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Klaaren, Jonathan

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OPEN JUSTICE AND BEYOND: *INDEPENDENT NEWSPAPERS v MINISTER FOR INTELLIGENCE SERVICES: IN RE MASETLHA*

JONATHAN KLAAREN
Professor of Law, University of the Witwatersrand

'Secrecy is in a sense a matter of degree. Nothing is ever completely secret. Information is always known to somebody. Information impinging on national security is no exception.' (*Independent Newspapers v Minister for Intelligence Services: in re Masetlha v President of the Republic of South Africa & another* 2008 (5) SA 31 (CC) para 41, per Yacoob J.)

INTRODUCTION

This note reflects upon the Constitutional Court decision in the matter of *Independent Newspapers v Minister for Intelligence Services: in re Masetlha* (hereafter *Independent Newspapers*), both on its own terms and within the contexts of related questions raised recently regarding the interface of national security and openness. Some of these questions relate to the Protection of Information Bill (B28–2008) that has been considered by Parliament from May 2008 (although the Bill was withdrawn in October after the resignation of the Minister for Intelligence Services at the same time as the resignation of President Thabo Mbeki). The note outlines the contours, coherence and contests of the court's significant notion of open justice (constructed from the right of freedom of expression, the right to a fair trial, and the right of access to courts), which the *Independent Newspapers* case enunciates. Finally, this note briefly identifies a related constitutional concept, arguably the fount of open justice. One might term this related concept 'open democracy'. Such a concept would be rooted even more directly than open justice in the right of access to information contained in s 32 of the Bill of the Rights.

THE CASE

The Facts

The *Independent Newspapers* case derives from another Constitutional Court case — what the court termed 'the underlying matter' — *Masetlha v President of the Republic of South Africa & another* 2008 (1) SA 566 (CC). (The matter was heard on 10 May 2007 and judgment was handed down on 3 October 2007.) In this underlying case, two applications by the dismissed head of the National Intelligence Agency (NIA), Mr Masetlha, were heard and eventually dismissed by the High Court. Masetlha then sought to appeal to the Constitutional Court. The facts crucial to the *Independent Newspapers v Minister for Intelligence Services* matter followed. As the court recounts (para 6):

'The application for leave to appeal was set down for hearing on 10 May 2007. Of its own motion and a few days before the hearing, this Court directed that the underlying record be removed from the Court website. The Registrar was directed not to make the hard copy of the record available to the public, pending further direction by this Court. This Court issued that direction

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> because certain documents in the underlying record were marked "in camera" or "confidential" or "secret" and related to the activities of the NIA.'

These markings were presumably made under the existing South African classification system, governed by a Cabinet policy termed the Minimum Information Security Standards (MISS). The MISS is widely considered to be unconstitutional, a fact acknowledged by, among others, Barry Gilder's submission to the Parliamentary committee considering the Protection of Information Bill. (For an analysis of the constitutional infirmities of the MISS, see Jonathan Klaaren 'National Information Insecurity?: Constitutional Issues regarding Protection and Disclosure of Information by Public Officials' (2002) 119 *SALJ* 721–732. Interestingly, the majority's citation in footnote 48 of *Independent Newspapers* points out that access to the MISS is itself limited, as it has been regarded as a restricted document in terms of the MISS in its own right.)

A major newspaper following the news story of the Masetlha dismissal asked to see the record and was refused access. It then launched an application for such access, appearing in court on the first day of the underlying matter. To complicate procedural matters further, the newspaper then requested conditional access to the materials in order to pursue its application for access to the previously posted record. The court denied this interlocutory application. After having decided the underlying matter partially in Masetlha's favour, the court then heard the application for access to documents and issued its decision in both the main and the interlocutory aspects of that case in May 2008. The court granted access to some, but not most of the documents to which the Minister for Intelligence Services retained his objections about being made public, and made no order as to costs, noting in para 76 that '[e]ach party has gained substantial success to some degree'.

The Majority Opinion

As Yacoob J notes in his dissent, the majority opinion, written by Moseneke DCJ, is 'engaging in its flow' (para 80). Appropriately, Moseneke DCJ began his inquiry with reference to s 32, the right of access to information. While the main thrust of Moseneke DCJ's opinion then moved on to the 'open justice' concept, it is not before he made a significant point regarding access to information jurisprudence. In para 23 he stated:

> 'It is clear that at the very least section 32 of the Constitution creates, subject to certain procedural conditions, a right of discovery of information held by the state or another person. There has been considerable judicial debate on whether that right co-exists with or supersedes the right a litigant has to access information under the discovery procedures regulated by various rules of courts.'

'Happily' (para 23), his opinion did not need to delve into this issue, since the applicant (Independent Newspapers) did not rely at all on s 32. The limited ambit to the issues that were placed before the court may have

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contributed to the relatively dismissive way in which the court's judgment was initially received. For example, the decision of the court in *Independent Newspapers* has come under criticism from one of the country's most respected advocates, Adv Wim Trengove SC. In a newspaper interview, he is quoted in response to a question about whether this was the worst decision of the court as having stated that the case was 'very disappointing. . . . Not so much for the outcome, as the sentiment of some of the leading judges, which seems to pay far too much deference to the state's assertion of secrecy and confidentiality, and I think that's a dangerous route. They're not sufficiently vigilant in making sure that state information is protected only when it truly involves serious national security rather than spurious government claims.' (Michael Bleby 'Advocate Marked for Greatness' *The Weekender* 9–10 August 2008 at 7.) By contrast, the opinion expressed in this note regarding this case is more positive.

I shall return to this interaction between the right to access to information and the court-announced concept of open justice below. But for the majority opinion, it meant that the Deputy Chief Justice needed only to acknowledge, but not to resolve, the issues posed by the complex interaction of court procedures and the right of access to information (see eg *Ingledew v The Financial Services Board & others* 2003 (4) SA 584 (CC); *Independent Newspapers* para 26, concerning the right of access to information in the context of civil litigation). He then rejected the interlocutory claim for three reasons. First, the applicant did not advance any substantive basis for its case. Thus, its request for access at this stage appeared to rest on mere inquisitiveness (para 29). Secondly, the claim of open court proceedings proved too much — on such a rationale, national security imperatives could be defeated by the mere public assertion of a court case (para 30). Thirdly, the minister did at least give some information to the applicant newspaper (para 31):

> 'In regard to each of the items of restricted materials, the minister gave a brief description of its contents, set out the legislative authority for his conduct and furnished reasons why it was appropriate to protect the item of restricted materials from public exposure. Added to this, the entire record of proceedings, save for the restricted materials, was at the disposal of Independent Newspapers.'

Moseneke DCJ also noted that Independent Newspapers was not a party in the underlying matter and that the earlier proceedings of that matter had indeed been public.

After dispensing with the interlocutory claim, Moseneke DCJ then turned in para 37 to the case made by Independent Newspapers: a case that the applicant characterized as a type of discovery case. While understandable, this characterization placed Independent Newspapers in a weakened position, since the newspaper was not a party in the underlying matter with a clearly defined interest in the discovery process.

At the outset of his three-stage analysis in para 39, Moseneke DCJ identifies the cluster of rights which provide and constitute open justice: the

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right to a fair trial; the right to freedom of expression; and the right of access to courts. Indeed, for him, there is a 'systematic requirement of openness in our society' (para 40). Furthermore, Moseneke DCJ gives a purposive reading to his systematic requirement — 'to ensure transparency, accountability and responsiveness' (see paras 40–2, citing earlier decisions of Langa CJ and Yacoob J on open justice). In Moseneke DCJ's view, openness is a default position, but it is not necessarily a presumption to be trumped by exceptional circumstances alone. Instead, it is a cluster of rights that can be limited, and can be limited by the s 173 powers of courts (paras 43, 45). In his characterization in para 48 — a classically judicial approach — the Minister for Intelligence Services was starting at 'the opposite end' of the spectrum from the right of open justice.

As is perhaps to be expected in a court case that directly concerned classified information, the court needed to articulate and assert its power over the executive. It did so by rejecting two arguments. The first was one that would overreach, and would ultimately be unduly restrictive of the role of the judiciary in our constitutional democracy. It was described as follows in para 49: 'Judicial authority over executive power, derived from section 172(1) of the Constitution, is to be exercised only by declaring invalid any law or conduct inconsistent with the Constitution. On this argument, judicial review is the only mechanism through which courts check executive power.' In para 52, the majority found 'no merit' in this argument.

Dealing with a second, more mainstream assertion, Moseneke DCJ rejected an argument implied from the nature of classified information. He underlined that there is no ouster of a court's own inherent power in relation to its record by the bare fact of classification. Yacoob J specifically agrees with this in para 89. As the majority stated in para 54 (see also para 53):

> 'A mere classification of a document within a court record as "confidential" or "secret" or even "top secret" under the operative intelligence legislation or the mere ipse dixit of the minister concerned does not place such documents beyond the reach of the courts. Once the documents are placed before a court, they are susceptible to its scrutiny and direction as to whether the public should be granted or denied access.'

The neat doctrinal consequence of this approach — a consequence that may be extrapolated to other uses of the concept of open justice itself — is that a court addressing a question regarding its own processes or records need not concern itself with the validity of a law of general application that might otherwise cloak the document in secrecy or classification (para 55). The argument that classifications could not be overturned or that classified documents could not be released by a court was not one explicitly made by the minister, who argued instead that a court should be slow to release a classified document in the absence of a challenge to the existing classification.

The majority opinion then articulates the second stage of its analysis: the test for limiting the rights of open justice. This may be seen as an assertion of judicial authority and a correlative rejection of executive power. (It appears

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that the interests of justice standard thus has its roots in Moseneke DCJ's logic of the court's power to regulate its own proceedings in s 173. Doctrinally, one can argue that such an intra-Constitutional power can indeed limit rights through a standard different than that of s 36(1).) This test is 'in the interests of justice' (paras 55–57; see discussion of these paragraphs in para 86 (Yacoob J)). As Moseneke DCJ put it in para 55:

> '[W]here a government official objects to disclosure of a part of the record before a court on grounds of national security, the court is properly seized with the matter and is obliged to consider all relevant circumstances and to decide whether it is in the interests of justice for the documents to be kept secret and away from any other parties, the media or the public.'

It is within the interaction of the rights with the standard identified in the second stage — the interests of justice — that the true balancing in the majority opinion occurs. And that was true balancing. It was the kind of balancing that results in a legal product; a standard that may be used and applied. For Moseneke DCJ, the third stage (paras 59–73) then consists not in re-doing that balancing but rather in the application of that standard to the facts of the case. For the majority opinion, the balance thus struck between openness and national security is a harmonious, abstract, legal one, rather than one that is messy and complicated by its factual matrix. For instance, the arguments in favour of openness put forward by Independent Newspapers were taken as a whole and used in this balancing. Indeed, despite some of the language regarding circumstances in para 55, it is Yacoob J in dissent, and not Moseneke DCJ in the majority, who undertakes the most thorough examination of the facts in relation to the applicable law.

In his third stage (the stage of application) Moseneke DCJ constructed and used four tools: (1) he examined the substantive content of the disputed material; (2) he characterized the information in the material as being either national security information or not; (3) he considered the de facto public nature of the information in the material; and (4) he considered redaction of the material. For instance, in respect of the materials in paras 18.1–18.6 of the in camera affidavit, it seems that Moseneke DCJ (in paras 61 and 62): (a) disagreed with the minister on the content of the paragraphs using the first tool; (b) argued that the information contained there consisted of conclusions, not national security facts to be classified using the second tool; and (c) argued that the information was in the public domain anyway using the third and the fourth tools. In relation to other disputed information (paras 63–9), Moseneke DCJ uses the same set of tools (although he does not always employ them all). In respect of the full version of the Inspector-General of Intelligence report, the majority specifically reasons (para 72) that to release when there has been partial leakage would be to encourage the violation of confidentiality.

The Dissenting Opinions

Three judges dissented from the majority judgment: Yacoob, Sachs, and van der Westhuizen JJ. (Two permanent members of the Constitutional Court,

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Langa CJ and O'Regan J, did not participate in this matter.) The Yacoob J and van der Westhuizen J opinions are analytically of a type, and differ only in a couple of fairly minor respects. In contrast with Yacoob J, van der Westhuizen J would not have granted the interlocutory application and differed with him in evaluating the risks of disclosing some of the disputed items. In particular, van der Westhuizen J differed on the risks that the redaction principle could pose, noting that disclosing the name of an operative could raise real danger for an operative (para 182). Sachs J appears to have agreed with van der Westhuizen J on this point, thus leaving Yacoob J the sole member of the court who would have disclosed the name of the operative. While sharing a number of the concerns of the other dissenting judges, Sachs J ultimately approached the matter from a truly different angle, as will be indicated below.

Yacoob J's opinion more or less accepted the majority's framing of the issue as a matter implicating the concept of open justice. However, he made four moves within that framework which contest Moseneke DCJ's conclusions: first, he compared Moseneke's use of an interests of justice standard based in s 173 with a s 36 limitations analysis; secondly, he added more weight (and perhaps substance) to the public interest side of the balance; third, he argued in favour of the principle that information, once disclosed, is forever disclosable; and fourthly, applied the law to the facts in a manner more generous to openness than did the majority.

Yacoob J indeed raises a compelling challenge to the majority's application of the interests of justice standard. He was assisted in this by the further explication of van der Westhuizen J. In Yacoob J's view (para 83), if it is the court's power to regulate its process in s 173 — that is, limiting a right of open justice — then since this is a constitutional provision limiting a right in the Bill of Rights, the limitations analysis should apply. Yacoob J was clear that the application of such a test would differ from the 'interests of justice' balancing that the majority had undertaken. He accepted that the onus would not be a usual one in such a limitations-based balancing test. Yacoob J thus distinguished the situation in *Independent Newspapers* from the *SABC* case, which was a true balancing of rights situation, and where the interests of justice standard was appropriate, since there was no hierarchy of rights (para 84, citing *South African Broadcasting Corp Ltd v National Director of Public Prosecutions & others* 2007 (1) SA 523 (CC) para 10). The relevant distinction is what one places on the other side of the scales from the freedom of expression (or open justice): the court's exercise of their s 173 powers, or the assertion of a fair trial right. For Yacoob J, *Independent Newspapers* was about a right and a state interest and was thus a good place for a limitations analysis (para 85).

While Yacoob J eventually left this line of inquiry open in para 86, van der Westhuizen J's opinion takes it to its logical conclusion. He would prefer a different test with more specificity and clear categories to be used in balancing. Van der Westhuizen J nonetheless thought that the usual limitations test could be used, even accepting that this was an instance where

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the court was engaged in doing the balancing itself. He formally accepted national security as a state interest. His important nuance from Yacoob J is in his working to show the rights that underlie that state objective (para 174). (A parallel can be drawn between the range of characterization of national security and the debate over the breadth of the concept of the national interest in the Protection of Information Bill.) Having constructed the case as one of rights versus rights, van der Westhuizen J argued that it is important to assess of 'the nature of the right that is limited, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and especially the question whether the purpose could be achieved by less restrictive means' (paras 176–181, going through the relevance and role of each of these limitations factors). Of all the writing judges, van der Westhuizen J comes closest to what might be termed the 'limitations fundamentalist' position. The limitations test, with its balancing gloss as envisioned by Yacoob J, might not be too far removed from the balancing of Moseneke DCJ. But with van der Westhuizen J, one is clear that the limitations analysis (apart from any application) would have led necessarily to a different outcome from the majority.

While the limitations versus interests of justice point may have been his best shot at legal analysis, the judgment of Yacoob J was not yet over. He went on to consider the balancing mechanism of the majority. Astutely, he pointed out that the balancing rhetoric is itself biased in favour of harmony, where there is a decided lack of such in reality (para 86). (Indeed, this is an oft-raised academic complaint with the balancing mechanism. See Stuart Woolman & Henk Botha 'Limitations' 34-93 to 34-104 in Stuart Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (Original Service 07-06).) Moreover, he pointed out in para 87 that the media are not the only ones with a right to know. Most fundamentally, and in a foreshadowing of much of the civil society criticism in Parliament of the Protection of Information Bill, he wished (para 88) to weigh the importance of public interest more heavily than anyone else in the case.

Secondly, Yacoob J differed with the majority on a point of principle. Yacoob J would allow information — for instance, the Minister's letter — out into the public realm on the basis that such items of information are already available. And then, after adopting this principle, Yacoob J manages to present, through the medium of his opinion, most of the substantive classified material at issue in this case. An observer could be forgiven for thinking that Yacoob has slyly used his judicial platform to make public just about everything that is in fact contained in the disputed and still-classified material. Clearly Yacoob J did hold back some information; see para 124, where he mentioned a designation that might reveal too much. In this respect, see also para 129, where Yacoob J laid claim to clearing up a public deception. Yacoob J furthermore did not hold back from clear language, writing in para 100 for instance: 'The other three documents concern the Macozoma surveillance which, as everyone knows, was botched.'

Finally, Yacoob J's application of the law to the facts of this case demonstrated a tool not explicitly contained within the majority's box — a

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presumption (albeit a rebuttable one) for openness. In particular, Yacoob J argued that avoidance of embarrassment (rather than legitimate factors) drove one facet of the claimed-for secrecy. Likewise, he argued that the publication of a materially-altered version of the IGI report was also an important factor in this factual context, and which encourgaed disclosure and not secrecy (paras 118 (embarrassment) and para 128 (publication of a materially altered version)).

As noted above, the Sachs J dissent takes a different approach to that of Yacoob and van der Westhuizen JJ, while still working within a balancing rhetoric. Sachs J did not balance an individual right against a state policy. Rather, he sought to balance the concept or principle of open justice itself (understood in his sense with a distinctively democratic flair) on the one hand, and secrecy on the other hand (para 151). After engaging in such a balancing of principles, Sachs J reached an outcome that accorded with the greater openness demanded by Yacoob J.

The holistic nature of an analysis a la Sachs does not make for easy parsing. As Sachs J states in para 159: 'All these various constitutional provisions need to be viewed in conjunction.' Given that a balancing of principles is the action being pursued, one can first identify the various principles (for there are not merely two) and after that then examine the character of the balancing act itself. As far as the first exercise is concerned, one principle is the inseparability of openness and democracy (para 153). For Sachs J, the filling in of detail about this principle — explaining their symbiosis — is a historical account. A second principle is the shared nature of the sense of security (para 155):

> '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. Above all, the society is bound together not by ties of arrogance combined with fear, but by a shared sense of security that comes to all citizens from the feeling that their dignity is respected and that each and every one of them has the same basic rights under the Constitution.'

A third principle is discussed in para 156: 'One of these basic rights gives a special and rare texture to our Constitution. It is the right in section 32 of everyone to have access to information.' A final principle (para 158) is that the Republic's intelligence services are and must be located within a Constitutional framework — thus they have no right to automatic secrecy.

Turning to the character of the balancing, Sachs J agreed specifically with the Deputy Chief Justice that even in fact-specific matters such as these, there is no need to resort to technicalities. Moreover, Sachs crucially agreed (para 161) that the case at hand was of a type with other instances where the courts have themselves needed to implement the appropriate constitutional standard. Nonetheless, he did suggest that the statute implementing the right of access to information was a potential source of guidance (para 157). At this

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point, Sachs J seemed to move quite quickly from the s 32 right to the Promotion of Access to Information Act (PAIA). Sachs J noted that, but for the Act's non-coverage of judicial records, he would have used PAIA to provide guidance in the case at hand. Moreover, his overview of PAIA took particular note of the careful and specific statutory delineation of grounds of refusal of access to information.

Sachs J makes two specific points that should be of value in future access to information and open justice jurisprudence. First, by drawing a parallel with the *Shabalala* case, he directed our attention to a key question that should guide analysis in this, and other areas of information law: should the focus be wider than the specific items of information at stake? In particular (para 163), to order the safeguarding of national security information, is something more than purely appropriate redaction called for? (In *Shabalala & others v Attorney-General, Transvaal & another* 1996 (1) SA 725 (CC), the question was whether there was value in protecting an individual source not simply for that source's sake, but rather in terms of maintaining the whole system of passing information on to the police.) Secondly, Sachs J underlined the distinction between the protection of information for the prevention of embarrassment — which goes against the Constitution — and the protection of information for the prevention of harm, which is Constitutional (para 165, tracing this back to the Cameron Commission of 1995). Such harm must be non-trivial and non-speculative (para 163).

The Context

The *Independent Newspapers* case indicates how real-life institutions tend to operate, and reveals their mistakes and foibles. In para 164, Sachs J put this well:

> 'There are two idiosyncratic features that give this case a surreal character. The first is that the initiative to suppress access to certain internal intelligence documents came from the Court itself and not from the intelligence agency. The belated response from the Ministry does not smack of any real perceived need to protect hot state secrets from the public eye. Rather, it suggests that the Ministry wishes to make points of principle for the future. The second is that all the documentation had already been placed on the Court website, so that any interested party, whether friendly or unfriendly or just curious, could quite lawfully have downloaded and printed it out.'

As he points out, these are hardly 'hot state secrets'. Indeed, one might ask whether anyone ever went back to the High Court and removed the record there — presumably so. (According to counsel for the Minister, the actual classified documents were never scanned and placed on the court's website, although Mr Masetlha's affidavit, which contained some paragraphs with some of that information, was.)

In a related, but separate feature of the case, *Independent Newspapers* was one where the contours of what one did not have (and what one wanted) were not clear to the parties from the beginning. Indeed, a prominent feature of the decision depends upon what is termed in para 16 the 'assumption' of

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the status of the parties as intervening. Substantively, however, this blindness is a common feature of access to information analysis and logic (as it is in the discovery context). (These questions are thus perhaps not as 'novel' as para 22 would suggest.) It is noted (para 10) that the claim by Independent Newspapers was for early and conditional access, to prepare a claim for open justice. This is congruent with the access to information situation: one needs some information both to justify and to know what information one wants (or needs). Such blindness was perhaps exacerbated by the fog of litigation (see para 21). Adding of course to this fog was that this application was indeed two applications; an interlocutory and a main application. Reasons are given in the majority judgment for both the interlocutory and the main application. The interlocutory application was turned down in the majority judgment (para 12).

It should be clear that the Ministry for Intelligence Services' participation in this case was not based upon the unthinking reflexive stance of apartheid secrecy. Instead, the ministry clearly applied its mind to the constitutional issues. For instance, the minister's initial refusal of the request for the information from Independent Newspapers was reported to be because the minister preferred a court to decide the matter (para 9). This is also consistent with the minister's stance in bringing to Parliament the Protection of Information Bill for its consideration. This did not go unnoticed and unappreciated by the judges. The majority opinion noted in para 11 that 'what is significant' is that the minister abandoned his earlier blanket claim. Likewise, the later move to narrow down the minister's objection to a mere several paragraphs was welcomed by the majority (para 77) and by Sachs J (para 152). Overall, one could say that this theme demonstrates the need for understanding, trust and specificity in these claims — factors not commonly encountered in the context of disputes between the media and intelligence services.

Finally, while this is not a particular focus of this note, the jurisdictional basis of *Independent Newspapers* is worth noting. The intervention application brought by Independent Newspapers did not succeed, as there was no direct and substantial interest (para 19). Instead, the court suggested a separate High Court application, or even a direct one to the Constitutional Court. In the result, the jurisdictional basis for this case was one of direct access (para 20). (This may have a parallel to the case of *Mamba & others v Minister of Social Development & others* (CCT 65/08; the case opposing closure of the temporary shelters for victims of xenophobic violence in Gauteng), enrolled for final hearing in the Constitutional Court on 20 November 2008, but then later withdrawn. A principle of jurisdiction may be emerging through these cases.) Direct access does of course make practical sense in a case such as *Independent Newspapers* (and, I would argue, in a case like *Mamba*) but of course direct access does mean that the Constitutional Court does not have another judgment for the court to look at and to work from.

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THE PERTINENCE OF OPEN JUSTICE: CONTOURS, COHERENCE AND CONTESTS

As the time of writing, the concept of open justice has clearly become significant in contemporary South African society. Nonetheless, as Sachs J notes (para 153), openness has not been given much attention thus far in the South African constitutional project. There are numerous current political conflicts that have openness and its degrees (or conversely put, secrecy and its degrees) either at their core or as one of their main themes. One or two of these are of the highest political profile. One way to frame the dispute between the Judge President of the Cape Provincial Division, Hlophe J, and the judges of the Constitutional Court is around openness. Framed in this way: should the Constitutional Court should have issued its media statement noting in broad terms the complaint of its judges that two of their number had allegedly been the targets of attempted influence by Judge President Hlophe? (A relevant contour of the concept of open justice concerns the extent to which the concept can be used to interrogate the judiciary's own practice — since, of course, that institution ought not to be beyond criticism. One example of this is noted in the *Independent Newspapers* case itself. As far as the practice of posting records is concerned, the court has apparently reversed its earlier trend of posting these. Why is this? Perhaps the reason is one of capacity or resources. But surely the trend ought to be in favour of making court records accessible, as it is with the court's website generally?)

Openness is also the main feature in the consideration of the Protection of Information Bill. Indeed, the consideration of this Bill can be closely linked to the context of the underlying *Masetlha* matter in the sense that the Bill aims to put on solid legislative footing the management of classified information. Other political conflicts over transparency are less high-profile, but of no less significance for the fulfillment of South Africa's democratic promise. There are ongoing conflicts over the degree and impact of openness within the implementation of the Promotion of Access to Information Act, over the place of transparency within the pursuit of socio-economic rights, and over the degree of openness within the administration of justice system more generally.

It is in this context that the articulation in *Independent Newspapers* of a concept of open justice with clear contours and with coherence must be viewed as a welcome and principled intervention. In particular, the unified and conceptually sound analysis of the court allowed the majority judges to present a consistent analysis of matters that have come before it, and an analysis that was concerned to base itself on a foundation of access to information. I would argue that this doctrinal development will serve South Africa's cause of constitutional democracy well in the long run. The court has a platform to make its voice heard in the debates to come.

Despite their significant differences, the four opinions in this case essentially cohere, and each works within the same concept: open justice. In the majority opinion, it is most classically (and perhaps most defensibly)

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articulated. In the opinions of Yacoob and van der Westhuizen JJ, the doctrine is internally fortified, as well as extended to some of its logical implications. (See above for Yacoob J. For van der Westhuizen J, note para 173, where he identified this cluster of rights as open justice.) As ever, Sachs J is harder to pin down. While he did frame his opinion more broadly than the majority did (and indeed more broadly than Yacoob and van der Westhuizen JJ did) and he specifically gave greater scope to the relationship between openness and democracy, his apparent ultimate touchstone of constitutional principles (openness versus secrecy) did not make a fundamental break with the balancing metaphor of the majority opinion. Thinking many of the same thoughts, Sachs J ends up thinking in a similar fashion to Yacoob and van der Westhuizen JJ, but differs from the others in how he sees the facts and their implications.

So much for the contours and coherence of open justice. What of its contests? How might the tensions that do lie within the concept play out in further development? One contest is perhaps a simple matter of judicial emphasis: Yacoob and Sachs JJ weigh the public interest more heavily on the scale than do the others. Another contest is about how to apply the law to the facts. At the end of the day, these two contests may be about what the particular viewpoints of the particular judge happened to be. Another contest concerns the limitations clause. This is more problematic, but just as (if not more) interesting. (A linked contest can be over rights/rules versus principles, bringing in Sachs's opinion.) A final contest is over openness, secrecy and democracy. It is really an implicit debate in some of the opinions, but there is a vision of a democracy heavily dependent on traditional media reporting (democracy as mediated by the publishers) that one can discern behind the majority and the Yacoob J opinions; but this not so with Sachs J. Arguably, a newer, more decentralized democracy lies in opposition to this. So, a final contest could be over the shape of democracy, and the centrality of openness to that democracy.

The coherence of the concept of open justice may additionally depend upon the resolution of these contests. From the outset, we can interrogate the coherence of the Constitutional Court by looking at them as a group of men and women who each have their own political agenda. *SARFU* (*President of the Republic of South Africa & others v South African Rugby Football Union & others* 1999 (2) SA 14 (CC)) is a doctrinal, but can never be a conceptual, bar to such unraveling. (That decision upheld the decision-making processes and impartiality of the Constitutional Court against an allegation of political bias.) But we should question whether we wish to interrogate the constitutional project to such a degree of legal realism. Secondly, we are talking about fine distinctions here. Especially where we have access to court, fair trial and free expression, it is the rights and not the limitations that drive the analysis. The technical dispute of the interests of justice versus a special case of limitations conflict can really only be of real interest to those relative few professionals who make their livings out of constitutional analysis and its foolish consistency. Finally, it has to be clear that coherence and democratic contests are inherently dynamic.

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As the above assessment of the coherence and contests of the concept of open justice demonstrate, it is a welcome fact that the differences among the judges in *Independent Newspapers* were ultimately more on the margins than at the core. The case was both about the records of the court and about documents claimed as important for national security by the intelligence services. This is the heartland (or at least should be a stronghold) of open justice, for courts and the public are the classic articulation of civil society (see for instance, Jurgen Habermas 'Postscript' in Jurgen Habermas *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (1996) 447–62).

Before leaving the assessment of the contours and coherence of the concept of open justice, it is perhaps worth commenting upon the intervention in *Independent Newspapers* of the amicus, the Freedom of Expression Institute (FXI) (para 14). The principal submission of the FXI did at least garner the court's attention. Collateral issue (e) (see para 15) was as follows: 'Is it desirable to set guidelines on a procedure to be adopted when a court record is sought to be withheld from the public?' Perhaps the relevant question here — one of course asked with the benefit of hindsight — is whether this was the best forum to raise this issue. The court more or less dismissed FXI's suggestion that there should be guidelines, on the basis that the guidelines that were proposed were fairly generic and were inherent in a court's operation anyway (paras 57 and 58). One could argue, as the minister apparently does, that Parliament is better placed to develop policy in this regard. The court's refusal to take up the invitation offered to it by the FXI may indeed allow Parliament the opportunity to investigate the matter. (Indeed, Sachs J implicitly welcomes the prospect of legislation such as that contained in the Protection of Information Bill when he said in para 157n14: 'To overcome such problems [ie that PAIA does not give guidance in the context of judicial records], the outdated Protection of Information Act 84 of 1982 needs to be replaced by a statute that takes account of present day constitutional and social realities.' If such legislation is not forthcoming, though, a future judgment may be necessary to best answer this set of questions.

CONCLUSION

After exploring the contours of open justice, we can now point to an equally fundamental constitutional concept: that of open democracy. This concept is more closely identified with the right of access to information. Without claiming that such a concept has been given a treatment similar to the concept of open justice, open democracy is arguably the concept that Moseneke DCJ uses — albeit without calling it such by name — to underpin much of his opening analysis in the majority opinion. Doctrinally, the right of access to information was as much implicated in *Independent Newspapers* as the other rights at issue; the applicant simply chose not to argue the matter on that basis. This is not to suggest anything different from the proposition that

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Independent Newspapers was on its facts correct and appropriately considered the concept of open justice. But the cluster of rights encapsulated in the concept of open justice is itself apparently nested in a concept of open democracy. Where the facts and context demand, the open justice concept must be brought to the foreground. But the fount is the concept of open democracy. Such a tiered doctrinal analysis is consistent with the complexity of modern democracy. For instance, Jurgen Habermas (idem) recognizes the relevant danger is not the stifling of comment — the classic freedom of expression point — but instead that the information necessary for the operation of an open democracy is not available to inform the debate at all. A concept of open democracy may push beyond that of open justice. The concept of open justice is of undoubted significance and power. Yet, seen in terms of transformative constitutionalism, *Independent Newspapers* really falls within the narrow reading of the term. The decision falls short of attempting to give a social democratic reading and push to the Constitution. Instead, the decision indicates that transformative constitutionalism means that the constitutional project itself is — qua *constitutional* — transformative for South African society.

In any case, regardless of the fulsomeness or future viability of the concept of open democracy, *Independent Newspapers* has real and direct implications for the area of law covered by the Protection of Information Bill. This is so even if we recognize that the direct application of this case to the Protection of Information Bill may be limited by the restricted challenge made by the applicant. As the court stated in para 22:

> 'Independent Newspapers did not challenge the authority of the Minister to classify or protect the documents as confidential for purposes of national security. It did not attack the manner in which the authority was exercised. Its claim was singularly premised on the right to gain access to and publish legal proceedings inclusive of the record before this Court.'

Eschewing reliance on its rights of discovery, Independent Newspapers simply relied on its rights in the cluster of rights in the open justice concept (para 28): 'In effect, as nonparties to the underlying matter, the order it sought was to vindicate the right to know and to let the public know and nothing more.'

One implication of *Independent Newspapers* lies with chapter 12 of the Bill, subtitled 'Protection of Information in Courts'. Several clauses that were initially presented to Parliament were in apparent conflict with the majority judgment. Section 52(4), as presented, provided: "The submissions referred to in subsection (3) may not be publicly disclosed, any hearing held in relation to the determination referred to in subsection (1) must be held in camera and any person not authorised to receive such information may not attend such hearings unless authorised by a court.' This blanket rule of closure appears to be contrary to the necessary flexibility regarding the courts' primary decision-making role that was identified and asserted in *Independent Newspapers*. The argument made by counsel for the minister that

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the court had no discretion was given short shrift by the majority, and was barely even taken up by the dissenting judges.

We can identify several further significant questions beyond the cabined but important question identified above regarding Chapter 12. For one thing, the majority opinion engages, in passing, in a discussion of the Promotion of Access to Information Act (PAIA) and Cabinet records at para 63. This has implications for an issue placed before the Parliamentary Committee on the protection of what was once termed 'designated information'. For another, there is the use of the term national interest. Given the controversy over the term as used in the Protection of Information Bill, it is interesting to note that at least Sachs J has few apparent problems with this term (para 167):

> 'I agree with Yacoob J that more damage would be done to the national interest in general, and to the vitality of the intelligence service in particular, by withholding stale and routine information about the workings of the agency, than by allowing the normal rules governing public access to all court documents to apply.'

Another, perhaps more fundamental question relates to the framing of the legislation and the limitations clause. Since there remains some doctrinal ground to clear, it is worth outlining this argument in conclusion to this note. It would seem clear that one may use s 32 to test and refine the proposed legislation on the protection of information. But a related question then arises. At least to the extent that it puts a limit on the right of access to information, is legislation such as the Protection of Information Bill itself some of the national legislation referred to in s 32(2)? If so, so what? In this case, the 'so what' may well be important. Let us say that the common-sense meaning of the limitations in s 32(2) is adopted. The common sense is that it makes things easier for the state to limit the right of access to information. This middle ground interpretation may indeed be most appropriate for a right that is aimed at managing state information within available resources. (See for instance the remarkable common ground of the SAHA/NMF and Gilder submissions in the Parliamentary consideration of the Protection of Information Bill, which were at odds with the media house submissions.) Such distinctions may be too fine, though, and such differentiation between tests of limitations may not easily be able to drive the analysis. It would still be appropriate to see the conceptual rooting of the constitutionality of protection of information legislation in s 32 (apart from the specific open justice analysis to be applied to chapter 12) as opposed to the distinctive and specific freedom of expression and media concerns associated with s 16. While *Independent Newspapers* only explores the concept of open justice directly, the decision should help us to see more deeply into our democracy as well.