutral and nonpartisan".

He said the "ability to distinguish between conjecture and facts appeared to be beyond the grasp of some media organisations and practitioners".

The ANC also disapproved of the media carrying cartoons to portray certain political characters as beetroots or "with showers grafted on their heads".

He said while some journalists to whom he had spoken believed there were "no issues of conspiracy against the government", personal prejudices within certain newsrooms could be affecting the newsworthiness of stories.

The document has apparently been contested within the ANC and is to be debated at the conference of the party's national executive committee in Polokwane in December.

According to leading businessman and senior ANC member Saki Macozoma it was still a discussion document. "Let us be clear that no policy decision has been made," he said. "It would appear



Kate Skinner, deputy chairwoman of the Freedom of Expression Institute, and Saki Macozoma at a colloquium at Wits University yesterday. Picture: TYRONE ARTHUR

there is an 'us and them' situation between the ANC and the media" and the media must accept the ANC was a political party that needed to propagate its ideals, and likewise the ANC must realise that the media may contest these.

"What we must not succumb to is that there are certain views that are not allowed to be expressed." He said own-

ership was but one area in the promotion of diversity within the media.

Mail & Guardian editor Ferial Haffajee said the media was "largely on side" and not, as President Thabo Mbeki had taken to claiming, "an opposition".

She said talk about tribunals and the like could be construed as "rather sinister".

MEDIA/Jane Duncan

Different guises, voices of the enemies of free speech

JACOB Zuma's second Letter from the (ANC) President has raised concerns once again about his and the African National Congress's (ANC's) commitment to media freedom. In the letter, Zuma accuses the media of being ideologically out of synch with the rest of society, and alleges that "what masquerades as public opinion" is really "minority opinion", reflecting the still-untransformed nature of commercial media.

The contents of his letter are unsurprising, as they largely reflect arguments in the ANC's media policy, which resulted in a lengthy resolution at the Polokwane conference calling for an investigation into the setting up of a media tribunal, to be answerable to Parliament.

From a media freedom point of view, there can be no justification whatsoever for parliamentary control of media content. It runs counter to the ANC's own media resolution in 1991, which said that "it would be erroneous to advocate the setting up of bodies which determine what society should and should not read, hear or watch".

Yet, in rejecting the idea of the media tribunal, we risk losing sight of the fact that in relation to media consolidation, the ANC is raising crucial questions of public importance in its media policy. The questions are subtle, and difficult to capture in sound bites. If consolidation commercialises the media to the point where the diversity of voices is reduced, then the quality of democracy will suffer, as public debate will be controlled by a few powerful groups.

The dangers of media consolidation were recognised by the ANC in 1992, when it adopted its Media Charter. This charter set a mildly progressive template for media transformation, and called for media diversification and stronger public media. To an extent, there was progress in diversifying ownership in the mid-1990s, with more black people, women and workers achieving a stake in the media.

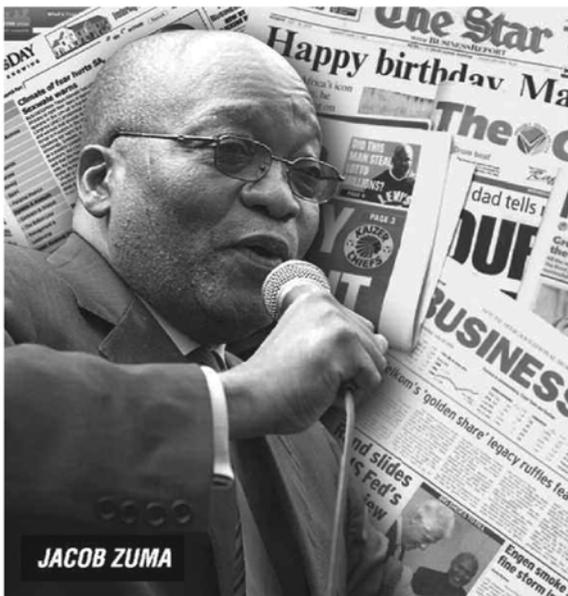
However, since the adoption of the controversial Growth, Employment and Redistribution (Gear) plan in the late 1990s, commercial media reconsolidated into three big groups, namely Independent Newspapers, Johnnic (now Avusa) and Media24.

As a result, the commercial media today manifests many of the elements of what has been called a "50%" society. The first 50% enjoys unparalleled diversity of media owing to their participation in the mainstream economy, which the three groups mentioned above have delivered admirably.

Yet such diversity has been delivered within a set of commercially defined limits. Given that they are focused on the "first economy", mainstream media do have a tendency — in the words of media academic Lynette Steenveld — to "tilt upwards" and prioritise the world view of political and economic elites.

This translates into news stories that focus on the misuse of power by politicians, corruption scandals, leadership battles and business news.

It is this upward tilt that made many



media miss possibly the biggest story of last year — how the shift in power from Mbeki to Zuma took place on the ground, at ANC branch level. Zuma pointed this omission out in his letter, and correctly so.

This upward tilt may lead to other subtle biases in media content, which has been most evident in relation to economic policy. This bias was captured by the Sunday Times's crass headline, "Let the good times roll", in 2004, reflecting the fruits the middle class has reaped from the government's economic policies. Yet in the same year, the Bureau for Market Research reported on a staggering 105% growth in unemployment among "Africans" from 1991 to 2002.

Recent media scholarship has also pointed to elite-orientated agenda-setting on economic policy questions. In a quantitative analysis of articles on privatisation over a four-and-a-half-year period (2000-2004), David McDonald and Anne Mahyer found that the English-language press "solidified privatisation as a dominant discourse", and limited the possibilities for anti-privatisation debate. Sean Jacobs has researched how the media has played divide and rule among social movements. Adrian Hadland has shown in his doctoral thesis how commercialisation has negatively affected the public-service role of the media, and, in fact, has laid the ground for greater state intervention.

Yet, ironically, the media has been quite partial to the ANC, because of its embrace of the very neoliberal policies it claims to despise. Media Tenor found that before the 2004 elections, many mainstream newspapers came out in support of the ANC. To this extent, the ANC's attack of the media is difficult to fathom.

The media has also been known to resort to censorship to protect its commercial viability. In the process, it draws boundaries around public discourse. Rapport's firing of columnist Deon Maas, after he penned a controversial column, falls into this category. So does Media24's threatened defamation action against media activist and former employee David Robert Lewis, for criticising the company.

The Sowetan's dismissal of sub-editor Llewellyn Kriel for criticising the company's journalistic standards on his Thought Leader blog does not inspire confidence in the media's ability to tolerate "friendly fire". Denying obvious problems in the mainstream media reduces the effectiveness of counter-arguments to the ANC's policy.

Yet, in spite of the fact that the ANC has a valid point on the consolidation question, its policy reflects a poverty of thinking about solutions to the problem. Its tribunal proposal marks a retreat from many of the progressive ideas developed in 1991, and taken

forward in its 2004 Stellenbosch conference.

This regression may well signal a shift towards a growing conservative nationalism in the ANC, which seeks to control public discourse it considers to be indecent, immoral and unpatriotic. In fact, the tribunal proposal signals a shift to the right in its media policy. This shift has already led to attempts to subject the media to prepublication censorship through the Film and Publications Bill.

In making its arguments, the ANC draws on a progressive media theory called critical political economy. This theory considers how corporate ownership of media leads to heightened media concentration, which encourages subtle biases towards dominant elites. But more contemporary versions of this theory recognise that journalists and readers can and do exercise relative autonomy from owners and managers, although not in conditions of their own making. Overwhelmingly, journalists play their elite watchdog role with independence, and this space must be protected and expanded.

Political economists do advocate state intervention to counter media commercialisation, but they roundly reject content controls. Governments are called on to fund ailing newspapers and public service broadcasters, that in return are expected to operate mainly on a noncommercial basis.

Ownership controls are considered necessary to advance freedom of expression, and some countries have adopted foreign ownership limitations. Some have implemented the "30% rule", where no media institution is allowed to own more than 30% of total circulation.

Other measures include support for advocacy media, which offers us a different model of journalism, but that has all but died, and the formation of a journalists' association.

Tellingly, the ANC has not considered such measures, perhaps because to do so would bring the party into conflict with the general government thrust towards relaxation of ownership rules and "regulated consolidation". It would also raise the ire of some its members, who are media behemoths. Perhaps the ANC has ambitions to replace apartheid-era consolidators with its own consolidators.

Political economy arguments help us to understand that media consolidation can pose a threat to freedom of expression; to that extent, they are useful. Yet there are signs that the ANC is misappropriating political economy arguments to legitimise content controls. This misappropriation has paved the way for individuals such as Dali Mpofu to abuse these arguments to shield his institution, the SABC, from criticism.

Such misappropriation amounts to an abuse of critical political economy theory. The task of those who consider themselves committed to freedom of expression is to rescue political economy arguments from abuse by those who claim — for their own self-serving ends — to act in its name.

■ Duncan is executive director of the Freedom of Expression Institute.

Relevant articles

MAIL AND GUARDIAN, 28 MARCH 2008

Scary new secrets Bill

Investigative reporters could find themselves negotiating a perpetual minefield under proposed legislation

Adriaan Basson, Stefaans Brümmer and Sam Sole

If new official secrets legislation had been on the statute books, the *Mail & Guardian's* award-winning articles about police national commissioner Jackie Selebi could have been illegal — and *M&G* reporters could have faced lengthy jail terms.

The Protection of Information Bill was published for comment by Intelligence Minister Ronnie Kasrils last week. A specially constituted parliamentary committee will process it and hold public hearings. Kasrils hopes to have it enacted by the end of the year.

The preamble to the Bill, which is to replace the draconian apartheid Protection of Information Act of 1982, states that its aim is to "promote the free flow of information within an open and democratic society without compromising the security of the Republic".

Provisions include the preservation of valuable state information and the automatic declassification of all formerly secret information older than 20 years, unless it is specifically reclassified.

Uniquely, it also criminalises the abuse of classification by state officials to conceal breaches of the law, inefficiency or embarrassment.

The Freedom of Expression Institute (FXI) slammed the Bill this week,

saying it smacked of "an attempt to eliminate genuine criticism and to entrench the powers of the executive". Kasrils, however, writes in commentary appearing in the *M&G* today (page 23) that "government has no interest in hampering the work of investigative journalists".

Red flags

Red flags for reporters include a prohibition imposed by the Bill on disclosing classified records and even a duty to return them to the state. There is no specific exemption for reporters who use the

Intelligence Minister
Ronnie Kasrils



records to expose corruption or the abuse of power. Failure to comply carries a jail term of up to five years.

Heads of state bodies or their delegated officials will have the power to classify documents and other records as "confidential", "secret" or "top secret". Information not in physical form can be "designated" to prohibit disclosure.

Investigative reporters could arguably find themselves negotiating a perpetual minefield under a section dealing with "hostile activity offences", which carry penalties of up to 25 years in jail.

These offences criminalise the collection and disclosure of "sensitive information" — a category more loosely defined than "classified information" — if the intention is to "prejudice the state".

Information is regarded as "sensitive" if it endangers the "national interest", which encompasses not only "the survival and security of the state" and the "pursuit of justice [and] democracy", but also ideologically loaded values such as growth and free trade.

Explicitly included among matters in the national interest are "defence and security plans", "significant political and economic relations with international

organisations and foreign governments" and even "details of criminal investigations".

This means that newspapers and journalists reporting on matters such as the Scorpions' investigation of Selebi or on the arms deal could conceivably be prosecuted if authorities decide there was an intention to prejudice the state.

The "hostile activity offences" section appears to have been drafted primarily in response to the threat allegedly posed by private intelligence operatives, although it does not distinguish between their work and that of journalists and bona fide researchers. The implications is that the provisions will apply across the board.

Last month Safety and Security Minister Charles Nqakula reportedly said the Bill aimed to stem intelligence gathering by "unauthorised entities". The dissemination of allegedly false information by "information peddlers" associated with the composition of the *Special Browse Mole* report were of particular concern, Nqakula said.

The *Special Browse Mole* report, compiled by the Scorpions with the help of outside sources, alleged that there was foreign support for Jacob Zuma's campaign to win the ANC presidency. Parliament's joint standing committee on intelligence has condemned the report as illegal intelligence gathering. Members of this committee will serve on the ad hoc committee that will process the Bill.

In his *M&G* commentary today Kasrils motivates for some private intelligence activities to be outlawed, writing: "Our history has demonstrated that certain individuals know-

ingly supply false information to our intelligence structures with the sole purpose of undermining the integrity of government institutions."

Kasrils writes that government recognises "the valuable role of the media in keeping the public informed and in exposing abuse of state authority where it occurs" and that "government's interest is only in preventing disclosure of information that by law needs to be protected". He emphasised that it would be a crime for state officials to classify documents as a way of hiding "incompetence or corruption".

The FXI's Melissa Moore said this week that no proper measures were included in the Bill to address public concerns about the abuse of power and information. "On the face of it the Bill appears to be about preventing proper and appropriate public investigation of the activities of 'organs of state'."

She said the FXI was concerned about the "numerous clauses" granting state officials the right to classify information and the reliance on appeal procedures which reverted to ministerial determination. "All of this smacks of an attempt to eliminate genuine criticism and to entrench the powers of the executive."

Last year the National Intelligence Agency invoked the apartheid-era Protection of Information Act to prevent the *M&G* reporting on a top-secret report handed to axed spy boss Billy Masetlha during his "hoax email" trial.

But reliance on the old Act has been the exception rather than the rule, perhaps because of its apartheid pedigree and concerns that it would not pass constitutional muster. The new Bill, if enacted, is likely to remove such qualms.

Forum to fight for blacks-only media body

Steering committee head says it is not about preventing white journalists from joining but a matter of principle

Chantelle Benjamin

Chief Reporter

THE Forum for Black Journalists (FBJ) said yesterday it would appeal yesterday's finding by the South African Human Rights Commission (SAHRC) that the barring of journalists on the basis of race was unconstitutional, and would take the matter to the Constitutional Court if necessary.

FBJ steering committee chairman Abbey Makoe told Business Day the forum was getting legal advice from constitutional experts, and would be willing to open the forum to all

journalists if the prevailing view was that such discrimination was unconstitutional.

"We are not convinced that the Human Rights Commission got it right, however, and that they have correctly interpreted the constitution," said Makoe.

Makoe said the battle had become a matter of principle. "It is not about preventing white journalists from joining — they are our colleagues," he said.

"It's about an organisation representing formerly disadvantaged journalists who are determined to ensure that there is meaningful transformation in the media," Makoe said.

These comments were a greatly toned down version of Makoe's earlier response straight after SAHRC chairman Jody Kollapen's presentation of the commission's findings in which Makoe lashed out at Kollapen. Talk Radio 702 (who brought the complaint) and the media in general.

Referring to the process as "a judicial ambush" and a "sham trial" Makoe rejected the findings, which he said amounted to "its first banning order to a black initiative".

"The commissioner has shamed his office and the integrity of SA's democracy by

banning us after leading us into a judicial ambush — and the country's commercial media would be just as culpable to treat the process in typically uncomprehending fashion."

"Again this racist reaction underscores the need for the FBJ and organisations like it."

Less contentious was the commission's findings yesterday that the term "coconut", while likely to cause hurt, did not amount to hate speech.

This referred to a complaint by Talk Radio 702's Yusuf Abrarjee against journalist Jon Qwebane, who allegedly told him to "stop behaving like a co-

conut" when Abrarjee objected to the meeting excluding white journalists.

Kollapen prefaced his presentation of yesterday's findings with the comment that the commission was aware that its decisions were inevitably unpopular with one side or other, but that they were compelled to follow the constitution.

He admitted, too, that the decision came after heated debate in the commission.

The complaint was brought by Talk Radio 702 news editor Katy Katopodis and 947 Highveld Stereo after the exclusion of white journalists from FBJ's

inaugural meeting attended by African National Congress president Jacob Zuma earlier this year.

The invitation was circulated among black journalists, and whites who attended were asked to leave before the meeting started.

The commission recommended yesterday that the FBJ revise and amend its membership policies to "desist from excluding membership on the sole basis of race".

It suggested the FBJ take a leaf out of the book of organisations such as the Black Lawyers' Association.

Outrage at SA Human Rights Commission finding that race-based groups cannot be tolerated under constitution

Forum for Black Journalists chief defiant in defeat

Chantelle Benjamin

Chief Reporter

FORUM for Black Journalists (FBJ) steering committee chairman Abbey Makoe was defiant in defeat yesterday, saying that the organisation remained committed to its cause: the advancement of black people.

The South African Human Rights Commission (SAHRC) made it clear yesterday that race-based organisations such as the FBJ could not be tolerated under the constitution, and recommended the forum revisit its policies.

An outraged Makoe told reporters that the findings, based on a poorly constituted hearing, amounted to the banning of his organisation.

"We have effectively been found guilty of being black and having the uppity presumption of wanting to address the injustices of the past that continue to thrive to this date. There is no other reason for our 'guilt'," said Makoe.

The FBJ says it plans to appeal, and get legal advice on whether to take the matter to the Constitutional Court.

But constitutional experts say the SAHRC's finding are in line with constitutional law.

The decision by the forum to refuse entry to white journalists at its inaugural meeting addressed by ANC president Jacob Zuma this year, sparked widespread public debate, particularly in the light of other race-linked incidents in the past few weeks, which prompted appeals for unity by people such as Archbishop Desmond Tutu.

The most recent incident was the uncovering of a controversial video made by four white

hostel residents at the University of the Free State, which showed them dumping five black, elderly cleaners into eating meat that had been urinated on.

This happened at a whitenity hostel, which had been allowed to exist on campus despite a number of allegedly racist incidents.

The video prompted Irvin Khoza, chairman of 2010 World Cup local organising committee, to apologise for calling a journalist a "kaffir" in February.

The SAHRC demanded an apology from Khoza, and last month he released an statement saying that he had not intended to "open old wounds".

Khoza said that his motivation was the racism at Free State University.

SAHRC chairman Jody Kollapen said the committee's FBJ decision was made taking into account the recent spate of allegations of racism.

"The reality of our country in the last few weeks is an indication that we are not race neutral. It continues to define how we behave and how to continue to define our relationship with each other and the state," he said.

The SAHRC said yesterday it had no problem with the formation of an organisation that pursued the interests of a specific group — in this case black journalists — but not if this meant the exclusion of a group on the basis solely of colour.

The commission said such a decision ignored the fact that some white journalists may well support the same principles and concerns.

The SAHRC found against the FBJ yesterday for its policy of not letting white journalists join or attend functions orga-



Abbey Makoe, far right, of the Forum for Black Journalists (FBJ), seen here with ANC president Jacob Zuma, was defiant yesterday after the South African Human Rights Commission made it clear that race-based organisations such as the FBJ could not be tolerated under the constitution.

lised by the forum. "The restriction of its members on the basis of race would not pass constitutional muster," the commission said.

Constitutional expert Jeremy Gauntlett says there needs to be a substantial reason for discriminating against white journalists and excluding them from a meeting.

"It's not enough to exclude someone on the basis of dermatological differences," he said.

"I believe the SAHRC got it right in finding that there is no fundamental basis for differentiation between people in this case."

Gauntlett said it was of con-

cern that the people being excluded were also journalists, and they were not allowed to attend a closed meeting only because they were white.

Makoe says he believes such a forum is necessary to further the interests of formerly disadvantaged black journalists.

He rejects suggestions by both the commission and Gauntlett that other organisations with black-based interests, such as the Black Lawyers' Association and Advocates for Transformation, had kept their doors open to all races with the only proviso that they support their aims.

"So what?" said Makoe.

cerning the use of the word "coconut" to refer to a black journalist who raised concerns about the exclusion of white journalists at the media event, the commission said it could not make a finding of wrongdoing against journalist Jon Qwebane for his alleged use of the word "coconut".

The SAHRC said that while this did not pass the test for hate speech, it did under certain circumstances evoke feelings of indignity.

It appealed to the public and those who were aware of the effect of such a statement to avoid using it.

The commission also cleared Ehrenreich of hate speech charges.

The complaint was lodged in September 2006 by Agri-Western Cape against several organisations and leaders, including Ehrenreich, for allegedly inciting hatred against white farmers.

At a rally in response to allegations by a 22-year-old farm worker that she had been raped by white farmers and her son assaulted, Ehrenreich called for those present to declare war on bad farmers, warning that if they did not stop their abuse of farm workers and their communities "there will be blood on the farmers of these farms".

The commission found that while Ehrenreich's statements were "extreme" they did not amount to hate speech or incitement to cause harm.

They said that the constitution also protected the right of individuals to free speech, and that the comments were made amid allegations of continuing violations, particularly in the Rawsonville area where the statement was made.



Substitution! Delegates at Polokwane call for a change of guard. Photograph: Lisa Skinner

The dark side of the Second Transition

Is the decision to disband the Scorpions just petty revenge?

Contretemps
Richard Calland

South Africa has entered a period that can be characterised as a "Second Transition". It lacks the grand narrative of the first and the international spotlight is not as intense.

There are political, institutional and constitutional implications to this Second Transition. Most obviously, there is a political transfer of power taking place within the ANC. For those for whom a rotation of power is a prerequisite for democratic health, this may or may not provide succour.

For diehard liberals it will not be enough: a rotation of power means more than a changing of the personnel at the top. Rather, it means that a different political party takes over. But such transfers of power on the basis of free and fair elections have tended to be exceptions to the rule in many parts of postcolonial Africa. Conflict of the sort occurring in Kenya is common, whatever the election result and its integrity.

So, for progressive democrats, the change in power within the ANC is a welcome sign that the complacent rut into which those with political power can slide can also be prevented by means other than elections.

As eminent political scientist Adam Habib has argued in the past, political uncertainty is the essence of democracy, with two distinct forms: institutional and substantive. Institutional certainty is desirable because it establishes the rules of the game. Substantive uncertainty about the outcome of the game is desirable because "it keeps politicians on their toes and makes them responsive to the citizenry".

How does this framework help us understand South Africa's "Second Transition"? Polokwane will no doubt be remembered for many things, depending on who you are and from which vantage point you surveyed the scene. So for some the lyrics of *Lethu Mabinzi Wami* will resonate loudest. For me, the hand-rotating signal of many of the delegates – mimicking that of the football coach indicating

his decision to make a substitution – was the more significant. It amplified the call for change. The rules of the ANC's game held firm: they provided the institutional context for a transfer of power. Yes, it is the same party in office, and many of the policies will remain the same. But people matter greatly in politics, and it is a very definite changing of the guard.

Competitive intraparty democracy is a feature of modern democracy that is scantily understood or measured by analysts and scholars alike. It may have a downside, however – and this is the part of the Second Transition whose outcomes are as much a cause for concern as a moment of opportunity.

The ANC as a party is seeking to reclaim authority and control over the "ANC in government". This is the macro-story. And, in doing so, it is introducing a level of institutional uncertainty that could yet create democratic vulnerability and even a constitutional crisis.

Two examples come to mind, which are likely to have very different trajectories. The one is the dissolution of the Scorpions. The other is the idea of a Media Appeals Tribunal that is also the subject of a Polokwane resolution.

Both are political responses to the turmoil of the succession battle. The "new" ANC – the shadow government-in-waiting – believes the Scorpions did not do things "right" – as the new ANC treasurer Mathews Phosa put it, tellingly, on these pages a fortnight ago.

What he meant was that it did not do things the "ANC way". It permitted no fudge: it did not allow itself to be subjected to "process management" by the ANC leadership. Instead, it ran around like a bull in a china shop, behaving like, well, a bunch of "untouchables" – which was its original branding.

Now it must pay the price. Instead of reform and refinement, retaining the core virtue of the model, it will be destroyed. The baby will be thrown out with the bathwater. If it goes, it is

The hand-rotating signal of many of the delegates was the more significant gesture at Polokwane

hard to imagine a corrupt police chief being effectively investigated in the future. The impact on policing organised crime may be heavily detrimental.

The problem for the "new" ANC is that, while it is certainly true that the South African electoral system is based on political parties who win and thereby control the seats in Parliament, they do so also on the basis of a mandate that is given to them by the electorate at election time in response to a party manifesto.

So the question to which the ANC will have to provide a convincing response to the country is: given that in 2004 there was no manifesto promise to dissolve the Scorpions – in fact, the contrary – where is the mandate for doing so now?

In the absence of a persuasive answer, we will all be entitled to conclude that the decision is the consequence of the need for petty political revenge and nothing more.

Yet, addressing the South African National Editors' Forum last weekend, newly elected ANC deputy president Kgalema Motlanthe stated that, in the light of the government's electoral mandate, there could and would be no changes of policy arising from the Polokwane conference.

Into this potential gap glides President Thabo Mbeki, with his no less intriguing announcement in his State of the Nation speech a week ago that there will be an "interaction" with Parliament on the Scorpions legislation. That sounds to me like a recipe for a very interesting contest of strength between the two centres of power, and a test of whether Parliament is to recover its *joir de vivre* as well as its *raison d'être*.

Meanwhile, the half-baked idea of the Media Tribunal will surely be dropped. Unlike with the Scorpions, the political imperative will swiftly wane as the desire for revenge recedes and the new dispensation comes to appreciate which fights are worth having and which ought to be abandoned.

If it is to prove its merit over the incumbent president, whose cantankerous intransigence began in recent years to encourage uncertainty where once there had been stability, the new ANC leadership will have to show sensible judgement if it is to persuade us that the Second Transition will result in a measure of institutional composure equal to the first.

Relevant articles

MAIL & GUARDIAN, 29 FEBRUARY 2008

Readers' forum

The wrong page for the media

Comment

Dene Smuts

I am shocked to learn from "A democracy of untouchables" (February 8) that Icasu councillor Robert Nkuna was involved in drafting the ANC's proposal for a print media tribunal.

The very fact of his involvement in writing policy for the ruling party (as "a deployed cadre") is unacceptable when he is supposed to be an impartial member of a Chapter 9 constitutional body sworn to free speech and independence from government. I don't accept that he can be "deployed" in his "personal capacity" and simultaneously maintain an appropriately detached state of mind as a councillor.

His work for the ruling party is all the more problematic when it betrays an inability to understand the terms of Icasu's constitutional mandate or the misapplication of that mandate. If an Icasu councillor cannot see the explicitly defined constitutional difference between the section 192 regulation of broadcasting and the free-speech rights of the private media under Section 16, he can hardly understand his job — or he is using Icasu's standing to advance an unconstitutional proposition.

He asks: "Shouldn't the print media take a page from the broadcast sector, where state-regulated and self-regulated systems co-exist?" The answer is no, absolutely not.

Broadcasters are licensed and regulated for diversity because there is not enough frequency for every entrepreneur to set up a radio or TV station. Those who do get a licence are required to feature diverse voices and views, and to follow fairness rules in the interests of democracy and pluralism. That is the constitutional justification for regulation. Now that we are digitising, frequency will be less scarce, and Nkuna should be applying his mind to diminishing regulation in broadcasting — not introducing it for print, where there is no constitutional or practical justification!

This has been pointed out before, when the ANC released the September version of its new media proposals. And the ANC in fact stopped citing diversity as a justification for the Media Appeals Tribunal after its initial, often near-comical casting about for respectable reasons for the creation of a body it actually wants simply in order to control newspapers. (It tried last year, remember, to introduce

Icasu councillor
Robert Nkuna



prepublication censorship through the Film and Publications Board, but had to back down in respect of newspapers.)

The argument has now narrowed to the proposition that print is abusing media freedom to infringe rights of dignity, privacy and equality. But the courts are the appropriate and properly qualified place to weigh these rights. Defamation law exists to resolve conflicts between free speech and dignity, which encompasses reputation and personality.

It is nonsense to say, as Nkuna does, that "almost overnight the notion of public interest has been elevated above other rights". Truth and public benefit have always been a defence in defamation cases and our courts have astutely developed the law of defamation under the Constitution. The Health Minister never sued the *Sunday Times* for defamation. She never denied the truth of its reports. She did not even sue for damages. She had no case. Judge Mohammed Jajbay was not "overnight" inventing the notion of public interest when he ruled that it was relevant in this case, while cautioning against invasion of privacy.

Nor is defamation action the only mechanism in place. Injuria, whether civil or criminal, is available. And as for equality, we already have media tribunals: the two provisions of the Equality Act of 2000, which deal with publication, turn these quick-fix courts into arbiters of a hopelessly diluted version of hate speech — which now amounts to little more than injuria.

But the systematic erosion of free speech under Acts like these is not enough for the ANC. It is not enough that the Supreme Court of Appeal decided that politicians do not have to sacrifice their personality rights when entering public life, but that they do have to be more resilient than private citizens.

The ANC wants to write the Print Code of Conduct to give Manto Tshabalala-Msimang a case, and Tony Yengeni a case, and Jacob Zuma all the cases he might ever need. No doubt the code will follow the Dali Mpofu doctrine: the SABC CEO claims a constitutional basis (dignity) for avoiding disrespectful stories.

As in broadcasting, the ANC wants to be able to impose remedies, to take the place of the courts. It sketches a scenario in which the statutory complaints body's independence will be secured, and

now suggests the tribunal would take complaints from the public, as in broadcasting. But the power to lodge complaints will be widened to government in less time than it took the ANC to amend the original Film and Publications Act of 1996. And as for a parliamentary appointment process to secure independent "official ombuds" — Nkuna turns out to be a party deployee, doesn't he?

Dene Smuts is DA MP and the DA spokesperson on communications

ANC head of communications does not find Madam & Eve funny and highlights how race is portrayed in local media

When media's sense of humour is no laughing matter

Thom McLachlan

Media Correspondent

IT IS not only what is written about South Africans in newspapers, but also how they are depicted in cartoons that gets up politicians' noses.

Take African National Congress (ANC) head of communications Jessie Duarte who had a partial humour drought this week when it came to popular cartoon strip Madam & Eve for depicting Eve as a domestic worker who will always fill that role.

"I enjoy the comic strip — but will Eve forever be a domestic worker?" Duarte asked at a Mail & Guardian critical thinking forum held on Tuesday.

The fact that someone would care about a fictitious, two-dimensional character so much as to make such a statement like this is surprising, even to its co-creator Rico Schacherl.

"But the fact is that domestic workers are around and they are going to be exploited. It will not change in the near future because of the economic realities we face as a nation," he says.

Schacherl's reaction shows that while Eve could be seen just as a domestic worker, she can also be seen as an iconic figure representing a shortfall in government's delivery of services and job opportunities to the poorest of its followers.

In reality of course she is just a two-dimensional character.

Duarte's comments seen in context were meant to highlight her perspective on the way race is portrayed in the South African media. But last year's fiasco involving former head of the Presidency in the ANC Smuts Ngonyama's outrage at the way ANC president Jacob Zuma has been portrayed in cartoons in the Sunday Times — with a shower grafted on the top of his head, following his comments that he takes a shower after sex which is a preventative measure against HIV/AIDS — indicated a somewhat more defensive stance from government.

Moments later Ngonyama announced the ANC's intentions to set up a media tribunal.



Proudly South African, but not so funny, say the politicians of one of SA's favourite cartoon strips, Madam & Eve.

Insight & Opinion editor at the Sunday Times Fred Khumalo says, "there is a level of discomfort on the part of public figures when we pull out our poisonous pens".

Khumalo believes that while there has been no scenario where anybody has candidly said "you cannot do that", the fact that legal papers had been served on the paper's columnist David Bullard and cartoonist Jonathan Shapiro

by Zuma for defamation, prior to his taking up the party's presidency, is an indication that there was an uneasy feeling towards the power of the press.

"Those such as (Minister in the Presidency) Essop Pahad made threats against both the Sunday Times and the media as a whole implying a misguided notion that there were some things that we could not write about.

"There is a belief that some politicians are above the law, they are untouchable," Khumalo says.

"When a cartoonist gets hit with a million rand lawsuit — that is an abuse of power. It's basically a scare tactic," Schacherl says referring to the legal claims by Zuma.

Business Day cartoonist Brandon Reynolds, meanwhile says, "we're in an exciting phase in this country. We're playing around

with our newfound freedom and obviously this is upsetting people, but we're not in any danger of losing satire in the media."

"In SA the level to which we stick the knife in — from a satirical perspective — is relatively mild, compared to the UK or America," Schacherl believes.

"When the powers that be are trying to stop satirists from doing their jobs, it means we are doing our jobs properly," he says.

Schacherl believes there is no need to worry until editors start getting calls to "get rid" of troublemakers.

"When organs of state are used to silence people by implementing censorship, it is worrying ... while I can see there are character assassinations taking place, to attack the cartoonist is not correct. It is, after all, an editorial decision to run a cartoon or illustration."

"I think our editors have proven to be pretty resilient so far," he says.

The ANC's talk of setting up a media tribunal to report to Parliament has had the media questioning the ruling party's agenda. Should there, in fact, be an ulterior motive in favour of a gagged press, cartoonists and satirists would not escape its sights.

"With all the threats to the media, we might become so self-aware that cartoonists will not draw as freely as they used to," says Stellenbosch University head of journalism Lizette Rabe.

"Political figures should know what they are and that if they are in the public space they are open to public scrutiny and cartoonists will depict a visual representation of what they do," she says.

Rabe believes that the constitution provides sufficient support for the media and this should be seen as the guideline to which we turn when establishing whether a cartoon is promoting hate speech or if it is defamatory.

Press Council ombudsman Joe Thlooe says the constitution allows for freedom of expression, as long as it does not incite war or violence and is not defamatory.

"I do have respect for those in power and for the ruling party and what it has accomplished. But each day I have to divorce myself from certain myths and look at scenarios objectively," says Reynolds.

"Each day we are out there bringing attention to what is seen as administrative arrogance — that the government in power is always doing what is right — and each day we poke holes in that notion while they question who we are to do that. It's an ironic cycle," he says.

ANC resolution on the MAT

52nd ANC Polokwane Conference Resolution on Communications and the Battle of Ideas

ON THE ESTABLISHMENT OF A MEDIA APPEALS TRIBUNAL (MAT)

Conference adopts the recommendation of the Policy conference that the establishment of a MAT be investigated. It accordingly endorses that such investigation be directed at examining the principle of a MAT and the associated modalities for implementation. Conference notes that the creation of a MAT would strengthen, complement and support the current self-regulatory institutions (Press Ombudsman/Press Council) in the public interest.

This discourse on the need for a MAT should be located within a proper context. It has to be understood as an initiative to strengthen the human rights culture embodied in the principles of our constitution (Constitution Act of 1996) and an effort to guarantee the equal enjoyment of human rights by all citizens.

It particularly relates to the balancing of human rights in line with section 36 of the Constitution of the Republic. This especially relates to the need to balance the right to freedom of expression, freedom of the media, with the right to equality, to privacy and human dignity for all.

The investigation should consider the desirability that such a MAT be a statutory institution, established through an open, public and transparent process, and be made accountable to Parliament. The investigation should further consider the mandate of the Tribunal and its powers to adjudicate over matters or complaints expressed by citizens against print media, in terms of decisions and rulings made by the existing self-regulatory institutions, in the same way as it happens in the case of broadcasting through the Complaints and Compliance Committee of ICASA.

The investigation should further consider remedial measures which will safeguard and promote the human rights of all South Africans.

The Media and other stakeholders, including civil society, shall be consulted to ensure that the process is open, transparent and public. Parliament will be charged with this mandate to establish this MAT, in order to guarantee the principle independence, transparency, accountability and fairness.