

Coming soon is the anniversary of the dark day when apartheid Justice Minister Jimmy Kruger's outlawed three newspapers.

Back then, on October 19, 1977, his decree meant the end of the World, the Weekend World and the Voice newspapers.

That action led to so much enduring disgust that when South Africa became a democracy, there was consensus that such suppression would never happen again.

This is one reason why the new constitution has very strong protection of the public's right to know. Such status is spelt out in the clause that citizens have the right to free speech. But the constitution also goes further and expressly gives the mass media - as an institution - the right to work freely.

This second point makes sense because it is not for nothing that the media is known as the "fourth estate". This formulation recognises that media is a pillar in a complementary system of democratic governance which includes the legislature, the executive and the judiciary.

Because each "estate" does different things, there are sometimes conflicts between them – for example, between judges and MPs about whether a law is constitutional or not. Likewise, there also often tensions between media and the other governance institutions.

These problems arise when the media is expected to help the police probe crimes or the courts to implement justice - and when the media seeks, instead, to stick to its own knitting.

In this spirit of media autonomy, the South African National Editors Forum (Sanef) declared last week: "People who talk to journalists need to be assured they are talking to journalists and not to extensions of the law enforcement agencies."

Their statement comes in the wake of recent events:

- Invume, the company that channelled R10 million to the ANC, has asked a court to order the Mail & Guardian newspaper to disclose its sources of information.
- The police have since investigated charges against the online version of the same newspaper, in what seems to be a parallel bid to root out the sources.
- A journalist at The Star newspaper last week gave state evidence in the Scott-Crossley “lion” murder trial.

What’s common to these three events is whether it’s right that journalists should get involved in the processes of another “estate”.

This is a long-standing and thorny question in South African history. Under apartheid, journalists John Matisonn of the Sunday Express, Benjamin Pogrund of the Rand Daily Mail, and Thami Mazwai of Sowetan all chose prison rather than testifying in political trials. It was clear cut in those days that journalists should have no truck with what was then an illegitimate state.

Under democracy, journalists and the justice system has become more complex.

Most journalists agree that being forced to give evidence is a travesty of freedom of the media. They argue that this violation “chills” the information environment. For example, people otherwise prepared to leak information about corruption might stay silent if journalists could be compelled to reveal secret identities.

In this reasoning, the public is best served by journalists being allowed to keep confidences, rather than being compelled to collaborate with law enforcement.

What complicates the case of the Scott-Crossley trial, is that the reporter there was not forced to testify. He did so voluntarily. Yet by doing so, Sanef said he had still “compromised his credibility”, and his employer “The Star” pulled him off the case.

But there was a different view at The Star in the 1997 prosecution of serial killer Moses Sithole. Then, the paper made available its telephone recordings to help convict a man who murdered 38 women.

In the Sithole case, it seems, the merits of the “end” – putting a criminal behind bars outweighed the normally taboo “means”, i.e. that a journalist should not play ball with the police.

Critics might ask if there is really a major distinction between Scott-Crossley and Sithole trials. But either way, it seems that there is not a 100% absolute principle whereby journalists never join forces with the justice system.

The same ambiguity is evident among the law-enforcers. In the 2003 Hefer Commission, Penuell Maduna - the then Minister of Justice - accepted that journalists had a right to refuse to co-operate with the police.

In an affidavit, Maduna noted: “Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such measure cannot be compatible with Section 16 of the Constitution unless it is justified by an overriding requirement in the public interest.”

Today, one part of the self same justice system is assessing whether it is in the public interest to force the Mail & Guardian to divulge its sources. Another part is buys investigating charges which could compel the same result.

At least one thing is certain. When we mark October 19th as the annual National Media Freedom Day, at least it is in the context of a free media. There is a now a nuanced debate about the tricky matter of when the Fourth Estate should mix its business with that of the other authorities. It's a different world to that of the late Jimmy Kruger.