

*Full Length Research Paper*

# **‘Sanitized, made to lie supine and left fanged!’ The final version of the 2010 Protection of State Information Bill / Secrecy Bill, and its threats to the civil liberty of freedom of expression in South Africa**

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Whilst the African National Congress (ANC, 2011) at the helm of the current South African government may have succeeded towards the end of 2013 in using its majority voting clout inside the country’s national parliament to forcibly push through the passing of the controversial and now infamous 2010 Protection of State Information Bill / Secrecy Bill, and thereafter declared it tame enough and ready to be gazetted into the country’s existing panoply of statutes, the reality of the Bill’s constitutionally-flawed and visibly-draconian state as it awaits to be enacted into law remains evident in its final version. Using a descriptive analytical approach, this study undertakes a critical discussion on the aforementioned version of the Bill in order to demonstrate how its architects, the state’s team of securocrats and legal advisers should retrospectively be considered to have both intransigently and consistently resisted to implement a genuine redress on many of the issues which have been raised as concerns against it by its opponents and critics since 2010, thus leaving it in a state which continues to pose a variety of potential threats to the democratic civil liberty of freedom of expression enshrined in the country’s Constitution if enacted into law in its current state. In spite of a somewhat less-sanguine picture which is painted in the article about the Secrecy Bill, a positive conclusion, is however, reached to effect that various safeguard mechanisms contained in the country’s Constitution should ultimately be considered to provide adequate insulations against any future attempt(s) by democratically-elected governments in South Africa to arbitrarily enact any piece of legislation, including the Secrecy Bill, without facing stiff opposition and criticism from the country’s media and civil society.

**Key words:** Secrecy bill, Adhoc committee on the secrecy bill, classified state information, democratic civil liberties, freedom of expression, threats to freedom of expression, constitution-flouting, state securocrats, ANC-led government, and sufficiently-independent, publicly-accountable bodies.

## **INTRODUCTION**

Casting a retrospective look at the groundswell of criticism and opposition which have been directed towards the controversial and now infamous 2010 Protection of State Information Bill, hereafter referred to as the Secrecy Bill,

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and the fierce debate(s) which it has generated since it was re-tabled before the South African National Assembly in August 2010, it is at times tempting to imagine that President Jacob Zuma's administration, his team of seurocrats and legal advisers would by now have either relented or capitulated to the nationwide calls which have since been made for a comprehensive overhaul to be conducted on it.

Unfortunately, the aforementioned has not taken place. Even though some of the Bill's critics such as Jacobs of the *Human Rights Watch* (2013), Smuts of the *Democratic Alliance* (2013) and De Vos (2013) among others, have acknowledged, albeit with notable reservations, that substantial improvements have been made on it since the row and debates around it began and before it was subsequently passed by the country's national parliament in 2013, a close reading of the Bill's purportedly final version points to a different reality.

The reality in question is one in which a variety of potential threats to some, if not many, of the democratic civil liberties, especially freedom of expression, which are enshrined in the country's constitution, and many of which have been consistently fingered as concerns by some members of the civil society, opposition parties and the media remain a conspicuous presence in some of the chapters contained in the Bills' final version. Under clause 16 of the Bill of Rights which forms Chapter 2 of the South African Constitution, the civil liberty of freedom of expression mentioned earlier is said to include, *inter alia*, the freedom of the press and other media, as well as the freedom to receive or impart information and ideas.

Accordingly, this study aims to undertake a critical discussion on the Secrecy Bill's English final version numbered B 6B – 2010 – ISBN978 -1-77037-877-3 which was presented by the parliamentary-designated *Ad Hoc Committee* before the country's National Assembly, and thereafter forcibly passed through by the ANC-led government using its majority clout inside parliament and declared it ready to be signed, and enacted into law by the country's current President, Jacob Zuma.

The study particularly aims to demonstrate how the Bill's architects, the state's team of seurocrats and legal advisers should retrospectively be considered to have both intransigently and consistently resisted to implement a genuine redress on many of the issues which have been raised as concerns against it by various stakeholders, opponents and critics since the controversies and debates around it began in 2010.

Although the issue of the Bill's threats to other civil liberties which are enshrined in and guaranteed by the country's constitution are discussed *en passant* in the study, the main focus is, however, on those threats which pertain to the two perennially contentious aspects of freedom of expression mentioned earlier, namely, the freedom of the press and other media, as well as the freedom to receive or impart information or ideas. While it

is conceded in the study, in line with the views and opinions of some of the Bill's commentators and critics, that several and notable improvements have since been made on its so-called 'final version' between 2010 and 2013, it is, however, be contended that such a version should be considered during the period in question to have merely undergone what could be characterized as a superficial or partial process of sanitization.

The sanitization process referred to earlier, it is also contended, is one which has only resulted in flimsy or cosmetic alterations which have either totally shunned or failed to execute a genuine redress on many of the issues which have been raised as concerns against it by various critics and opponents since 2010. In the same breadth, it is further contended that the supposedly improved state of the Bill's final version which its drafters may claim or hope to have achieved between 2010 and 2013, the retention in it of a significant number of draconian provisions and penalties and its biting potency as a law that will become legally binding and enforceable when officially enacted, all combine to render it amenable to a particular kind of analogical comparison.

The analogical comparison in question, and from which the title of present study has been derived, is that of any of the domesticated wild cats such as tigers or leopards or lions which even though may through subjugation and training be able to perform a myriad of antics at circuses - such as lying down in supine positions and allowing their handlers to fondle them anywhere on the exposed parts of their bodies, thus deceptively creating an impression of being tame - would still have their fangs intact, dangerous and lethal.

## METHODOLOGY

The desk research type which is discussed and reported in the present study was conducted between 2015 and 2016. Following on the well-established trajectory of other research studies which have been conducted within the broader domain of the interpretive paradigm and the qualitative research tradition within the humanities and social sciences, the discussion on the Secrecy Bill provided in it utilized the *purposive* or *non-probability* sampling technique in combination with the descriptive analytical approach and qualitative-based evaluation, the latter which implies that certain value judgements were subsequently made by the researcher or author as part of critiquing the Secrecy Bill.

During the study also, documented and publicly available sources (both online and printed) on the subject matter under scrutiny were also perused, and critically analysed. In the aforementioned case, while the printed final version of the Secrecy Bill was, on the one hand, considered to constitute its primary source and the target of its analysis, various critical articles which have been written and published in response to it between 2010 and 2016 were, on the other hand, considered to constitute its secondary sources.

Similarly in the study's case, the latter sources were then pitted against the former with the main objective of interrogating and validating the veracity of the study's hypothesis, namely, whether or not the Secrecy Bill does, through some of the provisions or

clauses contained in it, pose a potential threat to the democratic civil liberty of freedom of expression that is enshrined in the South African Constitution. Although serious considerations in relation to some of the foibles and limitations which are widely known to be inherent in the interpretive paradigm in general, and those which are also considered to be inherent in the *purposive or non-probability* sampling technique and textual analysis (especially, the issue of a lack of *triangulation* when textual analysis is used as the sole analytical instrument) in particular, it was, however, resolved that the deployment or utilization of such a qualitative research design and methodology during the study was in the end going to be both appropriate and valuable for its purpose (s) and in the face of the circumstances alluded to earlier.

With the aforementioned, it is contended in the present study that expecting the results of a research study which has been conducted within a highly subjective and contentious paradigm and a methodology such as the interpretive research paradigm and qualitative research methodology are known or widely reputed to be to fully satisfy all the scientific requirements of replicability, and generalizability might not only be extortionate, but also unrealistic. By the same token, even in the face of the strong tidal wave or climate of evidence-based research practice and distrust of qualitative research perpetrated by some scholars within the positivist paradigm of the pure sciences, the richness and scientific value of the 'thick descriptions' and the complexity of the picture which is often provided through qualitative research inquiries in relation to various aspects of human behaviour and other phenomena can, hopefully, not be doubted.

### **'Steeped in a history of controversy over the civil liberty of freedom of expression' - an overview**

In significant ways, the Secrecy Bill and the Protection of State Information Act, 84 of 1982 which the former is intended to repeal and replace are both steeped in the chequered and controversial history of the South African struggle for press/media freedom, and the right of access to state information and ideas. Such is a history that is fraught with a litany of incidents which entailed, among others, the use of a variety of state-orchestrated forms of censorship and a panoply of draconian measures and laws - aptly characterized by the former leader of the Democratic Alliance (DA) in South Africa, Zille (1982), in one of her articles as a 'minefield' - which were instituted under the apartheid governments of the past. Even though the measures and laws in question were ostensibly touted to have been aimed at regulating access to and dissemination of state information, protecting state information through classification, weighing state interests up against transparency and freedom of expression, they did, however, also had behind them the ulterior motive of muzzling the press, stifling its activities and even stripping it off its independence.

The history of the struggle for press freedom and the right of access to state information and ideas referred to earlier in South Africa is one whose roots are traceable to the early decades of the 19th century when people such as John Fairbain, the founder of *The South African Commercial Advertiser* in Cape Town, Thomas Pringle and Johannes de Wet, among others, are said to have won their valiant press freedom struggles against the British Governor, Lord Somerset (Domisse, 1980). It is also a history which extends to include the period soon after the National Party had assumed the reigns of political power in 1948, and after which the first direct steps are said to have been taken to restrain press/media freedom, and independence through the appointment of a Press Commission of Inquiry under the chairmanship of Justice (2012) J.W. Van Zyl in January, 1951 (Stewart, 1980).

The appointment of the commission of Inquiry under the

leadership of Judge T.M. Steyn in 1979 by the apartheid government of the day also marked another significant milestone in the chequered and controversial history of the struggle for press/media freedom and independence, as well as that of the right of access to state information and ideas in South Africa.

According to an account provided in the *South African History Online's* website, the *Steyn Commission of Inquiry* had been appointed to inquire, among other things, into the line between the rights of the media to inform and the right of the public to be informed, on the one hand, and the interests of the security of the state, on the other hand (p.1). As may be known, the recommendations made by the *Steyn Commission of Inquiry* through the two reports which it subsequently tabled before the apartheid government's parliament of the day incidentally paved a way for the passing of the Protection of State Information Act, 84 of 1982 which the Secrecy Bill that forms the main subject of discussion in this article is now intended to annul and replace.

As it has been the case with the Secrecy Bill during the past six years in South Africa, the two reports presented by the *Steyn Commission of Inquiry* to the apartheid government which commissioned it also drew widespread criticism and generated fierce debates within various sectors of civil society, and more so from the academic community and media fraternity. In his annotated bibliography in which he provides an abridged account on various critical articles which were written in response to the *Steyn Commission* reports of the late 1970s and early 1980s respectively, Abner Jack (1992), for instance, provides an immensely valuable discussion in that regard. In the bibliography in question, Jack classifies the articles in question into three categories which include: 'Libertarian Analyses', 'Structural Analyses', and 'Black Consciousness Analyses'. Incidentally, Jack's bibliography, in turn, sheds light-casting insights about the variety of angles and perspectives within which the two *Steyn Commission* reports were critiqued by their opponents and critics.

Jack's annotated bibliography is available both online and in the journal entitled *Critical Arts: South-North Cultural and Media Studies* Volume 2, Issue 3, 1982. However, the period between the enactment of the Protection of Information Act of 1982 and the landmark elections of 1994 in South Africa could somehow or conveniently be characterized as an 'interregnum' or a gap in continuity. The aforementioned should be considered to have been a case hence the struggle and tensions between the last apartheid government during its waning years and the mainstream press over the latter's freedom and its right of access to state information were during the period in question overshadowed by the turbulent political events of the 1980s.

The events referred to earlier culminated, among other things, into the rise of the United Democratic Front (UDF) in the early 1980s, the declaration of a State of Emergency in 1986 and the intensification of internal political struggle against the apartheid state through the Mass Democratic Movement (MDM) in the late 1980s, and all which took place against the backdrop of international sanctions, sports boycotts, cultural boycotts and embargos which had been imposed on the apartheid state by the international community.

The events mentioned earlier also included the unbanning of the previously-banned political organizations, the release of political prisoners in 1990 and the commencement of the Congress for a Democratic South Africa (CODESA) negotiations at Kempton Park during the early 1990s which paved a way for the country's first democratic elections in 1994.

As will be demonstrated in the next few paragraphs which follow, only after the period and events mentioned earlier could the struggle between the ANC-led post-apartheid South African governments and the mainstream press / media over the latter's freedom and independence, as well as their right of access to state

information and ideas in the country be considered to have formally resumed in the form of a few sporadic incidents which took place between these two powerful and eminent institutions of contemporary society. For instance, except for a few sporadic tiffs and insignificant spats which President Nelson Mandela himself and the government which he led also occasionally had with the country's mainstream print media during his single term as President of the Republic of South Africa, his presidential tenure could, by and large, be said to have been characterized by an atmosphere of cordiality and relative peace between the latter and the ANC-led government.

The aforementioned also took place against the backdrop of, among other things, the euphoria which had gripped the entire country over the newly-elected first Black President, the newly-found freedoms and civil liberties which had been enshrined in the country's then recently-adopted constitution and other hype-inducing events which were unfolding within the country at that time.

However, the trial of the alleged drug lord of the Cape Town Flats, Rashaad Staggie, who had been murdered by the members of a vigilante group which called itself People Against Gangsterism and Drugs (*Pagad*) and the issue of subpoenas which were subsequently issued to certain journalists by the state through its prosecuting authorities with the aim of compelling the latter to provide the video footage of Staggie's murder somewhat disturbed the atmosphere of relative peace and cordiality referred to earlier. Even though the Staggie incident did not raise the eyebrows of many within the country's civil society in the manner in which other events which occurred thereafter did, it did, however, draw fierce criticism from certain sectors of society, especially within the media fraternity and academic scholarship.

At issue regarding the Staggie incident, is the question which was subsequently raised about the powers or authority which had since been conferred on the police in order for them to be able to compel witnesses and journalists alike to testify in criminal cases under Section 205 of the Criminal Procedures Act. Within the context referred to earlier, several South African journalists and other international journalists, one from the *Reuters* news agency, and another from the *Associated Press* agency, were forced to reveal their sources in terms of the statute in question. In regards to the issue of subpoenas referred above also, questions were poignantly raised about the time-honoured and ethical obligation of journalists to protect their sources of information and the identities of the suppliers of such information.

Following President Mandela's departure from the country's highest political office in 1999, the *South African Human Rights Commission* (SAHRC 2000) of *Inquiry into Racism in the Media* became the next incident which once again brought the issue of press / media freedom, independence and the right of access to state information during the post-apartheid era under the spotlight during the presidency of Thabo Mbeki.

While the SAHRC inquiry into racism in the media had been less concerned with the issue of press / media freedom, independence and the right of access to state information *per se* than it was with that of racism in the media, the former did incidentally come under the spotlight during the inquiry. The aforementioned happened when subpoenas were once again issued to journalists, especially senior editors of major newspapers, with the aim of compelling them to participate in the SAHRC-convened public hearings which took place in the year 2000. Elsewhere in one of his articles, Berger (2006), the former Head of the School of Journalism and Media Studies at Rhodes University, now Director of UNESCO in Paris (France), points out that the issuing of subpoenas to senior editors of the country's mainstream press media in order to compel them to attend the hearings on Ms Claude Braude's 'Interim Report' which had been part of SAHRC Media Racism Inquiry was not only

followed by an outcry within the media, but also by eruptions in other circles.

The aforementioned in turn, points to the issue of how such an action by a statutorily-established body that the SAHRC is was subsequently perceived as an attack on press freedom and independence. In their response to the SAHRC subpoenas and hearings, media practitioners and others within the print media industry did somehow succeed, through a deal brokered by the South African National Editors Forum (SANEF), to persuade the former to withdraw such subpoenas and, instead, offered to attend the hearings in question voluntarily. After successfully spearheading the establishment of a communications task team known as COMTASK during his tenure as Deputy President under President Nelson Mandela, and which subsequently led to the establishment of the then newly-adopted Government Communication and Information System (GCIS), Thabo Mbeki during his office term as President of the Republic of South Africa had proceeded to try and tackle the problem of the rapidly escalating tensions and deteriorating relations between the government which he led and the country's mainstream print media.

The aforementioned, in turn, led to an *indaba* consultative engagement between President Mbeki's government and SANEF, representing the mainstream print media, and which resulted in the adoption and launch in April 2003 of the United States White House-based model of Presidential Press Corps (PPCs), the membership of which was going to be open to all *bona fide* South African journalists and other journalists who worked for South African media organizations and who had to be nominated by their own senior editors (GCIS, 2003).

In terms of the PPC project described earlier, designated journalists were going to have to obtain a security clearance in order for them to become part of a team that would be permitted to attend weekly briefings by senior members of government, who included the President, Deputy President, Ministers and Directors-Generals (Ibid). Even though the involvement of the print media in the PPC project was perceived by some media observers or commentators to have amounted to an act of having willingly 'gone into bed', as it were, with the government or adversary, this was, however, defended by the former.

In the mainstream print media's case, their collusion with the Mbeki-led government was explained as having been part of their attempt to mend their already strained relations with the latter in the name of building the country's new and fledgling democracy, its developmental goals and reconciliation efforts. In spite of the aforementioned, though, questions regarding press / media freedom and independence were also poignantly raised about the entire act of the 'embedding' journalists with government through the PPCs. In their article entitled 'Independent or embedded?: An exploration of views of Presidential Press Corps', Wasserman and Van Zyl (2003) argued against the notion of embedding journalists with the government. Wasserman and Van Zyl (2003) for instance, contended that when considered from a libertarian point of view, the PPC project presented some problems with regard to the normative ethical framework which sees press / media independence as a position that brings the media and government in opposition.

Wasserman and Van Zyl (2003) also pointed out that when 'freedom of speech and independence' are understood to mean that the media should act as a "Fourth Estate, the creation of PPCs raises questions about its ethical conduct. In buttressing their counter argument, Wasserman and Van Zyl (2003) cited the case of a former member of the PPCs Interim Steering Committee at that time, Jeff Radebe who is said to have admitted that PPC journalists might experience a conflict of interest when it came to obtaining top secret documents as they would not be able to reveal the content at any cost since they stood a good chance of being charged by the Presidency's Security Office. In the aforementioned case, the

presidency's security office is said to have made it clear that a journalist would be charged with breaking the law if top-secret information was found to have been leaked out (Ibid).

Once again, even though the issue of the PPCs did not raise the eyebrows of many within various sectors of civil society in the manner that other events that took place thereafter did, it did, however, raise questions about press / media freedom and independence, as well as that of the right of access to state information during the post-apartheid era of democracy in South Africa, including some of the dilemmas that inhere in the watchdog role or model of the media. One of the sentiments which were mooted in some circles about the PPCs, for instance, was that it was a covert ploy by the President Mbeki-led government to muzzle and regiment the print media. However, President Mbeki's departure from political office in 2007, following his unceremonious recall by the ANC's National Executive Committee (NEC), did not help to bring about any thaw in the already strained relations between the ANC-led government and the country's mainstream print media.

Having ascended to the highest political office against the background of his many politico-legal controversies, monumental scandals and gaffes, President Jacob Zuma's relations and those of his government with the country's mainstream print media did not show any signs of improvement. In fact, the former's relations with the latter have continued to deteriorate throughout President Zuma's still on-going term as President of the Republic of South Africa. Amidst the already strained relations between the ANC-led government and the mainstream print media referred to previously, the Secrecy Bill which was intended to repeal and replace the notorious Protection of State Information Act of 1982 was first tabled before the country's National Parliament in 2009, and subsequently re-tabled in 2010.

Accordingly, the aforementioned set of circumstances set the stage for the commencement of the row and debates which have continued until the end of 2013 when the ANC-led government managed to both dubiously and forcibly voted the Bill through, using its majority clout inside parliament and declared it ready to be signed and enacted into law by the country's President.

In one of their submissions to the parliamentary-appointed *Adhoc Committee* which had been charged with the task of drafting and piloting the Secrecy Bill, Milo and Stein (2010) provide an enlightening discussion which does not only shed some light and insight into the chequered and controversial nature of the history behind the Secrecy Bill, but also points to certain resemblances which the former shares with the Protection of Information Act of 1982 of the apartheid era which it was intended to repeal and replace.

In the study in question, Milo and Stein (2010) quote Peter Reynolds, a one-time attorney of the *Star* newspaper, and Gilbert Marcus, a one-time part-time lecturer at the University of Witwatersrand as having made a particular comment in relation to the Bill which paved a way for enactment of the Protection of Information Act of 1982 and which in many ways dovetails with the Secrecy Bill under discussion. The aforementioned comment reads as follows:

"It would be naïve in the extreme to deny that government secrecy is required to protect certain vital interests of the state...relating to military strategy, weaponry and intelligence matters...Were the bill designed to prevent disclosure of such matters only, it would be unobjectionable. Unfortunately, it goes much further and like other statutes in the security stable; it is characterized by the use of wide and vague phraseology. ... If the bill becomes law, it will be a further step by a government which is obsessed with secrecy" (2010)

According to Milo and Stein (2010) and Reynolds and Marcus'

comment cited earlier about the apartheid era Bill which paved the way for the Protection of State Information Act of 1982, and which the current Secrecy Bill is intended to annul and replace, should retrospectively be considered to apply with equal force to some of the crucial aspects of the latter.

Milo and Stein (2010) also point out that anyone who might or could possibly read the comment cited in the aforementioned quotation would almost likely think that it was made in reference to the current 2010 Secrecy Bill, especially given the similar or related nature of the kind of issues which have surrounded the two pieces of statutes (Ibid), which is not the case.

As may be recognized, therefore, the comments cited by Milo and Stein (2010), in certain ways make the controversies and debate(s) around the Secrecy Bill during the past six years in South Africa somewhat akin to a historico-political *dejavu*. Thus, even though not by any means intended to be exhaustive, the overview provided in the preceding paragraphs does, hopefully, shed valuable insight into the chequered and controversial nature of the history of the struggle for press / media freedom, as well as the right of access to state information and ideas in which the Secrecy Bill is steeped or embedded, and within which it can be better understood, and be put into a more clearer perspective.

#### **'A long passage from parliament to the president's office' - an overview (continued)**

Without any doubt, the journey which the current ANC-led government in South Africa, its team of securocrats and legal advisors have undertaken during the past six years or so in order to ensure that the Secrecy Bill finally gets enacted, and becomes part of the country's panoply of existing statutes has been long and arduous.

The fierce nature of the opposition and criticism which have been directed towards the Bill, the controversies and debates which it has generated and the extensive media coverage which it has received during aforementioned period almost remain unprecedented during the post-apartheid era of democracy in the country. To date, the Secrecy Bill may only be one of the few bills or proposed pieces of legislation which have turned out to be so daunting and taken so long to pass and officially enact into laws on the part of all democratically-elected governments under the leadership of the ANC during the past twenty three years.

The fact that as recently as 2015, the Bill still remained in limbo in the President Zuma's office where it also remains un-enacted (Reid, 2015) bears a testimony to the herculean nature of the challenges which have beset the process of trying to enact it into law. Following the Secrecy Bill's formal re-tabling before the country's National Assembly in 2010, various ways and methods of expressing displeasure about and opposition to it by its opponents and critics have been witnessed. While some of its opponents have, on the one hand, called for the scrapping of it in its entirety (for example, the *Right2Know Campaign*, 2011), others, on other hand, have called for either the inclusion in it or the removal of certain clauses or provisions. By the same token, various tactics and methods aimed at showing disapproval of and opposition to the Bill during the aforementioned period have included various forms of public protests such as pickets; walk-outs staged by opposition parties and opponents of the Bill during public debates and deliberations inside the country's national parliament; cartoons lampooning the Bill and vitriolic responses in the form of critical articles that have been published and posted through various media platforms.

In a similar manner, sporadic incidents demonstrating disapproval of and opposition to the Bill, and in which the ANC's own alliance partners such as the Congress of South African Trade Union or

COSATU and other opposition parties have participated, as well as other actions that have been aimed at obstructing all the efforts which were directed towards its enactment continued to dog the ANC-led government until 2013.

Similarly, the past six years have also witnessed a significant number of incidents in which the Secrecy Bill has been thrown back and forth between the designated parliamentary-appointed *Adhoc Committee* that was charged with the task of drafting and spearheading it, the National Assembly, the National Council of Provinces (NCOP), and during the second half of 2013 between the National Assembly and the Presidency for further reviews and alterations. In one of its online articles entitled 'Parliament Passes Secrecy Bill Again and Again (and again)' which was posted on the 13th of November 2013, for instance, the Right2Know Campaign, 2013a, 2013b) reported that the National Assembly had at 5 p. m. of the previous day adopted the Bill, thus defending its constitutionality for the third time in less than a year (2013).

In another article in which it condemns the ANC-dominated parliament for having rushed the Bill back to the President's Office within a space of two days, the *Right2Know Campaign* also reported that President Zuma himself had also refused to sign it in its then current state because he, in its view, had also considered it to be both unconstitutional and flawed in many respects (2013).

In the same article, the *Right2Know Campaign* further reported that even though the President had in one of the letters which he had written to parliament only mentioned two clauses which he considered to be unconstitutional in the Bill, he had incidentally also expressed his personal concerns about it in its entirety. In a similar vein, the *Right2Know Campaign* further lamented the fact that all of the above incidents had taken place against the backdrop in which members of Parliament, especially those who belonged to the ANC, had taken the oath of office to uphold the country's constitution, but yet went ahead and voted through the passing of the Bill, despite the fact that many, including the President's own legal advisers, had also intimated that it was unconstitutional (Ibid).

As may be known, the stand-off surrounding the Secrecy Bill in South Africa to date remains inconclusive. As pointed out previously, citing Reid, while the Bill still remained in limbo and un-enacted in the President's office in 2015, the ANC-led government has still not ((at least according to the knowledge of the author of the present article) made any public announcement about it in 2017.

However, following the passing of the Bill by the country's National Parliament towards the end 2013, two possible scenarios were then prognosticated going forward. The first one was that President Zuma himself was possibly going to elect to refer the Bill to the country's highest court, the Constitutional Court, in order for him to be able to tentatively pre-test, as it were, the unchartered waters by determining whether or not it was going to be able to pass 'constitutional muster' so that it could thereafter be signed and enacted into law, hopefully, without further hassles and embarrassment. The second one was that if the President elected to go ahead with the process of signing and enacting the Bill into law in its then constitutionally-flawed and draconian state, there was a high possibility that its opponents and critics themselves were, as they had repeatedly mooted many times before, also going to challenge it in the courts, including the Constitutional Court.

## RESULTS

Against the background of the analytical discussion on the Secrecy Bill provided under the previous heading earlier, the findings outlined below have been

extrapolated in relation to each one of its selected chapters for scrutiny with a view to validating the hypothesis about it posing a potential threat to the democratic civil liberty of freedom of expression in South Africa:

**1. Chapter 3** of the Bill entitled 'Policies and Procedures' has been found to pose a potential threat to the democratic civil liberty of freedom of expression on three aspects. Firstly, the broad nature or wideness of the scope of the definition covered under the term 'organ of state'. Secondly, the wideness of the scope and extent of the powers and authority which the Bill will vest in the heads of the organs of state to classify state information. Thirdly, the fact that the heads of the organs of state are deliberately and systematically removed from the media and public access and will operate in an environment in which a sufficiently-independent and publicly-accountable oversight body to oversee classification and de-classification of state information will be virtually non-existent.

While the term 'organ of state', on the one hand, has been found and shown to end up covering too wide a scope and to include too many a functionary, thus making it immensely difficult to monitor the implementation process of classification of state information, the wideness of the scope of the powers or authority vested in the heads of the organs of state, on the other hand, has been found and shown to leave such powers and authority highly open to misuse by those in whom they will be vested.

In the aforementioned case, the possibility of the heads of the organs of state, who are more than likely to be ANC political deployees, using or misusing such powers and authority to protect their own cronies in government, denying the media and public access to information about the latter's involvement in incidents of malfeasance, corruption and maladministration under the pretext that these are part of classified state information has been found to pose a real potential threat to the democratic civil liberty of freedom of expression in the country. In the manner described above, therefore, the definition of and the scope covered by the term 'organ of state' has been found and shown, in line with the views of many commentators, to be both illogical and disingenuous.

By vesting too much powers and authority in the heads of the organs of state to classify state information, as well as allowing such heads to delegate the powers and authority to classify state information on others below them and the fact that all of the above would take place in an environment where a sufficiently-independent and publicly-accountable oversight body will not exist have been found and shown to further aggravate the threat of misuse of power and authority through denial of the media and public access to state information..

**2. Chapter 5** of the Bill entitled 'Classification and

Declassification of State information' has been found to also potentially pose a threat to the democratic civil liberty of freedom of expression on two aspects. Firstly, the fact that the powers or authority to classify and declassify state information by those in whom these will be vested will be exercised at the so called 'sufficiently high level' where it could also be delegated them to others, thus enabling such processes to be shielded from and inaccessible to the media and general public, as well as being open to misuse by those on whom the powers and authority classify and declassify will be delegated. The aforementioned has, therefore, been found to pose a serious potential to the civil liberty of freedom of expression enshrined in the country's Constitution. Secondly, and as in the case of the heads of the organs of state, classification and declassification of state information will once again be exercised in an environment in which a sufficiently-independent and publicly-accountable oversight body will not exist.

**3. Chapter 7** of the Bill entitled 'Classification Review Panel' has also been found to pose a potential threat to the democratic civil liberty of freedom of expression in the sense of suffering similar setbacks such as those found in Chapter 3 & 5 respectively. Firstly, as with the latter, the Classification Review Panel is not only systematically removed from the access of the media and general public, but also set to operate in an environment in which a sufficiently-independent and publicly accountable oversight body will not exist, thus making it also potentially and prone to secrecy and misuse of power. Given also that the Classification Review Panel will only deal with the aftermaths of the classification process rather than the actual process, it has been found have the potential role of being a rubber stamper to what would have already been done in that regard

**4. Chapter 8** of the Bill entitled 'Appeals' has been found to potentially pose a threat to the democratic civil liberty of freedom of expression through the paradoxical or *catch 22* situation which it presents to the would-be requester of classified information who could either be a journalist or a member of the public, and who might find himself or herself having to adopt the type of recourse prescribed in one of chapter's provisions.

For instance, while Chapter 8 does in clause 32 (2) on page 16 permit, notwithstanding subsection (i) under the heading 'appeal procedure', the requester of classified information to apply directly to a court of law for urgent relief that is contemplated in section 19 (3) without having to exhaust the internal appeal procedure contemplated in section 31 of the Bill, such a process may, unfortunately, not in reality turn out to be as simple and easy as it is purported to be by the Bill.

The aforementioned is especially true when considered in the light of the requirements which have to be met or

fulfilled by the would-be requester of classified information before undertaking such recourse. The requirements in question include evidence of:

1. A substantial contravention of or failure to comply with the law; or "an imminent and serious public safety or environmental risk, and
2. The public interest in the disclosure of the state information clearly outweighs the harm that will arise from the disclosure (p.16).

There are three major challenges which the above mentioned clauses provided for in Chapter 8 are likely to create for the requester who may elect or intend to bypass the route of appealing directly to the Minister by approaching the court directly. The first challenge pertains to the fact that the requester of classified state information will first and foremost and as a matter of necessity have to access such information in order for him or her to be able to build and put up a strong case that could possibly convince the court to consider his or her appeal in manner that may work in his / her favour.

In terms of the Bill's final version (s), however, being in possession of such classified information would, as in the case of its earlier versions, still be illegal and criminally punishable. The second challenge pertains to the fact that even though the Bill's final version does, unlike its previous ones which did not include the 'public interest defence' clause called for inclusion by its critics and opponents since 2010 address it, albeit in a somewhat inadequate manner.

The third challenge pertains to the fact that while the appeal process is almost certain to present the requester of classified state information who may be an ordinary member of the public with mammoth financial difficulty, due to the high cost of instituting the legal recourse in question, the situation may be entirely different for the journalist. In the latter's case, his or her organization might presumably be in a somewhat better position in terms of having the financial and legal muscle to face up to such a challenge. In the end, Chapter 8 has not only been found to infringe on the citizens and the media's right of access to state information, but also their right to a fair justice process.mm,

**5. Chapter 10** of the Bill entitled 'Implementation and Monitoring' has been found to potentially pose a threat to democratic the civil liberty of freedom of expression through several corollaries which it is considered by some commentators to give rise to. Firstly, is the culture of secrecy which is widely considered not only to be endemic to the bodies which fall under the so called agency as found in Chapter 10 of the Bill, but also considered to be antithetical to democratic governance, full accountability and to provide a fertile ground for abuse of power, illegality and impunity.

Secondly, is the 'horizontal accountability' type of framework which is implied by the term 'agency' as found in the Bill and in which the oversight function is conducted by bodies within the same level as those which they are meant to oversee, as opposed to those which are either independent or drawn from the sectors of civil society below.

In a sense, therefore, the 'agency has, like most the chapters which have been analysed, been found to suffer from a similar set back of lacking impartiality and being publicly unaccountable. Accordingly, the endemic secrecy culture among the bodies which fall under the 'agency' poses a potential threat to the right of access to state information which is one of the essential elements of the democratic civil liberty of freedom of expression as enshrined in the country's Constitution.

**6. Chapter 11** of the Bill entitled 'Offences and Penalties' has been found to potentially pose a threat to the democratic civil liberty of freedom of expression through the 'chilling effect' tactics and fear which it is subtly and covertly intended to induce among the media and members of public who could be found to have breached the prohibitions pertaining to classified information. The above, in turn, goes against press freedom and the right of access to state information and ideas enshrined in the country's Constitution.

## DISCUSSION

Any meaningful critical discussion on the subject of the alleged 'fanged' nature of the final version of the Secrecy Bill, and the variety of threats which it should still be considered to potentially pose to various democratic civil liberties which are enshrined in the country's Constitution as it awaits to be signed, and enacted into law necessitates that cognizance is taken of the fact that the Bill in itself is first and foremost not a would-be piece of statute which was primarily intended to regulate the affairs and activities of the press / media as they relate to the latter's freedom and right of access to state information *per se*. In fact, as stated in the Bill's opening line before its preamble, its aim is "to provide for the protection of certain state information from destruction, loss or unlawful disclosure; to regulate the manner in which information may be protected; to repeal the Protection of Information Act, 1982; and to provide for matters connected therewith".

However, given the pivotal nature of the place which the press / media occupies within the vast chain which entails various processes of gathering and disseminating information within contemporary society, it was almost inevitable, and therefore, to be expected that it would always be impacted upon, either positively or negatively, by any law which would be enacted by any government in

the name of state security and national interest, as well as with the aim of achieving the types of objectives such as the ones cited in the final line of the previous paragraph. Granted the above, therefore, it has to be emphasized at the outset of the present analytical discussion that the Secrecy Bill is a would-be piece of statute that is intended to belong, in the same way that the Protection of Information of 1982 which it is intended to annul and replace also did, in the security stable or cluster of statutes, rather than that which is aimed primarily at regulating the affairs and activities of the press / media.

The aforementioned should be considered to be the case in spite of the fact the former does incidentally and in the end also affect the latter. In a similar vein, in as much as it is true that it is not every single chapter that is contained in the final version of the Secrecy Bill which raises the spectre of potential threats to the various civil liberties which are enshrined in the country's Constitution, it is also true that it is not every single provision or clause which is contained within such chapters which raises the spectre of threats to such civil liberties. Instead, it is only certain provisions or clauses which are contained in some of the Bill's chapters which should be considered to potentially raise the spectre of such threats. In view of the above, and for the purpose of the present discussion, therefore, only several of the Bill's chapters, especially some of the provisions or clauses contained within them, have been selected for the critique proffered in this part of the article. The chapters in question include: Chapter 3, 5, 7, 8, 10 and 11, and all which will be analysed and discussed in the same order in which they are listed above, beginning with Chapter 3 entitled 'Policies and Procedures'.

Chapter 3 of the Bill is a short chapter containing provisions which directly address the heads of the so called 'organs of state', a term which is said to have been introduced through the South African Constitution in 1993, and which is said to include any statutory body and functionary (Mdumbe, 2009). Chapter 3 provides, where applicable, for the heads of the organs of state to establish policies and procedures for classification of state information. In addition to providing for the heads of the organs of state to "establish policies, directives and categories for classifying state information, downgrading and declassifying state information, as well as ensuring protection against alteration, destruction or loss of state information created, acquired or received by a particular organ of state" (p.9), Chapter 3 also vests in the targeted heads of the organs of state the powers or authority to classify such information. Within the same context of the provisions listed in the previous sentence above, Chapter 3 also provides a further directive to the heads of the organs of state.

The aforementioned directive is that the policies, directives and categories for classification of state

information which the heads of the organs of state are authorized to establish must, where applicable, be carried out within a six month period after the date on which the regulations contemplated under section 54(4) in Chapter 13 of the Bill entitled 'General Provisions' have been formulated. Under the section of Chapter 13 in question, it is stated that such regulations must be formulated by the relevant Minister under whose Ministry a particular organ of state falls. Chapter 3 further contains a clause listed as 7. (3) on page 11 of the Bill and through which a caveat is issued to the heads of the organs of state to ensure that the policies and directives that they establish within the organs of state which fall under their respective areas of command are not inconsistent or in conflict with national information security standards provided for under section 54 (4) of Chapter 13 mentioned earlier.

As is often the case with most bills and pieces of legislation which are promulgated and enacted by governments through parliamentary processes in contemporary democratic states, the language used in Chapter 3 is characteristically imperious and prescriptive. The auxiliary or modal verb 'must', for instance, features in all of the three clauses listed as 7 (1), 7 (2) and 7 (3) on page 11. According to the Namibian Democratic Institute (1997), 'deontic' modal / auxiliary verbs such as 'must' and 'shall' in statutory documents such as official bills and pieces of legislation that are either to be enacted or enacted by governments through parliaments, are meant to convey both what legislators have decided and the fact that what is prescribed through them is not only obligatory, but also compulsory. Therefore, the meaning and usage of the above mentioned modal / auxiliary verbs within the context of Chapter 3 are not in any way different from their common meanings and usage in legislative contexts and discourses.

Accordingly, the aforementioned modal / auxiliary verbs within the context of the directives contained in Chapter 3 of the Bill imply that such directives or injunctions require nothing else from the so called 'heads of organs of state' other than their full compliance with and execution of the directives or injunctions which are being prescribed through them. Having been previously engaged in a mini research project which was at that time aimed at conducting a critical analysis on one of the earlier versions of the Secrecy Bill and which at that time contained approximately fifty eight pages in length, as opposed to the twenty eight pages which the final version under scrutiny contains, it is my personal observation as the author of the present article that nothing much or substantial appears have been done by its drafters between 2010 and 2013 to execute a genuine redress on many, if not most, of the issues which have been raised as concerns and levelled as criticisms against it by its opponents and critics in relation to Chapter 3.

Many commentators and critics of the Bill have during the aforementioned period raised concerns about several

aspects of Chapter 3; particularly, the definition of the term 'organ of state', the repercussions and ramifications which are likely to arise from the use of such a definition, and the scope of application of the powers or authority which the Bill vests through the same chapter in all of the heads of the organs of state to classify state information. In its online article entitled 'Secrecy Bill to Apply to 1001 Organs of the State', for instance, commentators from an organization known as the *Freedom of Information Programme*, (2015) and which has also been involved in the work of the *Right2Know Campaign* mentioned previously in the present article, noted in reference to Chapter 3 of one of the earlier versions of the Bill that apart from the problems which are raised by the definition of the term 'organ of state' in it, such a chapter, and by implication the Bill as such, grants exceptionally too broad powers and authority to the heads of the organs of state to classify state document (2011).

In the article in question, the aforementioned commentators reported that when questions were asked from the then Chairperson of the parliamentary *ad hoc* committee that had been tasked to draft and pilot the Bill, Mr Cecil Burgess, during one of the parliamentary deliberations about the issue of the scope which the term 'organ of state' was intended to cover and about the calls which had since been made by critics for information to be compiled in that regard, the latter responded in an apparently cavalier manner by saying that verifying such a process would be like "counting grains of sand in the Sahara Desert" (Ibid). The above mentioned commentators also reported that the investigations which were conducted by the Institute for Democracy in Africa (IDASA) in relation to the term 'organ of state' and the scope which it was going to cover revealed that there were potentially about 1001 entities which would constitute the organs of state in South Africa if such a definition was to be adhered to.

Concerns regarding the ramifications of adhering to the Bill's current definition of the term 'organ of state' and the scope of application of the powers or authority to classify state information being vested in the heads of the organs of state as found in Chapter 3 have in the past been also raised by several other opponents and critics of the Bill. In regards to the scope and powers or authority of the heads of the organs of state to classify state information as provided for in Chapter 3, for instance, Liz Justice of the *Chartered Institute of Journalists* cautioned that there is a great danger that these might not only be possibly used or misused to hide the incompetence and dishonest activities of public officials, but might also be used or misused to prevent the media from publishing such activities and information about them (2010). In his online article entitled 'Institute for Journalists Calls President Zuma to block legislation', O'Connor (2013:2), also a member of the *Chartered Institute of Journalists*, concurred and reiterated a similar caveat.

As may be inferred from the aforementioned comments by Justice and O'Connor on behalf of the *Chartered Institute of Journalists*, these were obviously directed towards those within the ranks of the ANC-led government under whose rule since the inception of democracy in 1994 the country has witnessed escalating levels of corruption, widespread abuses of state power in government circles, multitude of instances in which government officials committed serious offences with impunity, and a political environment within which clear lines of separation between the ruling political party in government and the state have become disturbingly blurred. Writing on behalf of the *Helen Suzman Foundation*, Antonie *et al.* (2012) also noted in relation to the term 'organ of state' that if classification of state information were to include any entity or person including, or any official to whom such authority or power is delegated in writing by a head of an organ of state, this could potentially be a huge number of people.

Within the aforementioned context, the so called heads of the organs of state, according to these authors, could possibly include, among others, "a department of a state or national, provincial or local administration; any functionary or institution, or sphere of government; or exercising a public power or performing or performing a function in terms of any provincial constitution or legislation" (2012). Antonie *et al.* (2012) argued that there cannot possibly be as many organs of state whose information would ever justify classification in terms of Chapter 3 of the previous version of the Bill in question.

The same authors further argued that doing so and creating separate policies on each classification would be irrational and that the idea of a city council head or his senior nominee classifying information was a ludicrous one. As a way of correcting the aforementioned anomaly in the Bill, Antonie *et al.* suggested that the scope covered by the term organ of state needed to be narrowed (*ibid*).

Contrary to the aforementioned, however, the reality remains that the definition of the term 'organ of state', the scope that such a term is intended to cover and the powers or authority that the Bill confers on the heads of the organs of state in the final version of the Bill remain the same as they were in its previous ones. Considered, therefore, in the light of the failure on the part of the drafters of the Bill to execute genuine redress on the aspects of Chapter 3 of the Bill referred to above, it should, hopefully, not take either a legal pundit or a rocket scientist to imagine and realize the nature of the potential perils or consequences that could possibly arise if such a situation was to remain unaddressed as is still the case in the Bill's final version.

One of the perils or consequences in question is the fact that given that the powers or authority to classify state information may only be used by the heads of the organs of state and those on whom they are permitted to delegate such powers or authority, there is a greater

possibility that these may end up becoming a potent political tool that could be arbitrarily used or misused by those heads to pursue hidden or undeclared political party agendas.

For instance, they may strive to ensure that any piece of information which is likely or more likely to tarnish the image of their ruling party comrades and officials in government or any other event surrounding their illicit or shady activities or acts of misconduct are kept murky and censured either under the pretext of being classified state information or in the name of the broadly and vaguely defined (at least, within the context of the Bill) notion of 'national security' enunciated in the Bill. The argument posited above is especially pertinent if one considers the fact that the heads of the so called 'organs of state' and those on whom they will be permitted to delegate such powers or authority are in a majority instances in the country and under the present political conditions likely to be those from within the ranks of the ruling party and its partner allies or surrogates.

As may be well known, it is the ANC's cadres or deployees who now have the strongest preponderance in the country's top bureaucracy or public service as a result of the former's Cadre Policy and Deployment Strategy which has been adopted and implemented alongside affirmative action policies during the post-apartheid era in South Africa. Therefore, the act of vesting the powers or authority to classify state information in people who are in many instances likely to have such strong political leanings and connections, and who are likely to be political deployees of the ruling party as most of the heads of organs of state are more than likely to be, clearly makes them highly dubious and questionable people to execute such a task in an above board, transparent and impartial manner.

By the same token, the acts or practices of obstructing the media and public's access to state information and shielding such information from their view as seen in the case of vesting the powers and authority to classify information in the heads of the organs of state through the provisions contained in Chapter 3 of the Bill should, in terms of the position adopted in this article, be considered to still present the same threats to the civil liberty of freedom of expression which also existed in the earlier or previous versions of the Bill. The threat posed by the act of vesting the powers or authority to classify state information in the heads of the organs of state becomes even more poignant when considered in light of the fact that the activities that such powers and authority bestow on or vest in them will have to be exercised in an environment in which a credible, sufficiently independent and publicly accountable oversight body or mechanism would be virtually non-existent.

As will be demonstrated during the course of the present discussion, the issue of the absence of a credible, sufficiently independent and publicly

accountable oversight body or mechanism referred to earlier equally applies to several other chapters of the Bill, namely, that which is entitled 'Classification and Declassification of State Information' in Chapter 5; that which is entitled 'Classification Review Panel' in Chapter 7; that which is entitled 'Appeals' in Chapter 8, and that which is entitled 'Implementation and Monitoring of Classification' in Chapter 10. In a similar vein, the problems which are commonly known to often arise from the use of the 'horizontal accountability' framework of overseeing the activities of state institutions as exemplified by the absence of a credible and sufficiently independent oversight bodies or mechanism referred to in the previous paragraphs and which are also applicable to the oversight function as it relates to the Secrecy Bill will form the subject of a more elaborate focus when its Chapter 10 is discussed.

Chapter 5 of the Secrecy Bill entitled 'Classification and Declassification of State Information' forms the next focal point of the discussion which follows hereafter. As can be inferred from its title, the chapter deals with the twin issues which have not only continually remained a bone of contention between government legislators and opponents of the Bill during the past six years, but which have also remained the focus of trenchant criticism from the latter, namely, classification and declassification of state information. Chapter 5 is divided into two parts, namely, Part A and Part B. Part A, on the one hand, contains provisions which deal with the subject of classification of state information and covers the following issues: the nature of classified information; the method of classifying state information; classification levels; the authority to classify state information; conditions for classification and declassification, and the reporting and returning of classified records.

Part B, on the other hand, contains provisions which deal with the subject of declassification and focuses on the subject of the authority to declassify information, as well as that of the reporting and returning of classified records, including maximum protection periods for such information. As with most chapters contained in the Bill, and in a manner that is characteristic of most official bills and pieces of legislation which are intended to be enacted or enacted into law by governments through parliamentary-based legislative processes, Chapter 5 contains a panoply of provisions which entail a combination of commands or prescriptions, discretions and prohibitions. For instance, the use of 'deontic' modal / auxiliary verbs such as 'must', discretions indicated by the use of affirmative modal / auxiliary verbs such as 'may' and prohibitive commands such as 'may not' in relation to those for whom these auxiliary verbs are directed are cases in point.

For the purpose of the present discussion, however, only a few of the provisions or clauses contained in Chapter 5 will be discussed, namely, those which fall

under the headings entitled 'Authority to classify information' on page 12, 'Conditions for classification and declassification of state information' on page 13, and 'Authority to declassify state information' on page 15. It is worth noting in relation to Chapter 5 that the authority to classify state information which is provided for and vested in the heads of the organs of state in Chapter 3 is elaborated on and extended in the former chapter by being vested in other personnel who are also higher up the bureaucratic or administrative ladder. For instance, it is prescribed, on the one hand, in clause (13).1 under the heading entitled 'Authority to classify state information' on page 12 that "A head of an organ of state may, subject to section 3, classify or reclassify state information using the levels set out in section 12" of the Bill.

On the hand, prescribed in clause (13.2) below that "A head of organ of state may delegate in writing the authority to classify state information to staff members at a sufficiently senior level". In a similar manner, while it is, on the other hand, prescribed in clause (13).3 under the same heading on the same page that "Only designated staff members may be given the authority to classify state information", it is, on the other hand, also prescribed in clause (13).4 below that "Classification decisions must be taken at a sufficiently senior level to ensure that only state information which genuinely requires protection is classified". Prescriptions similar to the ones referred to above are also repeated in Part Two of Chapter 5 entitled 'Declassification'.

Under the heading entitled 'Authority to declassify classified information' on page 15, for example, it is prescribed in clause 16. (2) that while the head of the organ of state remains the declassification authority, he or she may delegate in writing the authority to declassify and delegate to a staff member at a sufficiently senior level within the organ of state. Similarly in sub-clause 14.2 (e) on page 12 under the heading entitled 'Conditions for classification and declassification of state information', it is further prescribed that "if there is significant doubt as to whether state information requires protection, the matter must be referred to the relevant Minister for a decision". As may be conceded in relation to the clauses and the sub-clause in Chapter 5 referred to above, the fact that the powers or authority to classify state information have to be exercised at the so called "sufficiently senior level" where it is more feasible to have such a process remaining shrouded in a veil of secrecy poses a threat to the civil liberty of freedom of expression, of which the right of access to state information and ideas are one of the prime elements.

As may also be acknowledged, the situation described earlier could also be considered to be antithetical to the spirit and purport of some, if not many, of the provisions which have since been enunciated through the promulgation of the Promotion of Access to Information Act, 2 of 2000 (PAIA) as contemplated under Section

32(2) of the country's Constitution. By the same token, the fact that processes of classification and declassification of state information would have to take place in an environment where there will be no credible, sufficiently independent and publicly accountable oversight mechanism(s) could also be considered not only to be suspect, but to be also questionable. As pointed out previously, the oversight mechanism referred to above would, if it were to be put in place in the manner demanded by stakeholders, serve to ensure that the processes of classification and declassification of state information are not left in the capricious hands or to the whims of public officials who in many instance are likely to be prone to political biases and influences.

In levelling the aforementioned criticisms regarding the issue of the absence credible, sufficiently independent and publicly accountable oversight mechanisms in which classification and declassification will take place, one should not, however, be seen to be oblivious the existence of several other equally dubious and questionable oversight mechanisms or bodies in the Bill, namely, the 'Classification Review Panel' in Chapter 7 and the 'Agency' in Chapter 10 respectively, and to which the situation described above also applies. The South African veteran human rights lawyer, George Bizos (cited by Ferreira, 2012), is one of several legal experts who are said to have in the past argued in reference to one of the previous versions of the Bill that the above mentioned aspects of classification run contrary to and threaten many of the fundamental values and principles that are enshrined in the country's Constitution.

Bizos is said to have particularly faulted the earlier version of the Bill in question for allowing the Minister of State Security to delegate the powers and authority to classify and declassify important and sensitive state information to other ministers (Ibid). Given therefore that no attempt appears to have been made to implement genuine redress on the above mentioned anomalies in Chapter 5 of the Bill's final version, and the fact that the powers or authority of the Minister to delegate classification of state information to others will have to take place in an environment in which a credible, sufficiently independent and publicly accountable body does not exist, further renders the Bill similarly or equally threatening as its previous versions also were to the democratic culture of access, transparency, accountability checks and freedom of expression.

Chapter 7 entitled 'Classification Review Panel' forms the next focal point of the discussion which follows hereafter. Chapter 7 is the second longest, after Chapter 11 entitled 'Offences and Penalties', of the Bill's chapters. As implied in its title, Chapter 7 provides for the establishment of a Classification Review Panel which must review and oversee status reviews, classifications, declassifications and receive once a year reviews on the status of classified information conducted by the organs

of state. Chapter 7 also provides for a wide range of other issues pertaining to the regulation of the panel which will be entrusted and charged with the responsibility of reviewing and overseeing status reviews of classified state information that is to be declassified as contemplated in the Bill. The areas covered in Chapter 7 include:

1. Establishment of classification review panel
2. Functions of review panel
3. Constitution and appointment of a classification review panel and
4. Disqualification from membership.

This also include:

5. Removal from office
6. Remuneration of members and staff
7. Meetings of classification review panel
8. Decisions of *Classification Review*
9. Appointment of staff
10. Accountability of classification review panel, and
11. Reporting (p.13-16).

In their submission to the *ad hoc* parliamentary committee which was tasked with the responsibility of drafting the Secrecy Bill and leading its processes, commentators from the *Open Democracy Advice Centre (2011)*, also another member of the *Right2Know Campaign* coalition mentioned previously, expressed concerns about the Classification Review Panel as found in one of the Bill's previous versions. The aforementioned commentators pointed out, for instance, that the introduction of such a panel had somehow mysteriously led some people to believe that it can review the classification of state information, a situation which they attribute to the logical interpretation of the title of such a panel.

In contrast, they argued that such a perception was a wrong one since, in their view, the role of such a panel is to oversee all other departments of the state, the reviews of their classified information and to ensure their compliance with the Act that is being proposed through the Bill (2007).

The aforementioned commentators also argued that the classification review panel is not an independent appeal board that had been called for by civil society and critics of the Bill since it does not provide for an independent appeal mechanism in relation to the classification and declassification of state information (Ibid). In a similar vein, the same commentators pointed out in reference to one of the previous versions of the Bill that its reading suggested that it does not allow for the Review Panel to be approached by individual members of the public, including those from the media.

The commentators from the *Open Democracy Advice Centre* further pointed out that the citizens' only recourse

in such a case would only be through an internal appeal to the head of the organ of state or the Minister, and ultimately, to the courts. The concern referred to above about the Classification Review Panel is also said to have been raised by Bizos, cited previously, who is said to have also cautioned that such a panel was not going to be seen to be impartial (Ferreira, 2012).

Once again, the act of distancing the Classification Review Panel from easy access to the media and general public by not allowing latter to make direct appeals to it, and the fact that its independence and impartiality are as equally questionable as other oversight mechanisms provided for in the Bill violates the media and public's constitutional right of access to state information and ideas.

Given, therefore, also that virtually nothing appears to have also been done by the drafters of the Bill to implement a redress on the aforementioned anomalies in Chapter 7 of the Bill's final version under scrutiny bears a further testimony to its flawed state. As in the case of the heads of the organs of state already discussed above, the Classification Review Panel provided for in Chapter 7 of the Bill is not only systematically distanced and further removed from the media and public access, but also deals with the aftermath of the classification process which it is ostensibly purported to be intended to review. Chapter 8 entitled 'Appeals' forms the next point of discussion. This chapter contains two main headings comprising five clauses which provide for an internal appeal procedure and an application to court procedure in cases where an individual or a party has either been denied access to classified state information.

The denial referred to aforementioned may either emanate from the Bill's own provisions or may result from a situation in which the requester of classified information is aggrieved by either the findings or the final decision of the Minister of the organ of state to whom the request to obtain classified information has been made. In terms of the provisions contemplated in section 19 (3) of Chapter 8, for example, a requester may apply directly to a court for urgent relief, thus being enabled to by-pass or circumvent the internal appeal process which the Bill provides for. The above being the case, though, Chapter 8 upon a closer scrutiny could be considered to present a paradoxical or *catch 22* situation of one kind or another for anyone, including journalists and members of the public, who might find himself or herself having to resort to the type of recourse prescribed through one of its provisions.

For instance, while Chapter 8 does under clause 32 (2) on page 16 of the Bill permit, notwithstanding subsection (i) under the heading 'appeal procedure', the requester of classified information to apply directly to a court of law for urgent relief that is contemplated in section 19 (3) without having to exhaust the internal appeal procedure contemplated in section 31 of the Bill, such a process

may, unfortunately, not in reality turn out to be as simple and easy as it might be purported to be. The above is especially true when considered in the light of the requirements which have to be met or fulfilled by the requester of classified information before undertaking such recourse. The requirements in question include evidence of:

1. A substantial contravention of or failure to comply with the law; or "an imminent and serious public safety or environmental risk, and
2. Proof that the public interest in the disclosure of the state information clearly outweighs the harm that will arise from the disclosure (p.16).

There are three major challenges which the aforementioned clauses provided for in Chapter 8 are likely to create for the requester who may elect or intend to by-pass the route of appealing directly to the Minister by approaching the court directly. The first challenge pertains to the fact that the requester of classified state information will first and foremost and as a matter of necessity have to access such information in order for him or her to be able to build and put up a strong case which could possibly convince the court to consider his or her appeal in manner that may work in his / her favour. In terms of the Bill's final version (s), being in possession of such classified information would, as in the case of in its earlier versions, be illegal and criminally punishable. The second challenge pertains to the fact that the Bill's final version, like the previous ones, still does not adequately address, despite the flimsy and nominal efforts having since been made in that regard, the issue of 'public interest defence; clause which has been repeatedly called for by its critics and opponents since 2010.

As may be known, the rationale behind such a 'public interest defence' clause is that it could be used by anyone as a means for either justification or mitigation in cases where criminal charges pertaining to the acquisition, possession and dissemination of classified information are or have been pressed against him or her. The third challenge pertains to the fact that while the appeal process is almost certain to present the requester of classified state information who may be an ordinary member of the public with a mammoth financial challenge due to the high cost of instituting the legal recourse in question, the situation may be entirely different for the journalist whose organization, in cases where s/he is under the employ of such an organization, in that s/he may in many instances be in a somewhat better position in terms of having the financial and legal muscle to face up to such a challenge.

In her article entitled 'This Bill is dangerous', the former University of KwaZulu-Natal's academic and political violence monitor, Mary De Haas, has expressed her own qualms about the practicability of the appeal process

provided for in Chapter 8 of the Bill. She pointed out that even though members of the public may appeal to the heads of classifying departments, her own experiences with most of such appeals is that citizens “do not even get the courtesy of an acknowledgement, let [alone] a reply, despite there being certain exceptions” (2012). Chapter 10 entitled ‘Implementation and Monitoring’ is the next focal point of the analysis. Chapter 10 is the shortest of all of the Bill’s chapters and contains one heading entitled ‘Responsibilities of the Agency’ which, in turn, comprises two clauses that provide for the responsibilities of the so called ‘agency’.

In terms of the provisions contained in Chapter 10 of the Bill, the ‘agency’ is said to be responsible for performing a monitoring function of the implementation process among (a) all organs of state for compliance with prescribed controls and measures to protect valuable information, and (b) all organs of state referred to in Section 3, excluding the South African Police Service and the South African National Defence Force for compliance with the prescribed controls and measures to protect classified information. It is, however, important to point out that the definition of the term ‘agency’ in the Bill’s final version is not anyway dissimilar to those which are found in its previous ones. As has been the case with the Bill’s previous versions, the term ‘agency’ in its final one is still said to refer to “the State Security Agency contemplated in Schedule 1 to the Public Service Act, 1994 (Proclamation No. 103 of 1994), and includes the National Intelligence, South African Secret Service, Electronic Communications Security (PTY) Ltd (COMSEC), and the South African National Academy for Intelligence”.

As also pointed out previously, the type of work that is performed by the different bodies that are classified under the ‘agency’ is by and large clandestine. The Code of Conduct as approved by the TEC Sub-Council on Intelligence in the South African White Paper on Intelligence and which applies to the bodies that form part of the ‘agency’ prescribes, for instance, that their personnel or operatives must comply with a series of requirements or conditions that normally form part of their employment contracts with the state. The requirements or conditions referred to above include, among others, a declaration of loyalty to the state and constitution; obedience to the laws of the country and subordination to the rule of law; compliance with democratic values such as respect for human rights; submittance to an oath of secrecy [emphasis added]; adherence to the principle of political neutrality; a commitment to the highest degree of integrity, objectivity and unbiased evaluation of information (White Paper on Intelligence, 2010).

Notwithstanding the issue of submittance to the oath of secrecy mentioned earlier, though, the comment made previously in relation to the Chapters 3, 5 and 7 respectively, and in which these have been shown to

provide for the classification of state information to be implemented in an environment that is not only far removed from the view and access of the media and general public, but also one in which no sufficiently independent and publicly accountable body will exist applies with equal force to Chapter 10. Unfortunately, though, solely vesting the oversight function regarding the implementation of classification and declassification of state information in the above mentioned bodies is considered by many experts to be antithetical to the democratic principles of openness, transparency and fairness. Nathan (2012), for instance, points out that the secrecy culture which is known to be endemic to the bodies which fall under the ‘agency’ is considered to be antithetical to democratic governance, hence it is considered to prevent full accountability; provide fertile ground for abuse of power, illegality and impunity (2012).

In a similar breadth, some of the problems which are known to often arise when the oversight function is solely entrusted or left in the hands of the ‘agency’, especially the bodies that fall under its umbrella, have also been more elegantly highlighted by Caparini (2007) in her article entitled ‘Controlling and Overseeing Intelligence Services in Democratic Societies’. In the article in question, Caparini provides a valuable discussion on the concept of ‘horizontal accountability’, the opposite of which is ‘vertical accountability’, as it applies to the control and overseeing of the intelligence services in democratic states. As is demonstrated in the next few paragraphs below, her insights in that regard are also pertinent to the issue of the oversight function as it would apply to the Secrecy Bill in South Africa.

According to Caparini (2007), ‘horizontal accountability’ is a term that is used to describe “the restraint of the state institutions by other state institutions, namely, executive, legislative and judiciary”. Caparini (2007) points out that such accountability is considered ‘horizontal’ because it implies a relationship among equals. It thus refers to a situation in which designated institutions in the upper echelons of government or the state are also responsible for carrying out the oversight function across the same level, as opposed to a situation in which independent and publicly accountable oversight mechanisms are drawn from the lower ranks of civil society or outside the sphere of government or state institutions. The first potential problem which is said to arise from the use of the ‘horizontal accountability’ framework referred to above, according to Caparini (2007), is that of the possibility of ministerial abuse of power which may result from the politicization of the intelligence services and which may appear in the form of an intelligence service that is tailored to support government policy.

The events of the recent past decade and within the South African Intelligence Services bear a strong testimony to the issue which Caparini (2007) refers to earlier. In an article entitled ‘Kids of top brass coin it in

spies 'club' which appeared on the front page of the *Sunday Times* edition of August 24, 2014, for instance, the writer, Sibongakonke Shoba (2014), featured an expose in which he reported that the State Security Agency - the home of South Africa spies - has become the employment agency for the children of senior ministers and others with the right connection. In Shoba's words, an intelligence document seen by the *Sunday Times* reporters listed a number of children of the ANC luminaries such as the Minister in the Presidency, Jeff Radebe, Nosiviwe Maphisa of the South African National Defence Force and National Assembly speaker and Chairperson of the ANC, Baleka Mbete who are said to have been recruited to the intelligence academy since its opening in 2003 by then Deputy President Jacob Zuma.

Shoba further reported in the same article that an insider familiar with the academy's cadre programme had said that the children of the "known" were not only handpicked, but also that there was no recruitment process that allowed the agency to choose the best candidates (p.1). Surely, the case of ministerial abuse of power, the politicization of the intelligence services and the example of an intelligence that is tailored to support government policy which Caparini refers to in her article is best exemplified in the above mentioned story. In the case of the problem or challenge regarding an intelligence service that is tailored to support government policy, the classic example in that regard is that of the ANC's Cadre Deployment Strategy which has since 1994 been widely implemented across government and the rest of the public service, including its intelligence services, in South Africa.

In addition to the problems mentioned earlier, Caparini (2007) further points to the risk that the intelligence services may also be used to gather information on the government-in-power's political opponents. In South Africa's case, the saga involving the former Director-General of the National Intelligence Agency (NIA), Billy Masetla, some years ago who was fired by former President Thabo Mbeki, following the spy allegations against the former in relation to the internal squabbles involving the latter's opponents within the ANC-led government is another salient example of such a phenomenon. In more recent times in South Africa, there have been several stories which have done rounds in the media about the intelligence services' spying activities on some of the top officials inside government and its institutions and which have, in turn, led to 'trumped up' allegations against them because they are considered to be on the current President's blacklist.

The third potential problem which Caparini (2007) argues may potentially arise from the use of the 'horizontal accountability' framework which accords the agency the oversight function and control is that of the inculcation and perpetuation of a culture of excessive secrecy and withholding of potentially embarrassing

information by governments on the grounds of national security. Once again, the ANC-led government's bent on the inculcation and perpetuation of such a culture under the auspices of the former Intelligence Minister, Siyabonga Cwele, and President Zuma's current administration is also exemplified in the final version of the Bill under scrutiny. The aforementioned problems and dangers, according to Caparini, require an array of legal safeguards against ministerial abuse and the politicization of the intelligence agencies, such as establishing the political independence of internal intelligence agencies, granting heads of intelligence agencies security of tenure, establishing legal limits of what agencies can be asked to do by the Minister, and creating mechanisms by which personnel in intelligence can draw attention to alleged abuse.

Considered, therefore, in the light of the definition of the term 'agency' as found in Chapter 10 of the Bill and all its cornucopia of adverse corollaries, the validity of Caparini (2007) observations become even more difficult to refute. In significant ways, these vindicate many of the criticisms which have been levelled against the Bill and caveats which have been issued by many of its critics since 2010 in relation to the issues of transparency, independence and accountability as they apply to it. Chapter 11 of the Bill entitled 'Offences and Penalties' will hereafter be the next and last one of the six chapters selected for analysis to be discussed. This chapter deals with the inherently vexed and perennially contentious issue regarding the Bill's penalties that are prescribed for imposition on various offences regarding the unlawful acquisition, dissemination and publishing of classified state information. Chapter 11 particularly provides for the meting out of punishment on the constellation of breaches or violations which could be potentially committed by anyone in relation to classified state information.

The offences in question include the following: 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 and disclosure of classified information; failure to report possession of classified information and provision of false information to national intelligence structure. They also include: destruction or alteration of valuable information; improper classification; failure by head of organ of state or official of organ of state to comply with the Act and prohibition of disclosure of a state security matter. The aforementioned being the case, however, the draconian nature of many of the penalties which Chapter 11 provides for imposition on anyone who could or would be found to be in breach of its prohibitions pertaining to classified state information is one of many aspects of the Bill which have not only raised the eyebrows of many within various sectors of the

country's civil society, but have also drawn widespread criticism from many of its opponents.

The aforementioned has been the case, in spite of the fact that the draconian penalties for various infractions pertaining to the acquisition, publishing and dissemination of classified state information are not unique to the Secrecy Bill, hence many such draconian penalties did also feature in the Protection of Information Act of 1982 which the latter is intended to repeal and replace. With the hindsight based on the author of the present article's reading of the earlier or previous versions of the Bill on penalties in mind, and in spite of the few and far between alterations which appear to have been made on Chapter 11 in the Bill's final version, many of its draconian penalties remain a pervasive presence in it. The *Business Day* reporter, Wyndham Hurtley, observed that the controversial Protection of Information Bill had retained much of its draconian provisions, and by implication, the penalties thereof, intact, a situation which in his view was going to enable it to criminalize 'information peddling'.

Hurtley (2003) also pointed out that the Bill's original version had been "...withdrawn in 2009 after substantial criticism from civil society for being vague, unconstitutional and harsh [emphasis added]" (Ibid). In a similar vein, de Haas also drew attention to the hefty and excessive nature of the Bill's penalties for various categories of offences in her own submission to the *ad hoc* committee on the Protection of State Information Bill and described these as "outrageously high [emphasis added] by international standards. In buttressing her argument, de Haas () cited the case of the UK law in which a previously imposed maximum of fourteen years of imprisonment for supplying information to the enemy had since been amended through the Official Secrets Act into a stipulated fine and / or two years imprisonment for disclosure of security-related information.

Within the aforementioned context, de Haas () also cited the case of Canada in which a person permanently bound to secrecy who communicates information which may relate to 'special operational information' faces a maximum imprisonment of five years (less one day), and the maximum that such a person could face if the communication shared in *special operational material* is fourteen years (Ibid). As may be conceded based on the above, therefore, there seems to be no doubt that the draconian penalties which are contained in the Bill's final version under Chapter 11 could, like in any other law, be considered to have a number of overt and covert motives behind them, the latter which may be gleaned through inference.

In the case of Chapter 11, while its overt motives, on the one hand, could be considered to include, *inter alia*, reducing the likelihood of any future harm to the state by means of incapacitation and deterrence of the would be offenders in the regards to classified state information, covert motives, on the other hand, could be considered to

entail, among other things, various unobtrusive or subtle forms of censorship which are ultimately intended to induce a 'chilling effect' among the would-be offenders. who may contemplate laying his or her hands on the so called 'classified state information'. In a legal context, the phrase 'chilling effect' is said to be used to describe "the inhibition or discouragement of the legitimate exercise of any constitutional right by threat of legal action" (English Oxford Dictionary, 2011). Unfortunately, however, the political context within which the draconian penalties in the Secrecy Bill have been retained could possibly give rise to particular suspicions.

One of the suspicions could be about the ulterior nature of the motives behind them, especially when viewed within the broader political context of the sour relations which the ANC and the government which it leads have had with the country's mainstream print media after Mandela's exit from active politics, and during which the latter has at times been referred to as an 'enemy' (ANC, 2011). By the same token, the Bill's hefty penalties could possibly also raise the vexed question about whether or not the motives behind them are based on the dimension of justice known as *retribution as just desert*, of which the goal of attaining restorative justice through the use of proportional punishment and fair procedures is a prime element or the other dimension which is known as *retribution as just revenge* (also known as payback or vengeance) which aims to punish in order to get back at the offender and make him suffer (Gerber and Jackson, 2003).

## Conclusion

The present study has set out to critically analyse the final version of the South African *2010 Protection of State Information Bill* which has since been dubbed the *Secrecy Bill* in order to draw attention to the issue of how the ANC at the helm of the country's current government, its team of securocrats and legal advisers should retrospectively be considered to have consistently resisted or failed to implement a genuine redress on many of issues which have been raised as concerns against the Bill in question by its opponents and critics since 2010. In particular, the article has aimed to critically interrogate the claim which has been made repeatedly and vociferously by the opponents and critics of the Bill since then about it posing a serious potential threat to the democratic civil liberty of freedom of expression that is enshrined in the country's Constitution.

During the analysis, the six of the chapters of the Bill which have been selected for such a purpose have all been found and shown to pose in varying degrees a significant number of potential threats to the democratic civil liberty of freedom of expression within the country if the Bill gets enacted into law in its constitutionally-flawed and draconian state as found in its final version.

However, in spite of a somewhat less-sanguine picture which has been painted about the Bill during the analysis, a rather sanguine conclusion is hereby posited to the effect that the threats which have been considered to be potentially posed by certain provisions or clauses in the analysed chapters cannot and should not in the final analysis be considered to amount to either a potentially apocalyptic outcome or utter gloom and doom

The aforementioned, it is argued, should especially be considered plausible when considered in the light of the various safeguard mechanisms which are contained in the country's Constitution and which are considered to be almost certain to ensure adequate insulations for the country's citizenry and its media from any future situation in which any law, including the Secrecy Bill, would simply be imposed on them without their will and consent. The safeguard mechanisms in question, it is further concluded, should be considered to present themselves in three different aspects.

Firstly, is the fact that the country's constitution remains the supreme law which should guide all other laws of the country, including the Secrecy Bill. Secondly, is the fact that the Secrecy Bill will always have to pass 'constitutional muster' if it were to be enacted into law without the ANC-led government further witnessing the fierce opposition and criticism that it has witnessed during the past six years.

Thirdly, is the fact that any future attempt to amend the country's constitution with the goal of paving a way for the passing and enactment of any new law can only be achieved if at least two-thirds of the National Assembly (that is, at least 267 of 400) vote in favour of it, and that if the amendment affects provincial powers or boundaries, or if it amends the Bill of Rights, at least six of the nine provinces in the National Council of Province would have to vote in its favour.

Accordingly, any further hope of success on the part of the ANC-led government to enact the Bill into law without further encountering type of condemnation and opposition which it has during the past six years should, therefore, be considered to hinge a great deal on how it is able to circumvent the three constitutional safeguard mechanisms or hurdles referred to above. Meanwhile, though, with the Bill having been lying in the President's office during the past three since it was passed by Parliament in 2013, and in the face of the dwindling popular support for the ANC at the electoral polls, the Bill's future clearly hangs in an uncertain balance.

## CONFLICT OF INTERESTS

The author has not declared any conflict of interests.

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