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WHAT WILL CO-REGULATION MEAN? THE PRESS FREEDOM COMMISSION REPORT AND ITS IMPLICATIONS FOR THE REGULATION OF JOURNALISM

BY JULIE REID

On 25 April the Press Freedom Commission (PFC) released its final report, detailing its recommendations for the reform of South Africa's press regulatory system, and in particular its suggested changes to the Press Council of South Africa (PCSA). It was the end of a 10-month process during which the commission examined the written submissions of more than 220 civil society groups, political parties, academics and members of the public, travelled to four different countries and held public hearings in three different cities (Cape Town, Durban and Johannesburg). Of course, in the light of the ANC's insistent calls for a media appeals tribunal, it was an important process. The eventual report compiled by commission at the end of all of this, at first glance, suggests relatively sweeping changes to the current system of press self-regulation in South Africa.

Or does it?

The most significant recommendation lies in the change from a system of self-regulation to what the Press Freedom Commission terms independent co-regulation: a system of accountability performed cooperatively by representatives from the press and the public, but independent of government. This is the aspect of the report which has drawn the most criticism and which understandably makes the media folk the most nervous. The African Commission on Human and People's Rights Declaration of Principles on Freedom of Expression in Africa states, "[e]ffective self-regulation is the best system for promoting high standards in the media". A report prepared by a team of researchers from UNISA for the Press Freedom Commission, reveals that out of the top fifty countries in the world which achieve the highest press freedom ratings, 35 of them, or 70%, have a self-regulatory mechanism for the press. Simply, there are

real concerns that to ditch a system of self-regulation will symptomatically result in a decrease of editorial independence, a lessening of journalistic freedom of speech, and the possibility of the practice of self-censorship.

So, is there reason to worry?

In answering that question it is important to realise that the Press Freedom Commission's suggested move from self-regulation to independent co-regulation is not really all that big a change. The truth of the matter is that the Press Council did not constitute a self-regulatory body in the first place, even though it may have (incorrectly) labelled itself as one. Previously, the Press Council was constituted by six representatives from the press and six public representatives: in the truest sense of a definition, that's co-regulation (between the press and the public). A real self-regulatory system would include representatives from the press only, which was not the case at the Press Council of South Africa. Before we begin to mourn the loss of self-regulation we should remember that we are not losing self-regulation at all, because we did not have it to begin with.

The Press Freedom Commission recommends that the number of public representatives on the Press Council be increased to seven and the press representatives be decreased to five, so that the public representation slightly out-weighs the press representation. Previously the press vs public representation was a fifty-fifty scenario, so on the surface this change seems quite significant. But the most important activity of the Press Council body is the adjudication of complaints against publications, and this will be handled by something called the Ombudsman

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Panel. This is the cog in the Press Council machine that will have the most actual, real, and practical implications on the functioning of the system as a whole, and on newspapers that have a complaint laid against them. The Ombudsman Panel will include three public and three press representatives, meaning that at the site of activity where complaints are adjudicated, the press vs. public representation is back to a fifty-fifty deal. The adjudication of a single complaint will be dealt with by the Ombudsman himself, and two members from the Ombudsman Panel: one press and one public representative. Although the numbers are now downsized, this balance remains the same as the previous Adjudications Panel, on which sat six press and six public representatives. For all practical purposes, the public involvement in the process of adjudicating complaints has not gone an inch beyond what it was in the past.

That is not the case with regard to the Appeals Panel, wherein the new system the public representatives will out-weigh the press representative three to one, and accompanied by a retired judge. For newspapers this may be a cause for concern: it means that if a complainant is unsatisfied with the original Ombudsman's ruling and takes the matter to appeal, the majority of representatives from the Press Council who handle the appeal will not be from the press. But the impact of this move needs to be weighed against what it will mean in practice before press folk get overly nervous. The Press Council has stated that the Ombudsman rules in favour of the complainant two-thirds of the time, meaning that only about 33% of complaints are dismissed in favour of the press. This means that the number of complaints taken to appeal will only emanate from 33% of complaints laid, and we know that very few of those cases ever get taken to appeal. Indeed, as long as the Ombudsman and the adjudication panel do their job well, the appeals process should be utilised only on very rare occasions. Of course the hefty public representation and the measly press representation at this part of the process will concern newspapers, but this situation will become a reality on very few occasions.

On 4 May, *Mail&Guardian Online* reported the

perceived lack of press representation in the new process as such: "... no press employee should serve on either the adjudicating or appeals panels" (Sole 2012). That comment skews the picture slightly because it invokes the impression that the press is left largely out of the process, which is not the case. On page 80 of the Press Freedom Commission Report, you will find this line: "13.1 The Appointments Panel shall appoint an Ombudsman Panel of *three press* and three public members and an Appeals Panel of *three press* and five public members" (Press Freedom Commission Report 2012:80) (my emphasis). Both the adjudicating and appeals panels include representatives from the press, and one press representative will be involved in the adjudication of original individual complaints and during the appeals process.

Another significant change to the complaints procedure is the inclusion of third-party complaints, which means that the Press Council, as a media regulatory body, is now more consistent with other similar bodies such as the Broadcasting Complaints Commission of South Africa (BCCSA) and the Advertising Standards Authority (ASA). Prior to the Press Freedom Commission process, the Press Ombudsman really only accepted complaints from parties directly involved in the offending press report, meaning that no matter how offensive an individual reader may have found the content of a particular publication, they could not lay a complaint unless they were directly connected to the report. The Press Freedom Commission recommends that third party complaints now be allowed so long as the complaint can be deemed to be within the public interest. What this means is that the next time a major newspaper publishes explicit images of a sex act on its front page, we can all complain about it, which was not the case before. The denial of third party complaints meant that concerned parents who did not want their children exposed to images of sex on the front page of a newspaper, for example, had no grounds for a complaint to the PCSA, whereas they could lodge a complaint were the offending images screened on television before the watershed.

The absurdity of the Press Council's past refusal to accept third party complaints is perhaps best understood when considering some of the complaints which are

accepted by other media regulatory bodies. In February 2011 the ASA ordered the withdrawal of a LG cellular phone advertisement which represented a young girl ‘rescuing’ her terrified parents from a large spider by spraying shaving foam on the spider to immobilise it. This happened after the ASA received a complaint from the NSPCA and ten individuals (third parties). No complaint was received from a first party (who in this case, was the foamed-up spider). The complaint stated that “the commercial perpetuates negative conceptions about spiders and promotes the unnecessary and cruel killings of living creatures”. Spider lovers out there have every right to complain, have their complaints taken seriously and have offensive advertisements that discriminate and negatively stereotype spiders taken off air.

Critics have noted that the acceptance of third-party complaints may open the Press Council system to political pressure. That is possible, but it is also important to note that the system is under political pressure anyway, and has been for a long time, to which it has displayed remarkable resilience. Also, citing fears of political pressure as a motivation for excluding a measure which would serve to improve the process of press regulation and monitoring in general, is simply not good enough. The Press Council should not be constructed according to trepidations of the political ramblings of a few, but primarily according to how it best serves the reading public of our country. If the Press Council can do the latter well, then that is its best defence against political pressure. Simply, if the Press Council were to continue to refuse the acceptance of third party complaints, it would be all too easy for the ANC to complain that the Press Council is deaf to the voices of the people, unconcerned with the legitimate complaints of readers, and therefore an exclusionary body of the elite. To refuse the acceptance of third party complaints, especially ones that are in the public interest, in this light is simply not ethically defensible. If we all start talking about a media appeals tribunal in Parliament, the Press Council’s refusal to accept third party complaints would be akin to laying free ammunition and a Kalashnikov on the table in front of the ANC. Now that is political pressure.

Another seemingly significant recommendation made by the Press Freedom Commission is the introduction

of sanctions on publications that are found to have transgressed the press code. To ask newspapers to pay fines after publishing what is deemed offensive material is enough to have editors screaming. But again, on closer inspection of this move we find that very little has actually changed. The sanctions suggested by the Press Freedom Commission amount to space fines, and monetary fines will not be imposed with regard to the content of a publication. A newspaper may be required to publish a small apology of a few column centimetres for minor offences or inaccuracies, or several columns to publish a full statement or report of the adjudication process. The amount of space “fined” will depend on the severity of the infraction. But that is not really any different to how the system worked before. Section 6 of the Press Council’s complaints procedure spells out the same process, only without referring to it as a space fine or a hierarchy of sanctions, and even mentioning that the Ombudsman may order the publication of a complainant’s reply to an article. The Press Council have called this action the “findings of the Ombudsman”, and the Press Freedom Commission have called it a “hierarchy of sanctions” which entails “space fines”: but in practice it boils down to the same thing.

Media people are natural cynics and perpetual critics. We like to criticise, complain and grumble: that is part of our business. It is what we do. But in the case of the Press Freedom Commission perhaps we should pause and reflect on the value of the process, before getting over-excited with our objections. First, we should remember that the Press Council is a fantastically flexible body when compared to most other South African institutions of any kind, largely because it is not a statutory body. Before any of us had heard of the Press Freedom Commission, the Press Council had already conducted its own process of review, which is something that it has committed to do on a regular basis. So, if some of the recommendations contained in the Press Freedom Commission’s report, after trial in practice, prove to be error, they can be changed again quite easily. Second, the Press Freedom Commission managed to attract a much larger number of submissions and oral presentations than the Press Council review a year earlier, and even included participation

from the ANC (who arguably indirectly initiated all of this). The increase of the inclusion of a greater diversity of positions and voices on the platform of the Press Freedom Commission should be regarded as a good thing: high levels of public participation and engagement are, after all, supposed to be what democracies are all about.

But the real value of the Press Freedom Commission report may be measured in how defenders of media freedom intend to use it when entering discussions on a media appeals tribunal. If media freedom activists rubbish the Press Freedom Commission report, discarding it outright as a piece of suggested over-regulation of the press and a cheap political compromise, then the report itself is of no use. But in the grander scheme of things that may be folly.

In its submission to the Press Freedom Commission the ANC stated that an independent mechanism is the most desirable device for press regulation, which should be autonomous from political interests. In effect, by suggesting a system of independent co-regulation, that is what the Press Freedom Commission has delivered. The main difference between the picture of press regulation painted by the ANC and the Press Freedom Commission, is whether or not the regulatory body is established by Parliament. Considering that the Press Freedom Commission has delivered more or less what the ANC has asked for, insisting that this matter runs the gauntlet of Parliament now will only solidify criticisms that the ruling party wishes to bully the press. Other than that sticking point, the Press Freedom Commission report proves to be quite cleverly worded, in that it has actually changed very little in terms of how the Press Council currently functions, while selling the system as if it is fundamentally more independent from the press or any of the centres of power, including government.

How the ANC will be able to logically argue against that remains to be seen, but it will be difficult. The Press Freedom Commission report may smell of a cheap political compromise, but if handled carefully it could be used as a swift tactical move to out-flank the opponent. That is assuming, of course, that the South African National Editors’ Forum (Sanef) and PCSA accept the recommendations made by the PFC.