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PRESS REGULATION IN SOUTH AFRICA AND ITS IMPLICATIONS FOR PRESS FREEDOM

ABSTRACT

Using the critical political economy of the media theory (CPEM), this article analyses press regulation in South Africa. The data was collected from statutory documents, which inform press regulation in the country, and was analysed using inductive thematic content analysis. Four themes emerged, namely from self-regulation to independent co-regulation, the communal approach, independent co-regulation, and citizenship. The findings indicate that press regulation in South Africa has adopted a communal approach, which implies that press regulation attempts to include the media and the public, and it is supposed to be independent from the government, this does not make it much different from the previous structure of self-regulation.

Keywords: press regulation; press freedom; media freedom; critical political economy of the media; communal approach; citizenship.

INTRODUCTION

South Africa's approach to press regulation has progressed from self-regulation in 2007 to independent co-regulation in 2012, when the Press Council of South Africa (PCSA) adopted the recommendations of the Press Freedom Commission (PFC) following a review of the PCSA. Between 2002 and 2013 the ANC proposed a number of controversial ideas about press freedom, including a Media Appeals Tribunal (MAT 2010) and the Protection of State Information Bill (POSIB, or "Secrecy Bill"). Debates played out mainly in the English commercial press.

Since 2010, academic debates about press regulation and press freedom also emerged contesting the ANC's ideas on press freedom, and supporting self-regulation (Berger 2010; Daniels 2011; Duncan 2014). Duncan (2009) and Daniels (2011: 11, 233) argued that the MAT was not the answer to regulating the media, and that self-regulation of the press, independent from government intervention, was a better alternative. Duncan (2009) and Daniels (2011) both considered

issues in the press that accounted for the ANC's change in approach regarding freedom of expression, and which possibly informed the suggestions for a MAT and the POSIB. Duncan (2014: 180) argued for the self-regulation of the press in a plea to the PCSA not to adopt statutory regulation or co-regulation. Similarly, Berger (2011: 41) conducted a study on best practice for press regulation and concluded that, "for local best practice, it is imperative that the model introduced to a specific country takes into account the context and history of that country, and must have a common purpose". Berger (*ibid.*) warns against "... selective borrowing while disregarding the context of different countries", and argues that "... special caution should be taken when utilizing concepts derived from different countries".

Berger's (2010: 291) argument for self-regulation points out that it avoids the changes of political control and leaves media ethics largely to media professionals, both as individuals and as a community. Through these academic debates, press freedom is simply equated to self-regulation, and press regulation is made synonymous with press freedom. Berger (2010: 291-292) further argues that "... it is the extent to which the broader public cherishes press freedom and self-regulation which provides the ultimate guarantee against political control".

In contrast to these ideas, press regulation does not happen in a vacuum but includes power relations (Freedman 2008: 16). Each actor attempts to have its interests reflected in the way that the press is regulated. These interests are either to meet economic ends, or to have political control and, at times, both (Golding & Murdock 2005: 60). Murdock and Golding (2016: 764) posit that political parties often exploit the press in support of political ends, whereas the media could give some ideas privilege over others in consideration of profit margins, and the interest of its target audience. However, a press that is well regulated in a democracy opens up space for inclusivity, pluralism, diversity and citizenship (Bagdikian 2000: 234; Habermas 1992: 231). These are the notions that determine press freedom in a democracy.

PRESS REGULATION IN A DEVELOPING DEMOCRACY

The Press Ombudsman and the Press Council of South Africa that regulated press freedom until 2012 operated on the premise of self-regulation. However, the press and its regulatory bodies were forced to change the self-regulation system to an independent co-regulatory system in 2012 due to the pressures from the ANC-led government (PCSA 2016).

The idea for what would become the suggested Media Appeals Tribunal emerged from the ANC conference in 2002. In its discussion the ANC highlighted what the party perceived as "press wrongdoing" in, for example, how the party's ideas about press freedom were represented in the media. The ANC published a Media Appeals Tribunal (MAT) discussion document in 2010 in order to address these perceived transgressions by the media. Later in the same year, the Protection of State Information Bill (POSIB) was compiled to support the MAT. Both documents were presented to Parliament. By October 2018 the POSIB was still awaiting Presidential assent (Parliament 2018).

The statutory documents that provided the framework for regulating and governing press freedom, media freedom and freedom of expression over the years since democracy are the Bill of Rights, the Windhoek Declaration, the Review of the Press Council of South Africa, the Press Council of South Africa Constitution Document, and the Press Freedom Commission Report on Press Regulation in South Africa. The Constitution of South Africa gives credence to these documents. The Constitution, in section 16, protects and guarantees freedom of expression to all citizens; however, it does not guarantee press freedom to the extent that press freedom is accessible to all citizens. It merely attempts to open space for press freedom to develop. In other words, the Constitution guarantees the potential for press freedom, but not the exercising of press freedom.

The Windhoek Declaration notes that freedom of information is a fundamental human right. Consistent with article 19 of the Universal Declaration of Human Rights, the Windhoek Declaration also states that maintaining and fostering an independent, pluralistic, free press is essential to the development and maintenance of democracy (WD 1991).

An independent press is defined as “a press that is independent from government, political or economic control or from control of materials and infrastructure essential for the production and dissemination of newspapers, magazines and periodicals” (WD 1991). A pluralistic press, on the other hand, calls for the end of monopolies in the press and the existence of the greatest possible number of newspapers, magazines, periodicals and other media which would reflect the widest possible range of opinion within the community (*ibid.*).

The Windhoek Declaration's main concern for the advocacy of an independent and pluralistic press is that in many African countries journalists, editors and publishers have been victims of repression. Journalists and editors have been murdered, arrested, detained and censored, and are restricted by economic and political pressures, which limit the opportunity to publish. These pressures include restrictions on newsprint and licensing systems, such as restrictions preventing the free movement of journalists, restrictions on the exchange of news and information, and limitations on the circulation of newspapers among countries across national borders. The Windhoek Declaration views censorship as a human rights violation (WD 1991), and encourages African governments to provide constitutional guarantees of press freedom and freedom of expression.

A CRITICAL POLITICAL ECONOMY OF PRESS REGULATION

Critical political economy of the media (CPEM) acknowledges that economic dynamics define key features of the general environment within which communication activity takes place; however, it does not accept economic dynamics only as a complex explanation of the nature of that activity (Murdock & Golding 2016: 765). Equally, CPEM acknowledges that press regulation influences press freedom in a democracy. Within the regulation the other factors that can influence press freedom are forms of media, forms of ownership, media systems and management, history and context, the institutional roles of the media and their freedom to carry out those roles, funding and financing, production and media products, content and representation of reality, and audience access and reception (Ndela 2003: 6).

In relation to these factors, CPEM examines the role of power in the production, distribution and exchange of mediated communication (Mosco 2011: 10). CPEM developed during the 1960s among sociologists and political scientists who became concerned about what they saw as the dubious role of large corporations and the state in cultural production (Hesmondhalgh 2013: 42). CPEM is based on the premise that media are first and foremost businesses (Golding & Murdock 2005: 60). These businesses are subject to constraints by owners and other market profit oriented forces such as advertisers. The focus in CPEM is on the relationship between economic and social practices and political organisation. CPEM is relevant to this study because it contends that change can take place, which means that it is historical and pays attention to context. For example, private power is made blatant, and this makes CPEM important in understanding the relationship between private interest and public good (Wasko *et al.* 2011: 2). At the heart of CPEM's core normative project are questions about "diversity and quality of the information, analysis by major news and current affairs outlets, both print and broadcast have been central to debates around how well the media system serves the requirements of democratic citizenship" (Murdock & Golding 2016: 767).

In particular, CPEM is based on a communal approach because it promotes a press regulation that prioritises the public as a citizen rather than one that prioritises the public as a consumer. For these reasons, CPEM advocates for regulation of the press that emphasises community instead of individualism. In similar fashion, instead of a public that is defined by capitalism, critical political economy seeks a public defined by citizenship (Bagdikian, 2000). This also forms the basis for this article's discussion of the implications of the independent co-regulatory system.

METHODOLOGY

The study employs a critical approach based on qualitative data collected through a document analysis (Braun & Clarke 2013: 30-31). CPEM is useful as both theory and methodology because it focuses on seven interrelated themes. These are the historical or social context of a media system at national and global level, the institutional roles of the media and their freedom to do so, media systems, ownership and management, funding and financing, production and media productions, content or representation of reality, audience (access and reception), and media policy and regulation (Golding & Murdock 2005: 63-65). Using CPEM's themes as a framework, an analysis of the Press Freedom Commission's (PFC) review document provided the following four themes:

- ◆ from self-regulation to independent co-regulation;
- ◆ communal approach;
- ◆ independent co-regulation; and
- ◆ citizenship.

DISCUSSION

Theme 1: from self-regulation to independent co-regulation

As discussed above, a review of the Press Council in 2011 dealt with the Press Council's Constitution, the South African Press Code and procedures for laying complaints of ethical or other misconduct by newspapers and magazines and for dealing with these (Press Council Review 2011). The task team's mandate was to develop a process, no matter how structured, that would meet the need for dealing with complaints against newspapers and magazines while promoting excellence in journalistic practice and upholding independence, freedom of expression and freedom of the media (*ibid.*).

The current Press Council as from 2012 "is an independent co-regulatory system which involves exclusively representatives of the press and representatives of the public" (PCSA 2016). The change in the way in which the press is regulated has an influence on press freedom. Press freedom does not happen in a vacuum, but involves competing interests. CPEM involves an evaluation of these competing interests (McChesney 2008: 307). Classical liberal political economists and their present followers begin from the assumption that public intervention ought to be minimised and market forces given the widest possible freedom of operation (Golding & Murdock 2005: 65). Classical liberalism keeps government and the media in conflict, while the Constitution guarantees private freedom. McChesney (2008: 307) posits that, as long as government's influence on media is limited, the flow of information and ideas will be safe. However, CPEM points to the distortions and inequalities of the market system and argues that the deficiencies can only be rectified by public intervention (Golding & Murdock 2005: 65). Similarly, CPEM is interested in determining the appropriated scope of public intervention (*ibid.*). As a result, CPEM opens up space for press freedom that is based on a positive freedom that allows for participation in the press and in press regulation (Marxist 2008).

Press freedom requires restraints because it can be used to serve economic and political interests (Bagdikian 2000: 239). Press freedom is created through, for example, a constitution, policy discussion documents, and regulation. As a result of the PFC report's recommendations, media regulation in South Africa is now shaped by a system of independent co-regulation, whereas previously it had been regulated by a self-regulating system. As a result, the regulation of the press has changed from being based on liberalism to some indication of neo-Marxism. Liberalism focuses on the liberty of the individual where there are no restrictions (Curran 2000: 18).

In its previous iteration, the PCSA leaned towards liberalism because it focused on a self-regulatory process, which placed importance on values and neglected the structure of the press. For instance, the self-regulated PCSA consisted of six members who were representatives of the press. One of the members of the press was nominated to represent the public. The office staff consisted only of the Ombudsman and Deputy Ombudsman. Decision-making authority regarding complaints received by the PCSA rested with the Press Ombudsman. In the independent co-regulatory system, the office of the PCSA was extended to include a director, chairperson, deputy chairperson and

a public advocate, and the decision-making authority regarding complaints received by the PCSA rests with the director (PCSA 2016).

The Press Council Review placed the principles of journalistic practice, independence, freedom of expression, and the freedom of the media above the importance of the structure that should regulate press freedom. But CPEM emphasises both values and structures and economic dynamics behind the range of cultural production, texts and regulations of culture, and also incorporates questions on cultural consumption, access and cultural competence (Golding & Murdock 2005: 61). As a result, the industry bodies that make up the Press Council decided to hand over the Press Council Review to the Press Freedom Commission (PFC). The PFC was set up by the South African National Editors' Forum (Sanef) and Print Media South Africa (PCSA 2016).

For an effective and responsible regulatory system the PFC suggested independent co-regulation (PFC 2012). This recommendation from the PFC ties in with Neo-Marxism, which argues that the press must belong to the many (McQuail 2010: 96). PFC recommendations resulted in changes to the structure that gives effect to press regulation. Since 2016 the Appeals Panel consists of ten public members. The number of press representatives has been increased to eight from six. Furthermore, the Chairperson and the Deputy Chairperson alternate each term. If the Deputy Chairperson is from the members of the press one term, he or she will alternate with a member of the public the following term. Should the Director of the PCSA not be able to resolve certain matters at the level of mediation, these matters are escalated to the Ombudsman. This means that the Ombudsman still has the authority to make the final decision at the upper level of mediation. However, if a complainant is not satisfied with the decision of the Ombudsman, the complainant can appeal to the Appeals Panel, chaired by a retired judge appointed by the Chief Justice of the Constitutional Court. The complainant forfeits legal representation in the process, but is instead assisted by the public advocate (PCSA 2016).

The public advocate assist members of the public in formulating their complaints in an attempt to resolve complaints amicably by liaising directly with the publication on behalf of the complainant. In addition, the public advocate may represent the complainant before the Ombudsman and/or the Appeals Panel (PCSA 2016). The public advocate is also flexible enough to accept third party complaints and to lodge a complaint on a matter that a third party sees fit for complaint.

Theme 2: communal approach

The system of independent co-regulation is communal in nature. The communal approach means that the PCSA focuses on public good and on involving a community that consists of the public in the regulation of the press. Similarly, CPEM is concerned with the balance between capitalistic enterprise and public intervention. It goes beyond technical issues of efficiency to engage with the basic moral question of justice and public good (Golding & Murdock 2005: 61).

However, a communal approach cannot exist if the entities that make up the community in the communal approach are not representative of the general public in South Africa.

At present, the “public” in the PCSA is slanted as many of the members who represent the public have ties to especially commercial media companies as former employees or a similar affiliation. Public representatives with no media ties would perhaps allow for a better space for independent thought about press regulation in South Africa. In this way the communal approach required by independent co-regulation can be achieved.

Influence from commercial media is not suitable to a communal approach as the main objective of these private media institutions is to make a profit. CPEM, on the other hand, is a critical orientation that challenges unjust and inequitable systems of power (Wasko *et al.* 2011: 4; Murdock & Golding 2016: 764). In this regard, influence from community media is better suited to the communal approach because the focus of community media is on serving the community and members of the community. The behavioural consequence of a particular media system can be influenced by product differentiation and advertising behaviour (Gomery 1989: 49). In turn, this can influence the press regulation system.

A communal approach as advanced by the independent co-regulatory systems is ideal for a developing democracy such as South Africa. However, the parameters of what constitutes the “public” are vague in the current independent co-regulatory system. Currently, public representation is limited to those with some media experience, often within private media institutions and from tertiary education institutions. In this regard, the current independent co-regulatory system has to rethink its parameters for its public approach to be truly representative of the public. CPEM argues for a media that serves the public good (Golding & Murdock 2005: 61). When the Press Council does a type of “self-selection” of its public representatives it is self-regulation in a different form.

Theme 3: independent co-regulation

The PFC review envisioned independent co-regulation as being independent from government and private media as the government has political interests and private media has economic interests to serve. Independence in co-regulation is aimed at being a custodian to the public. Independent co-regulation is a “system of the press that involves public and press participation with a predominant public membership but without state or government participation. It is accountable to the public” (PFC 2012: 7). Hence, independent co-regulation differs from co-regulation as co-regulation involves both the government and the media industry (PFC 2012: 10). In independent regulation, “the Press Ombudsman should be independent of government and in operation independent of the media” (PFC 2012: 107). However, in independent co-regulation, as defined by the PCSA, there is no emphasis on independence from private media.

It could be argued that the extent to which the PCSA is independent is skewed towards the interests of the media, as the analysis of the structure and specifically public representation proved. For example, the Press Code and the principles of the PCSA are based on the democratic roles of the media. CPEM requires a strong focus on citizens. Thus, rather than serving the public, the PCSA should aim at serving the citizens that form the public. Citizens should be treated based on the principles of citizenship and the public sphere, rather than the public interest, which is difficult to define (Bagdikian 2000: 207).

Theme 4: citizenship

Citizenship, viewed through the lens of CPEM, requires press regulation that is inclusive, pluralistic and diverse. Diversity and pluralism of the press are important for press freedom. Pluralism is generally associated with a number of different and independent voices and different political opinions and representation of culture within the media (Doyle 2002: 11). The type of regulation of the press can also influence the degree of pluralism and diversity and, consequently, press freedom.

Furthermore, citizenship presupposes collective action in pursuit of equality and fraternity as well as individual liberty (Murdock 1992: 19). Citizenship is also the full right to social and cultural formation, which implies the right to participate in existing patterns of social and cultural life and the right to challenge these configurations and develop alternative ones (Murdock 1992: 20).

CPEM assists in understanding the structure of citizenship in a world that addresses people as consumers. The PCSA also realigned the bodies it comprises in 2016 in consideration of the rapid development of online media. The bodies that form the PCSA are the Association of Independent Publishers (AIP), the Forum of Community Journalists (FCJ), the South African Editors' Forum (Sanef), and the Interactive Advertising Bureau of South Africa (IABSA), which represents online media (PCSA 2016). Again it could be argued that these bodies are not representative of the public, and specifically of citizenship, as most members' interests are aligned with the commercial aspect of media. For example, the Association of Independent Publishers operates to protect the commercial interests of publishers (PCSA 2016). Although the PCSA includes a public advocate to assist members of the public to formulate complaints, the focus of CPEM is on the diversity and quality of regulation and how well media regulation systems serve the requirements of a democratic citizenship (Murdock & Golding 2016: 767). Thus, to serve the democratic citizenship, the public advocate needs to be accessible to all citizens. This would include diversity of language as well as cultural sensitivity as "access to the public sphere is constituted in every conversation in which private persons come together to form a public" (Habermas 1992: 23). This places an education purpose on the PCSA as well in terms of how the media operates. The public sphere is a concept which, in the context of today's society, points to the issue of how and to what extent mass media can help citizens learn about the world, debate their responses to it, and reach informed decision about what courses of action to adopt (Dahlgren 1991: 1).

CONCLUSION

The analysis confirms the change in South Africa's approach to press regulation, from self-regulation to independent co-regulation with a communal approach. The communal approach involves the public in the regulation of press freedom and regulates the press in relation to justice and public good. However, there is room for improvement in the communal approach within which the PCSA currently operates. In order for the press to be plural, diverse and accessible to the public, the structure of press regulation is important. Self-regulation, coming from a liberalistic perspective, places more emphasis

on principles while independent co-regulation, with its communal focus, can only be accommodated through structural changes to specifically public representation. The implications for press freedom is that press freedom is moving towards being treated as a positive freedom rather than a negative freedom. This entails emphasis on the freedom to participate in matters of press freedom, rather than to be protected from a particular entity such as the government.

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