SOUTH AFRICA'S PROTECTION OF STATE INFORMATION BILL

WHAT ARE THE LESSONS LEARNED FOR AFRICA?

Christian Echle / Justine Limpitlaw

In the age of technology with high-speed Internet access and smart phones, it is sometimes easy to imagine that all journalists' working lives are the same: deadlines, insufficient resources, worrying about the threats of digital media (if one is in print) and the race to break news. In some ways these concerns are indeed universal. However, what journalists in North America and Europe hardly ever have to worry about is their basic right to report the news. It is true that in a post-Wikileaks and News of the World journalistic environment, all reporters have had to consider their fundamental role in providing news, information and analysis ethically. However, in Africa many journalists find themselves carefully tiptoeing through minefields of media laws which limit their ability to report accurately and truthfully on the news of the day, particularly when reporting on activities of the powerful in government.

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A key characteristic of many southern African countries is a media law landscape with a relatively benign liberal constitution at the apex. All constitutions protect freedom of expression to some extent. However, very few changes have been made to media legislation to ensure that the legislation accords with the constitutional right to freedom of expression. Despite oft-expressed anger over the colonial era and its on-going repercussions for the continent, African political elites have essentially retained colonial era media laws as is. One only has to list many in-force statutes to note that African media law appears to have stultified in the early or mid-20th century. Both Lesotho's

and Swaziland's Sedition legislation dates back to 1938.[1] Swaziland's Cinematograph Act is from 1920. Many countries' Penal Codes date back to the 1960s – prior to their independence from colonial powers. These Penal Codes criminalise many forms of expression including defamation, insult and false news, and provide for significant jail sentences.

BLOCKING THE ROAD TO DEMOCRACY: STATE POWER THREATENING THE MEDIA

In Swaziland, a journalist was charged with contempt of court for reporting the fundamental issue of whether or not the Chief Justice is fit to hold office, given that he is the subject of impeachment proceedings in Lesotho.

Looking back to the year 2013, it is obvious that those laws are used by government officials to threaten journalists in their daily professional work. In Swaziland, a journalist was charged with contempt of court for reporting the fundamental issue of whether or not the Chief Justice is fit to hold office, given that he is the subject of impeachment proceedings back in his own country, Lesotho.[2] In Zambia, police detained two journalists of the *Daily Nation* and charged them with "publication of false information with intent to cause public alarm" under section 67 of the Zambian penal code. They had cited McDonald Chipenzi, leader of the non-profit organisation Foundation for Democratic Process (Fodep), voicing concerns about the recruitment process for new members of the Zambian police.[3] In Tanzania, the two newspapers *Mwananchi* and *Mtanzania* were suspended by the unilateral action of the Minister of Information, citing breach of the peace concerns – *Mwananchi* was reporting on new salary structures in the government.[4]

1 | Cf. Justine Limpitlaw, *Media Law Handbook for Southern Africa*, Vol. 1, Konrad-Adenauer-Stiftung, Johannesburg, 2012, Chapter 7 (Swasiland) and 10 (Lesotho), http://kas.de/medialawafrica (accessed 21 Mar 2014).

2 | "Swaziland: Concerned With Sentencing of Swaziland Editor Bheki Makhubu", *AllAfrica*, press release, 18 Apr 2013, http://allafrica.com/stories/201304180435.html (accessed 21 Mar 2014).

3 | "FODEP boss, Daily Nation Editors in court for mention", *Lusakatimes*, 26 Dec 2013, http://lusakatimes.com/2013/12/26/fodep-boss-daily-nation-editors-court-mention (accessed 21 Mar 2014).

4 | "Govt shuts down Mwananchi, Mtanzania for 'provoking hostility'", *The Citizen*, 29 Sep 2013, http://www.thecitizen.co.tz/News/Govt-bans-Mwananchi--Mtanzania/-/1840392/2011424/-/12bbww5z/-/index.html (accessed 21 Mar 2014).

Another constant cause for conflict between the state power and media houses is the matter of source protection. In May 2013, the police in Uganda searched the newsrooms of the newspaper *Daily Monitor*, the radio stations *KFM* and *Dembe FM* as well as the tabloid *Red Pepper* for eleven days. The reason for the raid was that a high-ranking member of the army had allegedly sent a letter to the editors. It supposedly contained information about a plot to assassinate army officers and politicians who were opposed to Muhoozi Keinerugaba, the president's son. It also revealed that this plot was created to make sure that Keinerugaba can succeed his father, Yoveri Museveni. After the United Nations had condemned the raids and the letter was not found on the eleventh day of the search, the media houses were finally able to resume operations.[5]

The example shows that the media in sub-Saharan Africa neither have a lack of explosive information nor corresponding informants. On the road to democracy and economic growth, corruption and nepotism continue to be the biggest problems on the continent. Since grave struggles for power and influence are not uncommon within the ruling parties, incriminating information about members of the government are given to the media on a regular basis.

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However, the protection of journalistic sources and so-called whistleblowers is no longer just a question of dealing with the media, but with the civil society in general. Thanks to mobile devices, the Internet spreads in Africa with rapid growth rates.[6] Confidential information is not only given to journalists any longer, but shows up on blogs, Twitter timelines and Facebook pages. The most prominent example of this development is Baba Jukwa (Father of Jukwa). This Facebook profile[7] caused quite a bit of hustle and bustle before last year's elections

5 | Katharina Lang, "Urged to Self-censorship: Tanzania's Control over the Media", Konrad-Adenauer-Stiftung, 23 Oct 2013, http://kas.de/medien-afrika/en/publications/35836 (accessed 21 Mar 2014).

6 | Cf. Markus Brauckmann, "A Good Connection? Mobile Phones and Democratisation in Sub-Saharan Africa", *KAS International Reports* 11/2011, 14 Nov 2011, http://kas.de/wf/en/33.29399 (accessed 21 Mar 2014).

7 | Facebook profile of Baba Jukwa, http://fb.com/pages/Baba-Jukwa/232224626922797 (accessed 21 Mar 2014).

in Zimbabwe by publishing any kind of confidential information, with a focus on the ruling party ZANU-PF and the state of health of President Robert Mugabe.

After Baba Jukwa had released a warning that the ZANU-PF wanted to get rid of the previous Mining Minister, Edward Chindori-Chininga, and he actually died in a mysterious car accident a few days later, the profile quickly had 300,000 followers and concentrated public attention. Other postings about conspiracies and corruption cases followed, as well as the telephone numbers of those involved in these plots. In mid-July, two weeks before the elections, President Mugabe finally promised 300,000 U.S. dollars to anyone who could reveal the identity of Baba Jukwa.[8] Seven months later, the profile is still active and is updated several times per week.

Published confidential information on the governing party ZANU-PF and the state of health of President Robert Mugabe: The anonymous Facebook profile of Baba Jukwa. | Source: N. 7.

8 | Jane Flanagan, "Mugabe hunts for internet mole 'Baba Jukwa' revealing his secrets", *The Telegraph*, 14 Jul 2013, http://telegraph.co.uk/news/worldnews/10178570/Mugabe.html (accessed 21 Mar 2014).

SOUTH AFRICA'S PROTECTION OF STATE INFORMATION BILL

These examples show that the handling of confidential information and its dissemination to the media is an important and highly relevant issue in southern Africa. Against this background, it is worthwhile to take a closer look at the Protection of State Information Bill (POSIB) in South Africa. This Bill represents the first attempt of a sub-Saharan African country to create security legislation which is not based on colonial law. As in many other areas, it can be assumed that this law will have a significant impact on similar legislative reform processes in neighbouring countries, as South Africa is still considered the most advanced country in the region and acts as a role model.

At the center of the biggest South African scandal is President Jacob Zuma, who needs to sign the Protection of State Information Bill in order to make it a law.

The planned introduction of the Bill is particularly delicate, since the country has seen numerous cases of corruption and irregularities going public in recent months. At the center of the biggest scandal is President Jacob Zuma, who needs to sign the Bill in order to make it a law. After the president's private homestead in Nkandla had undergone a security update, it became public that the costs to the taxpayer are in excess of 20 million U.S. dollars. The upgrades included a swimming pool – declared as "fire pool" – as well as a number of new residential buildings. Zuma is now confronted with the accusation of misappropriation of public funds. When the media quoted from the provisional version of the investigation report by Public Protector Thuli Madonsela, it was condemned unlawful by government officials. They voiced criticism that the president's security cluster did not have a chance to give its input on the report.

South Africa has a legacy of draconian, anti-media security legislation from the Apartheid era which, obviously, prioritised state security at the expense of media freedom. The pervasive culture was one of secrecy as opposed to transparency, and by its very nature, it put the needs of the Apartheid security apparatus ahead of the basic needs of ordinary citizens.

A new security legislation which is not based on colonial law: South African President Jacob Zuma still needs to sign the Protection of State Information Bill. | Source: Ragnhild H. Simenstad, Royal Norwegian Ministry of Foreign Affairs, flickr ⓒⓘⓔ.

The POSIB was initially introduced in March 2008[9] and it proposed to repeal the Protection of Information Act, 1982. This Act was a severe piece of security legislation, crafted in the era of P.W. Botha, the second to last president of the apartheid regime. It granted vast discretionary powers to the President to exercise subjective discretion, preventing the reporting on or publication of an array of security-related information.

After 1994, the Protection of Information Act (which was still on the statute books) was clearly unconstitutional as it violated, among others, the constitutionally-protected rights to freedom of expression, including the right of everyone "to receive and impart information and ideas"[10] and "to access any information held by the state".[11] Essentially, the POSIB was an attempt to repeal Apartheid-era security legislation and replace it with Democratic-era security legislation.

9 | Government Gazette No. 30885, 18 Mar 2008.
10 | Constitution of the Republic of South Africa, section 16(1)(b), 1996.
11 | Constitution of the Republic of South Africa, section 32(1)(a), 1996.

The history of the passage of the Bill through Parliament has been extremely torturous. Interestingly, the Bill became more draconian as it wound its way through Parliament, particularly after its reintroduction in 2010. The Bill met with furious opposition from civil society which protested vigorously its more problematic aspects. It essentially took precedence over and excluded the Promotion of Access to Information Act, 2000 which is the legislation that gives effect to the Constitutional right of access to information. Also, the Bill contained draconian offences provisions including long jail sentences (of up to 25 years) for disclosing classified information, even if this was in the public interest. Maybe the biggest problem was the fact that the Bill had extremely broad and vague grounds for classifying information, giving nearly everyone the opportunity to cover criminal actions and especially corruption cases on a state level.

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The Bill was debated in both the National Assembly and in the National Council of Provinces for years and in both chambers, civil society furiously derided the Bill as not moving sufficiently far away from Apartheid-era security legislation. It was finally passed by Parliament in April 2013 and went to President Jacob Zuma for his signature, which is required before a Bill can become law. Interestingly and in a move that was widely lauded, President Zuma did not sign the Bill into law and instead sent it back to Parliament for reconsideration as he is required to do in terms of section 79(1) of the Constitution if he "has reservations about the constitutionality of the Bill". The Bill was subject to further amendments and repassed by Parliament in November 2013. However, currently it is still not law and is sitting with the President awaiting his signature. If the President is of the view that his concerns regarding the constitutionality of the Bill have been addressed then he must sign the Bill into law. If not, he must refer the Bill to the Constitutional Court for a decision on its constitutionality.[12] Many commentators speculate that the Bill will not be signed into law prior to the May 7 general election due to the public opposition that the Bill has generated.

12 | Constitution of the Republic of South Africa, section 79(4), 1996.

Although the Bill is not yet law and might still go to the Constitutional Court for a ruling on its constitutionality, it is important to consider, assuming that the dust has settled, how it looks now. As it currently stands, the Bill[13] is a vast improvement over the Protection of Information Act old (currently enforceable) law and also over previous drafts of the Bill. Five aspects are to be highlighted.

The POSIB defines "national security" as the protection of the people of the Republic and the territorial integrity of the Republic against the threat of using force or the use of force.

First, unlike the Apartheid-era Protection of Information Act, it contains objective as opposed to subjective grounds for classifying information. Section 8(2)(a) of POSIB states that classification of state information is justifiable "only when it is necessary to protect national security". Further "national security" is defined as the protection of the people of the Republic and the territorial integrity of the Republic against the threat of use of force or the use of force as well as against a number of acts including: terrorism, espionage, sabotage, exposing state security with the intention of undermining the constitutional order of the Republic or serious violence aimed at overthrowing the constitutional order of the Republic.

Secondly, POSIB makes it an offense to classify information in order to:[14]

- Conceal corruption or other unlawful acts or omissions, inefficiency, incompetence or administrative errors,
- restrict access to state information in order to limit scrutiny and thereby avoid criticism,
- prevent embarrassment to a person, or organ of state,
- lessen competition,
- prevent or delay the release of state information that does not require protection under the Bill.

Third, POSIB no longer purports to take precedence over the Promotion of Access to Information Act which gives effect to the Constitutional right of access to information. This has been a significant bone of contention for many years. Earlier iterations of the Bill clearly and unambiguously gave the provisions of POSIB precedence over the provisions of the Promotion of Access to Information Act.

13 | Bill 6H, 2010.
14 | POSIB, section 8(2)(b).

Civil Society pointed out the illegality of this attempt to, in effect, ouster the right of access to information protected under the Constitution and it appears that the President, at least, recognised this illegality. The fact that classified information will still be subject to the provisions of the Promotion of Access to Information Act is a major victory for opponents of the Bill as it means that the grounds for disclosure contained in that Act will have application in respect of information classified in terms of POSIB too.

Fourth, and perhaps most controversially is the issue of a public interest exception for disclosure of classified information. Section 41 of POSIB makes the intentional disclosure (or even possession) of classified state information an offence carrying a maximum penalty of five years imprisonment. However, the Bill does now include exceptions to this and the exceptions include:

- Disclosures which are protected under legislation dealing with: whistleblowers, company law, corruption, the environment or labour.
- Disclosures which are authorised under any Act of Parliament. Significantly this would now include the Promotion of Access to Information Act which itself contains a public interest exemption15 in respect of disclosing information the disclosure of which would ordinarily be protected, if disclosure would reveal: a substantial failure to comply with the law and where there is an imminent and serious public safety and environmental risk and the public interest in disclosure outweighs public interest in non-disclosure.
- Disclosures which reveal criminal activity including wrongfully classifying the information in the first place.

Nevertheless, there is still no generally applicable broad "public interest" defence to disclosing classified information and for that reason many are concerned that the Bill does not go far enough in protecting journalists who are engaged in investigative reporting in respect of issues that do not fall within one of the protected disclosure exemptions set out above. It is likely that this issue will, at some point, be settled by the Constitutional Court.

15 | Promotion of Access to Information Act, section 70, 2000.

Fifth and perhaps most important for the continent, the Bill represents the first time an African country has repealed colonial era security laws and replaced them with security laws that are, generally speaking, in line with international standards for security laws. For this reason alone the POSIB is to be welcomed. In this regard it is important to note that the preamble to the POSIB contains a number of statements which are significant, since they accept that the right of access to information is a cornerstone of South African democracy and they recognise the harm caused by excessive secrecy. They also promote the free-flow of information within an open and democratic society without compromising the national security of the Republic.

Further, section 4 of the POSIB sets forth "General Principles of State Information" which underpin the Act and which will inform its implementation. Many of these are in line with international best practise statements. For example, one of the principles states that state information should be available and accessible to all persons, unless restricted by law that clearly stipulates reasonable and objectively justified public or private considerations. Furthermore, those principles require state information to be accessible to all as the basis of a transparent, open and democratic society. At the same time, the principles highlight that protection and classification of certain state information is however vital to save lives, to enhance and to protect the freedom and security of persons, to bring criminals to justice, to protect national security and to engage in effective government and diplomacy.

The general principles of POSIB require state information to be accessible to all as the basis of a transparent, open and democratic society.

FREEDOM OF EXPRESSION IN AFRICAN CONSTITUTIONS

Many countries in Africa have constitutions that protect fundamental human and civil rights. Further, African countries as members of the African Union often have a number of international agreements and treaties which ought to be informing them as to the kinds of laws that need to be passed (or indeed repealed) in line with their international obligations.

The first agreement in this regard was the African Charter on Human and Peoples' Rights, 1981 (Banjul Charter) which provides that "Every individual shall have the right to receive information".[16] The Declaration of Principles on Freedom of Expression in Africa, 2002, which was adopted by the African Commission on Human and People's Rights (African Commission) in 2002, goes more into detail. Article IV.2 provides that the right to information shall be guaranteed by law in accordance, among others, with the following principles:

- No one shall be subject to any sanction for releasing in good faith information on wrongdoing, or that would disclose a serious threat to health, safety or the environment save where the imposition of sanctions serves a legitimate interest and is necessary in a democratic society; and
- Secrecy laws shall be amended as necessary to comply with freedom of information principles.

Further, article XIII provides, among other things, that freedom of expression should not be restricted on public order or national security grounds unless there is a real risk of harm to a legitimate interest and there is a close causal connection between the risk of harm and the expression.

The African Union Convention on Preventing and Combating Corruption, 2003 (AU Corruption Convention) was adopted by the AU in 2003 and came into force in 2006. In article 9, it states that each State Party shall adopt such legislative and other measures to give effect to the right of access to any information that is required to assist in the fight against corruption and related offences. In article 12, it requires State Parties to create an enabling environment that will enable civil society and the media to hold governments to the highest levels of transparency and accountability in the management of public affairs and ensure that the Media is given access to information in cases of corruption and related offences on condition that the dissemination of such information does not adversely affect the investigation process and the right to a fair trial.

16 | Article 9.1.

Lastly, the African Charter on Democracy, Elections and Governance, 2007 (AU Democracy Charter) was adopted in 2007 and came into force in 2012. Article 27 provides that in order to advance political, economic and social governance, State Parties shall commit themselves to undertaking regular reforms of the legal and justice systems. They are also supposed to improve efficiency and effectiveness of public services and combating corruption and to promote freedom of expression, in particular freedom of the press and fostering professional media.

It is becoming increasingly difficult for governments to hide behind any secrecy law: People in Melbourne protesting for Wikileaks founder Julian Assange in 2010. | Source: John Englart, flickr CC BY SA.

SOUTH AFRICA AS A BATTLE GROUND IN THE FIGHT OVER SECURITY LAWS

Unfortunately the continent is not known for updating repressive security laws. The rhetoric of anti-colonialism that is so popular among governments that have fought for national liberation masks a deep-seated attachment to colonial-era security laws that, oddly, seldom seem to be repealed after liberation. Robert Mugabe's use of the Rhodesian regime's emergency powers is not an isolated example. There are many others, for example, the Zambian Penal Code of 1930, Lesotho's Sedition Proclamation of 1938, and Malawi's official Secrets Act of 1913. These are, obviously, entirely out of step with fundamental human rights, particularly the right to free expression.

Consequently, there are a number of real positives about the POSIB and it is clear that it does reflect a rights-based sea change in attitude when compared with Apartheid-era security laws. South Africa has been and still is a key battle ground in the fight over legitimate and illegitimate security laws. The role it plays on the continent means that the implications of this fight are likely to have international consequences.

It is worthwhile to consider that notwithstanding the inconsistent and incoherent forward and backward motion by the South African government on secrecy laws, one of the huge lessons of the "Arab Spring" and the cases of Wikileaks and Edward Snowden is that it is becoming harder and harder for governments to hide behind any secrecy law, progressive or not. The Internet and, specifically, the rise of the smart phone give ordinary people the power to be the investigative reporters of their own realities and to record and film their lives in ways that can easily be used by the mainstream media. Time and time again information is leaked to the media, and governments are fighting a losing battle over unwarranted secrecy laws. It is clear that popular sentiment is not in favour of secrecy, particularly illegitimate secrecy.