HAROLD WOLPE
MEMORIAL TRUST

Unit F, Colstine Terrace, 88 Belvedere Rd, Claremont
P O Box 44907, Claremont 7735. South Africa
Telephone: +27 21 674 0361 Facsimile: 086 670 6772 Email: wolpetrust@mweb.co.za
Website: www.wolpetrust.org.za

91st Harold Wolpe Dialogue

17 August 2010
Cape Town

Topic:

MEDIA CENSORSHIP

Speaker:

Prof Pierre de Vos
University of Cape Town

Respondent

Dr Laurie Nathan
University of Cape Town

The aim of these dialogues is to create a space for open and informed dialogue and debate around key local and global political, social and economic issues facing South Africa.

91st Wolpe Lecture 17 August 2010 - Media Censorship

Professor Pierre de Vos hold the Claude Leon Foundation Chair in Constitutional Governance at the University as well as degrees from Stellenbosch University and Columbia University in New York. He is a regular commentator on constitutional issues on his blog 'constitutionally speaking' which elicits regular engagement.

Dr Laurie Nathan is a graduate of UCT and the London School of Economics and he holds a position as a research fellow of both institutions and in 2006 & 2008 he was a member of the Ministerial Review on Intelligence.

Pierre de Vos:

Few people in South Africa will argue with the contention that– in the most exceptional circumstances – the state has a duty to keep secrets. The identity of intelligence agents, details of troop movements or the whereabouts of our submarines during a time of war (one never knows when we might be attacked by the Lesotho navy), and even the private deliberations of the cabinet may arguably be kept secret to protect "the life of the nation". In a democracy like ours it is therefore necessary – in very limited circumstances, to sanction state secrecy.

However, the South African Constitution unambiguously limits the situations in which the state should be allowed to keep secrets. This is because any form of secrecy infringes on the right to freedom of expression – including the right to the freedom of the press – as well as the right of access to any information held by the state. And as our Constitutional Court has emphasised, these rights lie at the very heart of our democracy. Secrecy – and the concomitant limits of freedom of expression and the media – therefore always pose a potential threat to the health of our democracy.

As the Constitutional Court stated in their judgment in the case of *S v Mamabolo:*

"Freedom of expression, especially when gauged in conjunction with its accompanying fundamental freedoms, is of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational norm."

State secrecy is inherently anti-democratic as it potentially prevents citizens from obtaining information kept by the state. This information will often be needed to allow every individual to participate meaningfully in our democratic system and democratic dialogue or will assist a citizen to enforce his or her fundamental human rights.

Knowledge is power: where the state abrogates for itself the right to keep knowledge about its activities from citizens, it potentially robs citizens of the power to make informed decisions about important issues of the day. Decisions on who to vote for, whether to engage in political protests, whether to sign petitions or even, in extreme cases, whether to engage in civil disobedience are burning questions that can only be answered responsibly

where citizens have access to sufficient and reliable information. In the absence of the free flow of information, democracy is hollowed out and becomes meaningless: citizens become mere passive recipients of state charity or, in extreme cases, become the passive victims of oppression.

Second, censorship and state secrecy infringes on the human dignity of every individual in South Africa. In order to live a meaningful life, a life in which an individual has the ability to decide for him or herself who they are or who they want to become, how they view the world around them, and how they want to live their lives according to the demands of an own moral code, the individual must enjoy the right to receive and impart the widest range of opinions and factual information.

This point was tellingly underscored by the Constitutional Court in the case of *South African National Defence Union v Minister of Defence and Another* where it stated that the free flow of information is valuable for many reasons including

"its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters . . . ."

The argument that secrecy and censorship will often be necessary to protect the human dignity of a small group of politicians and other public figures is therefore deeply problematic and fallacious as it prioritises the (subjective) human dignity of a few supposed servants of the people above the (constitutionally guaranteed and objective) human dignity of the 45 million South Africans who are not cabinet Ministers, do not drive around in R1 million cars, have never set foot in the Mount Nelson Hotel – except maybe to clean the toilets – and only see blue light brigades rushing past their homes while they prepare dinner for their families on open fires.

It is against this background that one should evaluate the provisions of the Protection of Information Bill and the rather eccentric, and un-lawyerly and vague, comments by the Chief State Law Advisor, Enver Daniels, who attempted to justify his opinion that the Protection of Information Bill was constitutionally valid.

From a constitutional perspective, the problems with the Bill go far beyond its individual clauses. In my opinion, a mere tinkering with particular clauses of the Bill will not render an otherwise unconstitutional Bill constitutionally valid. It will only make a fundamentally draconian and oppressive piece of legislation politically slightly more palatable without addressing the problems with the basic premise of the Bill. Section 17(1) of the Bill gives the game away as it states: "Secrecy exists to protect the national interest."

This sentiment cannot be true in an open and democratic society based on human dignity, equality and freedom. Secrecy is often the enemy of the national interest – if we assume that it is in the national interest for every human being in a country to live in, and meaningfully to take part in, a thriving democracy and to live a life of dignity in which individual agency, freedom and striving for justice and equality is more important than the

interests of the state as defined by politicians and state bureaucrats. Secrecy can only be said always to be in the national interest in a non-democratic or partially democratic state in which the human dignity of every individual is considered to be less important than the interests considered to be important by politicians and state bureaucrats.

It is therefore difficult to single out specific clauses in the Bill for criticism. However, I will highlight a few of the most problematic clauses and point out why they may make the Bill unworkable and dangerous and, in some cases, unconstitutional and why arguments in support of the Bill are at best disingenuous and at worst dishonest.

First, it is argued that the Bill will protect the public as it requires that all "valuable information" held by the state must be identified and protected from destruction. This, so the argument goes, will prevent state officials from destroying important state information, information that ordinary citizens might need to access to advance their own well being. But the Bill defines the "valuable information" that need to be protected from destruction extremely narrowly.

Only information required by the state itself for its own benefit or information that must not be destroyed because its destruction would deny individuals services or benefits they are entitled to, are protected from destruction. This means that information needed by individuals to exercise their fundamental human rights or information required by individuals to become active citizens who are capable of exercising their democratic rights in an informed manner, are not protected from destruction. State documents relating to corruption, maladministration, unlawful activity by politicians or state officials will therefore often not be protected by the provisions of the Bill and may legally be destroyed.

If this Bill is passed and if it is applied strictly (which might not be the case as the provisions seem rather unworkable and very expensive to implement), state officials will be entitled to embark on an orgy of destruction of state documents – long before they embark on an orgy of classification. These provisions of the Bill thus seem to be in conflict with the right of access to information as guaranteed in section 32 of the Constitution and have the potential completely to thwart the aims of the Promotion of Access to Information Act.

Second, where documents are not destroyed, the Bill allows any head of an organ of state to classify or reclassify information as "confidential", "secret" or "top secret". An organ of state includes any government department, parastatal or other institution created by an act of Parliament, including universities. The Minister of State Security or the President can allocate one organ of state to another for purposes of the Act, which means he or she can decree, for example, that Eskom now falls under the Presidency for purposes of the Act or that the Minister of Public enterprises now falls under the Minister of Justice.

This would potentially allow the Presidency to decide, say, on which documents held by Eskom should be classified as secret. These provisions are open to abuse as the President or the Minister can decide who should be allowed to classify information. Although the Act contains provisions warning that classification should not be done for a nefarious purpose and should not be aimed at hiding incompetence or inefficiency in government, it is difficult to see how these softening provisions could be practically policed. If anyone challenges the

classification of a document on the basis that the document was classified to hide corruption or inefficiency in government, the first question that will be asked of the challenger is whether he or she knows about the document because he or she is in possession of a copy of that document. If that person knows about the document because he or she is in possession of the document, that person may be guilty of a criminal offence carrying a minimum sentence of between 3 and 15 years imprisonment.

Unless a person is very sure of the fact that the document was wrongly classified, a person would therefore be foolhardy, to say the least, to challenge the classification of a document for fear of becoming Jackie Selebi's room mate. Worse, one might have to feign high blood pressure and might have to claim that one is eating copious amounts of Goji berries – like the poor, terminally ill, Schabir Shaik – merely to stay out of prison and to ensure at least some quality time on the golf course.

Third, it would almost be impossible to show that a document was wrongly classified as "confidential", "secret" and "top secret". Put differently, any head of an organ of state will have an extremely wide discretion to lawfully classify state documents. Unless state officials who classify documents have impeccable ethical standards, have no incentive to hide any corruption or maladministration, and take the greatest of care to apply the law holistically and with reference to those sections warning against needless classification of documents, vast amounts of state documents that could shine the light on the actions of the government and could keep individuals informed about important matters in our democracy, could be classified as secret.

This is because the operational sections of the Bill – especially sections 11 and 12 – state that whenever it is in the national interest to do so, documents can be classified. The national interest is defined so broadly that almost any state document could conceivably be classified. The national interest includes "*but is not limited to*", inter alia, all matters relating to the advancement of the public good, and includes the pursuit of justice, democracy, economic growth, free trade, a stable monetary system and sound international relations. This means that any document, for example, that might suggest that the President or the Minister of Finance has been bribed by a crooked businessman or any document that implicates the Police Commissioner in murder or corruption could be lawfully classified on the basis that news of such wrongdoing would not advance the public good.

Recall that then President Thabo Mbeki suspended Vusi Pikoli when he wanted to arrest Jackie Selebi and later claimed that this was necessary to protect South Africa from chaos and instability. Clearly evidence of the acts mentioned above could damage the country's reputation and may scare off investors who may negatively affect economic growth. These provisions are truly Orwelian in scope and only the most honest, diligent and upright official will be able to resist the temptation of using it to classify information to protect themselves and their cronies. (President Mbeki would have been able to use it to classify information regarding the warrants for Jackei Selebi's arrest and the searching of his house, for example.)

In his legal opinion, the Chief State Law advisor assumes that our government is filled with such upright individuals. This assumption seems to be rather optimistic and naïve, if not

delusional. In the document on "Leadership renewal, discipline and organizational culture" prepared for the ANC National General Council later this year the organisation admits that its members and leaders suffer from the "sins of incumbency", including patronage, bureaucratic indifference and arrogance of power.

The document paints a bleak picture of ANC members in government having forsaken their revolutionary roots and having embraced a culture of corruption and dishonesty. But it would be some of these very members described in the ANC document who will be asked to apply an Act that will invite them to use absurdly broad definitions of "national interest" to classify state documents, either to protect themselves and their cronies or to protect the governing party from embarrassment and ridicule. It is not a question of whether the Act as currently written will be abused, but merely to what extent the necessary abuse of the provisions of the Bill will achieve the aim of covering up maladministration, wrongdoing and criminality.

Fourth, if one wants to appeal against a decision about the classification of any documents, then one would first have to appeal to the had of the organ of state who has classified the information and then ultimately one will have to appeal to the Minister dealing with State Security. There is therefore no independent mechanism to challenge the classification od documents. One can of course approach a court, but as we are being told quite frequently in relation to the Media Appeals Tribunal, approaching a court can be extremely costly and time consuming.

The argument is often heard that rights – even the right to freedom of speech and the media, the right to access information held by the state and the right to human dignity – are not absolute and that the Bill merely represents a legitimate limitation on these rights. At first blush, this argument seems plausible. Section 36 of our Bill of Rights states that rights may be limited if it is reasonable and justifiable to do so in an open and democratic society based on human dignity, equality and freedom. Unfortunately the Chief State Law advisor, in relying on this section to justify his certification of the Bill as constitutionally valid, fails to apply the Constitutional Court jurisprudence on the limitation clause to the Bill at hand.

This failure is not surprising, because if he had applied the relevant jurisprudence he would not have been able to argue (without his nose growing ever longer – like a modern day Pinocchio's) that the Bill in its present form would pass constitutional muster. When determining whether the infringement of a right is justifiable in terms of section 36 one must balance two distinct interests against one another.

On the one hand, one must look at the purpose of the Bill and ask how important this purpose is for the achievement of legitimate goals in an open and democratic society, and whether there is a sufficiently close relationship between the purpose of the Bill and the provisions of the Bill. On the other, one must look at the importance of the rights that are being infringed and the seriousness of the infringement and ask whether less restrictive means could have been used to achieve the same purpose. In this case the very purpose of the Bill is under suspicion because it broadly claims to be aimed at protecting the "national interest" (which includes the advancement of the "public good").

Even if it was legitimate purpose for a law to advance such a broad interest there is not a sufficiently close relationship (or for that matter any relationship at all) between the advancement of the national interest and the imposition of a system of classification of a wide variety of state documents. Even if there were such a link, the means used to achieve the purpose is far too invasive as it potentially allows for the classification of vast amounts of information required by ordinary citizens to exercise their rights, to participate meaningfully in our democracy and to live lives of dignity. The provisions of the Act are clearly overbroad.

Given this, and given the facts that various provisions – including the draconian criminal penalties provided for the possession of classified documents – imposes severe limitations on our rights, no credible court would ever find that the limitations of our rights were justifiably limited in terms of the limitations clause. If our Constitutional Court finds otherwise, it would lose almost all the credibility it currently has overnight. No credible lawyer has argued otherwise. In fact, I will put any credibility I might personally have on the line and give an absolute guarantee that the Chief State Law Advisor is catastrophically misguided and that the Constitutional Court will never agree that the Bill in its present format is constitutionally valid.

Why he has maintained otherwise and why some members of Parliament seem to have believed him, is beyond me.

Laurie Nathan

At a public seminar on a university campus, a discussant is meant to be critical of the arguments raised by the main speaker. So, I feel obliged to say something positive about this Bill. Hence, I can think of 2 positive things to say about it:

1. The Bill has united and mobilized a very wide range of people in defense of our constitution.

2. The Bill is so bad that is will not get through the Constitutional Court. So I want to assure Pierre that his month or his year's salary if the State Law Advisor takes him up on this bet.

I want to argue that the Bill is blatantly unconstitutional and will not survive scrutiny by the Constitutional Court. There is a very strong constitutional presumption against secrecy. Any legislation that seeks to restrict access to information must do so in a way that leads only to minimal secrecy. The Bill falls well short of this requirement and hence it will result in excessive secrecy.

There are three reasons to argue that the constitution presumes against secrecy.

1. Throughout the constitution, there is an emphasis on an open and democratic society. It appears in the preamble, in the founding provisions, Article 39 which deals

with the interpretation of the Constitution and the terms 'open' and 'openness' appear as many as 12 times throughout the document. Cecil Burges, who is o the committee reviewing this legislation, says that the critics of this Bill are 'obsessed with openness and obsessed with the availability of information'. It seems that he failed to notice that the drafters of our constitution were likewise 'obsessed with openness'.

2. The principle appears in S36(1) of the constitution, which is the limitations clause, which curtails certain rights under specific conditions.

I want to read some of the operative conditions here from the Constitution:

> S36: Limitation of rights.-
> (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.

This wording creates a strong presumption against a large degree of secrecy and it is logically false to argue that a large degree of secrecy would be justifiable in an open society.

3. S36(1) says that we need to pay attention to the rights that are being limited. And the rights that are being limited are 2 rights: S16(1) (freedom of expression, academic and other freedom) and S32(1) which says that:

   32. Access to information.-(1) Everyone has the right of access to any information held by the state.

   Both S16(1) and S32(1) are enabling rights in that they make it possible for other rights to be enjoyed. They enable free political activity and free contestation of power, accountability, check abuse of power and they prevent a culture of impunity. So they are not simply important on their own terms but they are enabling rights. If these are limited by excessive secrecy, then a whole number of other rights are compromised automatically. The rights in issue here are not just these two rights, but all of the rights that flow from there.

So, how does the Bill fare in this regard against the presumption against secrecy?

The Bill provides that State information can be classified if: the state believes that unlawful exposure would result in harm to the security, the national interest of the republic or could

prejudice the Republic in its international relations. These are the ground upon which information can be classified.

So, how does the Bill define 'national interest' and 'national security'?

The Bill defines 'national security' as 'all matters relating to the advancement of the public good, security of all forms of crimes, defense and security plans and operations, details of criminal investigations and police enforcement methods, significant political and economic relations with international organisations and foreign governments, economic, scientific or technological matters vital to the Republic's stability, security, integrity and development, the survival and security of the state and the people of the country, and the pursuit of justice, economic growth, free trade and international relations'. If an official thinks that any state information might harm any one of these aims, then they are under an obligation to classify this information.

The Bill's definition of 'national security' covers not only the physical threats of violence and terrorism but also 'the resolve of South Africans as individuals and as citizens to live as equals, live in peace and harmony, to be free from fear and and to seek a better life'. This definition was taken from the constitution, but it could never be achieved under conditions of secrecy. Obviously this kind of security depends on an open and democratic society, as the constitution hammers on and on about.

Because the Bill provides so many grounds for restricting access to information and because these grounds are so broad, and because the authority to classify the information will lie with thousands of officials throughout the country, the Bill will lead to excessive secrecy rather than less secrecy and hence it is unconstitutional, which will not be salvaged if the minister or the Parliamentary Committee seek to 'tweak' it. The organising principle of the Bill is unconstitutional.

There are a number of the Bill's specific conditions that are unreasonable. It might be 'reasonable and justifiable in an open and democratic society' to classify information where disclosure would cause serious harm to a person or disclosure would reveal the identity of a police agent. But it would not be reasonable on a vague ground such as one relating to 'the advancement of the public good' or 'free trade'.

S36(1) only permits marginal impairments of rights. The Bill does not meet this proportionality test. The Bill presents the real and present danger of crushing the right to Freedom of Expression and Access to Information. The extent of the limitation is thus disproportionate to the importance of the rights and the importance of the Bill.

The Bill does not recognize that harm, arising from the disclosure of information by the State, has to be weighed against the strong interest in disclosure by the state. It does not appreciate that some harm from disclosure has to be tolerated because the dangers associated with secrecy, namely lack of accountability, the abuse of power, the

infringements of rights and a culture of impunity can impair the democratic order itself. So, sayeth the Constitution.

Questions

1. Why has this bill come in now?

Laurie

I don't think that there is a conspiracy behind the Bill. I don't think that it was drawn up with the deliberate aim of muzzling the press and I don't think that it was drawn up to defend the ruling party. One might get that impression, given how the ANC currently defends the Bill however.

What is the motivation for the Bill? Our current legislation which provides for secrecy is utterly utterly unconstitutional – it is apartheid legislation which needs to be revamped and revised. That process began three and a half years ago; way before the current mood and hostile pressure on the media by the ANC. I think that the Bill's current formulation is a result of the operational orientation of the drafters – i.e. the Department of Intelligence. Its drafters are officials in the drafters from this Department who drew up a bill which reflects the way that they view the world. We could contest whether the intelligence agencies themselves resort to excessive secrecy, but they have applied their mindset to the rest of the state. So the end result is dreadful but I don't think that the aim was conspiratorial.

2. Nothing happens in a vacuum. I keep seeing one brother looking after another who is not a politician. Why is this bill here and who is pushing it, maybe we will get to the real reason why is it happening now?

3. There is a similarity to previous media censorship in this country 40 or 50 years ago. There is a big emphasis on documentary information. I can recall a lot of press coverage from years ago that did not rely on documents but from observed information. Does the Bill address this kind of information as well?

Laurie:

What kind of information?

The Bill says: 'any facts, whether true or false' – so even false information can be restricted. These include data, documents, DVD and conversations and opinions as well as intellectual knowledge. So, an opinion can be restricted.

You can see the institutional thinking behind this. As an intelligence official, you have an agent in the field and you are concerned that information about this person might be disclosed. Whether these names are written down or not, it is irrelevant to you. But, when you read this legislation and think that this Bill is going to apply to every single municipality

in the country, then it becomes worrying. Then the 'designated officials' need to apply their minds to thinking about what this actually means. It really is bizarre.

4. Can a political party with a majority in government make any significant differences to the constitution as has happened in Zimbabwe?

Pierre:

The South Africa constitution says in Section 1 that is needs a 75% majority to change it in the National Assembly (NA) and 6/9 in the National Council of Provinces (NCOP). The other provisions of the Constitution can be changed with a 2/3 majority in both the NA and NCOP (which is effectively the ANC and the Minority Party).

5. The constitution when it was drafted sowed the seeds of its own destruction. The part that specified the power structure (as in a very strong national parliament and not much devolution of power), no constituencies, there is a push for parties to become more powerful parties over time.

Pierre:

I don't think that it is the constitution that is at fault. We live in a one party dominant party democracy. There are many social scientists who talk about this. What is required is a credible alternative to the dominant party in South Africa. For most people in our country the opposition is not credible and hence people have not voted for them (this is what happened in Zimbabwe in the previous election the Mugabe stole). The Parliament in South Africa is not very powerful, rather it is the political parties that are very powerful due to the influence given to party bosses. The pure proportional representation system, where you vote for a party and not for an individual, has given the party bosses, enormous power to hire and fire and discipline their members. The electoral system is perhaps even more problematic.

6. We had two important pieces of legislation passed by the post-1994 government with Promotion of Access to Justice Act (PAJA) and the Promotion of Access to Information Act (PAIA). It is my experience is that due to the bureaucracy, one's access to information has been reduced as a result. This is due to the way in which bureaucrats interpret information by trying to keep information close to their chests. So, this kind of legislation proposed now is truly frightening. I would like to hear the speaker's comments on these 2 pieces of legislation that were intended to promote access to information and the administration of justice.

Pierre:

These Acts were written in a way that was going to give the human rights commission (HRC) oversight over the implementation of this law, which, in reality is like pulling hen's teeth. I contacted the HRC to try and get assistance in getting hold of some information and even

though I knew someone there, they could not help me, because they did not have the human capacity to do what the legislation asked them to do.

This law will be worse because it calls for a 10 year review of all of the information by an official designator by looking at every single document. But, this is never going to happen. The existing legislation was not ideal and the way it has been implemented is even less ideal. The problem is less that the officials stonewall because they are evil. The Open Society Foundation lodged a number of requests, but more than 50% of their requests were never responded to. So, it is not a question of bad motives, it is often one of people ignoring the public because the public does not really count.

7. I have 2 questions. Laurie, you said that there is no conspiracy. So then, I must ask you specifically, what is so special about South Africa that this law has emerged here. Pierre, a document setting out what is secret would itself be secret. So, we would not know what the secrets are that are being kept secret, which is like the Nazi legislation of the 1920's and 1930's. Lastly, I have been a member of the ANC for 30 years and I never expected that my party would create and attempt to implement a Bill like this. I hope other ANC members will join me in speaking out.

Pierre:

Yes, the Bill is so broad that any document setting out what is secret would be secret, so it is quite Orwellian in that respect.

Although they did not appoint the best 4 candidates in my opinion to the Constitutional Court, they did appoint some credible candidates. The judgments so far do not suggest that there has been a lurch from an independent court to a subservient one. Our Court has always walked a tight rope where is has tried to make decisions that are far ahead of the public opinion (like legalizing gay marriage) versus ones that preserve institutional elites by supporting them to a degree (like supporting floor crossing). This Bill is so startling and the infringement so real that if the Constitutional Court ok's this Bill then this is the end of the Constitutional Court project.

8. I heard Dr Kader Asmal speak recently who said that the Bill should be thrown out in its entirety. The argument given is that if it got before the Constitutional Court (CC), it would be thrown out. He made it clear that he no longer has the same kind of confidence in the CC since the last 5 appointments were made to it. He felt that one could not depend on the CC to throw out this Bill.

Laurie:

We need to be skeptical of the CC when we see court judgments that are inconsistent to the spirit of the constitution rather than basing these merely on appointments alone. It is also surprising how apparently liberal judges make conservative decisions. I agree with Pierre that the rights here are so fundamental that it is inconceivable that it will get through the Constitutional Court.

9. Ten days ago, I deposited 153 pages of affidavits on how BAE was complicit with the British government to foreign bank accounts and already it is very obvious that SCOPA is trying to bury it. Am I now facing 25 years imprisonment for potentially causing harm with relations with the British government? 10 years ago I helped to fight another Bill, the second year, Terror Lekota and Kader Asmal rammed it through the ANC, where they were meant to represent the South African people and not their party. Now, we find that SA is exporting arms to Somalia, Saudi Arabia, Sudan etc. Does the Constitutional Court have the guts to take this bill on and throw it out?

Laurie:

As for this whole issue of a conspiracy, I am offering an interpretation, based on my awareness of how and who drafted the Bill that its extreme conservatism is not a consequence of a conspiracy but one of the Intelligence Ministry. How do you explain that PAIA and PAJA were drafted by this same party in government that is now drafting the Bill under discussion here? Well, you need to look at the Ministry that took responsibility for doing the drafting itself. For PAIA and PAJA it was the Justice Ministry but the current Bill came from Intelligence. The different ministers are going to deal with it in a completely different fashion. If it was issued from the Intelligence Department, then it ought to only have had regard to information that the Intelligence Ministry was dealing with, not to the entirety of the state.

10. If it is obvious that it will be rejected, why propose it? As a normal person in South Africa today, what should we be doing? Is there anything that we can do?

11. What is behind the appearance on the bill at this time? I think that it has been picked up by Zuma because he perceives a threat to his constituency from within his own following in specifically the ANC Youth League and he is worried that he might be

outflanked as a person in a leading position if he does not do things that will draw support from them. What we are seeing is a reflection on a larger power struggle within the ANC. What do you think?

Pierre – Laurie and I disagree here about the Bill. While it might have had a certain genesis, it was dropped around the same time as Polokwane and the media tribunal was raised and it was never followed through. Then in the past 2 months, both the media tribunal and the Bill were revived. That is the interesting question – why were they revived right now. Once can think about this as personalities or is this not a crisis of legitimacy in the ruling party and an understanding in the ruling party that it is facing a difficulty because it is not capable of doing what it wants to do with the state.

Why it has been revived is that it is not just about trying to stop the wind. Even if the Bills don't go through, it is sending a signal to groups in society, including the media that they had better toe the line. This often works because the media becomes more cautious as they gain extra sources for their stories.

12. Comment: If the state law advisor is dependent for his remuneration on the advice he is giving, then I feel sorry for him based on what I have just heard.

13. If the genesis of this legislation is not sinister, why has it provoked such a large response from civil society in a society that has become rather quite dormant in the past 16 years? The tallest trees collect the most wind and in order to survive they don't stop the wind they adapt attributes that allow them to stop the wind. Why does the ANC government want to turn the wind off with this legislation?

Laurie:

The import of the bill is unquestionably sinister. Regardless of the motive, but the motive of the Bill is not very important. We cannot see motive but we can see the content of the bill and where it will head.

Let me add by a way of an anecdote. When I participated in the review of our intelligence legislation, I took part in a debate with senior intelligence agents. The question was put to them: what is the distinguishing feature of your agencies? What makes you different from other departments? I said that what makes them unique is a superior analytical ability. The intelligence agencies need to be able to analyse threats to our security in a way. Another colleague said that what was distinctive about them was merely secrecy – their job was to protect our secrets and get other people's secrets. I thought he was wrong at the time but I think he is now correct.

Hence, if you give, to intelligence officers, the job of drafting legislation that tries to protect information, you will get a bill that looks like this. But, there is this broad unity of opposition – there is a campaign under way. There is a list serve that you can join about the campaign. There is a petition and a campaign. This is an area in which citizens can get engaged.

14. To put an extra positive spin on it - What is the role of the internet in this struggle now? It can be very constructive and important, but I am not sure what it is.

Laurie:

The internet is a fantastic medium for raising local, national and international mobilizing tool. This is also a great medium to get information into the public domain where the state cannot regulate it. Once it is out, it is out and cannot be got back.

The national intelligence agency tried to make sure that the report of the committee that I worked on did not see the light of day but at the point at which they tried to stop publication, it was already on a website. Finally, we will look back on Wikileaks as one of the most important and profound developments in the political life of the world, whatever its limitations and dangers.

Pierre: – I used to think that internet is for elites. But then, once I wrote something on the internet and about a certain judge president who evicted people from Joe Slovo informal settlement and how he must feel when he drives in his Porsche past the settlement, and then I was stopped in the street by someone who lived there and told me that they really enjoyed my piece on the internet. So, I thought that it is not just for elites and rather it is a very powerful tool and if people really want to get information they will get it. But, there is a problem is that we do not have a Wikileaks in South Africa and if the Bill goes through and people could be jailed for 25 years for putting information on the internet, then it will not be helpful.

15. Is there anyone where who has a different opinion?

No, it does not look like it