FREEDOM OF SPEECH
and the new constitution

In the new South Africa journalists can look forward to constitutionally entrenched freedom of speech. But that freedom won't be absolute, warns ***JOHN GROGAN.***

TIMES have changed dramatically for the media. Not so long ago there were more laws relating to the press than I could name in half an hour — laws which prevented us from knowing what certain people and parties were saying and thinking and doing (and which even prevented us from knowing that certain people existed), laws forbidding discussion of stupid and corrupt acts the government was perpetrating and, finally, during the recent states of emergency, laws preventing us from knowing what was happening on the other side of the street.

Today we are in a very different situation. We are not suffering from a surfeit of law. In fact, arguably, we are suffering from a dearth of law. What laws do exist, and there are still some of the old laws on the statute books, are widely flouted by newspapers. Two examples are reports of the Winnie Mandela trial, which in my view, came very close to transgressing one of the laws relating to contempt, and reports dealing with the frequent protests outside courts of law. There is actually a law prohibiting publication of details of those kinds of protests.

There is anarchy in the land — and there is clearly a need for a new legal system to replace the old repressive one and fill in the vacuum left by its demise.

Now I don't know any more than the next person what a future legal order is going to look like. But what is undoubtedly in the offing, is some sort of an entrenchment of freedom of speech and the media in the constitution and, secondly, some kind of constitutional court. The function of this court will be to adjudicate alleged violations of those freedoms so that the executive arm of government is precluded from using the law to serve its own propaganda needs in a way which the Nationalist government did so effectively in the late '80s.

That is essentially the objective of a constitutional court in a bill of rights — to prevent government intrusion on the media.

If we get a constitutional court and if we get an entrenched justiceable bill of rights that, I think, will represent considerable progress. What it will mean is that anyone — government or private individuals — who wishes to prevent the media from publishing certain information or views will have to justify whatever prohibition they seek. The only way in which they will be able to justify those kinds of restrictions and prohibitions will be to satisfy the court — be it a constitutional court or an ordinary court — that in their particular circumstances the interests served by the prohibition sought override those which will be served by the publication of the information at hand.

The court will, in all instances, be asked to balance the interest served — the public interest served by publication — with the interest that will arguably be served by the prohibition of that publication. In other words, we will no longer have a situation in which the government can decide *ex cathedra* what may not be published. In every instance, the restrictions sought will have to be justified.

If that then is the general approach, it should be obvious that the parameters of press freedom in the new dispensation can't be described in detail in the constitution itself. I think that is true of any bill of rights that exists anywhere in the world. They simply lay down broad principles. Just like the American courts have had to do, our courts will have to work out when and in what circumstances particular restrictions on press freedom are justified.

I would suggest that, like the American courts, ours will start from the presumption that, although freedom of speech is fundamental, it is not, and cannot be, absolute. In other words, to use legal terminology, there will be a rebuttable presumption that a person has a right to say or publish what he wishes to say. But that presumption is rebuttable. In other words, one will be able to go to that court to seek to prove that the presumption in favour of the right should give way to some higher or competing interest.

The point is that whatever rights and interests are guaranteed in a future constitution, there is always the possibility of conflict between them and it is going to be the function of the constitutional court to balance them in particular instances.

The question really is how, and under what circumstances, will the authorities — government or individuals — be able to justify proposed restrictions on press freedom?

WHEN ARE RESTRICTIONS ON FREE SPEECH JUSTIFIED?

SOME would argue that the only way one can have a media which performs its undoubtedly necessary functions for a democratic political system is if all restrictions are eliminated. Now I think that goes too far, and I think it goes further than any successful functioning democracy would allow. There are, after all, particular circumstances in which the courts in all democracies do allow certain restrictions.

Privacy and reputation

The first of these, and I refer to broad areas here, in which it seems some restrictions are justified, is where publication of news invades the privacy or reputation of individuals and where no discernible public benefit is to be served by such publication.

This is very much akin to what our present law of defamation requires. That law states that an infringement of a person's privacy or reputation is, to use a legalistic phrase again, *prima facie* unlawful — on the face of it unlawful — unless the publisher

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can prove that some public benefit is to be served by the publication of that information.

I think one of the considerations that our constitutional court will have to give to this area of the law is whether that additional requirement of public benefit should be eliminated from our law and our law brought into the position of that of the United States of America and England where the truth is deemed to be of paramount interest and a sufficient defence.

I think one has to concede that there are circumstances in which the hurt caused by publication of the truth is unjustified. For example, shouldn't a person (an example, as often cited by the courts) be able to live down some regrettable action performed in his youth? Surely his past wrong-doings shouldn't be dragged up by the media, possibly for malicious ends? Shouldn't a person be able to do things in private, free from the prying eyes of the press? Shouldn't I be able to claim that my private correspondence is sacrosanct?

A yes to all these questions doesn't mean that people in positions of authority should be able to cover up evidence of their misdoings. But the test should be whether the embarrassing or private information disclosed has a bearing on their public offices. Extra-marital romps clearly have a bearing on the fitness for office of a priest. I'm not sure that they affect the capacity of a politician or businessman.

Lies

The second restriction that I would suggest is a prohibition on the publication of outright lies. Strangely, our current law does not make it an offence to publish lies, unless those lies cause particular individuals financial loss or are defamatory. The media should be prevented from publishing news which they know to be false or tendentious insofar as they purport to be conveyors of the truth.

Trade secrets

Trade secrets is the third area which I would suggest should and probably would still deserve protection. Freedom to trade and compete is a matter which requires respect for traders' confidential documents and negotiations. Our law does recognise this in the concept of unlawful competition. For example someone going off and selling a trade secret can be stopped by an interdict. The problem here, of course, is that claims to trade secrets can be used to cover up criminal acts, corruption and stupidity — for example, Masterbond. But, once again, the test ought to be whether the public interest is to be served by publication.

The recent Sage finding is a case in point. The Appellate Division decided in favour of Sage and upheld the interdict on the basis that a company, like any ordinary person, has a right to privacy. That evoked the ire of certain journalists, in particular Ken Owen of the *Sunday Times*, who said that this was the worst judgment that had ever been decided by the courts and had, in fact, done more harm to Press freedom than the Nationalist government managed to do in 50 years of deliberate pressure.

Owen's claim is manifest nonsense, because if one looks at the judgment, what the court is saying is that a company has the right to privacy. If that right of privacy is invaded, it has a *prima facie* right to stop the disclosure of that information. The respondent newspaper then has an obligation to show that there is some public interest to be served by the publication of that information. What the courts said is: "Let's look in that light and in terms of those principles at the information or at the story which the *Financial Mail* proposes to publish". And they could see no public benefit whatsoever in the publication of this information. It's partly defamatory, partly untrue and there was no argument set up as to the fact that it was to the public benefit. So the Appellate Division simply said that there was no basis for overturning the lower court's decision. It doesn't come anywhere near the implications that Ken Owen suggests.

Encouraging crime

The fourth area, also controversial, is restrictions on the publication of information or the exercise of free speech used to encourage people to commit criminal acts. Exhortations to people to commit crimes are a clear infringement of the intended victim's right to life, property or security. This restriction gives rise to problems but, to me, the test is whether there is a direct causal link between the exhortation and the crime. We have difficult cases in public life at the moment with slogans of "One Settler One Bullet" and "Kill the Farmer Kill the Boer".

There is no evidence, granted, that these have a direct effect on people who do go off and shoot settlers, whoever they are, or farmers, who are an identifiable body. But there again the court would have to ask itself: "Is there a real likelihood that particular use of free speech will give rise to the action as exhorted?" In some countries slogans and rhetoric which create hatred towards certain groups are prohibited. A further problem is whether the media, as opposed to the utterers of the slogan, should be prevented from giving publicity to those who use words and slogans of that type.

The fact of the matter is that people are using those slogans at the moment arguably because they are encouraged by the prospect of media publicity. But whether the media should be punished, or restricted is a different question.

The American courts for example, deal with these kinds of problems in terms of a test that they call the "clear and present danger test" which is similar to the one that I am suggesting.

Fair trial

The fifth restriction is on the exercise of free speech which prevents people from

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having fair trials. A fair trial is a guarantee which will be entrenched in the constitution in whichever form or whichever model is accepted. I think it's clear that the media can quite easily prejudice the outcome of trials by publishing information, by pre-judging a person's guilt, by interfering with witnesses or by commenting on the evidence given by witnesses. Such infringements of the individual's right to due process will certainly continue to be interdicted.

The one thing that has to be avoided, however, is the *sub judice* rule being turned into what is known in England as 'the gagging writ'. That is, the use of the *sub judice* rule to prevent the media from commenting or reporting on matters of public concern simply because judicial proceedings are pending.

The English thalidomide tragedy is the classic warning in this regard. We had a similar kind of situation in our law where the Government extended by legislation the contempt rule to proceedings before commissions. It could then shelter under the *sub judice* rule by simply shifting something to a commission.

Alistair Sparks of the then Rand Daily Mail came into conflict with that particular provision back in the late '70s when he commented on the issue that was before a commission investigating township violence. He was prosecuted but the court took a very strict approach against the government and said that particular legislation should not be construed in such a way as to prevent public discussion about the issue before the commission, if it was indeed a matter of general public concern.

National defence

Restrictions on press freedom in the name of national defence in a democracy are controversial because I think the problem is, in the final analysis, anything can be regarded as related to the defence of a nation. The National Party, certainly read this notion of defence in a very far-reaching light. It prevented the publication of information which was economically damaging, it prevented publication of information relating to our oil resources and so on, all under the guise of the fact that this was necessary for military defence. We had the absurd situation in the '70s where everybody knew our troops were in Angola but nobody was allowed to read about it in the newspapers.

The most one should concede in this respect, is that the government has a right to classified information but if such information is leaked the test again should be along the lines of the "clear and present danger" test. Information that our troops were in Angola would clearly not have satisfied that test.

WHEN ARE RESTRICTIONS NOT JUSTIFIED?

THERE are restrictions which are not reconcilable with the democratic purpose.

Starting a newspaper

In the past we have had prohibitions on who should have the right to start or work for the media. We have had a provision in the Internal Security Act that provided for fairly prohibitive forfeitable deposit requirements on certain individuals who applied for a licence to start a newspaper.

Eroticism

Eroticism falling short of hardcore pornography should be allowed. I realise the implications here of establishing the difference between the two. I think the prohibition we suffered in the past in this respect was absolutely absurd. The courts should not be asked whether a picture of a bosom is criminal or not.

Public events

There must be no prohibition on the right to report any public events. Here I have in mind the kind of restrictions which were imposed during the state of emergency. Prohibitions on reporting on so-called unrest situations and on the reporting of security actions were the two prohibitions which plunged us into an information vacuum. If an event is public, it must be publishable.

Anti-democratic doctrines

Prohibitions on the right to express any views on the grounds merely of a doctrine which they convey cannot be allowed. If you are going to have a democracy you must allow people to publish their theories even if they are anti-democratic and even if people don't like them. I think that is absolutely fundamental and if a person comes up with a doctrine — even a racist doctrine — the answer is to compete with it by argument, not by prohibition.

Government corruption

Prohibitions on the reporting of any corrupt or criminal acts of government or other authorities are out. There should be no law on our statute book, for example like the Protection of Information Act, which enables the government to actually prohibit, if it dared to do so, the publication of information on how many cups of tea an official drank per day in our public post office.

Government coercion

There must be no laws which enable the government to compel the media to publish its own, or other parties, views. Certainly in the Soviet Union, for example, there were such laws.

And not least important, there ought to be no prohibitions whatsoever on criticisms of government policy. ●

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