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The Media Appeals Tribunal and the Protection of Information Bill as challenges to freedom of expression and good governance in South Africa

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This paper examines the Media Appeals Tribunal (MAT) and the Protection of Information Bill (PIB) as potential challenges to freedom of expression and good governance in South Africa. The modus operandi and the objectives of MAT and PIB are presented and examined to indicate whether these may act as threats to freedom of expression and good governance. This paper uses information obtained from academic articles, the South African Constitution, legislative documents, news articles as well as African and international reports. This research finds that if MAT and PIB are passed as laws without substantial amendments in favour of the genuine respect for freedom of media and press, they will potentially lead to the regression of both freedom of expression and good governance and above all, threaten democracy in South Africa.

Key words: Media Appeals Tribunal, Protection of Information Bill, freedom of expression, good governance, democracy, South Africa

Introduction

Let us imagine for a moment, a world without freedom of expression and a world devoid of a free media. In such a world it would be practically impossible for people to freely voice their opinions. The media landscape would one of bias, controlled channels, and a truly free press would not exist. A highly restrictive society would prevail in which inequality, misery and public ignorance would triumph (Nazeerally, 2001: 1).

The Freedom House (FH) (2010, lines 10) is worried about the global decline in freedom of expression. South Africa is not an exception to this decline. In recent years the South African media landscape has been challenged by MAT and PIB, both receiving harsh criticism for the threats they pose to freedom of expression. Consequently, the purpose of this paper is to examine MAT and PIB as challenges to freedom of expression and good governance in South Africa.

MAT is criticised for its abilities in terms of reviewing publications and its punitive aspect in cases where journalists are judged by the government to have published unauthorised information. PIB is attacked for its classifications function which shall prohibit

the press from disseminating information that any government official will classify as state's information. These two propositions are depicted as anti-democratic and as having the identical legal foundations that supported press suppression during apartheid (Farbstein, 2012).

On the one hand, South Africa is one of the important success stories on the African continent: with the help of its sound democratic institutions anchored in a prodigiously established constitution it unceasingly works towards the consolidation of its democracy. (Berterlsmann Stifung's Transformation Index, 2016:38). On the other hand, while such freedoms for everyone have taken a long time to achieve, it should not be forgotten that these achievements can be lost. 23 years of democracy has elapsed and now the question remains simple and clear: after the "*Long walk to freedom*"[1] will democracy be sustained or will propositions such as MAT and PIB contribute to its weakening? It is crucial to be reminded here that PIB is still a Bill and MAT is still in the project phase thus neither at this stage wield concrete influence. However, they may be seen as potential threats that may contribute to the weakening of freedom of expression in South Africa if they become laws without the necessary amendments. This research on the potential effects of MAT and PIB on freedom of expression is conducted without considering other threats to this freedom in South Africa. This paper aims therefore to exclusively study MAT and PIB as potential challenges to freedom of expression and good governance.

Freedom of expression and democracy

According to Smith and Torres (2006: lines 9) the origins of freedom of expression may be traced back to Socrates' speech at his trial in 399BC: "*If you offered to let me off this time on the condition I am not any longer to speak my mind… I should say to you, 'Men of Athens, I shall obey the Gods rather than you.'*" Freedom of expression also takes its origins with Voltaire through a letter addressed to M. Le Riche in February 1770: "*Monsieur L'abbé, I detest what you write, but I would give my life to make it possible for you to continue to write*".[2] Braji (n.d: 47 lines) uses the first definition of democracy of the Greek philosopher Cleon in 422 B.C, "*that shall be democratic which shall be of the people, by the people, for the people*" to show how democracy and freedom of expression are geared towards the well-being of the people. Uwizeyimana (2012:141) relates the speech of Hillary Clinton at the African Union's Headquarters in 2011 as proposing the most excellent description of a correct or idyllic liberal democracy. As per Clinton's words:

1 Autobiographical work written by South African President Nelson Mandela, and first published in 1994 by Little Brown & Co.

2 Voltaire quote., (no date). "Monsieur l'abbé, I detest what you write, but I would give my life to make it possible for you to continue to write." Iz Quotes [online] Available from: http://izquotes.com/quote/288025 [Accessed: 22 March 2015].

> *creating the conditions that allow people and communities to flourish in a democracy cannot simply be a matter of holding elections; they are a necessary but not a sufficient condition. Good governance requires free, fair, and transparent elections, a free media, independent judiciaries, and the protection of minorities.*

To connect both elements, Bronstein (2006 cited O'Regan, 1999: 1) writes that freedom of expression lies at the heart of democracy. The International Federation of Library Associations and Institutions (IFLA) (2008: lines 20) states that only trustworthy and reliable governments are disposed to endow freedom of expression to people and that civil society's distrust is only to happen under conditions of wide-ranging ignorance and secrecy.

Freedom of expression in South Africa

The democratic South African Constitution promulgated by Nelson Mandela in 1996 commenced on the 4th February 1997 (Constitution of the Republic of South Africa, 1996). Section 7 of chapter 2 of the Constitution formulates that the Bill of Rights is the: "*(1) cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom*" And that "*(2) the state must respect, protect, promote and fulfill the rights in the Bill of Rights*". It makes provision through Article 16 (1) that: "*everyone has the right to freedom of expression, which includes ff a. freedom of the press and other media; b. freedom to receive or impart information or ideas*". The Constitution also protects the right of access to information through Article 32(1): "*Everyone has the right of access to ffa. any information held by the state; and b. any information that is held by another person and that is required for the exercise or protection of any rights*".

Additionally, South Africa is signatory to the Universal Declaration of Human Rights (UDHR) (1948) of the United Nations (UN) and owes respect to Article 19: "*Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers*". Moreover, Article 19 of the International Covenant on Civil and Political Rights (ICCPR) (1966) which South Africa has ratified in 1998, states that,

> *Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.*

South Africa has also signed and ratified the African Charter on Human and Peoples' Rights and Article 9 clearly states that, *"Every individual shall have the right to receive information. Every individual shall have the right to express and disseminate his opinions within the law"*. According to Worthington (2013:11), it is obvious why the South African freedom of expression is so closely protected when considering the tumultuous history of the country. Indeed, as per the Freedom of Expression Institute (2013:10), the truth is best attained with freedom of expression as it gives the people the opportunity to criticise and to exchange ideas without fear. It plays a pivotal role in the democratic process of the country as a democracy is strengthened when there are free debates concerning public issues.

South Africa is a country where freedom of expression and of press form part of its reality and are deeply rooted in its democratic laws (Worthington, 2013). In 2012, one year prior to the announcement of PIB, the Freedom House (2012, lines 9) talked about the rising restrictive environment for the press in South Africa as being alarming. The Freedom House vehemently argues that both PIB and MAT run counter to the progress of freedom of expression contained in all the pieces of law, and it vowed to protect freedom of expression cited above. If PIB and MAT are to pass without major amendments, South Africa would head to an anti-democratic spiral from which escape would be extremely complicated.

Good governance and role of the press in good governance

Governance is defined by Olowu and Sako (2002:37) as being *"a system of values, policies and institutions by which a society manages its economic, political and social affairs through interaction within and among the state, civil society and private sector."* Cloete (2000:23) defines good governance as "the achievement by a democratic government of the most appropriate developmental policy objectives to sustainably develop its society..., in the most effective, efficient and democratic way." As per the United Nations Human Rights (UNHR) (2004, lines 10) to which South Africa is a signatory, good governance is a course of action where states´ public institutions manage public resources and carry out public affairs in a way in which social, cultural, civil, economic and political rights are respected. Among the features of good governance, there is rule of law and human rights, transparency, accountability, efficiency of the public sector, legitimacy, responsibility (UNHR 2004: lines 3).

According to White et al. (2000: 1), since 1994 one of the most significant components of the ANC government is to prioritise the foundations of democracy and good governance through the setting up of a Bill of Rights and the creation of an integrated public service. Ashraf (2014 cited Norris: 42) proposes that free press contributes in three major ways to good governance. Firstly, it acts as check or as a watchdog to ensure the promotion of transparency, accountability and public analysis. Secondly, it enables open forums and associations permitting people to get involved in debates and discussions thus promoting the exchange of ideas. Thirdly, the press is an agenda-setter where public policy makers are made aware of the demands of the population. In a nutshell, the role of the press in good governance is to monitor government's activities.

Checks and balances

Mahajan (1988:800) talks about a free, independent and fearless press ready to analyse, comment and criticise the government's activities in order to build a solid base of public opinion. Leusch (2014: lines 1) portrays the functions of journalists as being to protect and act as guardians, to defy and expose inefficiencies and unlawful practices of the government. UNESCO (2005: lines 24) argues that when there is a free, strong and independent space for the press, every aspect of good governance is respected. Moreover, it is only when the press is open to observe, dissect, investigate and criticise the government and the public administrations, that good governance is upheld.

As per the Bertelsmann Transformation Index (2006:4), the ANC is dominant in South African politics.[3] However, this does not indicate that the ANC is moving towards authoritarian rule. The active civil society and the press operating as a watchdog ballast the ANC. This sustains Leusch's arguments that the media is the organism that ensures the principles of good governance are respected. Ashraf (2014:42) says that the ability of the press in South Africa to investigate, denounce and hold accountable perpetrators of scandals and bad governance is real.

Market of ideas

The UNESCO (2005: lines 14) suggests that freedom of expression gives civil society the opportunity to voice their interests through platforms. Gordon (1997:235) makes reference to John Stuart Mill's '*market of ideas*' where people meet to freely speak and exchange ideas. Petersson (2010:6) observes freedom of association as a fervent supporter of pluralistic societies permitting diverse and different point of views, thoughts, ideas and opinions to be expressed and discussed. The African Charter on Human and People's Rights (ACHPR) through its Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa (2002), to which South Africa is a signatory (the African Union), makes provision under section III that

> *freedom of expression imposes an obligation on the authorities to take positive measures to promote diversity, which include among other things: availability and promotion of a range of information and ideas to the public; pluralistic access to the media and other means of communication, including by vulnerable or marginalized groups, such as women, children and refugees, as well as linguistic and cultural groups.*

Section V of the Resolution encourages states to develop a "diverse, independent private broadcasting sector" that will permit their people to receive and exchange ideas.

3 Bertelsmann Transformation Index (2006) Available from: http://bti2006.bertelsmann-transformation-index.de/fileadmin/pdf/en/2006/EasternAndSouthernAfrica/SouthAfrica.pdf [Accessed 14 January 2015]

Agenda-setter

According to UNESCO (2005: lines 42), the agenda-setter function of the press consists of allowing people to invest in how they are going to be governed by receiving a large outflow of information. Ashraf (2014:42) says that when people receive good information, they are able to present good and realistic demands to their governments. It is only then that governments can respond to such demands with efficiency, generating good governance. Press and media plurality is significant here so that people do not receive biased and distorted information. In South Africa (Buccus, 2011:11), one of the generally widespread forms of public participation in the public policy making process is when individuals and interest groups are invited by advertisements in newspapers, radio or public places to give their comments about Green and White papers. However, according to Buccus (2011:3), participation mechanisms channeling citizen's input for public decision making is endangered because of government attempts to censor the press.

State of media during the apartheid era

Pre –1994 the media was distinctive for its inequality of access, language and lack of diversity. A free media regulatory mechanism did not exist, leading to a situation in which some operators fulfilled both regulatory and broadcasting roles (Media Transformation, Ownership and Diversity Paper, 2010). Censorship was liberally used by the National Party (NP) exerting a tight grip on the media landscape. According to Botha (2014), "*any type of newspaper that had reflected the views of the majority or that did not align with the views of the minority were never allowed to operate*". For instance, the NP's unconcealed censorship prohibited reporters who had witnessed shootings from reporting what they had seen – "*If the journalist saw bodies of slain soldiers or police officers, he or she could not report that information until it came from official sources*". In addition, Botha writes that the Publications Act of 1974 offered the NP supremacy over the censoring of entertainment programs, movies, plays, books and so on. In short, the Government had the absolute right to decide "*what South Africans could or could not view*" while journalists were compelled to juggle stacks of legislative laws in order not to break them. For instance, the journalists had to rigorously cross-check their articles with the laws related to media to ensure their content was not illegal.

The current self-regulatory mechanism: the Press Council of South Africa

Today, the young democratic South Africa appreciates a media landscape that has diametrically changed since 1994 and embraces openness (Media Transformation, Ownership and Diversity Paper, 2010). As mentioned earlier, the Bill of Rights of the South African Constitution robustly protects the freedom of expression, referred to as being the cornerstone of democracy. Presently, South Africa possesses its self-regulatory bodies (Review of the Press Council of South Africa, 2011). The Press Council of South Africa (PCSA) with its bodies: the Press Ombudsman and the Appeals Panel, an independent co-regulatory mechanism, set up by the South African print and online media, has as its aim the delivery of "*impartial, expeditious and cost-effective adjudication to settle disputes between newspapers, magazines and online publications, on the one hand, and members of the public, on the other, over the editorial content of publications*". Eventually, the mechanism is founded on two

key pillars: "*a commitment to freedom of expression, including freedom of the media, and to high standards in journalistic ethics and practice*". To help realise these commitments, the PSCA adopts the South African Press Code to "*guide journalists in their daily practice of gathering and distributing news and opinion and to guide the Ombudsman and the Appeals Panel to reach decisions on complaints from the public*" (Press Council of South Africa).[4]

Nevertheless, there are many critics of the PCSA and its bodies: the mechanism is accused of being "ineffective" and "toothless" (Reid and Isaacs, 2015). Specifically, it has been forcefully argued that the current "*self-regulatory bodies do not have teeth to harshly penalise media organisations or journalists that are found to have transgressed rules*".[5] Furthermore, Bartlett (2010) claims that the PCSA is inadequate as the panel of the council's ombudsman consists of media representatives liable to oversee their own industry. Another criticism against the current media self-regulatory mechanism is highlighted by Berger (2009). The latter writes that in 2007 and 2008 a leadership contest was fought out in the ruling ANC where the press was "*co-opted (wittingly in some cases) into a weapon for disseminating information designed to discredit a particular side*". To illustrate this criticism, two stories may be considered. The first story lies in the disclosures about Thabo Mbeki's Minister of Health garnered from the latter's private medical records and the second is the open media exposure of the President Zuma's then-imminent rape charges even before he appeared in court (Berger, 2009). For Berger, these two cases call into question the existence of the "*rights to individual dignity and privacy*" as both Mbeki and Zuma were dismayed by the publications and accused the media of elevating the freedom of the press over individual's rights to privacy – eventually at their expense. Hence, through the Media Transformation, Ownership and Diversity Paper (2010) the ANC, with consistent consideration regarding a number of complaints received from victims of "*unfairness and unsatisfactory decisions of the self-regulatory body*" raised the need of a Media Appeals Tribunal (MAT).

Media Appeals Tribunal

MAT emerged from an ANC proposal via the Media Transformation, Ownership and Diversity Paper at the National General Council Conference (NGC) of 2010, which, in turn was built on an official resolution adopted in the Polokwane's conference of 2007 (Daniels, 2011). Indeed, considered as dormant since the ANC's 2007 proposal, MAT was again put on the table at the NGC Conference where it was endorsed on the key assumption that "*freedom of the press is not an absolute right, but must be balanced against individuals' rights to privacy and human dignity*" (Dlamini, 2015). Furthermore, during the NGC Conference of 2015, Jacob Zuma reiterated his stance for the implementation of MAT by pressing for '*media transformation*', '*accountability*' and '*diversity*' (ANC, 2015).

Indeed, MAT re-emerged when Thabo Mbeki and Jacob Zuma cliques deemed that the current self-regulation mechanism - the Press Council and its bodies – were ineffective (Daniels 2011). The establishment of MAT is proposed to serve the purpose of

4 http://www.presscouncil.org.za/

5 TUT to host debate on proposed media appeals tribunal. Available from: http://www.tut.ac.za/News/Pages/TUT.aspx

responding and acting as a remedy to the plethora of critics faced by the current self-regulatory system. For instance, the Media Transformation, Ownership and Diversity Paper (2010) highlighted the following remarks as to why a MAT is needed and what would be its purposes:

> *(93) Many who find themselves "in the news" are unhappy about the way their story has been presented or the way journalists have obtained information. Many laws restrict what can be published but not the behaviour of journalists, and there are few legal remedies for inaccurate reporting.*
> *(94) Legal aid is not available for libel cases, which are expensive. There is no statutory regulation of the press. Instead there is an entirely voluntary system which does not have the force of law. There continue to be a need to strengthen self-regulation by the press.*
> *(95) In order for a complaint to be accepted by the Press Ombudsman, the aggrieved party has to agree to waive his or her constitutional right to take the issue to the courts if he or she disagrees with the self-regulatory system's verdict.*
> *(96) This situation is untenable. There is a need to strengthen, complement and support the current self-regulatory institutions (Press Ombudsman) in the public interest. As a profession media can establish its own mechanism to deal with its ethical issues and to regulate conducts and some internally inherent conflicts.*
> *(98) The mere fact that the press ombudsman is from the media ranks, a former journalist, and is not an independent person who looks at the media from the layman's perspective poses an inherent bias towards the media with all interpretations favourable to the institution and the other party just have to understand and accept the media w ay which is grossly unfair and unjust.*
> *(102) We hold the view that the creation of a MAT would strengthen, complement and support the current self-regulatory institutions (Press Ombudsman/Press Council) in the public interest. Currently, citizens are subject to the decisions of the Press Ombudsman or taking the matter to Courts if s/he is not satisfied with the ruling of the Press Ombudsman. As a result, matters take long to clear the names of the alleged wrong doers by the media. Further, this is an expensive exercise for an ordinary citizen.*
> *(104) The proposal for MAT is meant to provide a platform for citizens to be fairly treated through an independent process supported by public funds and accountable to the people through parliament.*

Accordingly, to respond to the critics of the present self-regulatory system consisting of more media representatives, it has been proposed that "*the statutory body would be constituted by members of parliament, the near majority, or nearly two-thirds, of whom are ANC members, and would be an appeals structure, possibly with judicial powers*" (Daniels, 2010). Furthermore, according to Daniels (2010) MAT would curb the excesses of the South African media which is "*a law unto itself*" as it has become "*self-serving*". Moreover, MAT would require journalists to register themselves with the Tribunal and would have the power to levy punitive measures against the media for untruthful and malevolent reporting. Also, it will possibly be vested with the power to ordain by imposing fines. Strikingly, it "*will*

probably have the power to force newspapers to carry more prominent retractions and apologies; and will be able to impose penalties only after publication, rather than having the power of pre-publication censorship" (Daniels, 2012). Nonetheless, the arrangement of MAT is still ambiguous and its formal functions not yet clearly presented; but according to previous ANC's suggestions, it would be more powerful than the country's Press Ombudsman (Dawes, 2011). Nevertheless, many critics fear that the Tribunal may well replace and supersede the present system.

Threats to freedom of expression and good governance

MAT can be perceived as a threat to freedom of expression and good governance in South Africa, and, based on the motives of the ANC, the main concern is: will MAT be constitutional? According to Constitutionally Speaking (2010), "*If the proposed law therefore creates a MAT appointed by Parliament and that law empowers the MAT to punish journalists and newspapers…The limitation on press freedom would be so egregious that it could never be justifiable in an open and democratic society*". In a similar vein, Louw (n.d), Chairman of the SA Press Council explains that media freedom would be destroyed as journalists will be answerable to parliament about their publication and editors will have to reveal confidential information to parliament; otherwise they will be condemned. Moreover, PEN International (2011) admits that the proposed MAT fails to distinguish between '*ethics*' and '*regulation*' where the Press Council regulates an 'ethical framework' and the South African media are already bound by regulations which are enforced by the judiciary. Edward (2012) states that some critics have even labelled MAT a violation of human rights, with reference to the ACHPR's Declaration of Principles on Freedom of Expression in Africa, which protects press councils from political interference. Likewise, the Public Prosecutor Thuli Madonsela asserts that parliament consists of politicians who are propelled by political interest and any control by parliament would be problematic (Kings, 2012).

Furthermore, Edward (2012) adds that the conceivable call for MAT could signify the "*state-regulation of the press*" as freedom of the press in South Africa may face severe threats with a 'politically appointed' MAT while for Zeldin (2010) and Farbstein (2012) the real intention behind MAT is to constrict the space for critical journalism in order to make room for bad governance. However, as MAT is still in its propositional form and has not yet attained the status of a Bill, it remains unclear as to how its provisions would undermine democracy. Nevertheless, for many, the very idea of setting-up MAT is associated with threats to freedom of expression and the diminishing of good governance in South Africa. According to the Press Council Appeals in 2015, the formation of MAT appears too harsh and Judge Bernard Ngoepe maintains that an appeals tribunal could lead South Africa down a "slippery path" (Shange, 2015). Gordimer admits that the journalists will be more concerned should the government decide to go ahead with its propositions. She further advocates that,

we too are threatened by denial of freedom of the word, which is our form of expression of the lives of the people of South Africa. Journalists give us the facts, but in poetry and plays and novels there is a level of deep complexity, and that would be confined within the forces of government. Our aim is to explore life and that aim would be compromised by these regulations (Moss, 2010).

Protection of State Information Bill

The development of the Protection of State Information Bill (POSIB) has undergone major changes in parliament (BBC News, 2013: lines 3). Initially termed as the Protection of Information Bill and known as the Secrecy Bill, the POSIB was reintroduced in July 2010 in parliament after the secession of the prior 2008 version (McKinley, 2013: 1). The main objectives of the Protection of Information Bill 2008 were to dismantle and replace the Protection of Information Act 84 of 1982 (PIA) - the prevailing South Africa legislation outlawing the release of information, and to synchronise with the Promotion of Access to Information Act, 2000 (PAIA) (Klaaren, 2003: 194; Currie and Klaaren, 2011: 7).

The Protection of Information Act 84 of 1982

At the peak of apartheid the PIA was proclaimed as a quest for government secrecy at the expense of human rights (van Heerden *et al.*, 2014:40 cited Moore 2009). It overrode the Official Secrets Act No. 16 of 1956 and the Official Secrets Amendment Act No. 65 of 1956 in its entirety and Section 27C of the Police Act No.7 of 1958, in addition to Sections 10, 11 and 12 of the General Law Amendment Act No. 101 of 1969, and Section 10 of the General Law Amendment Act No. 102 of 1972. The PIA blatantly aims "*to provide for the protection from disclosure of certain information; and to provide for matters connected therewith*". Section 2 refers to "*the prohibition of certain acts in relation to prohibited places*"; Section 3 and 4 imply "*the prohibition of obtaining and disclosure of certain information*" and "*the prohibition of disclosure of certain information*" respectively. The remaining sections extend to its infringement, and criminal proceedings.[6] However, there have been many controversies over the nature and application of the PIA (van Heerden *et al.*, 2014: 41). The Minimum Information Security Standards (MISS) – a Cabinet policy document regulating the implementation of the PIA is generally perceived as outdated and unconstitutional (Klaaren, 2003: 195; Klaaren, 2008: 25).

The Protection of Information Bill 28 of 2008

In May 2008, PIB (B28 - 2008) was proposed to the parliament and was re-examined in October 2008 (Klaaren, 2008: 24). For Mckinley (2013: 1). Following public protest, PIB (B28-2008) was rejected due to its similarity to the PIA 84 of 1982. The withdrawal concurred with other boisterous political events such as the resignation of President Thabo Mbeki, the resignation of the Minister of Intelligence Services and the general election of Jacob Zuma as President (Currie and Klaaren, 2011: 12; Klaaren, 2008: 24). In general, the bill has received much criticism. Dr Laurie Nathan, member of the Ministerial Re-

6 Protection of Information Act 84 of 1982. Retrieved from: https://www.acts.co.za/protection-of-information-act-1982/laws_repealed.

view Commission on Intelligence (2006-2008) identified an important concern about the Bill's content and its impact on democratic stability (Mail & Guardian 2010).

Firstly, Nathan claimed that,

> *the government cannot seek to avoid all possible harm that might arise from the disclosure of sensitive information… some risk of harm has to be tolerated in a democracy because the dangers posed by secrecy– lack of accountability, abuse of power, infringements of human rights and a culture of impunity– can imperil the democratic order itself.*

Moreover, he admitted that the classification of '*sensitive information*' and the description of '*national interest*' of Sections 11 and 15 of the Bill were particularly complex. For him, the Bill also contravenes the Promotion of Access to Information Act (PAIA). Furthermore, Nathan maintains that the clause "*secrecy exists to protect the national interest*" appears unconstitutional. He further maintains that, "*since the 'national interest' includes the pursuit of justice and democracy, as stated in section 11, it is not secrecy but rather transparency and access to information that protect the national interest*" (Mail & Guardian 2010).

The Protection of State Information Bill (2010)

The Bill was reintroduced in 2010 with significant amendments and was again severely condemned by the public (Currie and Kaaren, 2011 :12). The dramatic changes to the Bill included its being renamed the Protection of State Information Bill (van Heerden, 2014:44 cited Benjamin, 2011). Despite some 120 amendments, the Bill is considered to be constitutionally improper (Masie, 2011). Overall, the Bill comprises of 13 chapters.[7]

Purposes

The main objectives of the POSIB as set out in Chapter 1, Section 2 of the Bill are to:

> *regulate the manner in which state information may be protected; (b) promote transparency and accountability in governance while recognising that state information may be protected from disclosure in order to safeguard the national security of the Republic; (c) establish general principles in terms of which state information may be made available or accessible or protected in a constitutional democracy; (d) provide for a thorough and methodical approach to the determination of which state information may be protected; (e) provide a regulatory framework in terms of which protected state information is safeguarded in terms of this Act; (f) describe the nature and categories of state information that may be protected from destruction, loss or unlawful disclosure; (g) regulate the conditions for classification and the declassification of classified information; (h) create a system for the review of the status of classified information by way of regular reviews and requests for access to classified information and status review; (i) regulate the accessibility of declassified information to the public; (j) establish a Classification Review Panel to review and*

7 Protection of State Information Bill (B6–2010).

> *oversee status review, classification and declassification procedures; (k) criminalise espionage and activities hostile to the Republic and provide for certain other offences and penalties; and (l) repeal the Protection of Information Act, 1982 (Act No. 84 of 1982).*[8]

Chapter 2 differentiates between '*State Information*' and '*Protected Information*'. Section 4 of the Bill stipulates that '*State information may, in terms of this Act, be protected against unlawful disclosure, destruction, alteration or loss*' whereas Protected Information according to Section 5 refers to,

> *State information which requires protection against unlawful alteration, destruction or loss is referred to as valuable information. (2) State information in material or documented form which requires protection against unlawful disclosure may be protected by way of classification and access to such information may be restricted to certain individuals who carry a commensurate security clearance.*[9]

Chapter 3 and 4 refer to the '*policies and procedures*', and '*state information which requires protection against alteration, destruction or loss*'.[10] The other chapters (chapter 5 to 9) focus on the '*classification and declassification of state information*' together with its '*regular reviews, request for access, review panel, appeals*'.[11] Chapter 11 outlines the different categories of '*offences and penalties*'.[12]

Development of the bill

In November 2011, the Bill was first passed in the lower house of parliament with the African National Congress (ANC) having a two-third majority of 229 votes to 107, with two abstentions (BBC News, 2011). In April 2013, the bill was passed in the national assembly in favour of the ANC by 189 votes to 74, with one abstention after the government modified it following protests about its restrictions on the freedom of the press (Smith, 2013: lines 4; Polgreen, 2013: lines 5).

However, surprisingly Zuma did not sign the Bill and in September 2013 sent it back to parliament for reconsideration. Zuma explained that,

> *after consideration of the bill and having applied my mind thereto, I am of the view that the bill as it stands does not pass constitutional muster…I have referred the bill to the national assembly for reconsideration insofar as sections of the bill, in particular sections 42 and 45, lack meaning and coherence, consequently are irrational and accordingly are unconstitutional (Smith, 2013).*

8 Protection of State Information Bill (B6 – 2010), Chapter 1, Section 2.

9 Protection of State Information Bill (B6 – 2010), Chapter 2, Section 4.

10 Protection of State Information Bill (B6 – 2010), Chapter 3 and 4.

11 Protection of State Information Bill (B6 – 2010), Chapter 5 to 9.

12 Protection of State Information Bill (B6 – 2010), Chapter 11.

However, the changes were to rectify a 'cross-reference in section 42' and 'a punctuation error in section 45'. Hence, '*30 typographical and grammatical*' changes were made to the bill by an ad-hoc committee (Mail & Guardian, 2013).

On 12 November 2013, the Bill was passed again with 255 votes against 88 (SAHA, 2013). The Bill is awaiting the President's signature for it to become a law and may also be sent to the Constitutional Court for a decision about its constitutionality. The current version of the Bill is indeed a marked improvement over the PIA and prior drafts (Echle and Limpitlaw, 2014 :30). According to Bhardwaj (2013), the positive aspects of the bill are:

> *Its scope is limited largely to Cabinet, the security cluster and their oversight services; It contains some protections for disclosure of classified documents; It has a narrower, although still open ended, definition of National Security and a narrower basis for classification of documents; Most commercial information is excluded from the Bill's ambit; The Bill no longer overrides the Promotion of Access to Information Act particularly in the notoriously secretive security sector.*

However, the Bill remains a threat to freedom of expression and good governance and according to the Right2Know statement, "*Parliament has failed in its duties by repeatedly endorsing this draconian Bill, and if the president signs it into law, we must, reluctantly, turn to the Constitutional Court to protect our hard won freedom*" (South African History Archive (SAHA), 13th November 2013).

Moreover, on October 19, 2015 for the commemoration of Press Freedom Day in Pretoria, Zuma reaffirmed his position about the Bill and he stated that as "*further objections were received which were of a constitutional nature, the new Minister of State Security Mr David Mahlobo also requested to work further on some aspects of the bill. At the appropriate time a determination will be made on the way forward*" (Africa News Agency 2015). Subsequently, in an interview Mr Mahlobo declared, "*that important piece of legislation must be supported with appropriate regulations. We have taken a long time to draft the regulations ourselves. They are at an advanced stage now. They should be finalised soon*" (Makinana 2015).

The Protection of State Information Bill undermining freedom of expression and good governance

In general, according to Right2Know (2014), there have been significant improvements in the Bill yet there are a number of imperfections which remain. These shortcomings as presented by Right2Know (2014) are: the vagueness of the definition of '*national security*' thereby promoting '*over classification*'; the Bill proscribes possession as well as leaking of classified information; 'secrecy' powers are vested in the security cluster and the cabinet; absence of a public interest defence clause; harsh penalties and no limit for declassification.

Moreover, the Bill is perceived as jeopardising media freedom by inhibiting 'free *speech*' and '*investigative journalism*' (Maclean and Smith, 2012). According to Smith (2012), "*some believe that the secrecy bill forms part of a wider assault on the freedom of the press in South Africa*" Moreover, the bill has received '*international condemnation*'. At a UN review on South

Africa's human rights record in Geneva, the Bill was slated for undermining freedom of expression and free press in South Africa. Norway and the Czech Republic recommended that the Bill should correspond to international human rights law and the International Covenant on Civil and Political Rights (ICCPR) (Smith, 2012). On the other hand, according to the Ministry of State Security the POSIB aims to promote the public interest by preserving certain state owned classified information (Amadhila, 2012).

Echle and Limpitlaw (2014:30) recognise that the current Bill provides "*objective as opposed to subjective grounds for classifying information*," where the level of classification of state information is acceptable to safeguard national security when required. However, it can be noted the Bill seeks to protect national security at the expense of access to information and transparency with the imposition of harsh penalties. According to Chapter 10f the POSIB (2010), national security refers to,

> *the protection of the people of the Republic and the territorial integrity of the Republic against— (a) the threat of use of force or the use of force…(i) Hostile acts of foreign intervention directed at undermining the constitutional order of the Republic; (ii) terrorism or terrorist related activities; (iii) espionage; (iv) exposure of a state security matter with the intention of undermining the constitutional order of the Republic; (v) exposure of economic, scientific or technological secrets vital to the Republic; (vi) sabotage; and (vii) serious violence directed at overthrowing the constitutional order of the Republic.*

Moreover, according to the POSIB 2010, classified information refers to,

> *sensitive state information which is in material or record form; must be protected from unlawful disclosure and against alteration, destruction or loss as prescribed; must be safeguarded according to the degree of harm that could result from its unlawful disclosure; may be made accessible only to those holding an appropriate security clearance and who have a legitimate need to access the state information in order to fulfil their official duties or contractual responsibilities; and must be classified in terms of section 12.*

Chapter 11 – Offences and Penalties of the Bill particularly refers to,

> *espionage offences; receiving state information unlawfully; hostile activity offences; harbouring or concealing persons; interception of or interference with classified information; registration of intelligence agents and related offences; attempt, conspiracy, and inducing another person to commit offence; disclosure of classified information; failure to report possession of classified information; provision of false information to national intelligence structure; destruction or alteration of valuable information; improper classification; failure by head of organ of state or official of organ of state to comply with Act; prohibition of disclosure of a state security matter. The penalties may vary on the basis of the nature of the offence and the actual or potential harm caused.*[13]

13 Protection of State Information Bill (B6 – 2010), Chapter 11.

As per the POSIB draft whistle-blowers and journalists are subject to harsh penalties up to 25 years of imprisonment if state secrets are exposed (Maclean and Smith, 2012). Smith (2012) refers to the case of Andrew Feinstein and the investigation about the arms deal costing around £5.35bn. Feinstein, a former ANC MP elected in 1994 in South Africa, resigned in 2001 after the government declined to investigate the issue. For Soggot (2001), Feinstein claims that the government has employed its power to prevent further enquiry. Moreover, according to Smith (2012), Feinstein believes that had the Secrecy Bill been a law, information about the arms deal – *'the biggest corruption scandal'* would have been suppressed as it was a subject of national security. Feinstein further notes that,

> *The fact there was blatantly corrupt; criminal activity taking place under the veil of national security secrecy means that the secrecy bill would have simply swept that under the carpet. People like myself and the myriad incredibly courageous journalists and other activists and writers who've campaigned around it would have had to be silent or face jail sentences (Smith 2012).*

Feinstein also maintains that he would have been jailed for 25 years if the Secrecy Bill had been law at the time he published his book The Shadow World: Inside the Global Arms Trade (Sunday Times, 2011). Feinstein justifies that, *"I look back on my own work and I think – if I understand the bill in its current form – that if I had published my first book, After the Party, and this legislation had been in place, I would have been liable for a jail term for using confidential state documents"* (Smith, 2012).

Similarly, Gordimer (2012) alleged that, *"the Secrecy Bill has been and continues to be seen as an obvious means of concealing the corruption that has become a way of South African life for many, from high-placed members of the government down to menial officials"* However, it remains ambiguous whether under the revised version whistle-blowers and journalists would be covered under the law if restricted subjects such as corruption are uncovered (Human Rights Watch, 2013).

Moreover, there is the Nkandla case in which the President of South Africa was criticised for using around $23m (£13.8m) of taxpayers' money to reconstruct his rural home (BBC News, 2014). Officials have repeatedly defended the huge amount spent on Nkandla on the grounds of security for Zuma as President (Smith, 2013). Investigative journalists at amaBhungane referred to the PAIA to request procurement documents containing the funding details when it emerged in 2012 that R200 million had been released. However, the request was turned down by the Department of Public Works based on the National Key Points Act of 1980, the Protection of Information Act of 1982 and the Minimum Information Security Standards (MISS) (Right2Know, 2014). The Nkandla Report has been classified as *'Top Secret'* by the Minister of State Security and the Bill would only inhibit information about *'corruption'* and *'maladministration'* by Zuma and his Cabinet (De Vos, 2013). However, following the court decision in June 2012, the Department of Public Works released 12,000 pages of *'internal documents'* which were not *'security sensitive information'*. Until 2013, the same reason of 'national security' was offered when cabinet requested to declassify and publicise the report (Sole, 2014).

Had the POSIB been in place, access to information, accountability and transparency would have been suppressed to favour abuse of power and corruption. Following Chapter 5, Section 13 of the POSIB (2010) states that,

> *(1) Subject to section 3, any head of an organ of state may classify or reclassify state information using the classification levels set out in section 12. (2) A head of an organ of state may delegate in writing authority to classify state information to a staff member at a sufficiently senior level. (3) Only designated staff members may be given authority to classify state information as secret or top secret. (4) Classification decisions must be taken at a sufficiently senior level to ensure that only that state information which genuinely requires protection is classified. (5) When state information is categorised as classified, all individual items of information that fall within a classified category are deemed to be classified. (6) Where a person is a member of the Security Services as contemplated in chapter 11 of the Constitution who by the nature of his or her work deals with state information that may fall within the ambit of this Act, that person must classify such information in accordance with the classification levels set out in section 12. (7) The member of the Security Services must submit the classified state information to the head of an organ of state in question for confirmation of the classification. (8) The state information classified in terms of subsection (6) must remain classified until the head of an organ of state in question decides otherwise. (9) The head of an organ of state retains accountability for any decisions taken in terms of a delegated authority contemplated in subsection (2).*

This evidently signifies that the Minister of State Security possesses extensive powers to classify information after parliament approval (De Vos, 2013). By bequeathing such broad powers, the Minister of State Security improperly used his influence to classify information to safeguard national security. Likewise, De Vos (2013) contends that,

> *If the Minister (and the majority party in Parliament) wishes to, they could empower any department of state or administration in the national or provincial sphere of government, any other functionary or institution exercising a public power or performing a public function in terms of any legislation and any owner of a facility or installation declared as a National Key Point, to classify information.*

De Vos (2013) further maintains that,

> *because the definition is open-ended, it is conceivable that a cabinet minister or the owner of Nkandla could interpret "national security" in a far broader manner than the examples mentioned in the definition of national security contained in the Bill to include almost anything that, in the mind of the classifier, would threaten 'national security.*

If information about Nkandla were publicised after the Minister has classified it, investigative journalists would have been subject to the abrasive penalties as per Chapter 11 of the POSIB (2010). Moreover, according to advocate George Bizos, an anti–apartheid

campaigner and human rights expert, the Bill is still constitutionally faulty despite the changes to the two sections requested by Zuma. He argued that a public interest defence is crucial and he further sustained that "*such a defence would exempt from prosecution certain individuals in limited and appropriate circumstances where the disclosure has been made in public interest*" (Makinana, 2013).

Conclusion

This paper acknowledges that since the transition to democracy in 1994, very substantial progress has been achieved in terms of freedom of expression. In stark contrast with the Apartheid system, South Africa is now protected by a strong democratic Constitution, a strong Bill of Rights and various international laws which allow the liberalisation of the press and civil society to enjoy freedom to speak and to receive information. Since 1994, the media is open to criticize and denounce bad governance. This paper shows the regressive effects of MAT and POSIB including their threat to the media's function of checks and balances, its status as a source of information of ideas and its role as an agenda setter. According to Mbeki and Zuma MAT was developed to repair the self-regulation system, the Press Council and its bodies. However, it has been widely criticized on a number of fronts, including the political appointment of its members and its powers to impose punitive measures, thereby threatening freedom of expression and good governance. Further research should be conducted when the detailed content of MAT is publicised. Similarly, although the POSIB has been improved over the course of its development, there are still a number of lacunas with regards to freedom of the press. PIB aims to safeguard national security, but at the same time jeopardises access to information and transparency. Both MAT and POSIB are still at the review stage and as such have no power. However, if they are passed without significant amendment, they will only serve to challenge freedom of expression.

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