

**Bill can't stand constitutional scrutiny. *The Sunday Independent* (South Africa), 25 July , 2010.
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It has been a turbulent few weeks for media freedom. Not only is Parliament considering a bill that, if passed in its current form, will result in widespread censorship of political speech, but politicians have also renewed their calls for a print media tribunal to regulate the content of newspapers and magazines.

The Protection of Information Bill would legislate several criminal offences, such as accessing, disclosing and continuing to possess classified information; communicating classified information that directly or indirectly benefits another state or directly or indirectly prejudices the republic; and publishing a "state security matter", being any matter that is dealt with by or relates to the functions of the various state security and intelligence agencies.

The maximum penalties for these offences range from five to 25 years in jail.

Because of this kind of jail time, these criminal offences will inevitably create a chilling effect on the publication of matters of public interest.

Along with the plethora of other constitutional defects in the bill that need to be corrected (such as overbroad definitions that will undoubtedly result in over-classification of information), it is clear that the absence of a public interest defence for the media will render the bill unconstitutional.

It is irrelevant that the bill also criminalises the improper classification of information: this is not the same as a free-standing public interest defence of the kind proposed by Print Media SA in its submissions.

Without a public interest defence, it will be cold comfort to a newspaper that is leaked classified information that reveals corruption and nepotism on the part of a public official, for instance, or irregularity in tender processes involving public money, to argue that the information ought not to have been classified in the first place.

What is needed is a clear defence for publishing classified information where the public interest requires this.

And it is not as if we are in uncharted waters. The notion of "public interest" has been interrogated by courts and the legislature in various contexts: there are public interest defences to the publication of hate speech in the Films and Publications Act; a public interest override to claimed secrecy in the Promotion of Access to Information Act; there are public interest grounds that protect whistle-blowers in the Protected Disclosures Act and in the new Companies Act; and, of course, aspects of the common law relating to defamation and privacy; and media codes of conduct, where the parameters of "public interest" are considered all the time.

A public interest defence would thus go some way to satisfying the constitutional difficulties with the bill.

A further threat to media freedom in the form of the proposed government media tribunal has also reared its ugly head once again.

In recent weeks both ANC secretary-general Gwede Mantashe and SACP general secretary Blade Nzimande have made renewed calls for the establishment of a media tribunal in the wake of the shocking revelation that Ebrahim Rasool paid Cape Argus journalist Ashley Smith to write favourable stories about his administration.

Talk of establishing a media tribunal first surfaced in 2007 before the Polokwane conference.

This culminated in the adoption of a resolution at the conference that the government would explore the establishment of a media appeals tribunal to "strengthen, complement and support the current self-regulatory institutions".

The proposal was eventually put on the back burner amid heavy protest from civil society.

Of particular concern is the fact that the Polokwane resolution, although stating that the tribunal is an initiative aimed at strengthening the human rights culture embodied in our constitution, also states that the ANC has been concerned that it is faced with a "major ideological offensive, largely driven by the opposition and fractions of the mainstream media".

Viewed from this perspective, it appears that the creation of the media tribunal may in part be an attempt by the ANC-led government to regulate content published by the print media, possibly on political grounds.

In the US, which has a robust culture of protecting free speech, the courts have rejected attempts by the government to control the content of publications.

In *Miami Herald v Tornillo* the US Supreme Court held that a Florida law that made it an offence for a newspaper to refuse to provide every candidate for election to a public office with an automatic right of reply when they had been criticised by the newspaper, was an infringement of press freedom because it compelled newspapers to print that which they would otherwise not have printed.

The law unjustifiably trod on the toes of editorial integrity, and hence fell foul of free speech rights.

While it is important for the media to report the news truthfully, accurately and fairly, and to conduct themselves with the highest standards of journalist ethics, oversight and control of the content published by the media by a government controlled tribunal would be a grave violation of media freedom and undoubtedly unconstitutional.

Those calling for such a tribunal would do well to heed the words of the US Supreme Court in *Miami Herald v Tornillo*: "Press responsibility is not mandated by the constitution and like many other virtues it cannot be legislated."