HAROLD WOLPE
MEMORIAL TRUST

Unit F, Colstine Terrace, 88 Belvedere Rd, Claremont
P O Box 44907, Claremont 7735. South Africa
Telephone: +27 21 674 0361 Facsimile: 086 670 6772 Email: wolpetrust@mweb.co.za
Website: www.wolpetrust.org.za

91st Harold Wolpe Dialogue

17 August 2010
Cape Town

Topic:

MEDIA CENSORSHIP

Speaker:

Prof Pierre de Vos
University of Cape Town

Respondent

Dr Laurie Nathan
University of Cape Town

The aim of these dialogues is to create a space for open and informed dialogue and debate around key local and global political, social and economic issues facing South Africa.

The Dangers of the Protection of Information Bill

Laurie Nathan, July 2010

The controversial Protection of Information Bill, presented to parliament by the minister of state security, is based on back-to-front ideas about the relationship between secrecy and the concepts of 'national security' and 'national interests'.

The Bill provides that state information must be classified as confidential if officials believe that unlawful disclosure might be harmful to the security or national interest of the Republic or could prejudice the Republic in its international relations. In all seriousness, the Bill insists that "secrecy exists to protect the national interest".

Hang on, you might protest, what about the constitutional principles of openness and access to information? Surely these principles exist to protect the national interest, which entails above all the preservation of our democratic dispensation?

The Bill has a chilling answer: the constitutional provisions on transparency are "subject to the security of the Republic, in that the national security of the Republic may not be compromised". The principle of transparency, which the Constitution regards as a cardinal tenet of democratic governance, is thus viewed by the Bill as subordinate to security.

This is bad news for democracy. In fact the closer one reads the Bill, the worse it gets. The Bill defines the 'national interest' so broadly as to cover "all matters relating to the advancement of the public good", "the survival and security of the state and the people of South Africa" and "the pursuit of justice, democracy, economic growth, free trade, a stable monetary system and sound international relations".

If the disclosure of state information is deemed to be harmful to any of these elements of the national interest, the information will be classified and the public will be denied access to it. The decision on whether harm might arise from disclosure will not be made by a judge or a panel of

constitutional experts. Instead, it will be made by the heads of organs of state or their officials, supported by the National Intelligence Agency.

The implications of this arrangement strain the imagination. In municipal bodies, parastatals, provincial departments, national departments and government enterprises across the country, hundreds of officials will spend their days reading thousands of documents in order to assess whether disclosure of any item of information might be harmful to free trade, democracy, economic growth, a stable monetary system, the pursuit of justice, the survival of the state or the advancement of the public good.

To complicate matters, the officials are expected to predict the degree of possible harm arising from disclosure so that they can decide whether to classify the information 'confidential', 'secret' or 'top secret'. This kind of forecasting is notoriously imprecise and would tax the finest political analysts. Consistency among the different organs of state would be impossible.

Imagine too the time, money, regulations, procedures, vetting, training, safes, locks and passwords that will be needed to ensure that millions of old and newly created secrets remain hidden and do not seep out into the sunshine as the government interacts with citizens. Imagine the prospect of turning the state into the bureau of state secrecy!

Recognising that this scenario might alarm the public, the State Law Adviser concedes that "we can get it horribly wrong if [the Bill] is not implemented by people who are properly trained. I hope people of integrity are going to perform these functions [of classification, declassification and review of classifications]".

This is a rather big hope and we have no guarantee that it will be met. Even if it is, we still have to contend with the ominous fact that the officials will be advised and trained not by the Human Rights Commission but by a fiercely secretive intelligence agency.

The Bill is fatally flawed because it fails to recognise that our national interests are protected at the most fundamental level by constitutional safeguards that include the principle of openness.

The founders of our democracy took this principle so seriously that it appears in the Constitution at least ten times. In case there was any doubt, the Constitution insists that "everyone has the right of access to any information held by the state… that is required for the exercise or protection of any rights".

In similar vein, the Promotion of Access to Information Act of 2002 seeks to "actively promote a society in which the people of South Africa have effective access to information *to enable them to more fully exercise and protect all of their rights*". Conversely, according to the Act, the system of government under apartheid "resulted in a secretive and unresponsive culture in public and private bodies which often led to an abuse of power and human rights violations".

The Bill is fatally flawed also because it demands secrecy on the basis of an overly broad approach to security. Its definition of 'national security' covers not only the physical protection of people from violence and terrorism but also "the resolve of South Africans, as individuals and as a nation, to live as equals, to live in peace and harmony, to be free from fear and want and to seek a better life".

This is a beautiful definition of security, taken directly from the Constitution, but it will never be achieved in conditions of secrecy. Its realisation obviously depends on the maintenance of an open and democratic society.

The concept of national security is too elastic and ambiguous to be used to as the basis for secrecy. When 'national security' is interpreted narrowly to mean the security of the state, it is often invoked to justify extreme measures that suppress civil rights and undermine the security of citizens. On the other hand, when 'national security' is interpreted broadly to cover all aspects of human security, then secrecy leads to excessive and spurious classification of information.

The Bill's overly broad and general grounds for secrecy should be replaced by provisions that indicate more precisely the harm that must be avoided through non-disclosure of information.

For example, it would be reasonable to classify material where disclosure would cause serious physical harm to a person, impair the government's ability to provide protection services to officials, compromise a national defence plan or disclose the identity of a confidential police source or undercover intelligence agent.

The Bill itself contains sound criteria of this kind but they do not appear in the section on classification. They can be found only in the section on "continued classification" of information that has already been classified. This adoption of different approaches to initial classification and continued classification is illogical.

In addition, the Bill should recognise that the harm arising from disclosure might have to be weighed against a strong public interest in transparency. The government cannot seek to avoid all possible harm that might occur from the publication of sensitive information. Some risk of harm has to be tolerated in a democracy because the dangers associated with secrecy – lack of accountability, abuse of power, infringement of rights and a culture of impunity – can imperil the democratic order itself.

Constitutional Court judge Albie Sachs has expressed an opinion along these lines: "It is important not to deal with hypothetical damage that could be caused to national security if certain types of information were to be revealed, but rather to verify whether on the facts a real risk exists that non-trivial harm could result. More particularly, it has to be asked whether more harm could well result from disclosure than from non-disclosure".

The Bill ignores the complexity of such questions. It wields a blunt instrument and will require the establishment of a new cadre of censors spread across the entire state. The censors will be entrusted to protect the country from harmful disclosure of information. We would be better protected by placing our trust in the provisions of the Constitution.

Dr Laurie Nathan is a research fellow at the University of Cape Town and the London School of Economics. He was a member of the Ministerial Review Commission on Intelligence in 2006-8.