



The implications of the Protection of Information Bill and the Media Appeals Tribunal.

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My thanks to the Diakonia and Democracy Development Programme (DDP) leadership for engaging media and the ruling party on this important and significant debate that has currently engulfed the public space. Such an effort on your part helps revive the civic debate, promote free speech and allow for an exchange of views – ingredients that make for a healthy democracy.

So why are we seeing this rising public outcry from civil society, big business, unions and the media, over the Protection of Information Bill (POI) and the ANC's suggestions or intended investigations for a Media Appeals Tribunal (MAT)

Simply put, the POI in its current form and the proposed MAT, discourage free debate in the media. Both are intended either overtly or covertly to censor free speech, curtail access to information, deny debate in all spheres of public life, and legislate and control a sacred space in our democracy – the media.

While the POI talks broadly of the protection of country, and MAT supporters in the ANC speak of the protection of individual rights, both segments are contradictory to the open society values prescribed and enshrined in our constitution. Both will lead to high levels of unjustifiable censorship within the media.

I will reflect firstly on the POI and its impact on the media.

At face value you do not have to be a lawyer or a legislative scholar to unpack the glaring clauses in the POI that will hinder a free media.

Constitutional and legal experts point out that the POI will not survive the Constitutional Court! Why then are the lawmakers and parliamentarians embarking on this long and tedious process if they already know this? Some say it is to enforce control unfairly and censor media's scrutiny on state corruption.

As it stands, the overarching aim of the POI is to create a statutory framework for the protection of sensitive state information.

Media lawyers and scholars contend that the Bill in its current form hinders two vital constitutional rights - Freedom of Expression and Access to Information. Denying the media access to classified information offends values of openness, accountability and transparency. For instance, Print Media South Africa (PMSA) is of the view that the bill would fail to pass constitutional muster in respects that will significantly restrict investigative reporting on matters of public interest.

The POI in broad terms speaks of three levels of information to protect sensitive state information – Confidential, Secret and Top Secret - that will be harmful to the state or national interest. Such documents could remain classified for 20 years, unless the Minister in charge decides otherwise. In addition when requested to review such classified information the head of an organ of state may refuse to confirm or deny the existence of the information if it is classified as top secret.

Media Freedom is a guarantee in our constitution. This guarantee is designed to serve the interests of citizens through a free flow of information. The citizens are you and me and all those who buy newspapers, watch television, and listen to the radio. You do not have to be a skilled analyst to understand what type of stories will fail to make the front pages of newspapers, headlines on radio and the main stories on our independent television screens.

The Bill calls for a review of the documents every 10 years and asks that the status be made public. If the public is denied access to any classified information, how then can the public be properly informed?

Other clauses in the Bill that undermine media freedom relate to a number of criminal offences that apply mainly to journalists. It is criminal for journalists to be in possession of classified information, access classified information, publish unclassified information and could face jail time for the disclosure of such information. The jail term could be anything from 5 to 25 years.

'The hostile activity offence', for example, carries a minimum jail sentence of 25 years. The current access to classified information Act (PAIA) can be lodged, but then Clause 23 of the Bill places overt powers of disclosure in the hands of the

Minister. Clearly the consequences for media freedom are worrying and the media is of the view that it must be sent back for review and not be rammed through parliament.

The Media Appeals Tribunal

At the heart of the proposed Media Appeals Tribunal is the ANC's need to hold media accountable, regulate media ownership, diversity and transformation in the media. It is intended to be there for the 'public good'. The ANC discussion touches on commercial imperatives and sensationalism at the expense of public interest and diversity of views. This sounds reasonable and acceptable, yet if these are the real reasons for MAT then there are other ways of achieving such desires without implementing a state or politically controlled structure to hold media accountable.

The barriers to media ownership and the commercial imperatives of running a newspaper is not something a tribunal can fix. It is more a case of creating an enabling economic environment that attracts new media owners into the current market. Arguments by some that bottom-line pressure erodes the news content in that news stories are subject to commercial pressures is also un-true.

Editors and journalists are aware of the pitfalls of commercial pressures on the newsroom and will not allow a situation where the bottom line prerogatives dictate the news content.

The timing of MAT at Polokwane had nothing to do with protecting the rights of the 'poor' or addressing the real concerns. It came at a time when the mainstream media were seen to have adopted an anti-Zuma stance. In fact when, as some in the ANC said, "media got it all wrong" about who would be the country's President. It began the year before when the Sunday Times was under fire for exposing the health records of the late former Minister of Health Manto-Shabalala Msimang.

That being said, attempts to now whip the media into shape and muzzle its coverage of corruption through a media tribunal to get agreement on what is being dished out by some in the ANC unfettered – is not going to go down to well. There will be resistance and more importantly, if such efforts appear to undermine press freedom and our constitution, the response from civil society organisations will be fierce. Thus the outrage that we are seeing locally, nationally and internationally.

Some in the ANC argue that the resistance by media is tantamount to a defensive reaction because media refuses to own up to its mistakes, and is hence weary of MAT or any outside control. Media is therefore accused of supporting an internal 'media friendly' system of self regulation in the current Press Ombudsman and Press Council.

The ombudsman system is based on the same system used by 80 of the 86 press councils of the democratic world, and the print media that are found to have transgressed all have the same punishment, according to the South African Press Council, which oversees the ombudsman's office.

The newspaper has to apologize, it has to correct the mistake, and it has to print the statement of the ombudsman on a page in the paper that the ombudsman determines.

That being said, yes the media makes mistakes and yes we have to address it fairly. We have to also address issues of transformation, ownership and in some areas quality. An appeals Tribunal will not achieve this – this is something that has to be driven from within the industry as it is being driven in other business entities.

What are the pitfalls with the current system of self-regulation according to some in the ANC?

- It is led by a former journalist
- The process of arbitration and adjudication is long
- The punishment is weak
- That judgments from the ombudsman are often disregarded due to the voluntary nature of the system

That being said, some in the media have responded pro-actively, and in the SANEF meeting with the ANC, editors suggested that the current system be strengthened and improved on. Our suggestions for a structure will be tabled at a future meeting.

Clearly the debate has forced media and the Press Council into a process of introspection. Some newsrooms have responded by correcting mistakes timeously, tightening up on inaccuracies and investing in more strict accuracy testing of stories before publication.

The Press Council has embarked on a review of the current structure. Media owners in conjunction with SANEF have suggested a Commission of eminent persons, independent of media, to probe solutions to strengthen the current system.

Currently the courts are there to deal with defamation and the “rubbish” that some in the ANC accuses the media of publishing. If the issue is to call media into question over publishing ‘private details’ of politicians and public figures, and trampling the rights of the same, then MAT cannot do more than the courts and the Press Council are doing. The media can also be held accountable by the Chapter 9 institutions such as the Human Rights Commission.

Furthermore, the Constitutional Court has developed a common law of defamation to bring it in line with the guarantees of media freedom, making it more difficult for any person – including any politician – to successfully sue the media for defamation, points out one expert. He adds: “if the court cannot impose stricter standards to punish the media for defamation, then MAT – which is less independent than a court, will never be constitutionally allowed to”. The issue is to clearly understand the rights of a public figure and to know that in fact there is very little that is private.

South Africa is a country governed by a Constitution that enshrines media freedom and the answer is to utilise a remedial mechanism within the ambit of the Constitution.

At the 50th national congress of the ANC in 1997, former President Nelson Mandela as the leader of the party expressed concern about the role of the news media. He at the time remarked that: “A bad free press is preferable to a technically good subservient press”.

Media has made great strides since then, and a cursory glance of the media landscape in this country under protection from the Constitution I believe gives the public a wealth of information, diverse views and information, opinions and commentary that helps them make discerning decisions. There will no doubt always be room for improvement, but a state or politically imposed system, or a statutory mechanism, is not the solution to fix it.

In the final analysis government and the ANC must accept that it is elected to serve the people. It must also understand that such a role involves accountability to the electorate. Media is seen in any democratic state as the body that holds government accountable. Efforts to curtail such scrutiny will be viewed as a sinister shroud over the very essence of governance by the people for the people.