

The South African “Secrecy Act”: Democracy Put to the Test

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The ongoing debate and consideration of the Protection of State Information Bill (often termed the “Secrecy” Bill or Act) has provided a true test for the postapartheid South African democracy. Using a case study of that legislation’s period of consideration over more than six years, this paper will propose three ways in which the Bill tested democracy in South Africa. The legislation tested South Africa’s structures of representative democracy in showing up the failure of the National Assembly to oversee the intelligence services, in showing the lack of individual accountability for representatives in South Africa’s postapartheid democracy, and in pointing to the as yet clumsy modes of incorporating elements of the national debate from provincial and local level in the National Council on Provinces (the second legislative chamber which, together with the National Assembly, makes up Parliament). The dominant democracy framework is not as helpful in analysing these developments as an analysis attending to the symbolic politics of transparency between the intelligence services and the media. This article thus explores the complex field within which the politics of the Secrecy Bill has played itself out in South Africa. Finally, the article also goes beyond the metaphor of balancing and argues that transparency and secrecy are not two concepts separate from each other. The insight that transparency and opacity are mutually implicated allows us to understand better how both are supported and nurtured within a constitutional democracy.

A. Introduction

While it seems that we often live in interesting and testing times, it is easily arguable that the passage of the Protection of State Information Bill (the Secrecy Bill) has provided a true test for the postapartheid South African democracy. There are five goals pursued by this legislation. First, the Bill aims for the repeal and replacement of the existing state information classification law. It therefore provides for the repeal in its entirety of the Pro-

tection of Information Act 84 of 1982. A second object of the Bill is to reconcile the necessity for a classification and information security regime with the constitutional principles of transparency and accountability in governance, as well as with individual rights. At one point, the Bill declared that it was one of its objects to “harmonise the implementation of this Act with the Promotion of Access to Information Act, 2000”. In its third principal object – the Bill attempts to put into law a government duty of confidentiality that goes beyond the conventionally narrow protection of national security information. In this sense, the Bill was understood as a statutory mirror of Promotion of Access to Information Act (PAIA). Whereas PAIA provided rules for government information disclosure, the Bill would provide rules for non-disclosure of government information, consistent with the PAIA. The fourth and fifth goals of the Bill fall in the category of effecting important policy reforms. With respect to the fourth, as the Explanatory Notes to the 2008 Bill stated: “[t]he aim of the current reforms is to significantly reduce the volume of information classified but at the same time to strengthen the protection of state information that truly requires protection. A comprehensive statutory foundation for the classification and declassification of information is likely to result in a more stable and cost-effective set of policies and a more consistent application of rules and procedures.” Finally and fifthly, the Ministry of Intelligence Services also noted that there was no statutory crime of espionage and only a weak regime of common law criminalization (due in part to constraints placed on such criminalization by courts during the operation of the apartheid regime) and thus included the purpose to provide for an appropriate statutory scheme of criminal offences and penalties. In order to achieve these five goals, the Bill contains 54 sections organized into thirteen chapters.

In its current version, B6H-2010, the legislation has progressed out of Parliament and is awaiting Presidential signature.¹ An indication of its controversial nature is the fact that it is the only one of the forty-one bills introduced into Parliament in 2010 that have not yet been finalized and signed into law. Using a case study of that legislation’s period of consideration over more than six years, this paper will propose three ways in which the Bill tested democracy in South Africa.

1 Protection Of State Information Bill, <http://bills.pmg.org.za/bill/282/> (last accessed on 23 June 2014).

The first testing by the Bill of democracy has been at a mostly formal and abstract level. The consideration and eventual passage of the Bill has been in part a battle over the processes of representative democracy. This battle has engaged with a number of institutional stress points in the scheme of the existing Constitution: Parliamentary oversight (particularly of the security sector), the supremacy of the party over both individual members of Parliament (MPs) and even the Presidency, and the relative place and effectiveness of the two houses of the South African Parliament, the National Assembly and the National Council of Provinces in national debate. In each of these stress points, the German comparison can be instructive.

The second testing by the Bill of democracy has been around the content of the contest. The debate over the Secrecy Bill was largely a prospective debate over the likely consequences of the passage of the Bill. The primary set of concerns were that the Bill might be used to aid and abet illegality by covering up corruption, to strengthen the power of the ruling power to use patronage to entrench its own dominant position in a dominant democracy, and to further increase the power of the security services within the factional battles of the dominant party. Proponents of this line of argument (especially the first two components) include, at least implicitly, Sujit Choudhry² and Samuel Issacharoff.³ This debate over the consequences of the Bill for accountability to a certain degree has paralleled the first referenced debate over formal representative democracy in South Africa. The content of this debate could be framed within the balance metaphor – what is the appropriate balance between national security and transparency? Here, it is interesting to explore whether and where South Africa fits within the range of democracies on this score.⁴ The challenge

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- 2 *Sujit Choudhry*, “He Had a Mandate”: The South African Constitutional Court and the African National Congress in a Dominant Party Democracy, *Constitutional Court Review* 2 (2009), pp. 1-86.
 - 3 *Samuel Issacharoff*, The Democratic Risk to Democratic Transitions, *Constitutional Court Review* 5 (2013), pp. 1-31.
 - 4 *Jonathan E. Klaaren*, The Promotion of Access to and Protection of National Security Information in South Africa, Center for the Study of Law and Society Jurisprudence and Social Policy Program (2003), <http://escholarship.org/uc/item/18c3p5kd> (last accessed on 23 June 2014).

of striking the balance between national security and openness is one that faces nearly all constitutional democracies.⁵

The third testing by the Bill of democracy is interior to the Bill and is implicit in the entangled concepts of transparency and secrecy. Arguably, both concepts encompass elements of trust and control. These concepts are exemplified in the South African jurisdiction by two statutes, neither of which has arguably been implemented even though one has been on the books for over ten years now. The one is the PAIA and the other is of course the Secrecy Bill. It would be possible to operationalize (or frame) the contest of these two concepts expressed in statutory form through an examination of the balance between national security and openness or through an examination of a particular structure such as bureaucracy. However, I wish in this section to take this opportunity to examine the more critical debate between and among these concepts as normative political values.

B. Background and Context

Before we dive into these three testings, let us get a further sense of the Secrecy Bill with some attention to its sociolegal context.

The story of the Bill can perhaps begin with four legal texts – indeed the first of these arguably engendered the following three. The first text is one of the Constitutional Principles placed into the interim Constitution, which South Africa adopted in 1993 and that provided both guidance and constraints on the text of the final Constitution, adopted in 1996. Constitutional Principle IX provided:

“Provision shall be made for freedom of information so that there can be open and accountable administration at all levels of government.”⁶

The second text is the right of access to information, included as part of the Bill of Rights in the 1996 Constitution. Section 32 of the 1996 Constitution provides:

5 *Peter Galison et al.*, *What We Have Learned about Limiting Knowledge in a Democracy*, *Social Research* 77 (2010), pp.1013–1048.

6 Constitution of the Republic of South Africa, 1993, Schedules, <http://www.constitutionalcourt.org.za/site/constitution/english-web/interim/schedules.html#sched4> (last accessed on 7 July 2014).

“32. Access to information. (1) Everyone has the right of access to – (a) 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. (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.”

The wording of this right actually changed slightly between the interim and the 1996 Constitutions but its substance remained the same.⁷ The third text is a Cabinet policy document approved on 4 December, 1996 as “national information security policy”, the Minimum Information Security Standards (MISS).⁸ The fourth text is the law mandated by subsection 32(2) of 1996 Constitution: South Africa’s access to information law, the PAIA.⁹

If the story of the Bill began with this opening burst of opening legal texts, the next significant moment was undoubtedly marked by the closing themes of the longrunning sagas of the Truth and Reconciliation Commission and the arms deal. The first is significant since it was the state effort to unearth the past. It failed of course to do this completely yet it had enough successes along the way to achieve a power to defang the retrospective argument against the still existing secrecy legislation, the Protection of Information Act of 1982.¹⁰ Indeed, this apartheid-era national security information legislation to a great extent weathered the storm of openness. At more or less the same time, the arms deal saga (where claims were made of corruption into the large scale post-apartheid purchases of military equipment) showed that the military complex retained great power and particularly retained a power to draw a cloak over its activities. Only now since 2013/2014 has there been a judicial inquiry into these allegations.¹¹ It is perhaps an understatement to observe that it is not yet clear that this judicial inquiry will get to the bottom of these allegations.

7 Iain Currie & Jonathan Klaaren, *The Promotion of Access to Information Act*, Commentary, Cape Town 2002.

8 Klaaren, note 4, pp.191–194.

9 Promotion of Access to Information Act 2000, http://www.saflii.org/za/legis/consol_act/poatia2000366/ (last accessed on 7 July 2014).

10 Deborah Posel & Graeme Simpson, *Commissioning the Past: Understanding South Africa’s Truth and Reconciliation Commission*, Johannesburg 2002.

11 Andrew Feinstein, Paul Holden & Hennie van Vuuren, Seriti probe’s cautious style risks hiding dirty secrets, *Open Secrets*, 26 February 2014, <http://opensecrets.org.za/seriti-probes-cautious-style-risks-hiding-dirty-secrets/> (last accessed on 7 May 2014).

The genesis of the Secrecy Bill may be located soon after 2000. As noted above, one source for the Bill was the growing state acknowledgement of the unconstitutionality of the 1982 secrecy legislation. Running alongside this acknowledgement was a parallel recognition of the increasing lack of fitness of the MISS. As Sandy Africa has pointed out, “the MISS is a post-1994 initiative, but is based on an administrative instrument inherited from the apartheid era.”¹² Against this background, a commission appointed by the Minister of Intelligence Services in 2001 investigated the need for a classification and declassification framework aligned to the Constitution.¹³ Another significant moment in the initiation of the Bill came from a successor intelligence Minister, focused on aligning the operations of the intelligence services to the Constitution and to executive oversight. Preparations for what became the Secrecy Bill thus began in earnest around 2005.¹⁴ In August 2005, the Minister of Intelligence Services appointed a task team to “look into a range of proposed changes to intelligence legislation”.¹⁵ This initial drafting effort resulted in the first version of a Secrecy Bill being introduced into Parliament in 2008. After several months of Parliamentary exposure, this first version of the Secrecy Bill was then withdrawn.

Yet another intelligence Minister (now titled the Minister of State Security) tabled a significantly redrafted and much more intelligence services oriented Bill in the National Assembly in March 2010.¹⁶ Moving from the National Assembly to the National Council of Provinces to the National Assembly and then to the National Council of Provinces and back to the National Assembly again, the Secrecy Bill was then significantly changed by the consideration of the relevant Parliamentary committees. This change occurred in a drawn-out process with fair degree of public input and debate, albeit filtered often through legal language.¹⁷

12 *Sandra Elizabeth Africa*, *Well-kept Secrets: The Right of Access to Information and the South African Intelligence Services*, Johannesburg 2009, p. 151.

13 *Id.* at 92.

14 *Id.* at 92–93; *Barry Gilder*, *Songs and Secrets*, Auckland South Africa 2012, p. 412.

15 *Gilder*, note 14, p. 408.

16 Protection Of Information Bill [B6-2010], Parliamentary Monitoring Group, <http://www.pmg.org.za/node/21973> (last accessed on 7 July 2014).

17 *Pierre De Vos*, *Bizos & Kerfoot: LRC submission on Secrecy Bill – Constitutionally Speaking*, 22 February 2012, <http://constitutionallyspeaking.co.za/bizos-kerfoot-lrc-submission-on-secrecy-bill/> (last accessed on 13 October 2015); DA:

The Secrecy Bill was finally passed by Parliament in 2014.¹⁸ The Bill’s legislative passage included a final turn of events where President Zuma sent the Bill back to Parliament for extremely limited revision – essentially fixing a couple of typographical errors – which the Parliament did. As mentioned above, the current state of affairs is thus the Bill passed by Parliament is waiting for Presidential assent. Without a doubt, this piece of legislation is heading for the Constitutional Court.¹⁹ The top advocates are already lined up.

C. First Testing

The first testing the Secrecy Bill provides is with respect to the operation of representative democracy in South Africa. I would argue that there are three stress points of South African representative democracy that the consideration of the Bill has highlighted.

The first stress point is the limited degree of effective oversight by Parliament over the security sector. The 1996 Constitution put into place a complex Parliamentary structure for overseeing the security services. But the implementation of this system never really took hold.²⁰ The 2010 and 2011-2012 annual reports of the intelligence inspector-general were released only in the dying days of the Fourth Parliament in March 2014, showing that not even the basic annual reports were completed and sub-

Statement by Dene Smuts, DA Shadow Minister of Justice and Constitutional Development, welcomes improvements to Secrecy Bill but constitutional problems remain, Polity.org.za, 23 March 2013, <http://www.polity.org.za/article/da-statement-by-dene-smuts-da-shadow-minister-of-justice-and-constitutional-development-welcomes-improvements-to-secrecy-bill-but-constitutional-problems-remain-13032013-2013-03-13> (last accessed on 24 April 2013); Secrecy Bill fears unfounded – Dlomo, Polity.org.za, 16 October 2013, <http://www.polity.org.za/article/secrecy-bill-fears-unfounded-dlomo-2013-10-16> (last accessed on 26 November 2013).

- 18 Protection Of Information Bill [B6G-2010], Parliamentary Monitoring Group, <http://www.pmg.org.za/bill/20131015-protection-information-bill-b6g-2010> (last accessed on 7 July 2014).
- 19 ConCourt action will be secrecy Bill activists’ last resort, The M&G Online, 28 November 2012, <http://mg.co.za/article/2012-11-28-00-info-bill-will-go-to-con-court-say-experts/> (last accessed on 23 April 2013).
- 20 Laurie Nathan, Intelligence Bound: The South African Constitution and Intelligence Services, *International Affairs* 86 (2010), pp. 195–210.

mitted to Parliament.²¹ Thus, the only degree of somewhat effective oversight when the line in respect of political intelligence was overstepped amidst the battle among various ANC factions came from the Minister of Intelligence Services and the judiciary, rather than through Parliament.²²

To see the relative place of transparency, we may go to the conceptual arguments for Parliamentary oversight in the first place. In a standard delegation understanding, through statutes Parliament delineates broad policy for the country but then also delegates to the intelligence services the implementation of that policy. In terms of being able to exercise control over its agent, transparency may be presumed to assist Parliament, providing greater information that Parliament may use to hold the intelligence services to account for and thus limit the degree of deviations the agent takes from the policy. Thus, transparency assists in ensuring the intelligence services are accountable to Parliament. Indeed, to some extent, the Minister at the time used the forum provided by Parliament in 2008 to publicly articulate an initial policy on classification of information and then allowed for that policy to be refined through public debate. This is particularly shown by the Minister's tabling in front of Parliament a document largely supportive of the potential for a public interest defence to a criminal charge of disclosing state secrets – a key demand made by civil society in relation to the Secrecy Bill.²³ The tabling of this document was a significant concession to the tone of the public debate. Still, the initiation of policy development is worth noting – even here it is the Minister using the legislative forum rather than the Parliamentary committee driving the events.

A second stress point is around the lack of individual accountability of members of Parliament. Party accountability figures in the Secrecy Bill story in several ways and does so against the background of a majority party, the ANC, being understood as dominant. In perhaps the most dramatic way, party accountability underlies the withdrawal of the 2008 version of the Secrecy Bill in 2008 after several months' consideration. This

21 Why is no one watching the watchmen?, The M&G Online, 14 March 2014, <http://mg.co.za/article/2014-03-13-why-is-no-one-watching-the-watchmen/> (last accessed on 8 July 2014).

22 *Gilder*, note 14.

23 *Iain Currie & Jonathan Klaaren*, Evaluating the Information Bills: A Briefing Paper on the Protection of Information Bill (2011), http://www.nelsonmandela.org/images/uploads/Info_bills_evaluation_final.pdf (last accessed on 8 July 2014).

withdrawal occurred simply because the Minister’s principal, President Thabo Mbeki, resigned under pressure after losing the support of the ANC at this point.²⁴

In another way, party accountability was highlighted in a key vote on the Secrecy Bill. An ANC stalwart and one other MP did the exceptional and abstained from a Parliamentary vote without party permission, thus avoiding voting in favour of the Secrecy Bill in a key vote in November 2011.²⁵ This is the only time such public flouting of ANC party discipline has happened. By the final vote on the Secrecy Bill, the stalwart MP was voting reluctantly in favour, citing the certainty of a Constitutional Court review of the legislation.²⁶ This plays into a key theme of critique of the current South African democracy – the call for electoral reform to address the lack of individual accountability for MPs.²⁷

A third stress point is around the institution of the National Council of Provinces, the second house of Parliament. Most of the debates over the Secrecy Bills introduced in both 2008 and 2010 was led by and focused around National Assembly structures including the ad hoc committee. The Constitution does, however, give the National Council of Provinces a role in national debates – though not in oversight. This is true for national legislation not affecting the provinces as well as under different legislative procedures for national legislation affecting the provinces. Indeed, a legal point relating to the correctness of the procedures followed may be crucial to the next step in the journal of the Secrecy Bill. If the National Council of Provinces did not follow the correct procedures in considering the Bill, the Constitutional Court in its inevitable case may well send it back to Par-

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- 24 *Frank Chikane*, *Eight Days in September: The Removal of Thabo Mbeki*, Johannesburg 2012; *Jonathan Klaaren & Theunis Roux*, *The Nicholson Judgment: An Exercise in Law and Politics*, *Journal of African Law* 54 (2010), pp. 143–155.
- 25 *Gaye Davis & Shanti Aboobaker*, *Turok facing censure over secrecy bill snub*, IOL.co.za, 24 November 2011, <http://www.iol.co.za/the-star/turok-facing-censure-over-secrecy-bill-snob-1.1185506#.U7v44fvNyBp> (last accessed on 8 July 2014).
- 26 *Sarah Evans*, *Secrecy Bill: Ben Turok won’t defy ANC this time*, *The M&G Online*, 25 April 2013, <http://mg.co.za/article/2013-04-25-secrecy-bill-turok-wont-defy-anc-orders-this-time/> (last accessed on 8 July 2014).
- 27 *Report of the Electoral Task Team*, Cape Town 2003, <http://db3sqepoi5n3s.cloudfront.net/files/docs/Van-Zyl-Slabbert-Commission-on-Electoral-Reform-Report-2003.pdf> (last accessed on 8 July 2014); “*Electoral system needs overhaul*” – *Politics | IOL News | IOL.co.za*, <http://www.iol.co.za/news/politics/electoral-system-needs-overhaul-1.1413064#.U7v6afvNyBo> (last accessed on 8 July 2014).

liament. Indeed, the objection that the Bill treads onto exclusive provincial competence was by early 2013 the “main constitutional objection” of the official opposition, the Democratic Alliance.²⁸ Perhaps most extraordinarily however was the utilization of the National Council of Provinces as a mechanism to hold a series of public hearings on the Secrecy Bill at key point in its Parliamentary passage in early 2012.²⁹ Framed as a genuine exercise in participatory democracy, these hearings done with the authority of the National Council of Provinces appeared to be largely a rushed inconclusive symbolic exercise.³⁰ They may nonetheless be a harbinger of province-level participatory politics to come.

A brief comparison with German parallels

In understanding further two of these three stress points, a brief comparative look to the German constitutional position is helpful. With respect to the National Council of Provinces and the Bundesrat, beyond acknowledging the clear institutional debt of the South African body on the German one and the structural similarity, a valuable comparative study would require greater space.³¹

With respect to Parliamentary oversight of the intelligence services, Parliamentary scrutiny of federal intelligence activities in Germany is enshrined in constitutional law by Article 45d of the Basic Law. This is a relatively recent development, being put into the Basic Law largely as a codification of existing law in 2009. It is a multiparty body with the members elected upon criteria of particular trustworthiness.³² The formal situation

28 DA, note 17.

29 *Andisive Makinana*, NCOP won't rush through secrecy Bill hearings, THE M&G ONLINE, 20 January 2012, <http://mg.co.za/article/2012-01-20-ncop-wont-rush-through-secrecy-bill-hearings/> (last accessed on 8 July 2014).

30 “Amandla”, “viva” banned at secrecy bill hearings, City Press, <http://www.citypress.co.za/news/amandla-viva-banned-at-secrecy-bill-hearings-20120214/> (last accessed on 8 July 2014); War of words erupts at secrecy bill hearings, City Press, <http://www.citypress.co.za/news/war-of-words-erupt-at-secrecy-bill-hearings-20120217/> (last accessed on 8 July 2014).

31 *Christina Murray*, NCOP: Stepchild of the Bundesrat, in: Bundesrat (ed.), 50 Jahre Herrenchiemseer Verfassungskonvent, Zur Struktur des deutschen Föderalismus. Tagungsband zum wissenschaftlichen Symposium vom 19. bis 21. August 1998 im Kloster Seon, Nördlingen 1999.

32 *Id.* at 218.

in South Africa is not so different. The specific institutions set up by the Constitution include the Office of the Inspector General. The appointment of the Inspector General of Intelligence is done through the Intelligence Services Oversight Act.³³ The Office of the Inspector-General has a certain degree of independence, with "line or functional accountability to parliament and an administrative accountability towards the Minister for Intelligence Services."³⁴ The Constitution mandates establishment of a body to carry out civilian oversight of the intelligence services, providing for "civilian monitoring of the activities of [the intelligence] services by an inspector appointed by the President, as head of the national executive, and approved by a resolution adopted by the National Assembly with a supporting vote of at least two thirds of its members."³⁵ In addition to the civilian oversight body, the Constitution requires legislation setting up a multiparty parliamentary committee for oversight of intelligence services as part of the security services of South Africa.³⁶ The implementation of these structures has not been complete, with reports to Parliament, for instance, often overdue.

With respect to the lack of accountability of individual members of Parliament, it is important to recognize the positive and significant role granted to political parties in the German Basic Law. From 1949, Germany regarded parties as a positive contribution to and a vehicle for democratization. Instead of being a hindrance, parties were an enhancement of self-government and the formation of the political will. This was a departure from the constitutional tradition in places like the United States, where parties were not an explicit part of the constitution.³⁷ Indeed, parties have become a defining concept for the notion of democracy. As has been

33 Intelligence Services Oversight Act 40 of 1994, sec. 7, <http://www.ssa.gov.za/Portals/0/SSA%20docs/Legislation/Intelligence%20Services%20Oversight%20Act%20of%201994.pdf> (last accessed on 5 May 2015).

34 *Imtiaz Fazel*, Who shall guard the guards? Civilian operational oversight and the Inspector General of Intelligence, in: Lauren Hutton (ed.), *To Spy or Not to Spy? Intelligence and Democracy in South Africa*, ISS Monograph 157 (2009), p. 35; accessible at: <http://www.issafrika.org/uploads/Mono157Full.pdf>.

35 Constitution of the Republic of South Africa, 1996, sec. 210 (b), <http://www.constitutionalcourt.org.za/site/theconstitution/english-2013.pdf> (last accessed on 27 November 2013).

36 Constitution of the Republic of South Africa, 1996, sec. 199(8).

37 *Mark Tushnet*, *The Constitution of the United States of America: A Contextual Analysis*, Portland 2009.

observed, “key democratic principles such as political participation, representation, pluralism and competition have come to be defined increasingly, if not almost exclusively, in terms of party.”³⁸ The German role for parties thus goes beyond the role of the parties in electoral participation. In so doing and doing so through constitutional means, Germany has effectively made the parties into constitutional or public entities.³⁹

South Africa’s take-up of the Germany model of party democracy is decidedly partial. As one observer has noted for South Africa:

“There are no significant constitutional provisions or legislation dealing with political parties.”⁴⁰

There is of course some regulation of political parties. The law regarding party registration is contained in the Electoral Commission Act and the Electoral Act. Both of these statutes are enforced through the Independent Electoral Commission, a body itself with constitutional standing.⁴¹ The closest the Constitution comes to the German philosophy is in a section titled “Other Matters” under a heading of “Funding for political parties”. Here, the Constitution provides for state funding of political parties “to enhance multi-party democracy”.⁴² This has been given effect to with the Public Funding of Represented Political Parties Act 103 of 1997. There have also been similar laws enacted in at least six provinces.⁴³ Once one moves away from the funding question, however, there is much less explicit parallels and much less significant regulation. The party funding provisions are implemented.

38 *Ingrid Van Biezen*, *Constitutionalizing Party Democracy: The Constitutive Codification of Political Parties in Post-war Europe*, *British Journal of Political Science* 42 (2012), pp. 187–212.

39 *Id.* at 196.

40 *Iain Currie & Johan De Waal*, *The Bill of Rights Handbook*, Cape Town 2005, p. 422.

41 Constitution of the Republic of South Africa, 1996, sec. 190–191, <http://www.constitutionalcourt.org.za/site/theconstitution/english-2013.pdf> (last accessed on 27 November 2013).

42 *Id.* at 236.

43 ANC seeks more party funding, *City Press*, 27 July 2014, <http://www.citypress.co.za/politics/anc-seeks-party-funding/> (last accessed on 28 July 2014).

D. Second Testing

The second theme of testing is the content of the debate. In a significant development, both proponents and opponents conducted the debate over the Secrecy Bill in presentist/futurist rather than historical-regarding terms. That is, the Bill's stance on transparency and secrecy and their appropriate interaction was not evaluated in terms of the substantive light that such a balance would reveal about the specific actions taken in the past, and specifically under the apartheid regime. Implicitly, the need for light into South Africa's past was regarded as having been addressed and sufficiently addressed by the TRC process. This orientation towards the present and the future made the Secrecy Bill more into a metric or proxy for South Africa's democracy – and a herald of its possible future – than might have otherwise been the case.

What were the terms of the debate? The primary set of concerns were that the legislation might be used to aid and abet by covering up corruption, to strengthen the power of the ruling power to use patronage to entrench its own dominant position in a dominant democracy, to weaken the role of the media in South Africa's democracy, and to further increase the power of the security services within the factional battles of the dominant party.⁴⁴ While the first two of these concerns are championed by an analysis of South Africa as a dominant party democracy, the concerns over the weakening of the media and the strengthening of the intelligence services more directly engage the values of transparency and secrecy. Indeed, it would not be too far-fetched to characterize the contest over the Bill as a proxy war conducted by the media (in particular the print media) and the security services over their centrality and symbolic power within the South African democracy.

Transparency and the dominant democracy analysis as applied to South Africa

To begin with the concerns about corruption and ruling party dominance, Choudhry and Issacharoff have in separate analyses articulated deep con-

44 Guide: Why the Secrecy Bill still fails the Freedom Test, Right2Know Campaign, 28 November 2012, <http://www.r2k.org.za/2012/11/28/guide-why-secrecy-bill-fails/> (last accessed on 8 July 2014).

cern regarding the so-called dominant place of the ANC within South Africa's polity, the tension between that dominance and the spirit of the Constitution, and the potential for entrenchment or extension of the ANC's dominant position through unconstitutional means. Specific mechanisms identified by Choudhry and Issacharoff in their critiques include the mechanism of cadre deployment on the one hand and the undermining of the independence of the state institutions supporting constitutional democracy such as the Public Protector and the Human Rights Commissions (called Chapter 9 institutions in South Africa) and the judiciary on the other hand.

Interestingly enough, Choudhry mentions transparency only once in his analysis, as part of characterizing the dynamics of politics in a dominant party democracy. For Choudhry, dominant party democracy "has the effect of pulling politics into the party, and into processes that lie outside constitutionally created institutions of liberal democracy, and which need not comply with the same norms of transparency and participation. The relative importance of Parliament, and through it, electoral democracy, declines."⁴⁵ Similarly, Issacharoff also mentions transparency in setting out the pathologies of unconstitutional incumbent power: "The greater the scale of government enterprise the more it rewards those who can master its byways in a process that is non-transparent to the public and that resists either monitoring or accountability."⁴⁶

As shown by these examples, transparency figures largely by its absence in the dominant democracy analysis. Where mentioned, it serves only by contrast to point out the evils of a dominant party democracy. This is quite interesting in these two pieces that advocate a robust pro-democracy jurisprudence from the Constitutional Court. Openness does not figure as a strand in an argument from first principles.

At least one sustained South African analysis partaking of the dominant democracy analysis engages with the specifics of secrecy and transparency in South Africa.⁴⁷ Dale McKinley identifies an intensification in autocratic power since the ascension to control of the state of the Zuma ANC faction in 2007-2008. He delineates a three-pronged secrecy-power matrix. The first side is a "conscious, politically and materially driven closing down of the constitutionally-enshrined right of access to information under the Zuma-led ANC/state ... The second side is the militarisation and centralisa-

45 Choudhry, note 2, p. 35.

46 Issacharoff, note 3, p. 17.

47 Gilbert Khadiagala et al. (eds.), *New South African Review* 4 (2014), pp.150–166.

tion of power within the coercive forces of the state alongside the massive and largely de-regulated growth of the private security industry. ... The third side of the matrix is the law, past, and pending. ... What better way to buttress those walls of secrecy around the physical representations of state and private (capitalist) power than to dust off and actively employ [the National Key Points Act 102 of 1980]. This apartheid dinosaur gives the minister of police the power to declare any place a "national key point" if it is considered vital to "national security". Once a site is declared, a range of strict anti-disclosure provisions which criminalise any person disclosing "any information" in "any manner whatsoever" about security measures of a national key point comes into effect as does the curtailment of the right of assembly in or near any key point."⁴⁸ While McKinley references a close cousin to the secrecy legislation the Secrecy Bill is designed to replace rather than the Secrecy Bill itself, the outlines of his analysis are clear. This analysis is clearly as much a polemic as it is empirical- yet it adds helpful evidence to this discussion. In addition to detailing an uptick in the relative power of the Zuma/securocrat network in the South African polity in 2007-2008, a development coinciding with and indeed causing the withdrawal of the first version of the Secrecy Bill in 2008, McKinley makes explicit what is implicit in the dominant democracy analysis – that there is a "symbiotic relationship between secrecy and power".⁴⁹

What is not examined in this line of argument may be as significant as what is examined, if not more so. There are a number of lines of credible research that argue that transparency does not deliver its promised effects and may even have unintended consequences.⁵⁰ For instance, one recent study found the counter-intuitive effect of greater transparency increasing corruption, through its effect of lessening support for anti-corruption initiatives by demonstrating that corruption is indeed rife, everyone is doing it, and sending the message that it is not worth trying to counter the corruption.⁵¹ Further, there is little comparative evidence that greater transparency would lead to greater opposition party competitiveness and reduce

48 *Id.* at 160–161.

49 *Id.* at 151.

50 *Clare Birchall*, *Transparency, Interrupted Secrets of the Left, Theory, Culture & Society* 28 (2011), p. 64..

51 *Monika Bauhr & Marcia Grimes*, *Indignation or Resignation: The Implications of Transparency for Societal Accountability, Governance* 27 (2014), pp. 291–320.

whatever degree of electoral dominance is enjoyed by the majority party. One might look to the American jurisdiction where, both before and perhaps even more so after the key Supreme Court case of *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), a high degree of transparency about what funding flows from private corporations to political parties co-exists comfortably with a high degree of influence by those corporations in politics, arguably strengthening rather than weakening party structures as those corporations seek to reduce agency and transactions costs by working with the two established American political parties. The relevance for South African politics is that what some term the “unconstitutional” practice of funding of political parties (including but not limited to the ANC) by provincial governments may well exist side by side with legislative accountability and transparency.⁵²

Leaving transparency aside for a moment, the dominant party democracy as applied to South Africa is also worth critically examining on its own terms.⁵³ There is of course the relatively simplistic rejoinder that the ANC has become dominant through the vote of the majority of the citizens of the country in terms of free and fair elections – itself presumably the purest and strongest rejoinder within the discourse of representative democracy. Beyond this, one might argue that the ANC is simply not in as dominant a position as this argument would have it. What a difference the steadfast and principled engagement of the current Public Protector (a South African Chapter 9 institution) and a shaky 2014 ANC electoral victory make. A number of recent developments – the small but steady erosion of support from the ANC, the evident vitality of at least some of the Chapter 9 institutions and the policy trend against cadre deployment – undercut the concerns articulated by Choudhry and Issacharoff and the specific mechanisms they discerned operating.

The relative place of the media and the intelligence services in postapartheid South African democracy

We turn now to a consideration of the direct politics of transparency and openness, picking up on the concerns that the Secrecy Bill entrenches the

52 Khadiagala et al. (eds.), note 47, p. 159.

53 Jonathan Klaaren, *Dominant Democracy in South Africa? A Response to Choudry*, *Constitutional Court Review* 2 (2009), pp. 87–96.

power of the intelligence services and that it impedes the democratic role of the media. Here, we may examine the place and the relative place of the media and the intelligence services in the South African constitutional democracy. As implied above in relation to the lack of oversight exercised by Parliament over the intelligence services, insufficient attention has been paid to the place of the intelligence services in post-apartheid South Africa. Most of the relevant academic literature is concerned with the specifics of structuring the security sector. And much of this literature is concerned to argue within a framework of increasing the efficacy and efficiency of the sector – in particular the fight against crime (and indeed corruption). Insufficient research and analysis has been directed to the role that the intelligence services have played and play within the ANC and within South Africa’s politics. This is unfortunate since the current of politics runs strong between the intelligence services and the ruling party. As the former coordinator of the national intelligence bureaucracy has observed: “Perhaps it is an unavoidable force of nature in a young democracy such as ours – a democracy attained through a struggle that engendered the twin emotions of passionate enmity and commitment – that the turbulence and cross currents that surged through the liberation-movement-turned-ruling-party should breach the harbour wall between party and government and break, in particular, against the ramparts of the intelligence community.”⁵⁴

There has perhaps also not been sufficient attention paid to the place of the media in South Africa’s democracy.⁵⁵ This is of concern since it should be acknowledged that the role played by the media is not a simple one of reinforcing the virtues of representative democracy through the multiplier effect of transparency. There is of course that aspect and the media is quite skilled at noting the significance of their place in a representative democracy. However, the role of the media goes beyond an enabler of transparency understood as greater quantitative flow of information.

The place of the media also includes its own role as a powerful social institution and, in what is perhaps a further distinct role, a reservoir of symbolism, of signs and conceptual understandings. For instance, Michael McCann’s *Rights at Work* articulates the often quite powerful influence

54 Gilder, note 14, p. 413.

55 Sean Henry Jacobs, *Public Sphere, Power and Democratic Politics: Media and Policy Debates in Post-apartheid South Africa*, London 2004.

that the media may play with respect to litigation campaigns for social and economic rights, such as the equal pay movement in the United States in the 1970s.⁵⁶ Even where the specific objective of a particular campaign was not achieved, over time the conceptual understanding of what constitutes equal pay was transformed, leading to significant reductions in the pay received by women and minorities, (if not still not fully equal pay). The media creates, disseminates, and stores cultural images and stories that exert their own power over time, even long after the event that generated them. South African analyses which could be considered in this vein include Jackie Dugard's study of the Phiri community's struggle for water as well as to some extent Belinda Bozzoli's *Theatres of Struggle and the End of Apartheid*.⁵⁷ It may well be that the campaign against the Secrecy Bill will be best analysed within this framework.

In a fashion similar to the intelligence services, the media had its own institutional interests to protect during the consideration of the Secrecy Bill. Those interests include the media's profitable and politically powerful role filtering and shaping the news and opinion of a well-resourced segment of South African society. In this respect, what is of particular interest is the contest that the media and the intelligence services engaged in with respect to the Bill.

An episode arguably illustrating a number of the above points occurred with respect to the perceived overlap between the Secrecy Bill and an initiative of the ANC to blunt the power of the media, the media tribunal initiative. As a policy proposition, this initiative can be sourced to a resolution taken at the ANC's conference in Polokwane, the same one where Zuma ousted Mbeki. This initiative, while not succeeding in its initial terms, nonetheless did result in a significant change in the self-regulatory structure of the print media, following a non-judicial commission of inquiry chaired by former Chief Justice Pius Langa.⁵⁸ Most but not all media ob-

56 *Michael W. McCann*, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization*, Chicago 1994.

57 *Belinda Bozzoli*, *Theatres of Struggle and the End of Apartheid*, Ohio 2004; *Jackie Dugard*, *Rights, Regulation and Resistance: The Phiri Water Campaign*, *South African Journal on Human Rights* 24 (2008), p. 593.

58 *Glenda Daniels*, *Media tribunal rejected, but major press reforms mooted*, *The M&G Online*, 26 April 2012, <http://mg.co.za/article/2012-04-26-major-press-reforms-mooted/> (last accessed on 10 July 2014).

servers felt that the changes suggested by Langa were appropriate and served to bolster good journalistic ethics.

Of interest here is the degree to which the media repeatedly conflated the Secrecy Bill and the media tribunal initiative. The joining of the two policy initiatives and in many cases their conflation served to fan the flames of the conspiracy view of the ANC, of it exercising dominant party power arbitrarily. For instance, the noted author Andre Brink wrote in an opinion piece published in the *New York Times*:

“South Africa faces its starkest challenge yet in the form of two pieces of anti-press legislation that would make even the most authoritarian government proud. One, cynically named the Protection of Information bill, would give the government excessively broad powers to classify information in the ‘national interest’; the other, which would create a media appeals tribunal” to regulate the printed and electronic press, is written in language chillingly reminiscent of that used by the apartheid regime to defend censorship in the 70s.”⁵⁹

The conflation of these two initiatives drew the ire of observers including the Nelson Mandela Foundation, which noted that “[c]ontrary to popular belief, the [Secrecy] Bill is not an offshoot of the ANC’s Polokwane resolutions on the media and does not contain provisions for a media tribunal.”⁶⁰ As an example of the conflation, the Nelson Mandela Foundation noted a cartoon by a well-known South African political cartoonist. The cartoon shows a distant figure wearing a banner “Press Freedom” menaced by two rifle-bearing assassins, one wearing a jacket saying “Protection of Information Bill” and the other “Media Tribunal”.⁶¹ This conflation served the interests of the media, wrapping the protection of its own interests in the opposition to the Secrecy Bill.

In the institutional politics of the media and the intelligence services, the interplay of transparency and opacity are directly implicated. Indeed,

59 *André Brink*, Silence in South Africa, *The New York Times*, 11 September 2010, <http://www.nytimes.com/2010/09/12/opinion/12brink.html> (last accessed on 10 July 2014).

60 *Iain Currie and Jonathan Klaaren*, Evaluating the Information Bills: A Briefing Paper on the Protection of Information Bill, University of the Witwatersrand, Johannesburg, 17 June 2011, http://www.nelsonmandela.org/images/uploads/Info_bills_evaluation_final.pdf (last accessed on 8 July 2014).

61 ANC’s new policy towards the media, Cartoon, *Sunday Times*, 1 August 2010, accessible at <https://zapiro.org/cartoons/100801st> (last accessed on 20 October 2015).

the two institutions are nearly polar opposites—the spy as the epitome of the secret and the journalist understood as the apostle of transparency. There is a collective dimension here as well: the set of organisations in the media field will wish to push out the bounds of transparency, at least symbolically, and push up against the limits of secrecy. The media was thus for instance particularly vociferous in the debate around the Secrecy Bill with respect to the provisions in various drafts that call for a duty of returning secrets that have found their way outside the protection of the state to the security agencies and criminalizes mere possession of such secrets.⁶² These provisions touch on a core media concept and received much attention. Nonetheless, as already demonstrated above, this is not to say that the spies always push secrecy and the journalists always push transparency. Rather both institutions play both values.

The balance between national security and transparency

As a final point in relation to the contest over the content of the Secrecy Bill, consider the balance struck between national security and transparency/openness. This metaphor is the usual framing metaphor for discussions of this policy in constitutional democracies. While the metaphor could have been employed to demarcate the symbolic boundary between the media and the intelligence services, it was not prevalent in the debate over the Secrecy Bill. Perhaps this reflected the still-developing and relatively inchoate nature of South African democratic politics. In any case, most provisions of the version of the Bill finally enacted by the Parliament arguably fall within the zone of tolerance in terms of the balance metaphor. As mentioned above, the official opposition's main constitutional objection at this point in time relates to a procedural and not a substantive con-

62 Clause 15 of the B version of the 2010 Bill provided: Report and return of classified records. 15. A person who is in possession of a classified record knowing that such record has been unlawfully communicated, delivered or made available other than in the manner and for the purposes contemplated in this Act, except where such possession is for any purpose and in any manner authorised by law, must report such possession and return such record to a member of the South African Police Service or the Agency to be dealt with in the prescribed manner.” Clause 44 then provided: “Failure to report possession of classified information. 44. Any person who fails to comply with section 15 is guilty of an offence and liable to a fine or imprisonment for a period not exceeding five years.”.

stitutional violation.⁶³ The clause attempting to harmonize between the bureaucratic procedures of the Secrecy Bill and the procedures of the PA-IA (discussed more fully below) was an explicit attempt to balance secrecy and transparency. Indeed, the call for the public interest defence can itself be interpreted as a call for balance, since it was commonly understood to include a proportionality element within this doctrinal device. However several of the clauses of the Bill that were dropped along the way were clearly outside the zone of tolerance (and were nearly certainly unconstitutional). One particular example was a clause which would have allowed the security agencies themselves to classify information and various subject matters but provided no objective criteria whatsoever by which this would be done.

According to the dominant democracy analysis, there is a symbiotic relationship between secrecy and power. There are reasons to question the potency of that simple understanding, just as there are reasons to question and demand proof for the positive democratic effects of transparency. As noted below, it is important to problematize the relationship between transparency and trust: "Transparency certainly destroys secrecy: but it may not limit the deception and deliberate misinformation that undermine relations of trust. If we want to restore trust we need to reduce deception and lies rather than secrecy. Some sorts of secrecy indeed support deception, others do not. Transparency and openness may not be the unconditional goods that they are fashionably supposed to be. By the same token, secrecy and lack of transparency may not be the enemies of trust." In any case, a different kind of analysis of democracy, of the symbolic politics of transparency between the intelligence services and the media, has revealed a more complex field within which the politics of the Secrecy Bill has played itself out.

E. Third Testing

The third testing of democracy in South Africa is interior to the Bill itself and may be tracked by the entanglement of the transparency and opacity.

63 One of the provisions that caused the most controversy among the South African public would be judged relatively tame by Western developed nations – the penalties of up to 25 years for espionage.

In my view, this cultural contest may, with only a small degree of loss of accuracy, be neatly represented by two statutes, transparency being associated with the PAIA and opacity with the Secrecy Bill. The initial drafting effort within the Ministry of Intelligence Services drew in several lawyers or legal academics with human rights background (including this paper's author). One doctrinal achievement in which this drafting team took pride at that point in the legislative process was a mechanism – section 28 – which operated to harmonize the freedom of information implementation procedures of the PAIA with the classification regime of the Secrecy Bill. This was done through granting authority to directors general (the executive but not political heads of the South African departments of the public administration) to strike the balance between the right to access to information and its limits. The criteria for this exercise in substantive balancing to be used by these bureaucrats in the actual implementation of this section were never very clear but were to be drawn from both statutes.

This harmonization clause itself shows how the two concepts of transparency and opacity are intertwined with each other. This can be shown from the point of view of either of the statutes. From the point of view of PAIA, the right of access to information is justifiably limited by a number of policy reasons – confidentiality, national security, privacy etc. The balance is struck already within the structure and operation of the PAIA. From the point of view of the Secrecy Bill, the need for secrecy is abridged by a number of demands of justification according to specific criteria (such as the need to pass certain tests of necessity in order to retain a classification for more than a five year period) and by the entrenchment of transparency as to the reasoning of those safeguards. The balance is struck already within the structure and operation of the Secrecy Bill. Beyond the metaphor of balancing, I wish to suggest that transparency and secrecy are not two concepts separate from each other. The insight that transparency and opacity are mutually implicated allows us to understand better how both are supported and nurtured within a constitutional democracy.

Some work in the field of cultural studies has deepened this line of analysis, focusing it directly on the power of secrecy as well as transparency.⁶⁴ Claire Birchall's argument examines the value of transparency from the point of view of the Left. Given the near-universal adulation given to transparency, it makes sense, she says, to examine and at least discover

64 *Birchall*, note 50.

what politics, if any, this global diffusion of transparency precludes. This leads Birchall to cite work by Onora O’Neill problematizing the relationship between transparency and trust: “Transparency certainly destroys secrecy: but it may not limit the deception and deliberate misinformation that undermine relations of trust. If we want to restore trust we need to reduce deception and lies rather than secrecy. Some sorts of secrecy indeed support deception, others do not. Transparency and openness may not be the unconditional goods that they are fashionably supposed to be. By the same token, secrecy and lack of transparency may not be the enemies of trust.”⁶⁵ After examining two fields where transparency does not reign supreme, Birchall concludes: “In both psychoanalysis and poetry we can see that it is not just that secrecy is productive, but that it is constitutive. A violence is performed in current discourse, therefore, when transparency is advocated as an alternative to secrecy or as a method by which secrets will be eradicated. Secrecy is always already at work in transparency.”⁶⁶ Birchall then offers a way to “recuperate” secrecy and develop its laudable constitutive qualities, thinking through the notion of secrecy as a commons.⁶⁷

To further develop this line of analysis within the South Africa post-apartheid context, we may be able to use the metaphor of entanglement. For Sarah Nuttall, entanglement is “a condition of being twisted together or entwined, involved with; it speaks of an intimacy going, even if it was resisted, or ignored or uninvited.”⁶⁸ Drawn by its use in human relationships, Nuttall has used it to explore a number of topics, including the secrets and lies that white South African have told themselves growing up under apartheid.⁶⁹ She writes further: “Entanglement offers, for me, a rubric in terms of which we can begin to meet the challenge of the “after apartheid”. ... It enables a complex temporality of past, present, and future; one which points away from a time of resistance towards a more ambivalent moment in which the time of potential, both latent and actively surfacing in South Africa, exists in complex tandem with new kinds of closure and opposition. It also signals a move away from an apartheid op-

65 *Id.* at 66.

66 *Id.* at 71.

67 *Id.* at 72–77.

68 Sarah Nuttall, *Entanglement: Literary and Cultural Reflections on Post-apartheid*, Johannesburg 2009, p.1.

69 *Id.* at 58–82.

tic and temporal lens towards one which reifies neither the past nor the exceptionality of South African life.”⁷⁰

F. Conclusion

A prominent opposition party MP claimed that the Secrecy Bill was “South Africa’s first real exercise of democracy”.⁷¹ Was it? Or was it a herald of things to come? Either democracy or its demise? This article has suggested above that the Secrecy Bill did test South Africa’s structures of representative democracy in three particular ways – in showing up the failure of the National Assembly to oversee the intelligence services, in showing the lack of individual accountability for representatives, and in pointing to the as yet clumsy modes of incorporating elements of the national debate from provincial and local levels of the National Council of Provinces.

These three stress points do not add up to a conclusive argument that representative democracy has reached its end in South Africa. But they do add force to the notion that we should consider closely forms of democracy – such as participatory democracy and direct democracy – that are less concerned with the legitimacy often claimed from the moment of electoral blessing by a state’s citizen and more concerned with the issues of compliance on an everyday timescale – with citizens’ interaction with the bureaucracies and agencies of the state.⁷² This is not a startling new insight. For one scholar closely identified with the drafting of South Africa’s interim Constitution, it was the importance of moving beyond the austerity of snapshot democracy to a more fulsome vision of responsive democracy – a vision identified as ambiguous and analysed with respect to participation and accountability.⁷³

Was the genesis and continuing consideration of the Secrecy Bill an episode that should be understood as a fight against the dominant role of

70 *Id.* at 11.

71 Secrecy bill fight “SA’s first real exercise of democracy”, City Press, 28 September 2013, <http://www.citypress.co.za/politics/secrecy-bill-fight-sas-first-real-exercise-democracy/> (last accessed on 8 July 2014).

72 Edward L. Rubin, *Beyond Camelot: Rethinking Politics and Law for the Modern State*, Princeton 2005, p. 141.

73 Etienne Mureinik, *Reconsidering Review: Participation and Accountability*, *Acta Juridica* 35 (1993).

the ANC in South Africa’s democracy? Or in the truest form of deliberative democracy, was the movement against the Bill an instance whereby the results of national discourse in civil society was transmitted by some set of mechanisms and struggles to elected officials in Parliament who then responded appropriately?⁷⁴ Perhaps neither. Indeed, the dominant democracy analysis is wanting in several respects – that the ANC is simply not so dominant, that the focus on electoral dominance misses the everyday sphere where citizens live with the South African state, and that dominant democracy analysis does not provide a nuanced account of the place and role of secrecy and transparency in the South African democracy. This article hopes to have offered some steps towards such a more nuanced account, using the case of the Secrecy Bill to outline the symbolic politics of transparency and secrecy between the intelligence services and the media.

74 *Rubin*, note 72, pp. 159–160; *Jürgen Habermas*, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, Cambridge, MA 1998, pp. 354–359.

