

Guarding the guardians: A Media Appeals Tribunal?

A Right2Know Campaign
Discussion Document

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Introduction

The African National Congress (ANC) has proposed that a statutory Media Appeals Tribunal (MAT) be investigated by Parliament in South Africa.¹ At present the country's press is self-regulated. This system works relatively well, with more cases found against the media than for.

The ANC's proposal for a MAT was made as a formal resolution at its policy conference in Polokwane, December 2007, and remains as an issue for implementation. The press at present enjoys relative freedom, governed as it is through self-regulation: The Press Code; the Ombudsman and the Appeals Panel.

“Effective self-regulation is the best system for promoting high standards in the media,” according to the Declaration of principles on Freedom of Expression by the African Commission on Human and Peoples' rights.

This paper argues that if a MAT were to be introduced in South Africa it would signify significant closures for freedom of expression, media freedom and therefore democracy, as has occurred in a number of African countries post colonialism. It reaches this conclusion after moving from the premise that while the present self-regulation system, may be imperfect and while the media make mistakes, government control would be infinitely worse: the proposed MAT would ultimately ensure political control of the media. And at the very least, journalists would self-censor, for fear of offending the statutory regulatory body.

The MAT proposal, a political proposal, can also be viewed alongside the state threat to the media be if within the context of the Secrecy Bill having just been adopted by the ad-hoc committee in Parliament in September 2011, without a public interest defence: journalists, whistle-blowers, trade unionists, academics, activists against corruption all face jail time for possession, disclosure, and publication of classified information.

Professor Franz Kruger² quotes French academic Claude-Jean Bertrand, who used the term Media Accountability Systems, abbreviated as M*A*S and defined as “any non-state means of making media responsible towards the public” (2004). In a nutshell, Kruger argues that while the media makes mistakes, this does not translate into an argument for statutory regulation.

Presently the press is “guarded” by self-regulation, and the public and protected by the Constitution. Should a Tribunal be instituted, this would change to control and guarding by whichever ruling party is in power.

¹ The ANC passed a resolution to this effect in Polokwane December 2007, and this was re-asserted at the national general council of the ANC in September 2010 in Durban.

² See Kruger (2009) paper: Media Courts of Honour: self-regulatory councils in Southern Africa and elsewhere in Fes Media Africa series

Even if the ANC assures opponents of such a statutory tribunal that its proposal is for an “independent body” merely to make journalists more “accountable”, opponents of the MAT are wary.

From the ANC’s point of view³, and other supporters’ of the MAT such as the South African Communist Party (SACP) the Tribunal can be called an accountability mechanism consisting “independent” individuals. But such independent bodies⁴ have, in recent years, come under severe pressure from the ANC.

Guy Berger, who is anti a MAT and is an activist for the free flow of information, points to the argument by the proponents (in a paper Best Practice in Media Self-Regulation (July 2011) published in *Ecquid Novi* Vol 32 (2) the “existing press council and ombudsman were portrayed as being slow in responsiveness, low in profile, violating the principle of separating player and referee, being exclusive author of their code of conduct, reactive rather than proactive in initiating complaints, structurally empowered to impose only symbolic sanctions giving insufficient weight to rights like dignity and privacy, and failing to raise standards in the press as a whole.”

The question now is: Are these deficiencies in the system sufficient reasons to warrant a ruling party taking control to impose a statutory tribunal? This issue is interrogated in the introductory chapters to the Press Council’s Review, released August 18, 2011.

The implications and the Reactions

The ANC’s big concern is the different or out of tandem “ideological outlook of the media”. Clearly it would prefer a more sympathetic and less critical press. It also does not like investigations, such as the arms deals and the Oilgate scandals, which embarrass it. In addition, the issue of how to balance constitutional imperatives of both freedom of expression and dignity and respect for privacy has not been resolved. Sanef and the Press Council have responded in a few ways to the proposal of a MAT: Sanef set up a Press Freedom Commission in July, which is chaired by retired judge Pius Langa. The Press Council completed a year long process of public hearings and submissions and drew up a new proposal for a Press Code, one which would have stricter sanctions on media for making mistakes. This Review would now go to the constituents of the Press Council for acceptance or rejection.

Critics of a MAT have pointed to several possible or even probable implications of having a statutory body control what goes into the press, and which is accountable to Parliament. It would result in self-censorship, as journalists would be afraid of whatever punishment could be meted out to them for making mistakes. In the view of

³ Not all in the ANC, there is no one view in the organisation about MAT but some of the well-known supporters include president Jacob Zuma, secretary general Gwede Mantashe, spokesperson Jackson Mthembu, and government spokesperson Jimmy Manyi.

⁴ The Office of the Public Protector and the Judicial Services Commission are two such examples. There is alleged executive interference in these independent bodies.

this paper, it would most certainly mean regulation of speech and freedom of expression.

Not all newspapers are of one view. A *Business Day*⁵ editorial expressed the view that the MAT was intended to replace the self-regulation system. This is not precisely what the ANC has proposed (although this might well be the ultimate intention). The ANC says it wants to “strengthen and complement” the present system. Nevertheless the editorial perceived, correctly, the ANC’s intentions in the following way: “It argues editors and newspapers ruin lives and reputations without having to take responsibility for their actions; and they must be held to account by a body that can dish out punishments for bad behaviour that really hurt.

“The MAT would bring the press under political control, which is why the media and civil society have opposed it.” (op cit).⁶

However, in the end the argument is, and supported by the argument in this discussion/position paper, is that the current system of self-regulation may be weak but it should be strengthened rather than replaced or complemented by a statutory body. A statutory body would be anti-democratic, close spaces for real debate and investigations, as sanctions against newspapers and journalists could be severe. To have a body, which controls the media, under the auspices of Parliament – irrespective of which party has the majority in Parliament or near majority, is shortsighted and not a democratic way to guard the guardian.

But *Business Day* argued further that regulation of the media should not just be out of the hands of politicians but should perhaps be out of the reach of journalists too: “If media regulation needs to be independent of politicians, does it not also need to be independent of journalists and publishers? Where self-regulation is insufficiently convincing, genuinely independent regulation surely would be. The point, anyway, isn’t what regulation works or doesn’t. The point is what the public is comfortable with.” Half-Touché. The point gives one food for thought but it is not necessarily the way to go. After all, no one understands the newspaper industry better than a newspaper journalist. A guardian body should consist of an equal number of citizens – men and women from diverse backgrounds, civil society stakeholders, retired judges but also journalists.

This argument in *Business Day*’s editorial is for independent regulation, against statutory regulation as in a MAT, but is also against self-regulation. Proponents of self-regulation argue that the industry is best equipped to handle regulation, as it understands better than any one or institution how things work, and depending on peer review is powerful indeed.

⁵ *Business Day*: media needs an independent fix: 11 July 2011

⁶ The editorial was written after the saga of the News of World newspaper from the famous Murdock group News Corp was shut down after advertising was withdrawn because it was discovered the methods used to gain information were illegal. The owner closed the paper on 8 July 2011 after 168 years of publishing sex, and crime stories. The saga is now called the hacking scandal. Journalists hacked into phones to get information and admitted it and it was alleged that they bribed policemen to get information.

Don't conflate and collapse issues

Now let's turn to an argument from the Democratic Left Front (DLF).⁷ The organisation made a convincing argument about why a MAT is unworthy of the ANC's attention in a recent⁸ statement-cum-paper.

The Forum stated that it condemned the attempts to suppress the freedom of expression through the establishment of a statutory MAT and the promulgation of a Protection of Information Bill. The DLF was "under no illusion about the lack of transformation in the media" but did not believe that the Tribunal was being proposed to address these problems.⁹

The intention of the Tribunal in the ANC and the SACP is to "stifle the spaces that do exist for critical journalism, especially of their own leaders, who because of the elite nature of much journalism, are the main subjects of critical reporting: "Both the Tribunal and the Protection of Information Bill [Secrecy Bill] are intended to make investigative journalism impossible."

The DLF supported the concept of self-regulation but not as it is currently practiced. Instead it believed self-regulation should be about ethics, and about keeping journalistic decision-making as far away from centres of power such as Parliaments, media owners, governments and so forth. Unfortunately, the paper noted that journalists were not organised enough to run it as a peer review system, and there is substantial evidence to support this.

The Forum's conclusion was that the Secrecy Bill and the Tribunal were part of a bigger malaise in South African society and politics today: the present ruling elite is enhancing the coercive capacities of the state, and was in "the process centralising power in an increasingly unaccountable security cluster".

The Forum did not offer too many practical solutions but then this was not their intention. It is worth noting though that in their proposal for an "investigation" into a Tribunal, the ANC and the SACP do not offer any ideas on how this investigation would take place, nor any implementable plan either. Parliament should investigate this, they state, and it becomes unclear how Parliament can investigate such a thing.

⁷ The interim steering committee of the DLF consists Brian Ashley, Ayanda Kota, Jane Duncan, Mazibuko Jara, Martin Legassick, Noor Nieftagodien, Vishwas Satgar, Roy Chetty, Trevor Ngwane, Phumi Mtetwa

⁸ The statement is not dated but it arrived by email in June 2011.

⁹ Some of the problems include "middle class and politically centrist biases of the mainstream media", the urban bias and neglect of the rural areas, "socialism barely exists as a political concept worthy of serious debate in the media".

Can such an investigation be part of Parliament's mandate, or is it stretching it? For some clarity, Stella Ndabeni ANC communications whip would have been ideal to interview. She did not respond to email questions. However, one of the authors of the resolution, Lumko Mtimde did grant an interview to amaBhungane (M&G: 19 June 2011).

The below argumentation should draw out some good discussion points to engage with.

Explaining the ANC's rationale for the MAT

Interview (June 2011)¹⁰: Lumko Mtimde – Chief executive of the Media Development and Diversity Agency¹¹ and one of the authors of the discussion documents on the media tribunal for the ANC's national general council (ngc) in September last year.

Who will run this tribunal? This tribunal will be independent of all interests – political and commercial and will be passed through an act of parliament – the same way that the IEC, Icasa and the HSRC has.

Registration of journalists? There will be no such thing. People who want to trivialise the idea have come up with the idea of registration.

What's the problem with self-regulation?

It has no teeth. It's a process for itself.

On the self-regulation review

It's good that the review was done, so hopefully the outcomes of the review will be debated as part of a public enquiry.

What's behind the idea of the tribunal?

It's to strengthen and complement the self-regulation process. The resolution is clear, read it, and don't trivialise it.

Problems with the media?

¹⁰ See Mail & Guardian 10 June 2011: Press not off ANC's hook

¹¹ The MDDA was set up as a statutory body – a government agency to work in partnership with media groups to develop and diversify media in terms of the MDDA Act no 14 of 2002.

They are unfair to the ANC, inaccurate reporting. They write about the opposition winning but it was the ANC that won the last election. Why can't the media acknowledge that the ANC did well?

Now there's a double threat – Secrecy Bill and Media tribunal?

These two are separate processes; they are not the same thing, they must be delinked. There is legislation of state security all over the world. If the issue is that it is too broad then that must be the focus of the criticism.

The above interview did not take the issue any further than what has already been discussed. There are a few things to note however: opponents of the Secrecy Bill and the Tribunal are keen to link both as together they both strangle freedom of expression, investigative journalism and ultimately democracy.

Research on the media and the Self-Regulation system

Media Monitoring Africa (MMA), a research group into the media freedom and diversity issues, among other, in a similar way to the DLF, Sanef and other opponents of a statutory MAT condemned the idea but also offered some practical solutions in a submission to the Press Council,¹² under topics, for instance, the overall framing of the code, how to minimize harm, children, public interest and discouraging brown envelope journalism.

Reviewing self regulation

The Press Council conducted a two-month countrywide public hearing process, while the entire review process took a year, to end a few months ago, April 2011. The report from these hearings has been handed over to the constituent associations of the Press Council: the Newspaper Association of SA, the Magazine Publishers Association, the Association of Independent Publishers, PMSA the Forum of Community Journalists and Sanef.¹³

Sanef and PMSA launched a Press Freedom Commission in July 2011, which would appoint an eminent persons panel to examine self-regulation of the media in South Africa. The ANC was contemptuous in its dismissal.

¹² The MMA's submission is online.: MMA Submission Press Council October 2010

¹³ See Daniels, G: 24 June 2011 Overhaul of self-regulation on the cards. AmaBhungane website: www.amaBhungane.co.za

Mthembu told the media, at the launch, that the commission was already flawed. “If you get a group of eminent people to investigate media control with specific reference to your favoured mechanism, they will be nothing more than playboys of Sanef and PMSA.”¹⁴

Which makes one wonder at the commitment of the ANC to press freedom, to strengthening and enhancing self-regulation or to just wanting control over something it does not have control over, the print media - something it fears will continue to expose all its secrets, as it is doing.

Some concluding reflections

Self-regulation must be strengthened. Journalists must be more aware of the code of professional ethics: the Press Code. They must adhere to it at all times, and must apologise when they err. The press does seem to have a credibility problem with some sections of the public, and some NGOs, but not all.

The ANC is not committed to self-regulation. It seems to be highly committed to a statutory tribunal. However, to date, no plan of action is on the table.

The MAT must be fought by all those who have reservations about the intentions: although there seems to be no concrete implementation plan, the idea has been mooted, a resolution has been taken which cannot be rescinded until the next ANC policy conference takes place (Mangaung: December 2012).

Meanwhile, this Tribunal signifies significant closures for democracy and its implementation would completely squeeze out the space for investigative journalism, especially when coupled with the Secrecy Bill.

The Press Freedom Commission set up by Sanef could be a creative and imaginative initiative. It should be supported, although there are detractors arguing this is just more of the same. The MMA’s proposals should be examined more closely, as there are several interesting ideas in there about self-regulation. In addition, various academics (Berger, Duncan, Harber, Froneman, Teer-Tomaselli and Fourie) have done much commendable on this issue.

To end of a low note, however, on the ground journalists seem to be quite complacent about their freedoms being whittled away (see interview with amaBhungane’s

¹⁴ See *Mail & Guardian*: ANC slams Press Freedom Commission: July 8-14 2011

Stefaans Brummer 2009, for my research¹⁵: in which he states that over the Secrecy Bill “the media is in a deep slumber”.

Journalists appear to have left all their protests (and we haven’t heard too many of these) to Sanef, the editors’ body. The question of who will guard the guardians, if self-regulation is okay, how could it be improved, what would happen if there was a MAT and a Information Act, is hardly discussed in journalist circles, which is astonishing. Besides the Mail & Guardian¹⁶, and AmaBhungane attending in activist capacity (and 702 and Daily Maverick in reporting mode)¹⁷ not too many journalists attended the Right2Know rally and march to the Constitutional Court on August, 13, 2011, for example.

Those who are concerned about freedom of expression and the whittling away of the free space of the media (irrespective of what their criticisms of the press are, and these are many: profit driven media, middle class bias, concentration of ownership/lack of diversity and so forth) should be strongly opposing the proposed MAT. There are ways to make the media more accountable (but to the public) and more responsible in its reporting without having to resort to draconian statutory regulation. As Guy Berger concludes in his article on Best Practice – we must rise above “expedience” and “vested interests” such as no doubt party political interests.

¹⁵ Daniels 2010: The Role of the Media in a Democracy: Unravelling the Politics between the Media, the State and the ANC in SA (PhD thesis)

¹⁶ Editor in chief of the M&G Nic Dawes was a speaker at the rally.

¹⁷ There may have been more media reporting

Appendix 1: The ANC's Polokwane resolution: The Media Appeals Tribunal Resolution re-adopted at the ANC ngc in Durban, 20-24 September 2010.

The existing self-regulatory system (Press Ombudsman and Press Council) is ineffective and needs to be strengthened to balance the rights of the media and those of other citizens, guided by the values enshrined in our bill of rights, for example human dignity, equality and freedom. The commission affirmed the call for Parliament to conduct a public enquiry on:

a) balancing the rights enshrined in the Constitution, like rights to dignity, freedom of expression and media, guided by the values enshrined in our bill of rights, human dignity, equality and freedom.

b) enquiry on transformation of the print media in respect of a [black economic empowerment] media charter, ownership and control, advertising and marketing and the desirability of the establishment of a media accountability mechanism, for example the media appeals tribunal.

c) the media accountability mechanism [should be] in the public interest including the investigations into the best international practices, without compromising the values enshrined in our Constitution

d) on what regulatory mechanisms can be put in place to ensure the effective balancing of rights, this may include self-regulation, co-regulation and independent regulation. Any media accountability mechanism, should be independent of commercial and party political interests, should act without fear, favour and prejudice, should be empowered to impose appropriate sanctions and must not be pre-publication censorship.