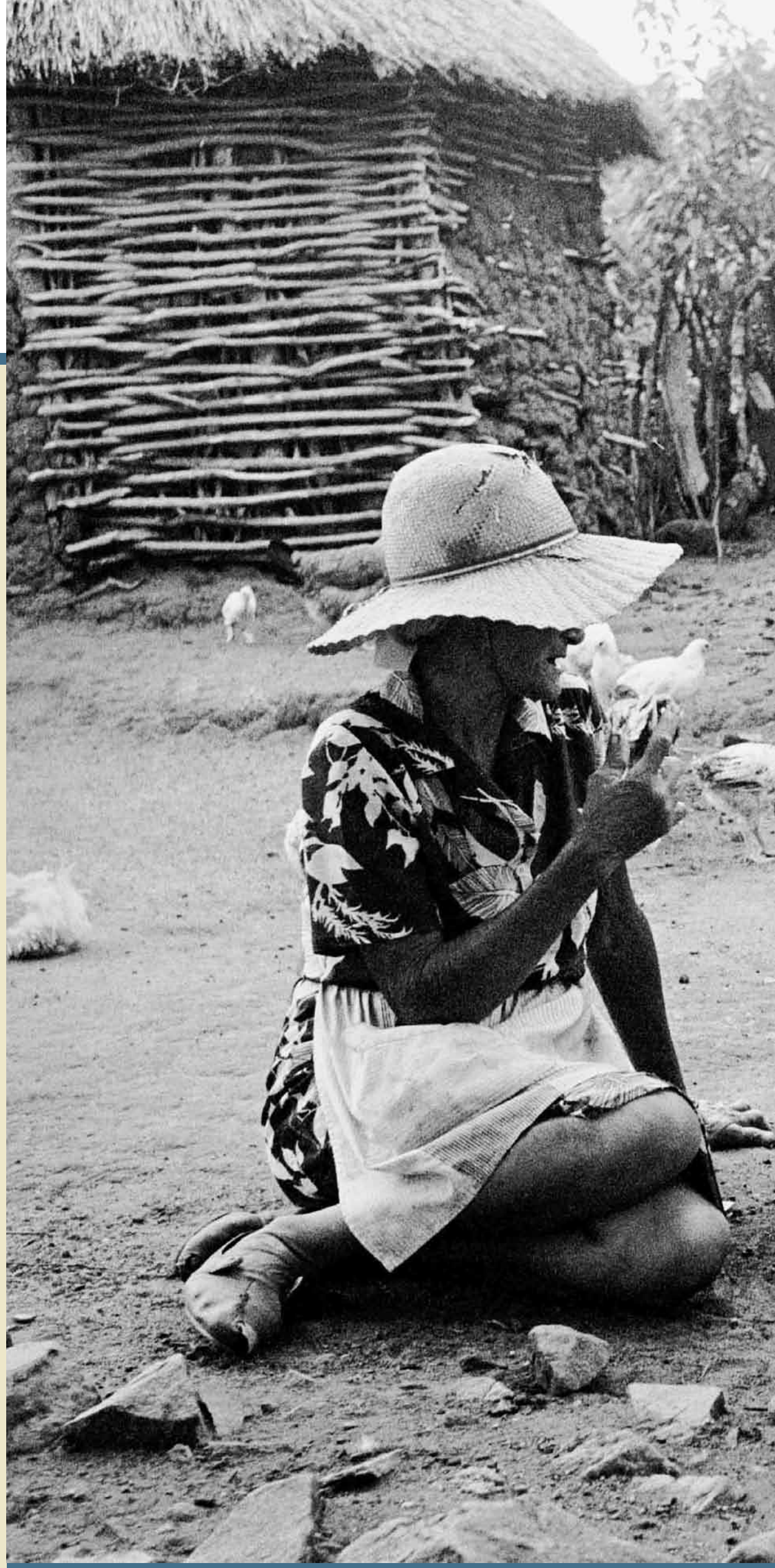
“NOW,
FOR THE FIRST TIME,
WE ARE BEING
PUSHED
INTO A DEBATE OVER THE CONSTITUTION ITSELF,
AND ARE BEING ASKED
TO CONSIDER
THE PROPOSITION
THAT WE NEED
LESS FREEDOM,
NOT MORE.”



Cedric Nunn

LAW AND CONSCIENCE

BY NIC DAWES

Journalists have spent the past two years worrying about, and mobilising against, legislative proposals that represent a threat to our work. We must be careful, however, not to miss the larger scheme of which the Protection of State Information Bill and proposals for more robust regulation of media content and ownership form only one part.

For nearly two decades South Africans have been debating how best to realise the more equitable society set out in the Constitution. We have adopted more conservative approaches – the macro-economic stabilisation strategy of the Gear years, for example, and more classically left strategies such as investment in state-owned companies and industrial policy – but the basic framework has never been up for grabs.

Now, for the first time, we are being pushed into a debate over the Constitution itself, and are being asked to consider the proposition that we need less freedom, not more.

The Protection of State Information Bill chills journalists because its draconian jail sentences and broadly drawn offences will ask us to choose between the demand of our conscience and that of the law, a choice that should not be imposed on us in a rights-based democracy. Conscience, vocation, and simple professional duty dictate that when we obtain credible information that reveals serious wrongdoing, we publish it, notwithstanding any "top secret" stamp on the front page. The Bill, on the other hand, demands that when we obtain such information we march down to the nearest police station and hand it over, or risk years in prison.

Of course conflicts between conscience and law were routine under apartheid, they were structured into our understanding of a criminal system, and our place in resisting it. In the Constitution, however, we have a basic law which aims to bring into harmony the dictates of law and of conscience. To see these duties crudely set up against each other as they are in the Bill is incomprehensible, even traumatic.

ANC proposals for a statutory Media Appeals Tribunal (MAT), which establishes the press complaints process in law, and allows politicians a role in appointing media commissars, is even more disturbing, because its scope extends to ethical regulation broadly, not just classified secrets. While ANC secretary general Gwede Mantashe has said the party accepts the recommendations of the Press Freedom Commission for a tougher and more independent regime of voluntary regulation, the MAT is far from entirely off the table, and the threat is backed by pressure to deal with the (very real) transformation issues in newspaper ownership through a charter, despite the fact that within the tripartite alliance the charter process is broadly discredited as a machine for replicating a narrow elite, and for buying influence. More creative and perhaps more credible routes to transformation, it seems, are not acceptable to Parliament's portfolio committee on communication, no doubt because they provide less political leverage.

These moves come as senior alliance figures, from President Jacob Zuma to South African Communist Party general secretary Blade Nzimande and the influential Deputy Correctional Services minister Ngoako Ramatlhodi, launch a broader attack on the constitutional scheme. Zuma and Nzimande question the power of judicial review that is at the heart of the rule of law, while Ramatlhodi describes the Constitution as a failed compromise that entrenches white dominance. To defend the courts, Nzimande tells us, is "anti-majoritarian" and a "liberal assault".

Nowhere is the refusal to understand the structure of the Constitution more clear than when this approach is being voiced by Nzimande's reasonable-sounding deputy, Jeremy Cronin, an increasingly vocal critic of the press, and of civil society, which he accuses of being harnessed to a "right-wing liberal" agenda.

In a textbook and ultimately very revealing aside in a recent article in the SACP's online journal *Umrabulo*, Cronin asks: "Who voted for the *Mail&Guardian*?" He goes on to suggest that it is really through the state, and the majority party, with its large electoral mandate, that accountability should be demanded and democratic development should take place.

The objective of these remarks is clearly to delegitimise those who contest the untrammelled power of the government and the ruling party. They are of a piece with his attack on the union federation Cosatu for collaborating with unelected civil society groups, and they betray a fundamental misunderstanding of the constitutional architecture.

Pace Cronin, Jimmy Manyi, and others, the Constitution does not ask us to trust the government nor the ANC. Indeed it does not even ask us to trust the state, with its architecture of separate executive, legislative and judicial powers.

On the contrary, our founding law envisages a set of overlapping institutions of accountability functioning in an "open democracy" where ideas can be exchanged, tested, and debated freely.

Special room is carved out within the broad right to free speech for the press for precisely that reason, and space for civil society, for trade unions, for scientists, artists, and academics is similarly guaranteed.

These rights are not ornaments glued onto to basic democratic structure because they look pretty in UN or World Bank surveys – they are part of its foundations. Journalism, activism, creativity, are legitimised not by an electoral mandate, but by the structure of our democracy.

They are classical individual rights, of course, but they are also intimately linked to the "progressive realisation" of socio-economic rights like access to housing and water, connecting the moral autonomy of human beings with their basic conditions of life. It is this insight which underpins the effective activism of organisations like the Right2Know campaign – formed in the aftermath of the Protection of State Information Bill – and the social justice coalition, which put freedom of information and of speech at the heart of the struggle in poor communities for basic services and an accountable government.

The fight to secure the space for journalism then, is part of a much broader battle for rights and for justice.

We can certainly debate how best we make use of the freedom we currently have, improving ethical standards in journalism, committing more resources to training, developing sustainable and appropriate approaches to transformation and diversity in both ownership and newsrooms. If we retreat from the assertion of our fundamental constitutional and democratic role, however, or conceive of it in narrow and sectoral terms, we will find ourselves watching from the sidelines as the extraordinary progress of the past 18 years is rolled back.