Moving on from Mistrust: Balancing State Security Concerns with the Right to an Open and Democratic Government

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Introduction

The protection of state security, and the requisite secrecy often associated therewith, has become an increasingly contentious issue for South Africa's citizenry and civil society. It is an issue that has come to represent a battle for the country's consciousness as it raises questions related to corruption, the abuse of power, transparency, the right to open and democratic government, and to the growing mistrust between the people and their state. This paper examines the application of existing security legislation and how the levels of secrecy related to its application may derogate, in certain instances, from the constitutional rights to access to information and freedom of expression and the constitutional principle of open and democratic government. In doing so, the authors submit that state security, and the regulation thereof, has now become more than an issue of practical protection owing to the underlying mistrust that has permeated into the relationship between the state and the citizenry. This mistrust is inflamed by a lack of transparency and civic engagement by the state as to why, how, and for whom, security legislation is implemented. It is further compounded by the absence of a legitimate security threat. In order to counteract this mistrust, it is submitted that the state should commit itself to substantive, open and meaningful engagement with the citizenry.

State Security and the Constitutional principles outlining open and Democratic Government

The South African state currently relies on, inter alia, two pieces of legislation, enacted before the installation of democracy in 1994, in maintaining state security. The first is the National Key Points Act ("NKPA").[1] The second is the Protection of Information Act ("PIA").[2] A third piece of legislation relating to state security, although not yet enacted, is the Protection of State Information Bill ("POSIB")[3] which, supposedly, has been drafted to 'protect the people from fear'.[4] The first two pieces of legislation, the NKPA and the PIA, were enacted by the apartheid regime and are increasingly invoked by the ANC-led government – the former more so than the latter. The third piece of legislation, the POSIB, is a creation of the ANC-led government to repeal apartheid era legislation in "heeding the clarion call of the Freedom Charter that: 'All apartheid laws and practices shall be set aside.'"[5] However, the application of the NKPA and the proposed enactment of the POSIB have garnered widespread condemnation due the perceived lack of accountability and transparency resulting from the secrecy incumbent on their application.[6]

Security legislation therefore, unchecked, has the ability to severely limit human rights and, in doing so, it should be treated with the utmost caution and care.

The preamble of the Constitution of the Republic of South Africa ("Constitution")[7] states that "[w]e the people of South Africa … adopt this Constitution as the supreme law of the Republic so as to [l]ay the foundations for a democratic and open society in which government is based upon the will of the people and every citizen is equally protected by the law …" Section 39(1)(a) further states that "when interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom." The use of the words "open and democratic" occur a further four times within the text of the Constitution.[8] The word "reasonable" appears twenty nine times. It is therefore within this constitutional framework that legislation which may inhibit fundamental rights and freedoms must be interpreted – whether enacted before or after the installation of democracy. Accordingly, the Constitution requires both the state and the citizenry to act in an open and democratic manner, and with reason.

Affected rights and the limitations clause

Within the text of the Bill of Rights, security legislation such as the NKPA and the POSIB may have the effect of directly limiting the fundamental rights to freedom of expression[9] and access to information.[10] Indirectly, security legislation may have the effect of limiting the rights to equality,[11] human dignity,[12] freedom and security of the person,[13] privacy,[14] freedom of association,[15] political rights,[16] just administrative action,[17] access to courts[18] and the rights of arrested, detained and accused persons,[19] amongst others. Security legislation therefore, unchecked, has the ability to severely limit human rights and, in doing so, it should be treated with the utmost caution and care. Mill expresses the fundamental nature of rights best: "[i]f all mankind minus one were of one opinion, mankind would be no more justified in silencing that one person than he, if he had the power, would be in silencing mankind."[20]

However, constitutional rights such as the rights to access to information and freedom of expression are not absolute; they can be limited in certain circumstances.[21] According to Charles Herrick:

> '…what does it mean to say that an individual has a right to access specific types of information? Rights are powerful assertions of claims that demand respect and sociopolitical status... If an individual appeals to rights, a response is warranted. As Ronald Dworkin puts it, rights are "trumps"… However, it is not the case that rights are nonderogable. "The assertion that rights are powerful normative considerations does not imply that their weight is absolute or that exceptions cannot be built into their scope"... Rights can conflict with one another, some rights are more important than others, and there are cases where the exercise of one right may necessitate the temporary suspension of another right. In other words, there are occasions in which it is appropriate to recognize and act upon trade-offs among different rights.'[22]

Rather, it is that this limitation, or perceived limitation, of constitutional rights is perceived as illegitimate, given that the limitation does not appear to be "reasonable and justifiable in an open and democratic society" as it does not appear to 'reinforce the values that animate our constitutional project.'

In light of the aforegoing, the Constitution does allow for the limitation of certain rights in terms of section 36, the "limitations clause". In terms of the provisions of the limitations clause, "[t]he rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors…" Factors which must be taken into consideration include: the nature of the right, the importance and purpose of its limitation, the nature and extent of the limitation, the relation between the limitation and its purpose, and whether or not there are less restrictive means to achieve the purpose of limitation. Ultimately, 'the limitations clause tells us that rights may only be limited where and when the stated objective behind the restriction is designed to reinforce the values that animate our constitutional project.'[23] Dworkin would refer to this limitation analysis as indicative of the fact that rights are indeed "trumps"[24] that require adequate justification before they can be limited. Therefore, security legislation, that may limit fundamental rights, can be invoked only if it satisfies the criteria outlined in section 36, as determined by the courts. In other words, the requisite response must be given by the state in order to limit the "trumps" held by the citizenry.

However, the current controversy surrounding the application of the NKPA and the proposed enactment of the POSIB is not that through their application certain constitutional rights, such as the right to access information, may be limited. Rather, it is that this limitation, or perceived limitation, of constitutional rights is perceived as illegitimate, given that the limitation does not appear to be "reasonable and justifiable in an open and democratic society" as it does not appear to 'reinforce the values that animate our constitutional project.' This is to say that the justification by the state to the people exercising their "trumps" has been inadequate, and there is therefore a perceived illegitimacy in the purported state need to exercise the level of secrecy it currently employs in the application of security legislation.

A Hard Sell: The Right to Secrecy and the Notion of a Legitimate Security Threat

Given the constitutional provisions outlined above, it becomes necessary to explore whether or not the South African state is proportionally enacting, or relying upon, state security legislation and secrecy measures in line with legitimate and reasonable threats against the state, its assets, and its people. In doing so, it becomes clear that the state's maintenance and enhancement of security measures, so long as there is neither a discernible threat to the state or a requisite level of trust between the state and the citizenry, will continue to face vehement opposition for the foreseeable future.

Two key questions arise when assessing the necessity and credibility of our state security regime. The first question relates to the need for state security legislation in current times. The second question relates to who the security legislation is intended to protect. In the South African context, the latter question is perhaps the more important, based on the presupposition that South Africa faces no legitimate security threat.

A state that subscribes to the principle of open and democratic government would therefore, presumably, have to identify, analyse and defend against credible threats whilst ensuring that that threat identification, analysis and defence would pass constitutional muster by allowing for a legitimate limitation of rights.

What for?

In order to protect the security of the state and its people, degrees of secrecy need to be maintained and enforced by states – occasionally through the limitation of the rights of access to information and freedom of expression, amongst others. This is justified through the basic link that is drawn by a state between security, secrecy and the mandate to protect.[25] The onus or response to "trumps", therefore, should presumably be on the state itself to put forward a credible and reasonable argument as to why such rights should be infringed or, in the extreme, completely limited, in accordance with the provisions of the limitations clause. This is particularly the case where states insist on adherence to the broader principles of liberal democracy contained within a written constitution. A state that subscribes to the principle of open and democratic government would therefore, presumably, have to identify, analyse and defend against credible threats whilst ensuring that that threat identification, analysis and defence would pass constitutional muster by allowing for a legitimate limitation of rights. Falling short of this, a state's actions may be perceived as unjustifiable or even arbitrary. It is logical to accept South Africa, at face value, as a robust liberal democracy that has enacted a constitution based on the ideals of the social contract. From this basis, it becomes appropriate to assess how other states which subscribe to the same democratic ideology, at least in principle, have come to orientate their own approach to the use of secrecy in upholding state security.

The United States ("US"), by way of example, has arguably the most entrenched, monitored and enforced state security infrastructure in the world. Both the Bush and Obama administrations have theoretically positioned democracy and security in so far as the "limitation of the former as a necessary precondition for the achievement of latter."[26] Secrecy, therefore, is one of the practical tools through which security is achieved. Whilst the voting public of the US may disagree on

many things, the perceived threats against their security are an apparent unifying scourge that stimulates a greater sense of patriotic virtue amongst the citizenry. This unified stance has ostensibly created an enabling environment for the state to propose and institutionalise security and thus secrecy measures on a national and, in some instances, international scale. As a matter of course, there may be millions of Americans who do not support a hardening of secrecy measures - but the position from which they argue is ultimately weakened by the very real threats to security that face the US state and its people.

However, whilst the "element of threat" exists far more predominantly in the US than in South Africa, it is necessary to examine a more opaque distinction, in that the US state has "earned" a greater degree of trust from its citizenry to carry out security and thus the requisite secrecy measures for their protection. This is opposed to a perceived distortion and manipulation of this infrastructure for ulterior motives by the South African state. This trust in the US state by the citizenry is evidenced by the recent Edward Snowden scandal, whereby the age and maturity of the US democracy coupled with more robust institutional checks and balances, has ostensibly created a more enabling environment in which security legislation, and the requisite secrecy associated therewith, can take effect, even amongst public outcry.

However, the question as to who is controlling state security apparatus and for what purpose raises issues more relevant to the current South African context.

On reflection, the intentions of the South African state to use security legislation to protect what it deems state secrets when there exists no substantial domestic or foreign threat to our country must be questioned. Siyabonga Cwele, the Minster responsible for State Security, has previously declared that there exist no "discernible" threats to the country and the government has not since put forward any form of coherent justification for the strengthening of, and continued reliance on, state security measures.[27] However, the question as to who is controlling state security apparatus and for what purpose raises issues more relevant to the current South African context.

Who for?

As a former director of the US Central Intelligence Agency, William E. Colby, conceded: "[a] problem inherent in any system of secrecy arises over who is to decide what is to remain secret".[28] The discretionary nature of the dissemination and classification of information is irrepressible in the context of an open and democratic government. This susceptibility of state security to be manipulated stems from what Sagar terms the "asymmetry"[29] of information flows and the executive branch of government's ability to manipulate information for its own ends. Unsurprisingly then, the POSIB has become the most debated piece of legislation in the post-Apartheid era[30] as South Africa has become gripped by a particularly vehement debate around state security that is, in the shared opinion of the authors, most succinctly characterised by a single word: mistrust. Compounding this mistrust is the continued reliance on the NKPA by the state which, in and of itself, it characterised by an ability to declare secret any security upgrades on any premises declared by the Minster of Defence as a national key point.[31] This piece of security legislation has most recently been invoked in relation to the Presidents' private residence at Nkandla, KwaZulu-Natal, causing widespread civic condemnation.

This underlying sense of suspicion exists most tangibly between the state and those outspoken elements of civil society who believe that the pursuit of increasingly restrictive security measures is a means of cloaking the true intentions of the state, which may be defined as securing on-going political control and sustaining a cycle of enrichment for and control by the country's political elite. Indeed, these elements would argue that it may not be disputed that South Africa's security apparatus has, or perhaps always has been, used for partisan gain in light of growing factionalism within the ruling party via an intentional misallocation of state authority and purpose-driven abuses of state "secrecy apparatus". The Matthews Commission Report of 2006,[32] which intended to shed light on state intelligence structures, made it clear that our intelligence infrastructure had become "politicised", only to be suppressed by the very structures it was meant to review.[33] Thus, a circle of deceit has been created. As succinctly pointed out by Earl Warren, "[w]hen secrecy surrounds government and the activities of public servants, corruption has a breeding place."[34]

In instances where security legislation may legitimately necessitate secrecy, an onus resides on the state to take the citizenry into its confidence and justify the need for the limitation of constitutional rights through substantive, open and meaningful engagement.

As issues of corruption and a lack of government accountability continue to play out within the South African discourse, the unfortunate reality is that little has been done to prove to the people of South Africa that, rather than serving partisan interests, our state genuinely requires these measures to carry out its democratically defined mandate. The application of the NKPA to security upgrades at the President's private residence at Nkandla, the Morris "KGB" Tshabalala scandal, the Zuma spy tapes scandal, and others, are inescapably linked to the misallocation of secrecy disguised as state security. As we weigh-up the reality, little has been done on the part of government to convincingly state their case for the further reliance upon, or enactment of, state security legislation. In light of the aforegoing, the authors proffer that the citizenry still retains its "trumps" with the insufficient state response unable to support the need for a limitation of their rights to access to information and freedom of expression.

Recommendations: Moving on from the mistrust

Due to the current conduct of the state, an impasse has been created whereby the application of security legislation is associated with secret, nefarious and self-serving activity. The authors therefore recommend, in general terms, that the state should act in a more open and democratic manner by making reasonable concessions when engaging with the citizenry on matters of security and secrecy but, equally, this engagement should be based on the acceptance by the citizenry that certain matters of state security rely substantively on secrecy in order to be effective. In instances where security legislation may legitimately necessitate secrecy, an onus resides on the state to take the citizenry into its confidence and justify the need for the limitation of constitutional rights through substantive, open and meaningful engagement. However, in instances where security legislation illegitimately invokes secrecy, civil society should remain steadfast in its opposition to such conduct. More specifically, the authors take the view that the proposed amendments to the NKPA should occur without undue delay and that in the interim, reliance upon the NKPA by the state should cease. In relation to the POSIB, the authors contend

that, if signed into law, the POSIB should be tested for constitutional validity by the Constitutional Court and that civil society should work together to ensure that effective legal argument is placed before that court.

Conclusion

We have our "trumps" and we should use them. The limitation of the constitutional rights to access to information and freedom of expression through the application of current and proposed security legislation does not 'animate our constitutional project' but takes us away from it. As opposed to being 'protected from fear', we should fear, above all, that we do not possess the requisite knowledge to regulate our state. For without knowledge, we are unable to make informed and reasonable decisions regarding the future of our country. As we should respect the decisions of our duly appointed representatives, if they are made in an open and democratic manner, our duly appointed representatives too should respect the people that they govern and engage with the people so that we can begin to move on from mistrust.

NOTES
1 102 of 1980.
2 84 of 1982.
3 B6-2010.
4 Government Communications Advertorial "Information Bill: Government Explains the Protection of State Information Bill", accessed at http://www.info.gov.za/faq/information-bill.pdf, accessed on 22 August 2013.
5 Ibid.
6 See Chandre Gould & Louise Flanagan 'The trouble with South Africa's national key points' (12 June 2013) Institute for Security Studies, accessed at http://www.issafrica.org/iss-today/the-trouble-with-south-africas-national-key-points, accessed on 22 August 2013 and Right2Know Secret State of the Nation Report (2013).
7 108 of 1996.
8 Sections 36, 59(2), 72(2), and 118(2). Section 1(d), a founding provision of the Constitution, states that "[t]he Republic of South Africa is one, sovereign, democratic state founded on the following values: Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic governance, to ensure accountability, responsiveness and openness."
9 Section 16.
10 Section 32.
11 Section 9.
12 Section 10.
13 Section 12.
14 Section 14.
15 Section 18.
16 Section 19.
17 Section 33.
18 Section 34.
19 Section 35.
20 J. Mill On Liberty (1859), in J. Mill & S. Collini (ed) On Liberty and Other Essays (1989) Cambridge: Cambridge University Press.
21 Dawood and another v Minster of Home Affairs and others 2000 (3) SA 930 (CC) at paragraph 57.
22 Charles Herrick "Homeland security and citizen response to emergency situations: a perspective on the need for a policy approach to information access" (2009) Policy Sci. at page 195.
23 Woolman et al. Constitutional Law of South Africa 2nd ed. (2011), 34-2.
24 J. Waldron (ed.) Theories of Rights (1984) Oxford: Oxford University Press.
25 Right2Know op cit note vi above.
26 Silvina M. Romano 'Liberal Democracy and National Security: Continuities in the Bush and Obama Administrations (2012) Crit. Sociol. at page 150.
27 Dale T. McKinley 'State Security and Civil-Political Rights in South Africa' (2013, Volume 35, Number 1) Strategic Review for Southern Africa at page 129.
28 William E. Colby 'Intelligence Secrecy and Security in a Free Society' (1976, Volume 1, Number 2) International Security at page 11.
29 Rahul Sagar 'Who Holds the Balance? A Missing Detail in the Debate over Balancing Security and Liberty' (April 2009, Volume 41, Number 2) Polity.
30 McKinley op cit note xxvii above.
31 Op cit note i above, section 2.
32 McKinley op cit note xxvii above at 127.
33 Ibid.
34 Earl Warren 'Governmental Secrecy: Corruption's Ally' (1974) 60 American Bar Association Journal at page 550.