2

AN INCONVENIENT MARRIAGE: MEDIA FREEDOM AND ACCESS TO INFORMATION IN AFRICA: THE SOUTH AFRICAN PERSPECTIVE

By

Fola Adeleke*
and
Rachel Adams*

In 2013, the African Commission released a Model Law on Access to Information in Africa, in the midst of what is identified here as a growing trend across the continent on freedom of information laws. At the time of writing, twenty-two countries on the African continent have adopted, or are considering the adoption of, an access to information law. This chapter examines the role of the media in the various access to information regimes in the African region, with specific emphasis on South Africa as a case study. A brief genealogy of the historical relationship between access to information and the media in international law is set out, before an examination of the role of the media in various access to information campaigns across Africa. The last two sections of this chapter deal specifically with South Africa, and the role of the media

* **Fola Adeleke** Ph.D, is a Senior Research Fellow with the Mandela Institute, Wits University, South Africa. He is an Atlantic Fellow on Social and Economic Equity and his latest work is a book that explores a human rights based approach to investment regulation in Africa published by Routledge.

* **Rachel Adams** is a Research Specialist at the Human Sciences Research Council, South Africa, and a Researcher at the Information Law and Policy Centre, Institute for Advanced Legal Studies, University of London. Her work and research spans human rights and constitutionalism, to artificial intelligence, gender, surveillance and transparency in the post-colony.

in access to information litigation and the development of the country's legal regime on freedom of information. In conclusion, it is suggested that although access to information laws are critical for a number of reasons, they must be crafted and implemented alongside other public institutional structures which work to enhance civic engagement and bolster state accountability.

Introduction

The right of access to information is now well established globally, and increasingly African governments are beginning to recognise the usefulness of this right, passing laws that allow better access to information for citizens. Congruently, an ever-broadening body of scholarship is developing, focused towards theorising access to information as a right which can be used to claim other rights, or legal power that can be used to lever the social, economic and political equality of ordinary citizens. Yet, little theoretical or empirical work has been conducted on the relationship between the right of access to information and the media. Historically, as this chapter will show, the full benefits of the right of access to information was rarely realised without the important role played by the free media in publicly disseminating and discussing the information disclosed. This chapter seeks to bring fresh perspectives on the importance and role of the media in advancing the right of access to information both through its involvement in campaigns for the adoption of access to information laws and through usage of the law after implementation.

Prior to the adoption of the African Union (AU) model law on Access to Information in 2013, only ten states had adopted

an access to information (ATI) law.[1] Since the adoption of the model law, twelve additional states have adopted an ATI law. These countries are Malawi (2017), Kenya (2016), Morocco (2016), Tanzania (2016), Burkina Faso (2015), Côte d'Ivoire (2013), Mozambique (2015), Rwanda (2013), Sierra Leone (2013), South Sudan (2013), Sudan (2015), and Togo (2016).[2] Advocates of Freedom of information (FOI) often raise concerns about the involvement of the media in campaigning for FOI as they seek to distinguish access to information as a form of right used to champion the realisation of another right, as opposed to a media right. However in the South African case, as this chapter will show, the media has contributed to the development of the body of law on access to information through the courts and therefore to the development of ATI as a standalone right. The introduction of the Protection of State Information Bill (POSIB) in South Africa - a Bill that seeks to restrict access to information on grounds of national security - poses a threat to media freedom and also raises fresh imperatives to argue that media freedom and access to information are duly coupled, and that FOI advocates as well as media practitioners should forge a united alliance in ensuring transparent and accountable governments across Africa.

Using South Africa as a case study, the relationship between ATI advocacy groups and the media, the use of FOI laws by the media and the impact of this on development of case law as well as the impact of national security principles on access to information by the media are analysed. The first

1 Angola, Ethiopia, Guinea, Liberia, Niger, Nigeria, South Africa, Tunisia, Uganda and Zimbabwe.

2 African Freedom of Expression Exchange, <http://www.africafex.org/access-to-information/22-african-countries-that-have-passed-access-to-information-laws> , accessed 22 October 2018.

section provides a brief history of the historical relationship in international law between the right of access to information and the media. The second section examines the role of the media in freedom of information advocacy in various African countries. Lastly, the final sections analyses the role of the media in the access to information legal regime and litigation. It is argued that the media needs ATI advocacy groups in campaigning for more effective laws that will make ATI more beneficial to the media and in turn, ATI advocates need the support of a free media in setting the agenda for sustaining effective transparency campaigns.

Access to Information and the Media: A Coupled History

The right of access to information has been considered by ATI scholars to be a fairly recent addition to the international human rights law corpus. Darch and Underwood, for example, state that only in 2006 (with the Inter-American Court of Human Rights' case of *Claude Reyes y otros vs. Chile*[3]) did the right become recognised as a distinct and separate right from the right to seek and receive information, as conceived in the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights.[4] However, this decoupling of the right of access to information from the right to seek and receive information marked a more significant decoupling of a historical affiliation between the right of access to information and the media. Indeed, as will be briefly set out here, while the right of access to information can be understood to have a longstanding historical presence in the international human rights system, prior to the formal

3 IACHR Series C no 151 (Official Case No) IHRL 1535 (IACHR 2006)

4 Darch, C., Underwood, P.G., 2010. *Freedom of Information and the Developing World: The Citizen, the State and Models of Openness*. Chandos Pub., Oxford, Chapter 2.

interpretation of the right by the Inter-American Court of Human Rights in 2006, it was only conceived in terms of media freedom.

In 1948 the United Nations (UN) held a conference in Geneva, Switzerland, on Freedom of Information. The conference brought an international delegation together to discuss the free flow of information across borders, and to inaugurate a new draft convention on access to information to be tabled before the then Economic and Social Council of the UN.[5] While this conference notably marks the first articulation of a right of access to information within international law, it ascribes to a decidedly different conceptualisation of ATI in comparison to contemporary times. Historically, the 1948 conference came about just 3 years after the 2nd World War ended, and the discovery by the allied forces of the terrors and atrocities of the Nazi German concentration camps. At this time there was a pressing common commitment among these particular countries to enshrine international laws to prevent this kind of atrocity form happening again. It was believed that by inscribing standards for the free flow of information from country to country, states could be held in check and the re-occurrence of the horrors of Nazi Germany could be prevented. It followed that the free flow of information was to be facilitated by journalists and international media agencies, and three draft conventions emanated out of the 1948 conference: a Draft Convention on the Gathering and International Transmission of News; a Draft Convention Concerning the Institution of an International Right of Correction; and a Draft Convention on Freedom of

5 United Nations Conference on Freedom of Information, Held at Geneva Switzerland, from 23 March to 21 April, 1948, United Nations Publications E/CONF.6/79.

Information.[6] These documents thus conceived of ATI as an instrument of the media, as pertaining to news. Article 1 of the Draft Convention on Freedom of Information states 'each Contracting State shall secure to all its own nationals and to the nationals of every other Contracting State lawfully within its territories freedom to impart and receive information and opinions, orally, by written or printed matter, in the form of art, or by legally operated visual or auditory devices without government interference'.[7] Commenting at the time in 1949, Zechariah Chaffee Jr, a Professor at Harvard Law School, wrote that:

> In the area of freedom of information, great importance attaches to a much freer flow of news and ideas across frontiers. This was stressed by the General Assembly in calling the Geneva Conference. The most fruitful achievement of that Conference consisted of two draft conventions, one proposed by the United States to facilitate the gathering of news by foreign correspondents and its transmission to their own journals at home, the other proposed by France to establish an international right of correction of statements of fact in news reports sent from one country to another. These two conventions, after many vicissitudes, have been happily merged into one and put in final form by the General Assembly in May I949. If all goes well, this Convention on the International Transmission of News and the Right of Correction will be

6 *Ibid*.
7 *Ibid*, p. 14.

> signed by many nations long before work is completed on the Covenant on Human Rights.[8]

However, as it transpired, the UN adopted none of the Draft Conventions. Instead, the UDHR was adopted in the same year, articulating in Article 19 a 'right to freedom of opinion and expression [that] includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers'. While this chapter does not assess the possible reasons why the various Draft Conventions of the 1948 UN Conference on Freedom of Information were not adopted, what is clear is that the conceptualisation of the right of access to information as a right intrinsically bound up with media rights and freedoms remained embedded in international law until 2006 as the judgment in the matter of of *Claude Reyes y otros vs. Chile* noted above.

Parting Ways: ATI Advocacy and the Media

One trend appears to be common in each of the countries that have successfully adopted an ATI law or that are currently engaging in a campaign for an ATI law. The international organisations at the forefront of these campaigns in partnership with local non-governmental organisations have either sought to distance their ATI campaigns from the support of the media or ensure that media organisations are not very visible in the campaign. This is significant because despite the fact that the right of access to information is a significant tool that can

8 Z Chaffeee 'Legal Problems of Freedom of Information in the United Nations' (1949) *Law and Contemporary Problems* Vol 14 Issue 4, pp. 553-554.

make the work of the media more effective, a lot of national campaigns geared towards the adoption or implementation of a right of access to information law believe the involvement of the media frustrates or hampers the success of the campaign. There are two reasons that explain this phenomenon.

First, many governments in Africa perceive the media as hostile entities who are in search of information to antagonize or expose the government. In many cases, these governments perceive access to information as a media right and a tool which will simply arm the enemy to be more critical of government.[9] This is an unfortunate misunderstanding of the right, as it is arguably most effective as a leverage right for the realisation of socio-economic rights which cannot be realised if the government fails to see how access to information benefits the lives of its citizens.

Second, the lack of independence and perceived bias of media entities towards particular interests have caused most ATI advocates to distance themselves from the media when advocating for the right of access to information. In 2010, as part of an attempt to determine the levels of openness in the Democratic Republic of Congo (DRC) and Zambia and the importance of access to information in ensuring social accountability by the government of both countries,

9 Media Rights Agenda, *Unlocking Nigeria's Closet of Secrecy: A Report on the Campaign for a Freedom of Information Act in Nigeria* (2000) ch 2.Even in developed countries, the same perception of the media as an enemy of the state prevails. Former English Prime Minister Tony Blair in his memoirs said: "*The truth is that the FOI Act isn't used, for the most part, by 'the people'. It's used by journalists. For political leaders, it's like saying to someone who is hitting you over the head with a stick, 'Hey, try this instead', and handing them a mallet. The information is neither sought because the journalist is curious to know, nor given to bestow knowledge on 'the people'. It's used as a weapon."* Tony Blair, *Tony Blair: A Journey* (2011) (London: Arrow Books) 516-517.

researchers interviewed Media entities during a research trip.[10] In both countries, the privately owned media outlets that were interviewed, accused the government media outlets of lacking independence and being biased towards the government. They failed to see the irony in their accusations given the fact that these private media outlets were owned by recognised opposition leaders to the government in power. The private media corporation in DRC for example was actually the official broadcaster for the opposition party. They believed that to oppose the government and support the opposition meant independence. While it will be naïve to suggest that media entities can be completely independent, the perception of bias of these entities has given enough reason for FOI advocates to separate their campaigns from media support.

In theory, access to information is expected to aid the work of the media as a force that holds government accountable. In *Government of the Republic of South Africa v "Sunday Times" Newspaper and Another*[11], the Court held that 'it is the function of the press to ferret out corruption, dishonesty and craft wherever it may occur and to expose the perpetrators.'[12] In practice however, access to information laws are hardly used by the media in countries like South Africa where the law has been in operation for a long time. Due to the bureaucratic process of seeking and accessing information prescribed in some ATI laws, the habit of government institutions in using this process to frustrate access and the subsequent time delays that result in accessing information, the benefits of ATI laws have been slow in

10 Affiliated Network of Social Accountability in Africa in partnership with the Open Democracy Advice Centre undertook a research project that assessed the societal impact of access to information in 4 countries.

11 1995 (2) SA 221 (T)

12 Para 227H - 228A.

coming for the media. This is illustrated by the example of the Promotion of Access to Information Act (PAIA) of South Africa which prescribes forms to be filled in and fees to be paid before an information request can be submitted. PAIA also allows a government department to consider a request for 30 days and to seek another extension of 30 days before responding to the requester. Yet, as illustrated in *The Sunday Times v. United Kingdom No. 2*[13], 'news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.'[14] Thus, the time-delay allowed by the ATI law could disrupt the objective strategic pattern of the media. Three cases from South Africa discussed below illustrate the frustration and ineffectiveness of using an ATI law to access timely information that will be of public interest and the role of the media in developing the ATI regime in South Africa.

The Relationship between ATI and the Media in South Africa

Three key relationships between access to information and the media are identified here. First, in conceptual terms, freedom of expression and information are two sides of the same coin, or phenomenon.[15] The freedom of the media which is expressly protected by section 16(1) (a) of the South African Constitution is inextricably linked with the right of the public

13 (1991) 14 E.H.R.R. 229, 242

14 Para. 51

15 Eduardo Bertoni 'Freedom of Information. Three harmless words? The role of the media and access to information laws' Research undertaken by the Center for Studies on Freedom of Expression and Access to Information – CELE- at the Palermo University School of Law –Argentina presented at the Global Transparency Research Conference at Rutgers University, USA, May 2011.

to receive information and ideas (protected in section 16(1) (b) of the Constitution), as has been explained within an international and historical context above. It is an aspect of the right to freedom of expression that the right of access to information has received specific emphasis in the judgments of the highest court in South Africa. In *Khumalo v Holomisa*[16], the Constitutional Court stated as follows 'The print, broadcast and electronic media have a particular role in the protection of freedom of expression in our society. Every citizen has the right to freedom of the press and the media and the right to receive information and ideas. The media are key agents in ensuring that these aspects of the rights to freedom of information are respected.'[17]

The second relationship between the media and the right of access to information relates to the media's role as an *agenda-setter*. The media can enhance the value of disclosed information by stimulating public engagement and public participation on government affairs, as well as demonstrating the importance of ensuring access to information in general.[18] Indeed, access to information is an essential tool for journalism, arguably improving the quality of news coverage, and promoting an informed citizenry.[19]

Third, as has been noted by Bertoni, the media can verify the implementation and effectiveness of ATI information through its own use of such laws.[20] It is this pragmatic relationship that is reflected in the three South African court cases discussed here. Media agencies have challenged the constitutionality of PAIA, bringing about a review on: time

16 2002 (5) SA 401 (CC).
17 para 22.
18 Z Chaffeee, (n 8).
19 *Ibid*.
20 *Ibid*.

limits for appealing against the denial of a request for information; restrictive interpretations on the grounds for denial of information; and the distinction between what constitutes a public and a private body.

The Role of the Media in Challenging the Constitutionality of ATI Legislation in SA

In *Stefaans Brummer v Minister of Social Development,*[21] the applicant, a journalist of the Mail and Guardian (M&G) Limited sought information through the PAIA. The information sought related to a government tender that the Department of Social Development was alleged to have awarded to a consortium.[22] The journalist alleged that he required the information in order to report accurately and properly on an article that he was writing.[23] The journalist instituted review proceedings in the High Court under section 78(2) of PAIA after he was denied access to the information on grounds that the information sought was the subject of civil litigation between the Department and the consortium.[24] He sought, amongst other things, an order setting aside the decision to refuse information and an order directing the Minister to furnish him with the information in question.[25] However, as his application was brought well after the 30 day limit to appeal prescribed in section 78(2) of PAIA, he also sought an order condoning his non-compliance with the 30 day limit.[26] The High Court refused condonation of the late application holding that the applicant had not provided a

21 [2009] ZACC 21.
22 *Ibid*, para 3.
23 *Ibid*.
24 *Ibid*, para 4.
25 *Ibid*, para 6.
26 *Ibid*.

satisfactory explanation for the delay and that the applicant had no prospects of success in the underlying review.[27] The court found that the Minister of Social Development had demonstrated that releasing the information sought would prejudice the trial or otherwise be unfair to the trial.[28] The court however concluded that section 78(2) was unconstitutional because, in the first place, the 30 day limit was grossly inadequate and therefore limited the right of access to information and, in the second place; the limitation was unjustifiable under section 36(1) of the Constitution (limitations clause).[29] It accordingly declared the provisions of section 78(2) of PAIA to be unconstitutional, and referred the matter to the Constitutional Court.

At the Constitutional Court, the applicant asked the Court to answer two questions: first - whether the applicant should have been allowed to challenge the refusal even though he did not comply with the 30 day requirement; and, second - whether the requirement of 30 days is unconstitutional as it does not afford people who wish to challenge the refusal adequate time to approach the court. The applicant asked the Constitutional Court to confirm the order of invalidity made by the High Court. The Court in granting the relief stated that:

> The role of the media in a democratic society cannot be gainsaid. Its role includes informing the public about how our government is run, and this information may very well have a bearing on elections. The media therefore has a significant influence in a democratic state. This carries with it the responsibility to report

27 *Ibid*, para 10.
28 *Ibid*.
29 *Ibid*, para 11.

> accurately. The consequences of inaccurate reporting may be devastating. Access to information is crucial to accurate reporting and thus to imparting accurate information to the public.[30]

The court ordered Parliament to extend the 30 day period for appeal to 180 days which led to the subsequent amendment of PAIA. While this case on the one hand is a positive contribution in allowing requesters to seek recourse from the courts in cases of refusal of access to information, on the other hand, the fact that it took years after the original information request was submitted, for a final determination to be made on access raises justifiable claims that the dispute resolution mechanism for PAIA should not be the courts but an independent appellate body. South Africa's PAIA alongside other ATI laws emerging from the continent have been criticized for their failure to provide cheap, accessible and timely remedies for the resolution of access to information disputes.[31] These laws do not take into account the economic realities of African countries where media bodies will simply not have the financial resources to challenge a refusal of access to information by a public body in the courts. There has been an attempt to remedy this problem in South Africa with the establishment of the Information Regulator with enforcement powers to drive compliance with obligations in terms of PAIA.

Another case relevant to this discourse is that of *M and G Centre for Investigative Journalism v Minister of Defence,*[32] where the applicant was a not for profit company founded to

30 *Ibid* para 63.

31 The laws in Uganda, Nigeria and Niger like PAIA do not prescribe the establishment of an information commissioner to resolve disputes.

32 (33729/15).

promote open democracy through by developing investigative journalism in the public interest.[33] The applicant lodged the information request after it took 8 months for the Ministry of Defence to acknowledge a PAIA request. Ultimately, it took more than 18 months for the Minister to refuse the request which the court found unconscionable.[34] Almost four years after the initial PAIA application was launched, the Minister withdrew opposition to the applicant's request for access to the records. The applicant requested a punitive cost order against the Minister which was granted. While the court noted that it is often reluctant to grant such orders, it was willing to do so in this case especially where the information sought had lost a considerable amount of currency following the four year delay.[35] This case sets a significant precedence for courts to penalise public entities that deliberately frustrate PAIA applications by the public.

The harsh reality is without a credible alternative for rights assertion, public institutions in Africa will recognise that a refusal of access to information will most likely go unchallenged by requesters of information because while the doors of the courts remain open for recourse, high legal fees and long time delays bars entry to the courts. Kisoon, who was previously head of access to information in the South African Human Rights Commission, the body tasked with overseeing the implementation of PAIA in terms of the Act, argues that the courts have presented a formidable barrier to rights assertion for the majority of people in the country, again

33 *Ibid* para 6.
34 *Ibid* para 13.
35 *Ibid* para 15.

reinforcing the perception that information rights are luxury rights of no ready value to ordinary people.[36]

In *M & G Limited and Another v President of the Republic of South Africa and Others,*[37] the former President of South Africa, Thabo Mbeki, dispatched two sitting judges to Zimbabwe to conduct an investigation on his behalf. It is not clear what the exact mission of the two judges was, but the President stated in his papers that the judges were appointed 'as something in the nature of envoys…of the President of the Republic of South Africa in order to assess the constitutional and legal challenges that had emerged in Zimbabwe and to report on those matters to the President directly in confidence.'[38] The two judges reported directly in writing to the President.

M&G launched an application to the High Court in terms of PAIA to request access to the Report after they were refused access by the Presidency. The onus rested upon the respondents (the Presidency) to justify their refusal to grant the applicants' access to the Report. The respondents contended that PAIA is not applicable to the Report because the Report is a 'record of the cabinet and its committees' in terms of section 12(a) of PAIA.[39] The respondents also contended that the report is excluded from the provisions of PAIA because it contains information 'supplied in confidence by or on behalf of another state or an international organization' in terms of section 41(1)(b)(i) of PA1A, and finally it was 'for the purpose

36 Chantal Kisoon 'Ten Years of Access to Information in South Africa: Some challenges to the effective implementation of PAIA' February 2010 Unpublished paper for the Open Democracy Advice Centre on the review of ten years of open democracy in South Africa.

37 1242/09.

38 *Ibid* p. 4.

39 *Ibid*, p. 8.

of assisting to formulate a policy or take a decision in the exercise of a power or performance of a duty conferred or imposed by law' in terms of section 44(1)(a) of PAIA.[40]

The court ruled that it was inconceivable that a report be deemed confidential because it was information supplied by a foreign state in terms of section 41 because the judges and President who had seen this record failed to depose to affidavits to this effect.[41] Also, the court ruled that the information obtained by the Judges could not have initially been for the purposes of formulating policy because the President would only have found the report useful for the formulation of policy after obtaining the Judge's report.[42]

The court ruled that the Presidency had relied on affidavits attested to by persons that did not indicate that they had personal knowledge of the relevant facts pertaining to the appointment of the two judges and could not in their own personal knowledge describe the judges' mandate and their terms of reference.[43] The Court ruled that the evidence led indicated that the two judges made their report directly to the President and that the report has remained in the office of the President without being incorporated in the records of the Cabinet.[44] Court ordered the Presidency to provide the M&G with a copy of the report.

On appeal, the issue before the court was who bore the burden of proof. The court stated that in cases of this kind, the public body bears the burden of proving that secrecy is justified.[45] That burden of proof casts an evidential burden on

40 *Ibid*, p. 9.
41 *Ibid*.
42 *Ibid*, p. 12.
43 *Ibid*, p. 9.
44 *Ibid*, p. 12.
45 [2010] ZASCA 177, para 14.

the public body to allege sufficient facts that will justify the refusal.[46] The presidency justified the secrecy of the report on 3 legs. First, the appellants sought to cast the judges in the role of diplomats who embarked upon a diplomatic mission.[47] Second, they described the nature of diplomacy, pointing out that it is 'generally accepted' in diplomacy that information is exchanged in confidence.[48] Third, it was asserted that the judges were indeed received and dealt with in Zimbabwe as diplomats.[49] The SCA held:

> …no evidential basis has been established by the appellants for refusing access to the report. It might be that the report contains information that was received in confidence, and it might be that it was obtained or prepared for a purpose contemplated by s 44, but that has not been established by acceptable evidence. What the affidavits establish by inference is that the judges were commissioned to report on 'constitutional and legal issues' pertaining to the election but that does not bring the report within the terms of the sections that were relied upon.[50]

The court dismissed the appeal and ordered M&G be given a copy of the report. This case eventually went on appeal at the Constitutional Court. The Presidency argued that its officials were not obliged to release the report because the two judges were "special envoys" and maintains that the

46 *Ibid*.
47 *Ibid*, para 43.
48 *Ibid*.
49 *Ibid*.
50 *Ibid*, para 53.

information the judges received was confidential. The publisher of the newspaper emphasised that the report remains a matter of great public interest because it will throw light on whether the President of Zimbabwe legitimately remained in office after the presidential elections of 2002.[51]

It took over ten years of litigation for the government to eventually release the report after exhausting all forms of appeals which the government lost on each occasion. This was the longest running case on PAIA and demonstrates the government's attitude in upholding secrecy over open government. This case also demonstrates the institutional belief by the state that information is not held on behalf of the public and on the other hand, the media's belief that public interest disclosures outweighs any harm that disclosure may create. This difference represents an inherent divide between the state and civil society on the nature of information itself. The persistence of the journalists in this case suggests that their role in constitutional democracy is elevated to the status of human rights defenders especially in this case where the realisation of the right of access to information was ultimately at the crux of the prolonged dispute.

Section 46 of PAIA allows for confidential information to be nonetheless disclosed if the disclosure of the information clearly outweighs the harm contemplated in restricting access. In practice, it appears that section 46 is largely ignored by bureaucrats. The question of whether a defence of public interest can be raised by a journalist who receives confidential information and discloses it if he reasonable believes that the information should be released in the public interest is a grey area under South African law. A proposed law in South Africa that is discussed later in this paper makes it a crime for such

51 [2011] ZACC 32.

confidential and classified information to be published and does not currently permit a public interest defence to be raised. The cases discussed above show how even within the legitimate parameters of the law, government can still create hurdles in accessing information and only through consistent perseverance from the media can the barrier be broken.

In *M & G Limited v 2010 FIFA World Cup Organising Committee (LOC) ,*[52] the applicant (an editor and investigative journalist) submitted a public body request in terms of PAIA for access to certain records relating to the procurement or tender processes applied by the company responsible for organising the 2010 soccer world cup in South Africa.[53] The public body request was refused on the basis that the LOC was not a public body. In order to expedite the process, the applicant then submitted a private body request on the basis that the records were required for the exercise of the right to media freedom and to vindicate the right of the public to receive information on matters of public interest. The private body request was also refused.

The applicant launched a court application and the main issue the Court had to decide was whether the LOC was a public or a private body. In a PAIA request of a public body, the onus is on the public body to show why the records cannot be released i.e. in order to refuse a request, the LOC would have to rely on a recognised ground of refusal. In a PAIA request of a private body, the requester has to show that he or she requires the record 'for the exercise or protection of any rights'.[54]

52 09/51422.
53 *Ibid*, para 10.
54 s50 of PAIA.

The Court held that the LOC was a public body but even if the LOC was a private body, the M&G had shown that the records were required for the exercise or protection of the right to media freedom.[55] The Court held that 'the law ought to recognise the special position of journalists in this context'.[56] The Court concluded that the LOC "charged with organising the most significant sporting event in the world, purporting to discern the public interest, takes a legally insupportable stance in seeking to keep its conduct inaccessible to public scrutiny".[57] Through these cases, the media have succeeded in contributing to the development of the ATI regime in South Africa. Despite the bureaucratic and frustrating constraints that users of PAIA face when using the law, the media have in significant ways contributed to the development of the law. A new threat faces the media however in South Africa. This is the introduction of the Protection of State Information Bill (POSIB) which seeks to restrict access to information on grounds of national security. Refusing access to classified information in South Africa or any other country on the continent is not new. Some African countries still have the notorious Official Secrets Act from the colonial administration in their statute books. The next section evaluates the threat of national security principles on access to information by the media.

National Security and Access to Information: Public Interest Defence for the Media

The POSIB currently before Parliament attempts to set up a parallel regime for refusing access to information, and for

55 *Ibid*, para 389.
56 *Ibid* para 344.
57 *Ibid* para 416.

classifying such documents when considered in contrast to PAIA, the principal governing law on access to information. At the time of writing, the Bill had been signed by both houses of Parliament and still awaits Presidential sign off. It is anticipated that once signed into law by the President, it will be challenged at the Constitutional Court. This paper will not delve into an in-depth analysis of the Bill but a broad overview of the impact of national security legislation on access to information and media freedom will be evaluated.

There are legitimate reasons for the adoption of a law seeking to protect information based on grounds of national security, and particularly the need to revoke Apartheid-era laws such as the Protection of Information Act of 1982. To this end, legislative reform is certainly required to address the issue of information regulation and information security. Indeed, regulation of access to information through legislation is not in and of itself an anti-democratic action, however, the basic premise of the POSIB does not reflect that public records and information are the property of South African citizens, and therefore that all initial presumptions should favour disclosure of information, as in PAIA. While certain information must be exempt from immediate disclosure for several disparate reasons, these exemptions must only function to an extent that is reasonable and justifiable in an open and democratic society as provided for in the Constitution and must at all times reflect the public interest of South African citizens in order to be considered legitimate.

The South African courts have had to consider the values of open and transparent governments in the context of information that should be made available to the public. In the case of *Independent Newspapers (Pty) Ltd v Minister for*

Intelligence Services,[58] a newspaper group sought an order to compel public disclosure of discrete portions of a record of proceedings in the Court. The state, represented by the Minister of Intelligence objected to the disclosure sought on grounds of national security. Some of the issues before the Court included whether the right to open justice entitled Independent Newspapers to access the restricted materials in the court record?; whether the Minister's objection premised on national security constitute adequate justification?; and what the proper approach to harmonising these competing constitutional claims is?

The bedrock of the disclosure claim of Independent Newspapers was that the media and the public have a constitutional right of access to court proceedings. The court stated that there exists an umbrella of related constitutional rights which include, in particular, freedom of expression and the right to a public trial and which may be termed the right to open justice. In deciding whether documents ought to be disclosed or not, the court identified some factors which include

> …the nature of the proceedings; the extent and character of the materials sought to be kept confidential; the connection of the information to national security; the grounds advanced for claiming disclosure or for refusing it; whether the information is already in the public domain and if so, in what circumstances it reached the public domain; for how long and to what extent it has been in the public domain; and, finally, the impact of the disclosure or non-

58 2008 (4) SA 31 (CC).

> disclosure on the ultimate fairness of the proceedings before a court.[59]

The majority judgment stated that these factors are neither comprehensive nor dispositive of the enquiry. The court granted partial access to the restrictive documents but in a minority judgment by Westhuizen J, he preferred the approach that any limitation of the right of access to information must be justifiably restricted in terms of the section 36 limitations clause of the Constitution.[60] Sachs J while agreeing with the judgment of the majority also stated that 'an open and democratic society does not view its citizens as enemies. Nor does it see its basic security as being derived from the power of the state to repress those it regards as opponents. Its fundamental philosophy is quite opposed to the authoritarianism of the past. Its starting-point is not repression, but the promotion of positive elements of social stability, such as food security and job security.'[61] According to Judge Sachs:

> …no longer is it possible to view the intelligence services as shadowy and all-powerful supports for a beleaguered society. Their function is to keep government well-

59 *Ibid* para 55.

60 In order to pass constitutional muster, such restrictions must comply with the requirements of section 36 of the Constitution: (1) The 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, including-
(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

61 Note 53 at para 155.

> informed, so that it can confidently fulfil its responsibilities towards ensuring a better life for all in a country. While many of the processes of information-gathering might remain confidential, and sensitive information gathered might be for restricted eyes only, their work is not essentially of the cloak-and-dagger kind popularised in Cold War fiction, with operatives putting their lives at risk with every venture they undertake. There will, of course, be intelligence-gathering activities of a highly sensitive nature involving matters such as serious cross-border crime, money-laundering, and international terrorist actions, where secrecy will be of the essence. There is nothing that suggests that the work of the intelligence services should automatically be regarded as secret. Everything will depend on the specific context.[62]

The Supreme Court of Appeal has also articulated the importance of media freedom in a democracy. In the *National Media Ltd v Bogoshi*[63] case, the Court held that 'we must not forget that it is the right, and indeed a vital function, of the press to make available to the community information and criticism about every aspect of public, political, social and economic activity and thus to contribute to the formation of public opinion .... The press and the rest of the media provide the means by which useful, and sometimes vital, information

62 *Ibid* at para 159.
63 1998 (4) SA 1195 (SCA).

about the daily affairs of the nation is conveyed to its citizens…'[64]

Also, in the recent case of *Brümmer v Minister of Social Development and Others,*[65] Ncgobo J (as he then was) held concerning access to information in a democratic state:

> The importance of this right [the right of access to information] too, in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the state. Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency "must be fostered by providing the public with timely, accessible and accurate information." Apart from this, access to information is fundamental to the realisation of the rights guaranteed in the Bill of Rights. For example, access to information is crucial to the right to freedom of expression which includes freedom of the press and other media and freedom to receive or impart information or ideas.[66]

The question that legislators dealing with the POSIB should have addressed is how to protect legitimate national security concerns while safeguarding the constitutional rights of access to information, participatory governance and public

64 *Ibid* para 1206.
65 2009 (6) SA 323 (CC).
66 *Ibid* paras 63 & 64.

accountability. While there are legitimate functions of the POSIB, including the provision of criteria for the classification and de-classification of information on grounds of national security, the protection of classified information, and the creation of a crime of espionage which currently does not exist in South Africa, there are many concerns that remain. The broad application of the Bill to all public institutions and the broad definition of 'National Security' have not been addressed, and there remains a problematically low threshold for the classification of information without the establishment of an independent oversight body to review and deal with appeals. The non-existence of a public interest defence as well as the inadequate protection for whistleblowers and journalists is another major cause for concern. To this end, there is no doubt that the Bill limits the right of access to information and freedom of expression.

Similarly, a Cybercrimes and Cybersecurity Bill (CCB) is before the South African Parliament, echoing aspects of the POSIB in relation to the criminalisation of journalists in possession of classified information. The Bill further criminalises what it considers harmful data messages that threaten violence against a person, family or property. It also criminalises data messages that are inherently false in nature. that can cause mental, psychological, physical or economic harm.

The *Right2Know*, an invaluable advocacy organisation working to promote freedom of expression and related matters in South Africa, stated in their submission on the Bill that:

> Quite simply we reject this provision. We do not believe the prosecuting capacity of the state should concern itself with policing truthfulness. Aside from the extraordinary waste of policing resources this could entail,

> freedom of expression is a human right, and it includes the freedom to be wrong, and the freedom to be dishonest. With due respect to the Honourable Members of the Committee, there are even some politicians who can be thankful for that. Most importantly, in our current political climate, given a concerning trend of politically motivated and vexatious prosecutions, a 'fake news' clause would provide another avenue through which the state or political actors could harass and intimidate investigative journalists and voices of dissent.[67]

These legislative developments are certainly worrying, with the potential to greatly impact upon the crucial role of the media to facilitate access to information and encourage and foster public debate.

Conclusion

The benefits of access to information as a tool in ensuring social accountability are not in doubt. The role of the media as a force in holding government accountable is well established. The right of access to information illuminates the totally changed character of the society envisaged by the South African constitution but, sadly, the promise of open democracy, underpinned by principles of transparency and accountability, has not necessarily translated into reality.[68]

---

67 Right2Know submission on Cybercrimes and Cybersecurity Bill, <http://www.r2k.org.za/2017/08/11/r2k-submission-on-the-cybercrimes-bill-2017/> accessed 29 August, 2017.

68 Dennis Davis 'Corruption and Transparency' Unpublished Paper commissioned by the Open Democracy Advice Centre for the Open Democracy Charter project.

Daily reports in newspapers are filled with allegations of corruption and abuse of state privilege by government officials. This daily reports on corruption unquestionably reflects not only a widespread public perception of the cancer of corruption which continues to exist in the political body of South Africa but, sadly, the reality that post apartheid South Africa has not been entirely transformed into the open, transparent society based on integrity which was promised in the constitution.[69]

It is therefore important that the constitutional value of transparency translates into media freedom and the public having regular access to information held by public institutions. To achieve this, ATI advocacy groups cannot shun the powerful influence of the media and collectively, a greater force can be established in translating the lofty ideals of a constitutional democracy into reality. This is a lesson that other African countries can also learn while they campaign for or implement ATI laws.

69 *Ibid*.