

SOUTH AFRICA & ZIMBABWE

SILENCING CRITICAL VOICES

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INTRODUCTION

In general, the situation in both South Africa and Zimbabwe is very different from the ‘Arab Spring’ model, where mass uprisings used social media as advocacy and organizing tools followed by states switching off the internet or blocking access to it via mobile phones, as discussed in the chapter by Nagla Rizik. It is also quite different from the situation in China, where the target is public use of online media. In South Africa and Zimbabwe there are more incident-based instances of censorship, which pertain to specific media reports or information published online and to individual voices on social media platforms. Both countries have constitutional protection of freedom of expression, including press freedom. However, they both have legislation which has been used to secure the censorship of critical voices. It is not possible in a chapter of this length and type to engage in full-scale analysis of all relevant legislation. Therefore, the chapter only provides a snapshot of some of the relevant legislation. It aims to provide examples of the different types of censorship that have occurred in both countries in the last two years.

State information in South Africa is currently protected by the Protection of Information Act 84 of 1982. This Act will soon be repealed and replaced by the Protection of State Information Bill (B6D-2010), commonly known as the Secrecy Act. At the time of writing (November 2013) the Secrecy Act has been passed by the Parliament but has been denied presidential assent due to constitutional concerns.¹ It is currently being recon-

sidered by an Ad hoc Committee of Parliament. Access to information is regulated by the Promotion of Access to Information Act 2 of 2000 (hereinafter, 'PAIA'). The Electronic Communications and Transactions Act 25 of 2002 (hereinafter, 'ECTA'), which provides for internet service provider (ISP) liability, is also relevant to this discussion, and is the subject of another chapter in this book, written by Andrew Rens. Censorship is often closely linked to surveillance and interception of communications. South Africa's Regulation of the Interception of Communications Act 70 of 2002 (hereinafter, 'RICA') is also directly relevant. It is not discussed in this chapter and readers are referred to other writings on the topic.² This chapter will only focus on the provisions of the Secrecy Act.

State information in Zimbabwe is protected by the Official Secrets Act,³ and access to non-state information is regulated by the Access to Information and Protection of Privacy Act.⁴ Like South Africa, Zimbabwe has legislation regulating the interception of communication, namely the Interception of Communications Act.⁵ In addition, Zimbabwe's Public Order and Security Act⁶ creates the criminal offence of insulting the president.⁷ Similarly, the Criminal Law (Codification and Reform) Act,⁸ creates the offence of undermining or insulting the President. Zimbabwe has a new Constitution, adopted in the first quarter of 2013. This will necessitate the evaluation and amendment of all of the above legislation to ensure that it complies with the new Constitution. As will be shown below, some of these provisions have already been struck down by the Constitutional Court.

SOUTH AFRICA

Section 16 of South Africa's Constitution provides for the freedom of expression, which expressly includes 'the freedom of the press and other media'.⁹ It also lists the 'right to receive or impart information or ideas'. Section 32 provides for the right to access state information as follows:

- (1) *Everyone has the right of access to —*
 - (a) *any information held by the state, and;*
 - (b) *any information that is held by another person and that is required for the exercise or protection of any rights;*
- (2) *National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on*

the state.

These constitutional provisions have been further fleshed out by PAIA and its regulations over which the South African Human Rights Commission (SAHRC) has been given oversight. The SAHRC's main role relates to monitoring the implementation of the Act and reporting on this annually to Parliament. Whilst the legislation has been implemented to some extent, it has been pointed out that it has not been as successful as expected mainly due to limited public knowledge of the legislation which means that only a few requests for information have been filed.

South African media has used these provisions to obtain information on which they have reported, particularly in relation to state corruption, to the chagrin of the state. In other instances, information forming the basis of such media reports has been provided by whistleblowers who work for, or with, the state. The state's response has been varied. This chapter focuses on its arguments that some of this information ought not to be disclosed as to do so would be detrimental to national security.

Like its predecessor, the Secrecy Act will allow the state to cordon off certain information on the basis of state security. The media and other stakeholders pushed back against the passage of the Secrecy Act arguing that it is nothing but an attempt to hide wrongdoing under the pretext of security concerns.¹⁰ The initial lack of any protection for whistleblowers was considered as a deliberate ploy to discourage whistleblowing. Other arguments centred on the harshness of the penalties prescribed for convictions on the offences created by the Act. Despite such contestation, the (revised) Secrecy Act was passed by Parliament on 25 April 2013. As noted above, the President declined to sign the bill and referred it back to Parliament in September 2013. Under the Secrecy Act, certain state organs will be able to classify certain information as sensitive and thus put it beyond the reach of the media and any subsequent public scrutiny.

It is against this background that we consider the role of the Internet and how the tensions between press freedom and the protection of state information are likely to be played out. The major concern here is that, under the new regulatory regime created by the Secrecy Act, the media will be unable to report on significant issues. This is because their possession of relevant information,¹¹ their failure to surrender this information to

the relevant authorities¹² and any unlawful or intentional disclosure or publication of this information will constitute criminal offences.¹³ Section 41 provides for a public interest defence in the following terms:

Any person who unlawfully and intentionally discloses or is in possession of classified state information in contravention of this Act is guilty of an offence and is liable to a fine or imprisonment for a period not exceeding five years, except where such disclosure or possession—

(a) is protected or authorised under the Protected Disclosures Act, 2000 (Act No. 26 of 2000), the Companies Act, 2008 (Act No. 71 of 2008), the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004), the National Environmental Management Act, 1998 (Act No. 107 of 1998), or the Labour Relations Act, 1995 (Act No. 66 of 1995);

(b) is authorised in terms of this Act or any other Act of Parliament; or

(c) reveals criminal activity, including any criminal activity in terms of section 45 of this Act.

A few observations about this section are necessary. First, it is a revised version of the defence that was provided for in earlier versions of the Secrecy Bill, namely clause 43 of the Protection of State Information Bill 6B of 2010/2011. Clause 43 of Bill B6B read as follows:

Any person who unlawfully and intentionally discloses classified information in contravention of this Act is guilty of an offence and liable to a fine or imprisonment for a period not exceeding five years, except where such disclosure is —

(a) protected under the Protected Disclosures Act, 2000 (Act No. 26 of 2000) or section 159 of the Companies Act, 2008 (Act No. 71 of 2008); or

(b) authorised by any other law.

Clause 43 was clearly narrower than the current s41 as it contained a shorter list of legislation in paragraph (a) and did not contain paragraph (c). It was criticized for not incorporating a full public interest defence.¹⁴ Secondly, section 41 of the Secrecy Act contains limited whistleblower protection but does not provide for a full public interest defence as had been called for by numerous stakeholders.¹⁵ The defence is not a full defence as it is limited to disclosures about criminal activity only. It does not extend to improper conduct such as compromised tender processes. Thirdly, reliance on the section 41 defence requires that the person disclos-

ing information must first ascertain that the information he wants to report or disclose is protected by the specified legislation or actually relates to the commission of a criminal offence. This necessitates reliance upon legal advice. The process of obtaining such advice may take some time and thus delay the disclosure of certain information. In some cases this may be detrimental to the public interest as the allegedly criminal activities will continue in the interim.

South Africa has had its fair share of conflicts in relation to access to information. One of the most well-known conflicts relates to the Arms Deal scandal that has been under public scrutiny since it was signed in 1999. One of the key players in the matter, Richard Young, Managing Director of CCII Systems (Proprietary) Ltd. successfully applied to the High Court for state information to support his claims that CCII's bid to supply information management to support the Arms Deal.¹⁶ The fact that the state refused to give Young information on the basis of sensitivity until he obtained a High Court order may be seen as an example of the state withholding information.

Another well-known case is that of Project Avani in which hoax e-mails were allegedly sent by the National Intelligence Agency (NIA) to discredit some contestants in the presidential race.¹⁷ Another controversial issue that has been the subject of media scrutiny is the upgrades to the president's rural homestead in Nkandla, KwaZulu-Natal. Being a presidential residence, this property is protected by the National Key Points Act 102 of 1980 and the disclosure of certain information about it, may be an offence.¹⁸ It has been argued that had these events occurred after the enactment of the Secrecy Act, the media would not have been able to report on them without attracting criminal liability as they could have been classified.¹⁹ These matters were ultimately reported in the print media and the newspapers' websites or electronic editions. Therefore any attempts to censor the contents of print media inevitably extends to the internet as well.

Old school state censorship was evident in the arrest of a Sunday Times Journalist, Mzilikazi wa Africa in 2010. Whilst not expressly stated as the reason for his arrest, the arrest appears to have been linked to his reporting on alleged corrupt or criminal activities by the then Commissioner

of Police.²⁰ The relevant newspaper reports were published in the print edition of the Sunday Times, and also on the newspaper's website.

Another oft-cited incident of censorship is that of Brett Murray's 'Spear of the Nation' painting.²¹ This painting was exhibited at the Goodman Gallery in Johannesburg in May 2013. It depicted the President of South Africa in a Leninist pose with his genitals exposed.²² It was also published on the City Press newspaper's website. The exhibition and publication of the painting raised the issue of how to balance freedom of expression with the right to dignity, both of which are enshrined in the constitution. Was a demand to take down the picture an attempt to protect the President's dignity or an unjustified act of censorship?

A number of attempts were made to secure the removal from the painting from the Goodman Gallery. These included the instigation of a defamation claim by the President and negotiations with the gallery by the ruling party on behalf of the President. The Film and Publications Board classified the painting as pornography, which would have required its removal. However, this classification was later revoked. The picture was ultimately removed from the gallery after it was vandalized by two men on the same day. These men were arrested and, at the time of writing, are still being prosecuted for the crime of malicious damage to property.

The African National Congress, the President's political party, led a boycott of the City Press and demonstrations against the newspaper after it refused to remove the painting from its website. In the end, the editor of the newspaper apologized to the president's family and removed the picture from the newspaper's website.²³ However, by that time the painting had been posted on Wikipedia and other websites and had already gone viral.

A final example is the censorship of the First National Bank's (FNB's) 'You can help' online advertising campaign. FNB's campaign included statements by young South Africans criticizing the government was challenged as disrespectful political agitation by the ruling party and ultimately removed voluntarily from the bank's YouTube channel.²⁴ In neither of these incidents was there direct censorship by the state; in neither case did the state remove the material from the internet through litigation or prosecution. Rather, after robust national debates with strident voices on

both sides of the debate, FNB removed the videos from YouTube. However, this may be viewed as indirect state censorship in the sense that social pressure initiated primarily by the state ultimately led to self-censorship.

ZIMBABWE

In Zimbabwe threats of prosecution under various pieces of legislation have a chilling effect of freedom of expression and press freedom online. However, in March 2013 Zimbabwe adopted a new Constitution.²⁵ Section 61 of the Constitution, 2013 provides for freedom of expression and freedom of the media,²⁶ and section 62 provides for access to information.²⁷ These provisions are comprehensive and clear and should usher in a new era of freedom of expression, freedom of the media and access to state information. As noted above, Zimbabwe's existing legislation will have to be evaluated and amended if necessary to ensure compliance with these constitutional provisions.

Under the current legislative framework, there have been numerous reports of instances of old school censorship. For example, within two years of the enactment of the Access to Information and Protection of Privacy Act (AIPPA), it was reported that there had been more than a dozen instances of arrest or other state harassment of journalists.²⁸ These incidents affected the print and online publication of certain stories.

Technical examination of the Internet infrastructure has shown that the state is not using any direct filtering of the Internet.²⁹ However, there have been reports of email surveillance, the use of an e-mail filtering system that blocks political content from reaching Reserve Bank employees and physical raids of Internet cafés where suspected illegal activity was taking place.³⁰ The suspected illegal activity was the dispatch of an email that was considered to be insulting to the President, which is criminalized by the Public Order and Security Act (POSA) and the Criminal Law (Codification and Reform) Act (CLCRA). However, on October 30, 2013, the Constitutional Court of Zimbabwe struck down sections 31(a)(iii) and 33(a)(ii) of the CLCRA which provided for the offences of 'publishing or communicating false statements prejudicial to the State' and 'undermining the authority of, or insulting, the President' respectively.³¹

In early June 2013, an individual began posting information about the allegedly corrupt activities of members of the ruling party in government on Facebook, under the pseudonym 'Baba Jukwa'.³² This person claimed to be a disgruntled member of the ruling party who could no longer sit back and watch the wrongdoings in his party. He thus took to exposing them online. The ruling party's initial response was to shrug off Baba Jukwa, saying that he was entitled to his opinion and had the freedom to share it, if he so wished. This apparently noble stance was probably due to the fact that 2013 was an election year in Zimbabwe and it would not do for the ruling party to be seen to be aggressively censoring critical voices. However, appearances may be deceptive, and it seems that the police are trying to unmask Baba Jukwa,³³ and some online attackers have ostensibly locked the e-mail address that Baba Jukwa was using.³⁴ If these efforts are successful, he may be prosecuted.

CONCLUSION

Both countries have similar legislative frameworks that enable censorship to occur (see figure 1 below). The main difference is that Zimbabwe has legislation criminalizing insults to the President — whilst South Africa does not. However there have been calls for the introduction of such laws in South Africa.³⁵

In both countries, there have been incidences of censorship of the press and individuals as recounted above. In many instances the information or views acted against are available in both print and online format. Action, though often primarily directed at the print or physical manifestation of the material, inevitably affects the Internet as well. All the instances outlined above have political overtones in that the newspaper or individual had expressed views that were considered to be critical of the sitting government. This then led not only to direct state censorship, but state-encouraged and censorship or the exertion of socio-political and economic pressure that led to the 'voluntary' removal of the material from the internet.

Aspect	South Africa	Zimbabwe
Classification of information	Protection of Information Act, 1982 to be repealed and replaced by the Protection of State Information Act, 2013; National Key Points Act, 1980.	Official Secrets Act, 1970.
Access to information	Promotion of Access to Information Act, 2000.	Access to Information and Protection of Privacy Act, 2002.
ISP liability	Electronic Communications and Transactions Act, 2002.	No specific statute.
Monitoring & interception of communications	Regulation of the Interception of Communications Act, 2002.	Interception of Communications Act, 2007.
Insult laws	No specific statute.	Public Order and Security Act, 2003; Criminal Law Codification and Reform Act [Chapter 9:23].

Figure 1: Relevant legislation in South Africa and Zimbabwe

- 1 Parliamentary Monitoring Group, *Protection of State Information Bill: referral back by President* (Oct. 10, 2013), <http://www.pmg.org.za/report/20131010-protection-state-information-bill-referral-back-president> (last visited Nov. 5, 2013).
- 2 Phillip De Wet and Alistair Fairweather *Spying far worse in South Africa than the U.S.*, MAIL AND GUARDIAN (June 13, 2013), <http://mg.co.za/article/2013-06-14-00-spying-far-worse-in-south-africa>. See also, Lauren Hutton, *Oh Big Brother, Where Art Thou? On the Internet, Of Course ... The Use of Intrusive Methods of Investigation by State Intelligence Services*, 16 AFRICAN SECURITY REV. 111, and Caroline B. Ncube, *Watching the Watcher: Recent Developments in Privacy Regulation and Cyber-Surveillance in South Africa*, (2006) 3 SCRIPT-ED 344, available at <http://www.law.ed.ac.uk/ahrc/script-ed/vol3-4/ncube.asp>.
- 3 Official Secrets Act of 1970, Chap. 11:09 (Zimbabwe).
- 4 Access to Information and Protection of Privacy Act of 2002, Chap. 10:27 (Zimbabwe). For a brief historical overview, see Caroline B. Ncube, *A Comparative Analysis of Zimbabwean and South African Data Protection Systems*, J. INFO. L. & TECH. (2004), <http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2004.2/ncube/>. For a detailed overview, see AFRICAN NETWORK OF CONSTITUTIONAL LAWYERS, NATIONAL STUDY ON ACCESS TO INFORMATION IN ZIMBABWE (2012), <http://www.right2info.org/resources/publications/publications/national-study-on-access-to-information-in-zimbabwe-2012>.
- 5 Chapter 20,
- 6 Public Order and Security Act of 2003, Chap. 11:17, s.16(2)(b) (Zimbabwe).
- 7 See Caroline B. Ncube, *The Dignity of the Office of the State President and the Freedom of Expression: Section 16(2)(b) of the Public Order and Security Act of 2003 (Zimbabwe)*, 2004 TURF L. REV. 12 (2004).
- 8 Criminal Law (Codification and Reform) Act of 2004, Chap. 9:23 (Zimbabwe).
- 9 Section 16 provides:
 - (1) Everyone has the right to freedom of expression, which includes —
 - (a) freedom of the press and other media;
 - (b) freedom to receive or impart information or ideas;
 - (c) freedom of artistic creativity; and
 - (d) academic freedom and freedom of scientific research.
 - (2) The right in subsection (1) does not extend to —
 - (a) propaganda for war;
 - (b) incitement of imminent violence; or
 - (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.
- 10 See Secrecy Bill, RIGHT2KNOW CAMPAIGN, <http://www.r2k.org.za/secrecy-bill> (providing details of the campaign mounted by the Right2Know against the Secrecy Bill).
- 11 Section 41, Protection of State Information Bill, 2013.
- 12 Section 42.
- 13 Section 41.

- 14 See James Grant, *Defences under the Protection of State Information Bill: Justifications and the Demands of Certainty*, 28 SOUTH AFRICAN J. HUM. RTS. 328, 338-339 (2012).
- 15 See, e.g., R2K to protest Secrecy Bill vote, RIGHT2KNOW (Apr. 25, 2013), <http://www.r2k.org.za/2013/04/25/secercy.bill.vote.protest>.
- 16 *CCII Systems (Pty) Ltd v. Fakie* NO 2003 (2) SA 325 (T). There was a related Supreme Court of Appeal decision that did not affect the High Court's access to information ruling, *Fakie v CCII Systems (Pty) Ltd* [2006] SCA 54.
- 17 OFFICE OF THE INSPECTOR-GENERAL OF INTELLIGENCE, EXECUTIVE SUMMARY OF THE FINAL REPORT ON THE FINDINGS OF AN INVESTIGATION INTO THE LEGALITY OF THE SURVEILLANCE OPERATIONS CARRIED OUT BY THE NIA ON MR S MACOZOMA (2006), <http://www.oigi.gov.za/Speeches/IG%20Exec%20Summary%202023%20Mar%2006.doc>.
- 18 Pierre de Vos, *Nkandla: The Details Will, and Should, Be Made Public*, DAILY MAVERICK (May 16, 2013), <http://www.dailymaverick.co.za/opinionista/2013-05-16-nkandla-the-details-will-and-should-be-made-public>.
- 19 Ilham Rawoot, *Secrecy Bill: the Stories that Couldn't be Told*, MAIL & GUARDIAN (Sept. 9, 2011), <http://mg.co.za/article/2011-09-09-secercy-bill-the-stories-that-couldnt-be-told>.
- 20 See Fienie Grobler, *Media Freedom under Spotlight as Reporter Arrested*, MAIL & GUARDIAN (Aug. 4, 2010), www.mg.co.za/article/2010-08-04-media-freedom-under-spotlight-as-reporter-arrested; see also Sapa, *Cops Admit Mzilikazi Wa Afrika Arrest Was Wrongful*, THE TIMES (Nov. 18, 2012), <http://www.timeslive.co.za/local/2012/11/18/cops-admit-mzilikazi-wa-afrika-arrest-was-wrongful>.
- 21 See generally David Freedberg, *Case of the Spear*, 11 ART SOUTH AFRICA 36 (Sept. 2012), available at <http://www.columbia.edu/cu/arthistory/faculty/Freedberg/Case-of-the-Spear.pdf>.
- 22 Matthew Burbidge, *Gallery Refuses to Remove "Spear of the Nation" Artwork*, MAIL & GUARDIAN (May 17, 2013), <http://www.mg.co.za/2012-05-17-anc-irate-over-spear-of-the-nation-artwork>.
- 23 Phillip de Wet, *Boycott Fails, but City Press Agrees to Drop "The Spear"*, MAIL & GUARDIAN (May 28, 2013), <http://www.mg.co.za/article/2012-5-28-boycott-fails-but-city-press-agrees-to-drop-the-spear>.
- 24 Sizwe same Yende, *FNB: Removal of Clips Doesn't Censor Young Voices*, CITY PRESS (Jan. 23, 2013), <http://www.citypress.co.za/politics/fnb-removal-of-clips-doesnt-censor-young-voices>.
- 25 CONST. OF ZIMBABWE, available at <http://www.copac.org.zw>.
- 26 Section 61 states:
1. Every person has the right to freedom of expression, which includes:
 - a. freedom to seek, receive and communicate ideas and other information;
 - b. freedom of artistic expression and scientific research and creativity; and
 - c. academic freedom.
 2. Every person is entitled to freedom of the media, which freedom includes protection of the confidentiality of journalists' sources of information.
 3. Broadcasting and other electronic media of communication have freedom of establishment, subject only to State licensing procedures that:
 - a. are necessary to regulate the airwaves and other forms of signal distribution; and
 - b. are independent of control by government or by political or commercial interests.

4. All State-owned media of communication must:
 - a. be free to determine independently the editorial content of their broadcasts or other communications;
 - b. be impartial; and
 - c. afford fair opportunity for the presentation of divergent views and dissenting opinions.
5. Freedom of expression and freedom of the media exclude:
 - a. incitement to violence;
 - b. advocacy of hatred or hate speech; or
 - c. malicious injury to a person's reputation or dignity; or
 - d. malicious or unwarranted breach of a person's right to privacy.

27 Section 62 states:

1. Every Zimbabwean citizen or permanent resident, including juristic persons and the Zimbabwean media, has the right of access to any information held by the State or by any institution or agency of government at every level, in so far as the information is required in the interests of public accountability.
2. Every person, including the Zimbabwean media, has the right of access to any information held by any person, including the State, in so far as the information is required for the exercise or protection of a right.
3. Every person has a right to the correction of information, or the deletion of untrue, erroneous or misleading information, which is held by the State or any institution or agency of the government at any level, and which relates to that person.
4. Legislation must be enacted to give effect to this right, but may restrict access to information in the interests of defence, public security or professional confidentiality, to the extent that the restriction is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom.

28 Article 19 & MISA-Zimbabwe, THE ACCESS TO INFORMATION AND PROTECTION OF PRIVACY ACT: TWO YEARS ON (2004), <http://www.article19.org/data/files/pdfs/publications/zimbabwe-aippa-report.pdf>.

29 OPENNET INITIATIVE, INTERNET FILTERING IN ZIMBABWE (2009), http://opennet.net/sites/opennet.net/files/ONI_Zimbabwe_2009.pdf

30 *Id.*

31 Zvamaida Murwira, *Concourt Strikes Down Sections of Statute Law*, THE HERALD (Oct. 31, 2013), <http://www.herald.co.zw/concourt-strikes-down-sections-of-statute-law>.

32 See Wikipedia, *Baba Jukwa*, http://en.wikipedia.org/wiki/Baba_Jukwa (as on Nov. 5, 2013, 20:15).

33 Marry Anne Jolley, *Mugabe Offers \$300,000 for Outing of Anonymous Whistleblower Baba Jukwa*, ABC NEWS (July 17, 2013), <http://www.abc.net.au/news/2013-07-17/mugabe-offers-243002c000-for-outing-of-anonymous-whistleblower/4824498>

34 Adam Taylor, *Has Baba Jukwa, Zimbabwe's Infamous Anonymous Whistleblower, Really Been Caught?*, WASHINGTON POST WORLDVIEWS BLOG (June 25, 2014), <http://www.washingtonpost.com/blogs/worldviews/wp/2014/06/25/has-baba-jukwa-zimbabwes-infamous-anonymous-whistleblower-really-been-caught/>

35 Babalo Ndenze *Call for Zuma Insult Law*, IOL NEWS (Nov. 15, 2012), <http://www.iol.co.za/news/politics/call-for-zuma-insult-law-1.1423784>.