

Now for the really **bad** news

Guy Berger

THE GOOD NEWS is that the draft new constitution improves our right to information. The worrying news is that it has not yet accepted press representations for strengthening freedom of expression.

The disturbing news is that the draft bill of rights expressly refuses to protect unfettered free expression.

But without doubt the really bad news is not the flaws in the draft constitution. It is that the media missed the whole story.

Not that South Africa's newspapers were entirely snoozepapers. They, and their electronic counterparts, did a good job with the draft's deal (or lack thereof) on provincial powers, the Senate, the anthem, capital punishment, and the like.

But, to find the facts about constitutional thinking on matters pertaining to the press, one had to turn elsewhere.

The Internet was there — and the info highway produced the provisions particular to press freedom. A week later came *Constitutional Talk*, bulletin of the Constituent Assembly, inserted directly into most daily newspapers.

Still missing, in all this, however, were the journalists.

For the public, even with the Constitutional provisos in hand, there was no independent professional source — no Fourth Estate collecting, creating and publicising interpretations, comments, analysis, background and context about what the constitution means for press freedom.

And yet it is precisely these issues that earlier this year precipitated the most public rupture in the press in decades.

After lengthy lobbying, including securing support from the International Press Institute and the International Federation of Newspaper Publishers, the Conference of Editors won an audience with the Constituent Assembly's relevant theme committee.

But Conference of Editors (CoE) chair Khulu Sibiyi failed to pitch up, and his white colleagues were left playing second fiddle to representations by Thami Mazwai and the Black Editors Forum. The CoE's well-researched dossier by advocate Gilbert Marcus was eclipsed by Mazwai's call for constitutional limits on foreign ownership of the press.

Sunday Times editor Ken Owen, moving force in the campaign to get to the Constituent Assembly, felt he had been suckered — that the CoE's case could now be condemned as a whites-only initiative. In a dramatic display of *hubris* in his paper, he resigned; followed in similar style by *Mail & Guardian* editor Anton Harber.

So it was that the two papers that — more than any others — had focussed attention on press freedom under a new constitution fell

silent. It was as if they had withdrawn from the battle. Thus, neither paper raised a peep when the draft constitution was published without the CoE's views achieving acceptance.

It may have been a self-fulfilling prophecy that Owen and Harber's constitutional representations came to naught. But their failure to follow up on the issues involved could only have helped along a sorry situation.

Race is a real issue in South Africa's media control and content, and it rightly occupies much attention among journalists. But press freedom is not a racial issue, and nor should it be neglected in relation to the questions of colour.

However, without lead from erstwhile champions like Owen and Harber, the remainder of the media kept mum on the matter.

Was it a case of having lost the will to fight — a feeling that a press freedom campaign is counterproductive if it comes from white journalists? Was it a tactical decision to lie low, in the face of criticism from government, ANC and the Black Editors Forum? Was it a case of assuming that whatever the Constituent Assembly may decree, press freedom will merrily continue its happy way? Or, was it just sloppy, forgetful, uninformed — and uninformative — journalism?

Whatever, if the press is pussyfooting around the problems, South Africa's most powerful political voices are not.

My prediction is that there will first be increasing attempts to bypass the mass media, with the government trying to set up its own media apparatus.

No one would deny either state or government the need for a strong communications initiative, even if most journalists would also argue that a democracy needs a strong and independent mass media as well.

The danger is that no government in a democracy can possibly mount a communications plan that parallels the power and reach of politically-independent mass media (print as well as broadcast).

A time may therefore come when politicians under pressure decide it is time to mess with the media. Certainly this would be much more difficult than in the past, but a culture of constraint can be created. How? Consider the following:

● Freedom of expression in the draft constitution expressly does not protect "the incitement of imminent violence". Could this, then, open a journalist up to prosecution for reporting remarks like PW Botha's "don't awaken the Afrikaner tiger" or Mangosuthu Buthelezi's regular refrains that certain ANC actions "could lead to violence".

● While this particular clause is still under discussion, the draft says the right to free expression "does not protect ... advocacy of hatred based on race, ethnicity, gender or religion that constitutes incitement to discrimination".

In terms of this, a journalist could be really stretched in terms of comprehensive and verbatim coverage of racial clashes at Wits University, or anywhere else.

● And how does the "hate speech" provision impact on reporters trying to reflect Robert Mugabe's views on homosexuality (not to mention Winnie Mandela or those of Khoisan X!)?

In short, the constitution could create problems for journalists to do their job — and especially in a climate where criticism of government (from the left or the right) could be ultimately construed in colour coding. Could you quote the PAC's Patricia de Lille criticising the government for "pandering to whites"?

Also with ominous potential in the draft constitution, is the fact that while freedoms like religion cannot be limited under a state of emergency, freedom of expression may be.

To be sure, this is hinged on the qualification that any such limitation must still be reasonable, and consistent with the values of "an open and democratic society based on freedom and equality".

Yet what of a scenario of real mayhem in KwaZulu-Natal, prompting a central government crackdown in which freedom (necessarily) is a far cry, and where reporting on human rights abuses by security forces is ruled out?

It would have been reassuring had the Constituent Assembly taken on board CoE recommendations for a stronger test as to the constitutionality of curbs on press freedom. But left undecided — at this fairly advanced stage of negotiations — is the matter of whether limitations (such as on the right to freedom of expression) must be justifiable and/or necessary — and not merely reasonable.

Why the hesitation in the Constituent Assembly in this? The sad thing is the last place you'll find this question asked, let alone answered, is in the press.

Sometimes, it is true, people get the press they deserve. In this case, however, the people should not be blamed. The press has done a pitiful job of informing them of the press freedom picture. That is the bad news.

The worst news is that if things don't change, the press will get the pressures it deserves; the public will be one to suffer.

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