

**An Overview of Major Role Players regarding the Protection of State Information Bill:
the case of the Right2Know Campaign, the South African National Editors' Forum and
the African National Congress**

Research Question: Are there ideological interests in the discourse of the African National Congress, the Right2Know Campaign and the South African National Editors' Forum around the Protection of State Information Bill?

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Declaration

I declare that this thesis is my own unaided work. It has not been submitted before for any other degree or examination in any other university

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Signature

Date

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Abstract

The fight against the Protection of State Information Bill (POSIB) by the Right2Know Campaign (R2K) and the South African National Editors' Forum (Sanef) marks a key point in the fight to protect constitutional democracy in South Africa. Apart from undermining this constitutional democracy, the POSIB signals the extent of the ideological divide between the ruling party – the African National Congress (ANC) – and its opponents. This study suggests that the POSIB is a tool to serve the ideological and hegemonic interests of the ANC and its elites, shielding the party from scrutiny by the commercial press and other critical actors.

In exploring the ideological discourse of the POSIB, this study uses semi-structured interviews conducted via email with members of the R2K and Sanef. The ANC chose not to participate in the study, but advised that its views were expressed on its party and Parliamentary websites.

The study is intended to contribute to the academic literature on the media, primarily the press, and democracy in South Africa and to add insight into the current debates around the POSIB. Literature and theory agree that the flow and access to information is crucial for any democracy and any failure or blockage of this flow and access hinders democracy.

However, this study finds that both Sanef and the R2K are also ideological actors. Both organisations use their position of opposition to the proposed legislation to further their own ideological interests.

The position of Sanef reflects its journalistic interests and the forum's own definition of the role of the press, including the concept of press freedom. The study finds that the R2K is also an ideological actor and uses its opposition to the POSIB to promote and widen discourse on the concept of "public interest."

Keywords: public sphere, active citizenship, public interest, national interest, ideology, journalism, freedom of the press and democracy

Sub-questions

- a. Is POSIB serving any particular ideological interest?
- b. Is there a need for the information bill? If so, on what grounds?
- c. Is there a way forward, or a possible compromise, between the different parties?

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Chapter 1: Introduction

1.1 Background

Since its inception, the POSIB has been widely criticised for its attempt to hinder the free flow of information, undermining the constitutional right to freedom of speech and flow of information (Friedman, 2011). According to Friedman, access to and flow of information is a crucial determinant of democracy. This study offers an overview of the discourse and ideology of the African National Congress (ANC), the Right2Know Campaign (R2K) and the South African National Editors' Forum (Sanef) on the Protection of State Information Bill (POSIB). The ANC, the R2K and Sanef dominate debates surrounding the Bill and therefore, in this study, are used to represent the different social environments engaging with the issues contained in the Bill – from political to civil society and the media. The POSIB is ostensibly security legislation, introduced in Parliament in 2008, aimed at promoting national security, but it goes beyond this to impede the flow of information and, according to both the R2K and Sanef, is a threat to democracy.

In this study, the term media refers to the means of mass communication ranging from print and electronic to new media. The primary focus of this study, however, is on the privately-owned commercial print media. Dubbed the “Secrecy Bill” by its opponents, the POSIB impacts on the media, the public, civil society, chapter nine institutions¹ and other non-state bodies (Wasserman *et al*, 2011), although it is not a media Bill but a protection of state information Bill.

This study looks at the Bill from different perspectives, exploring the discourses and ideologies invoked by the organisations involved, particularly those selected for this study. This study uses Critical Discourse Analysis (CDA) as a methodological approach to render an overview and analysis of the views made for and against the Bill. In analysing these views, the study relies on primary documents from the ANC, the R2K and Sanef, as well as a series of interviews with the R2K and Sanef².

¹ This includes institutions such as the office of Public Protector, South African Human Rights Commission (SAHRC), Commission for Gender Equality and others

² No interviews were conducted with the ANC. The party referred all questions regarding the Bill to information published on its website at, www.anc.org.za.

The study is informed by two conceptual tools; discourse and ideology.

According to Hook (2001, p.6) Foucault defines discourse as “rules, systems, and procedures.. which constitute..... knowledge”. In simple terms, discourse refers to what constricts or enables writing, speaking and thinking (Hook, 2001). It is also important to note that discourse is a building block of ideology. Ideology refers to a system of beliefs shared by members of a social group. These shared beliefs are known as social representations (Van Dijk, 2011).

In analysing the discourse and ideologies surrounding the Bill, CDA is used to highlight the hidden meaning, ideology and proposals made about the Bill by the three selected organisations. CDA is a tool used to analyse written or spoken words in order to identify and understand power relations and reveal the hidden ideologies behind the words or text, according to Fairclough (2003) and Van Dijk (1995). In this study the use of the term **text** refers to both spoken and written material.

In order to place CDA into context, it is important to outline an overview of the POSIB. The Bill is an attempt by the ruling party to replace the Protection of Information Act of 1982, legislation put into place by the apartheid government. The POSIB seeks to regulate the flow of information between state and non-state organisations, using a system that allows a selected state body to classify, declassify and reclassify selected state information on the basis of national security and national interest.

After first being placed before Parliament in 2008, the Bill was re-introduced in Parliament in 2010. The National Assembly, the lower house of Parliament tasked with making and debating laws, passed the Bill in November 2011. In November 2012 the Bill was passed, with amendments, by the National Council Provinces (NCOP), the upper house of Parliament. Once both houses of Parliament had approved the Bill it was supposed to be signed into law by the President. However, in September 2013 the President refused to sign the Bill citing constitutional problems. The Bill was sent back to Parliament for “reconsideration” and “fixing” (Mail & Guardian, 2013). In November 2013 the slightly amended Bill was once again approved by

Parliament and returned to the President for his signature. As of August 2014, the Bill has still not be signed into law.

It is important, at this time, to note that there are several aspects of the POSIB that are a cause of concern for numerous politicians, activists and commentators. On such example is that the POSIB did not take into account the recommendations made by the Ministerial Review Commission on Intelligence, commonly called the Matthew's Commission.

The Matthew's Commission was set up in 2006 by the then-Minister of Intelligence Ronnie Kasrils, to look carefully at the mandate and activities of the intelligence services, particularly any possible infringements of Constitutional rights³. The commission was appointed following a leak of so-called "spy tapes" that resulted in corruption charges against ANC President Jacob Zuma being withdrawn by the National Prosecuting Authority (NPA)⁴. The commission's⁵ report, concluded in 2008, pointed out that the then Ministry of Intelligence⁶ had no effective control mechanism to prevent or curb the abuse of power by the state. The commission recommended a series of measures to improve state accountability and to avoid the abuse of state organs for party political purpose. According to the R2K, the Matthew's Commission report was not formally tabled in Cabinet or Parliament and was, therefore, regarded as a no status report.

When the POSIB was drafted, it failed to take the Matthew's Commission recommendations into account including a lack of a clear definition of security and a narrow mandate of the Ministry of State Security. For example, critics say the Bill gives the state too much power to classify information as "secret". The concern is that the state may abuse this power and avoid accountability to the press, whistle blowers and others for wrong doing.

³ Kasrils is a retired ANC MP who is now a vocal opponent of the POSIB.

⁴ However, the spy tapes did not implicate Thabo Mbeki in anything they were used by the NPA as a excuse to point to a alleged political conspiracy against Zuma

⁵ The commission was purposed to review and "strengthen mechanisms of control of the civilian intelligence structures in order to ensure full compliance and alignment with the Constitution, constitutional principles and the rule of law, and particularly to minimise the potential for illegal conduct and abuse of power" (Matthew's Commission Report, 2008, p.9).

⁶ Now the Ministry of State Security.

1.2 Research problem

The introduction of the POSIB in Parliament provoked strong and opposing views. Sanef and the R2K argued that some sections of the Bill were not constitutional and had the potential to criminalise investigative journalism, whistle blowing, civil society watchdogs and consequently be harmful to democratic practice.

The Bill was criticised for its ability to hide corruption and mal-administrative activities of the government and state official and for its potential to undermine the element of transparency in a democracy (Sanef, 2011). However, the ANC, the ruling party, argued that the Bill was aligned to the democratic framework of the country, and was not aimed at stifling media and other freedoms, but rather was intended to protect and promote national security as mandated by the Constitution.

1.3 Justification of the study

This study coincides with 20 years of South African democracy following the first free and fair elections in 1994. Important cornerstones of democracy are freedom of expression and the right to access information. The media and civil society play an important role in protecting these fundamental rights. This study conducts an analysis of POSIB by exploring the views and ideologies of the three major role players in either promoting or contesting the Bill. This study contributes to academic literature on media and democracy in South Africa, while adding insight into the current and ongoing debates on the POSIB.

1.4. Justification for the use of the POSIB as a case study

The POSIB, which is not a media bill *per se* but is an information security bill, has generated significant interest – and vocal opposition – from non-state organisations. Opponents argue that the Bill impinges on the right to information enshrined in the Constitution and is in conflict with other legislation, such as the Promotion of Access to Information Act (PAIA) of 2000. They also argue that the Bill, if made law, would criminalise anyone who published or distributed classified information. Such people would face extreme punishment, including up to 25 years in jail. The POSIB is therefore a valid and compelling study of proposed legislation that provokes opposing views of how best to promote and protect democratic practice.

1.5 POSIB and interest groups

As the ruling party, the ANC is the organisation that proposed the Bill and supported it through Parliament, while the two key opponents of the Bill are the R2K and Sanef. Both are non-state organisations claim the Bill is anti-democratic and unconstitutional. The R2K labels the Bill as a threat to a hard-won democracy (The R2K, 2012), while Sanef echoes these sentiments and argues the Bill will criminalise investigative journalism, making it difficult for journalists to expose corruption.⁷

The R2K is a “specific campaign founded in the struggle for access to information, made up of selected and voluntary individual activists, community organisations, non-governmental organisations, trade unions, church bodies, legal professional, academics and others and is by no means representative and inclusive of all South Africans opposing [the] POSIB”⁸. Sanef is a professional body representing the interests of the press.

It is worth noting that although the Bill was conceived and drawn up by the ANC, there are members within that organisation who have challenged it and questioned its relevancy, for example, Kasrils.

1.6 Academic significance of the study

This study seeks to contribute to the area of media and democracy in South Africa, a field that is well researched by a number of media and political scholars in South Africa such as Steven Friedman (2011), Herman Wasserman (2011), Jane Duncan (2011), Lynette Steenveld (2012), Guy Berger (2012) and Keyan Tomaselli, among others. This study also seeks to contribute to the field, expanding and deepening knowledge on issues of media and democracy in South Africa.

⁷ See Daniels, G. 2010. *The role of the media in a democracy: Unravelling the politics between the media, the state and the ANC in South Africa*: PhD thesis submitted to the Faculty of University of Witwatersrand, South Africa.

⁸ This definition is extracted from Dr Dale McKinley (2013), based on feedback on his report to this initial project, prior final corrections.

1.7 Democracy and the role of the media in South Africa

The concept of democracy is rooted in Greek philosophy. The word democracy comes from two root words, *demos*, meaning people and *kratos*, meaning power. Democracy, therefore, means the power of the people (Ober, 2007). Held (1994, p.15) defines democracy as “a system of decision-making about public affairs in which citizens were directly involved”. On that note, it is important to note that dictatorship is the opposite of democracy. It does not take into account the power and will of the people and ignores consensus. Military rule is one form of dictatorship.

While there are many forms of democracy, this study limits its focus to radical and participatory democracy. This is because, this study argues, the debates around the POSIB are mostly informed by these two forms of democracy.

Radical democracy is identified by Laclau and Mouffe (1985) in their work on *Hegemony and Socialist Strategy*, which looks at the role of social movements in promoting democracy and is informed by a Marxist paradigm. Participatory democracy is informed by the work of Jurgen Habermas (1962) and *The Structural Transformation of the Public Sphere*, which looks at active public participation in decision-making. Despite some criticism of Habermas that his concept of the public sphere often marginalises the voices of non-dominant actors, including women and unorganised people, this study will non-the-less use the concept of the public sphere as it is fitting given the central roles of Sanef and the R2K in the discourse on the POSIB.

According to Jacobs (2011), a working democracy requires a functional civil society, privately-owned media and basic fundamental rights and freedoms. In South Africa these building blocks of democracy are enshrined in and protected by the Constitution.

In a democracy, the media plays a critical role as a watchdog by providing a public sphere (these concepts are explained in the literature review). These conceptual frameworks – that of the role of watchdog and the public sphere – are primary characteristics that define the role of media in a democracy. According to Steenveld (2012), the structure and ownership of the printed media in South Africa compromises the ability of the press to serve a democracy. Although the apartheid system officially came to an end with the democratic elections of 1994, Steenveld argues that

most of the commercial print media houses in the country are still dominated by white ownership, and it is this ownership that constructs an ideology that challenges the ANC's commitment to collective rather than individual rights. Steenveld (2012) argues that most South African private media houses place a stronger emphasis on individual rights rather than collective rights. Print and Digital Media South Africa (2013, p.13) reports that "Until this year, the print and digital media ownership scenario of the major players has hardly been dented by transformation. While there has been some dalliance with ownership transformation in the sector, the major players had hardly been touched". This view claims that the ownership and transformation of the press in South Africa is still a challenge.

According to Tomaselli and Dunn (2001), the media plays an intermediary role between the state and citizenry, and provides a platform for public debates while promoting a sense of accountability amongst the ruling elites. However, according to Steenveld (2012), it is hard to point to the role of media in a new South Africa given that much academic debate on media and transformation has focused on structural changes based on race and ownership only, ignoring the role of the media.

The South African print industry is mostly commercial and dominated by four companies: Times Media Group (TMG), Caxton, Media 24 and Independent News (Steenveld, 2012).

There is a conflict between the ANC and the commercial media about what the role of the press should be in a new South Africa, argues Steenveld (2012). The ANC believes that the media should play a supportive role to realise the goals and aspirations of a developmental state, this role is based on collectivism guided by the African notion of *ubuntu* (Wasserman, 2010). On the contrary, according to Steenveld (2012), the private media in South Africa is driven by a neoliberal agenda that places a strong emphasis on individualism, individual rights and market fundamentalism. With this in mind, it can be argued that the South African media is currently fragmented in terms of race and class, yielding a divided public sphere (Duncan, 2012). This weakens national unity and the African philosophy of social cohesion as a normative discourse⁹.

⁹ South Africa has been a fragmented society throughout its history. Apartheid also contributed immensely to this view through policies and laws that promoted segregation.

The South African media, argues Duncan (2012), needs to undergo a massive transformation in order to play the “normative role of enabling democracy”. This, according to Duncan (2012), can be achieved by establishing an “inclusive public sphere”. Duncan argues further that the broadcast media are more transformed than the print media, with the latter being a “haven for independent, critical, investigative reporting, now under attack from the ruling ANC”.

In 2010 the state got its own media voice with the establishment of The New Age, a national newspaper owned by the Gupta Group¹⁰. The Guptas enjoy close ties with President Zuma and give a favourable view on its coverage of the ANC (Daniels, 2010). The New Age practices what is called developmental journalism, a practice of reporting on government policies and programmes designed to create fundamental change in society from an overt capitalist system to that of a more egalitarian society. It can be argued that The New Age is fulfilling the ANC’s ideal role of the press, supporting its developmental agenda. The newspaper is often accused of not being critical of government. [For more, see Wasserman and De Beer (2004), Christians (2004).]

The role of the media in South Africa is not yet clear nor defined. This uncertainty can be seen in the continuous tension between the ANC and the commercial press, as well as in the legal instruments proposed by the ANC such as the POSIB and the Media Appeals Tribunal (MAT). [For more, see Daniels (2010), Wasserman (2011), Duncan (2011) and Friedman (2011).]

1.8 What is ideology?

According to Van Dijk (2000), ideology refers to the system of beliefs held by the group and its members. These beliefs are thoughts, perceptions, values and others, and when grouped together they form an idea that is shared by the collective. According to Torfing (1999), ideology plays an important role in producing hegemony, a concept Eagleton (1991) defines as a practice in which the dominant class imposes its rules on its subjects. Ideology is, therefore, enforced by ideological institutions, such as the social structures that socialise members of the group into the

¹⁰ The Gupta Group is a family-owned company based in India. Family members who live in South Africa are perceived to receive special treatment from certain official sources.

norms and values of society. Such structures include the family, church and school and others. In this way, ideology is reproduced and sustained different societies have different ideologies.

According to Van Dijk (2000) the role of ideology can be understood on both the micro and macro level. At the micro level ideology serves to organise and unite members of the society into a group for joint and collective action. At the macro level that ideology is purposed to legitimise dominance, in this case dominance refers to power and control. Ideology can be used as means to ensure hegemony. Within a Marxist framework, this would describe how the ruling class used its dominance and power against a non-dominant group such as the working class.

Based on Van Dijk's definitions (2000) it can be submitted that ideology, language and power are inseparable. Not all ideas are equal, there are those that are dominant and those that are not. Therefore, to understand power and polarities between different groups in any society, it is important to understand the ideologies that exist and how those ideologies are linked to hegemony.

1.9 Conclusion

Using discourse analysis this study explores the ideological discourse and overviews of positions made on the POSIB by the ANC, the R2K and Sanef. These three organisations represent different environments; the state, the media and civil society.

The ANC states that the POSIB is a proposed state security law aimed at promoting national security by regulating the flow of information through a classification system guided by national security and national interest. This position is a source of conflict between the ANC and the R2K and Sanef. Both Sanef and the R2K argue that the Bill goes beyond national security to impinge on the rights of citizens' to know and journalists' rights to impart information. Both organisations claim this is undemocratic.

In addition, the POSIB threatens journalistic freedom by criminalising investigative journalists, whistle-blowers and others in possession of classified material. Both Sanef and R2K argue that certain sections in the Bill are not constitutional and need to be revised. The organisations

challenge the POSIB on issues such as the definition of national security/national interest, the criminalisation of investigative journalists with punitive jail terms for transgressions of up to 25 years, and the distribution of power to state organs in classifying information.

Chapter 2: Literature Review

2.1 Introduction

This section examines the literature relating to the role of the media and democracy in South Africa by exploring different views amongst various local and international scholars. It is important to note that the Constitution of South Africa is the supreme law of the country and is enforced by the Constitutional Court. Therefore, before looking at the literature, it is important to note certain sections of the Constitution – sections 16¹¹, 32¹² and 36¹³. The first two sections provide grounds for the media to demand its democratic role. Section 16 promotes the freedom of expression¹⁴ while Section 32 promotes access to information¹⁵. Section 36¹⁶ provides limitations to Section 16 and 32.

2.2 Literature related to the media and democracy in South Africa

Media, civil society and democracy are important concepts to this study.

According to Berger (2002), the media refers to a communication system that carries signs or messages to a multi-point destination. Civil society means “the aggregate of institutions whose members engage primarily in a complex of non-state activities – economic and cultural production, voluntary associations and household life – and who in this way preserve and transform their identity by exercising all sorts of pressures or controls upon state institutions”. Berger’s definition of civil society can be linked directly with the identity and role of the R2K in its campaign to challenge the POSIB. Berger (2002) argues that for a civil society to be functional and effective it needs to be strong, independent and not influenced by market interests. According to Berger (2002), commercialisation is a threat to the role of media and democracy in South Africa.

¹¹ See Appendix 3

¹² See Appendix 4

¹³ See Appendix 5

¹⁴ This particularly includes freedom of the press and the freedom to receive or impart information.

¹⁵ This includes any information held by the state, and is ‘enforced’ by the Promotion of Access to Information Act of 2000.

¹⁶ Used by the ANC as a battle ground, this section spells out limitations to the Constitution.

According to Berger (2002), democracy refers to the power of decision-making by the majority, done in a manner that promotes “equal rights of participation”. He writes that there are various attributes which inform democracy, including “informed participants, freedom of expression, right of access to public information, rule of law, checks and balances on power, human rights, and respect for minorities”. As noted in the introduction to this section, freedom of expression and access to information are rights entrenched in the South African Constitution.

Dehghan (2009) defines democracy as the will of the people expressed through representation, consent and participation. The latter is enabled by free, independent media/ press. Democracy is also viewed as market place of ideas, where the media plays a crucial role in providing citizens with accurate political information and platform for active participation in a political discourse (Blidook, 2009).

Berger (2007) contends that freedom of speech is an essential ingredient for democracy and views the practice of censorship as a violation of freedom of expression that impedes the flow of information. Hyden *et al* (2007, p.8) argue that freedom of expression is constantly and continuously tested in Africa: “Presidents, governments, ministers have intervened to seize publication or detain individual reporters responsible for articles that are deemed unduly or unfairly critical of the political establishment”. According to the Freedom of the Press Index (2014)¹⁷, the press in Africa is partly free and in danger. In South Africa this can be seen in the controversy surrounding the POSIB.

The press is an indispensable corner stone of democracy, according to Louw (2008). He adds that without an independent press good governance is hard to achieve. Kasoma (2000) defines press freedom as a lack of state intervention/interference in the work of the media. Kasoma (2000) argues that any laws made in relation to the press should call for maximum openness of state institutions and the removal of all laws restricting the flow of information.

Looking at the role of the press, M’bayo (2000, p.3) notes that “one of the most useful socio-political function of the press is to extend the scope and quality of political discourse”. It is with

¹⁷ Freedom of the Press Index 2014, Report by Reporters without Borders, Retrieved 18 April 2014 From: <https://rsf.org/index2014/en-africa.php>

this concept in mind that Crigler *et al* (1991) argue that political information is a critical source for political debate amongst members of the public in democratic societies. This produces an engaged and active citizenship. For Crigler and colleagues this kind of engagement leads into the notion of the public sphere with active participation by citizens.

According to Friedman (2011) media freedom is an essential ingredient for democracy, Friedman explains that lack of access to information, constrains democracy and robs people of their rights to speak and participate in decision-making processes. Friedman (2011, p. 108) argues that “People cannot exercise their right to say if they do not know what power holders are doing or what instruments are available to hold them to account. So, a crucial determinant of the depth and breadth of democracy is the information about the exercise of power available in any society, and the range of social groups who enjoy access to it”.

The role of the media in a democracy needs to be understood under the gaze of the public sphere, a theoretical tool posited by Habermas (Berger, 2002). Berger (2002,) argues that the private media in South Africa has become a space that serves the commercial/market interest of owners. This can be seen by looking at the content offered by the press. According to Berger (2002), the commercial media try to increase circulation and attract advertising revenue by publishing sensational content, attracting more readers who are then delivered to the advertisers. Wasserman (2010) writes about the “tabloidization” of the media.

Guidry and Sawyer (2003, p.275) note that the concept of a public sphere “describes a space of freely shared political discourse and contest among equals”, while Habermas (1991) states that the concept of a public sphere can be better understood with reference to the traditional realm of politics such as liberal democracy. The defining feature of the public sphere is a space that is free and independent from political and market forces. The notion of a public sphere allows autonomous individuals to exercise rationality and engage in “rational public debates” (Gardiner, 2004, p.28). These defining features of the public sphere are normally associated with the normative/traditional role of the press in liberal democracies. The inherent view attached to the concept of public sphere is that it allows the press to contribute to the democratic discourse by safeguarding freedom of speech, a crucial ingredient for a sustainable democracy.

In many societies the media, according to Duncan (2012), play an important role. However, in liberal societies the media play a crucial role in enabling democracy by making sure that the public is provided with information necessary for debate and to reach an informed opinion. In South Africa, the commercial media are also in a position being able to set the public agenda and shape the public discourse¹⁸. Duncan (2012) views the print media as a space for independent, critical and investigative reporting. This space, according to Duncan (2012), is now under attack by the ANC through the proposed POSIB.

Berger (2012) argues that the policies proposed by the ANC related to regulating the press are potential threats to the role of the media in promoting democracy. After the Polokwane Conference¹⁹ in 2007 the ANC proposed two policy frameworks – the Media Appeals Tribunal (MAT) and the POSIB. The MAT proposed the establishment of a state body to regulate the media²⁰. The South African media is currently governed by a press code overseen by the press council.

The ANC has been particularly unhappy with the press regarding the way it constructs and reflects the image of the party, Duncan argues (2012). The press is often accused by the party of being inaccurate, biased, political and unobjective²¹. It is perhaps on this basis that the ANC saw the need for the MAT²². The tribunal, however, has been seen by civil society as a media court with the potential to undermine the role of media and suppress media freedom. The enabling legislation has been withdrawn from Parliament until further notice.

¹⁸ Before the death of former President Nelson Mandela the media had been focusing on a report by the Public Protector detailing spending of public money on a private residence of the current President, Jacob Zuma. After Mandela's death media attention shifted away from the report and on to his death. The same applied to social media both local and abroad, indicating the power of the media in setting a public agenda and public discourse.

¹⁹ The conference is the highest decision-making structure of the ANC and is held once in every five years. It is during the conference that the ANC decides on the policy issues that will inform the outlook of the country under the leadership of the ANC.

²⁰ The enforcement of the press code is currently overseen by the press council, which, according to the ANC, is weak and ineffective.

²¹ For more information see Daniels, G. 2012. *Fight for Democracy: The African National Congress and the Media in SA*. Johannesburg: Wits University Press

²² A tool aimed at regulating journalism, the MAT is widely criticised by the public for its effect on the Constitution and democracy. Among its critics is Guy Berger, a former professor for Journalism and Media Studies at Rhodes University, South Africa and now a director of Freedom of Expression and Media Development at UNESCO.

In a fight for media freedom, Duncan (2007,) suggests that it is mainly the commercial press that takes on this quest against powerful forces in authority. This is true in South Africa. The fight against the POSIB is led by leading editors, members of Sanef. Sanef has made a number of submissions to Parliament and to the Press Freedom Commission²³, raising concerns about the POSIB, including its vague definitions of what information can be considered classified.

Friedman (2011) suggests that the Bill gives officials wide powers to classify information, while imposing heavy penalties to those who disclose classified information. Friedman argues that the negative impact of the Bill can be avoided by inserting a public interest clause that will allow journalists to disclose information that is classified – using the public interest clause as a defence. In Friedman’s view the Bill, when passed, will affect the poor who lack the resources to challenge the state to make available information regarding government, corruption, budgets and service delivery²⁴. Simply put, Friedman (2011, p.114) argues that “the press and those with means would be able to enforce their rights, while those at grassroots would not”²⁵. The effect of the POSIB will not only affect the poor, as Zaffiro in Tomaselli and Dunn (2001) argues, but “civic groups need freedom of expression and access to information in order to structure and act on political choices”. What this means is that if the Bill becomes law it will be hard for civil society to embark on its mandate to promote democracy and social justice given that the Bill will make it difficult for civic movements to access information that is classified.

According to Jacobs (2011), a strong democracy needs a strong civil society. Jacobs argues that the private-owned press is a good source of democracy and plays an essential role in ensuring the use of public sphere. Jacobs distinguishes between three functional roles of civil society and the media. The role of civil society is to limit the state and its abuse of power; unite various sectors of the society; and enable communication between society and the state. The role of the media is to act as a watchdog. While this role is normally viewed as a political function of the press,

²³ This is a task team set by Sanef and Print Media South Africa (PMSA) to look into issues of self-regulation by the press following a complaint by the ANC about the press, its regulatory framework and the proposal of a need for the MAT.

²⁴ South Africa has recently seen a number of service delivery protests, with the poor demanding basic services such as water, lighting and housing.

²⁵ This could impact on poverty and service delivery.

Jacobs (2011) argues that the press also has a social role to play. This includes nation building, a role achieved by incorporating and reflecting on marginal actors.

In South Africa, there are fears that the proposed Bill signals the return of apartheid, a brutal regime that promoted discrimination, racial inequality and the abuse of human rights²⁶. But, McDonald in Wasserman (2011) challenges this argument and argues that there is no moral equivalence between what happened then and now. Perhaps this is also backed up by the fact that the socio-political context has changed and “moved” from a single party to a multi-party state, from an oppressive to a democratic rule.

According to Wasserman and Jacobs (2012) the South African media is a contested terrain, as indicated by the different positions on the proposed Bill, in particular the conflict between the ANC, the R2K and Sanef. According to Wasserman and Jacobs (2012) the most common source of conflict between the ANC and press has been the normative role of the press, that is, should the press adopt a communitarian approach informed by the spirit of *Ubuntu*? Should the press have a collective interest and contribute to the agenda of development and nation building, or should it adopt a western liberal style and be critical and objective while carrying out its watchdog role fundamental for a democracy?²⁷ These differing issues often lead to the ongoing tension between the ANC and the independent press.

The next section will explore the individual views on the Bill by the ANC, the R2K and Sanef. This section will also examine the ANC’s view of the independent press and the need for the POSIB and the earlier proposed MAT.

2.3 Relationship between media, state and democracy

According to a report by the Media Institute of Southern Africa (MISA) in 2011, the relationship between the press and government in most African countries is often fragile and antagonistic.

²⁶ Human rights include freedom of movement, freedom of association, and freedom of expression. Under apartheid blacks were not allow to express their critical political views, they were sentenced as political prisoners accused of terrorism for challenging the regime, and were denied movement without a necessary permit. Apartheid limited the civil liberties of selected people based on race.

²⁷ However, there is compelling evidence to suggest the ANC does not enjoy being held accountable for some of its less ethical actions - that is a key element of attempts to restrict access to information

MISA argues that journalists in Africa are often harassed, jailed or killed for exposing the ill functions of the government. In turn this affects the state of democracy and promotes a culture of fear amongst journalists, who see their role as reporting objectively about the business of government. Dahl (2000) argues that citizens, including journalists, need to use their freedom of expression to state their views regarding the activities of government. According to Dahl, such a political culture will help promote and strengthen democracy. MISA argues that the POSIB will weaken democracy in South Africa, given there will be a restricted flow of information. In addition, the fear of arrest will limit journalists' right to freely express themselves, newspaper organisations will also be more cautious in order to avoid heavy fines. In support of this view, Bhattacharyya and Hodler (2012) argue that democracy and media freedom are important tools that can be used to combat political corruption. These authors add that the strength of democracy is dependent on the strength of press freedom. Putting the POSIB into such a context, it will be interesting to see if the POSIB will have a detrimental effect on the state of democracy and press freedom in South Africa.

2.4 ANC press policies before and after 1994

Throughout its history the ANC did not have concrete policies regarding the press and the media – until 1994. As argued by Duncan (2011), prior to the introduction of democracy in South Africa, the ANC focussed mainly on social justice; press freedom and other rights associated with the media were not on the top of the agenda. However, there are some of documents that can be considered in examining the historical discourse of the ANC with regard to media policy before democracy. A key document is the *African Claims in South Africa*²⁸, drafted in 1943 in response to the Atlantic Charter of 1941 established by the presidents of Britain and US at that time. This charter was aimed at setting ideal goals for a post-World War II order. The African claims document was drafted by the ANC leaders, reflecting the aspirations of African people. It stated that “in South Africa, Africans have no freedom of movement, no freedom of choice of employment, no right of choice of residence and no right of freedom to purchase land”. (*African Claims in South Africa*, 1943, p.1). This report made it clear the ANC had priorities that were

²⁸ These claims were included in the Constitution adopted by South Africa in 1996. They form the basis of the Bill of Rights.

based on the socio-economic rights of the people. The press did not feature strongly in the ANC policies at the time.

However, in 1955 the ANC based its fight for democracy on the Freedom Charter, a document outlining the aspirations and needs of the people of the country. The charter was adopted in 1955 at Kliptown by the Congress of the People and was attended by South Africans of all races and creeds. The charter stated that “all shall enjoy equal human rights – the law shall guarantee to all their right to speak, to organise, to meet together, to publish ...” However, even though the Congress of the People event was not purely an ANC initiative but it is good to see that the ANC adopted the charter following the conference as a guideline. Again, in this case the ANC does not specifically address the needs of the press but raises subtle undertones on what can be regarded as the normative function of the press.

In 1991, as negotiations for democratic transitions were unfolding, the ANC adopted a Draft Workers Charter. This charter was meant to deal with workers’ rights and made little reference to the media other than to stipulate that “big business and the state must ensure workers effective access to all sections of the media” (Daniels, 1991, pg.56). Later, in 1992, the ANC adopted a Media Charter, a document speaking to the need for the transformation of the print media sector in South Africa. The charter expressed the ANC’s commitment to media freedom and media diversity and noted that “Over the years, the ANC has remained resolute that the media, including print media patterns of ownership, management and content must reflect the democratic dispensation ensuring the freedom of expression of the media, freedom of expression of the citizens as well as ensuring other rights guaranteed to South Africans in the Constitution and Bill of Rights.” (Extracted from ANC discussion document on media policy, 2012, pg.23).

The ANC went on to state that “despite protestations and evident denial, the print media existed for many years as one of the pillars of the apartheid super-structure providing rationale and intellectual support to apartheid practice.” It noted, however, that the progressive media that fought for the democratisation of society was initiated and linked to the mass democratic movement led by the ANC. (Extracted from ANC discussion document on media policy, 2012, pg.23)

Taking into account the statements above, it is clear that the ANC established a position regarding the press and its rights only after it was unbanned in 1990. The media charter is a resolute document that can be regarded as the ANC's position on the press prior to the advent of democracy in 1994. Earlier documents are vague and not specific about the ANC's view of the press. What becomes clear is that the ANC only became serious about issues regarding the press and its liberties in the early 1990s, a few years before the birth of democracy.

After 1994, the ANC adopted a democratic Constitution recognising the freedom of the press. This was tangible evidence of the ANC's commitment to democracy, and in redressing the shortfalls of the previous political regime, which failed to honour this right.

In the period after 1994, the state broadcaster became the focal point, with most media policies adopted by the ANC aimed at transforming the broadcaster from a state to public broadcaster. It is evident that the ANC viewed the broadcast media as the most effective and efficient mechanism for delivering its message to a mass audience. The policies adopted included the Independent Broadcasting Authority Act of 1993²⁹, the Broadcasting Act of 1999³⁰, the Media Development and Diversity Agency Act (MDDA) of 2000³¹, and the Convergence Bill of 2005³², among others. All these legal instruments were mostly aimed at the broadcasting and electronic media, with the exception of the MDDA, which accommodated various mediums.

However in 2007, following the Polokwane National Consultative Conference, the ANC altered its position on the press and proposed a series of policy interventions aimed at redefining the role of the commercial press and its position in the country. The MAT and the POSIB can be considered the official mechanisms of the ANC's press policies from 2008. These are the very policies that have put a question mark over the ANC's view of a democratic press and the state of South Africa's young democracy.

²⁹ Aimed at regulating the broadcasting media in order to promote public interest. For more information see, <http://www.polity.org.za/article/independent-broadcasting-authority-act-no-153-of-1993-1993-01-01>

³⁰ Act aimed at establishing three tiers of broadcasting: public, commercial and community. For more see, <http://www.polity.org.za/article/broadcasting-act-no-4-of-1999-1999-01-01>

³¹ Aimed at promoting diversity with regard to media content, management and ownership of media platforms at grassroots level.

³² Aimed at promoting universal access to ICT and reducing the cost of communication.

2.5 Primary documents relating to the POSIB by the ANC, the R2K and Sanef

This section looks at various positions and statements made on the Bill by the concerned organisations. These positions are extracted from the primary documents of the organisations,³³ as well as from press releases and newspaper articles. These are therefore presented per actor, starting with the ANC.

2.5.1 The ANC's documents relating to the POSIB

Following the 52nd national congress of the ANC in 2007, the organisation produced a document that listed all the conference resolutions adopted by the party, including a number of issues on poverty, development, health and elections, among other topics. At the conference, the ANC made the following observations regarding the press:

- The ANC is faced with a major ideological offensive, largely driven by the opposition and fractions in the mainstream media, whose key objective is the promotion of market fundamentalism, control of the media and the images it creates of a new democratic dispensation in order to retain old apartheid economic and social relations. (ANC Resolutions of the 52nd National Conference, 2007)
- The ANC's commitment to media freedom is well known and entrenched. This principle is reflected in the Constitution Act of 1996. The ANC's commitment to freedom of expression in society, including the media, is located within the context of the Constitution of the Republic. These rights need to be weighed against other constitutional rights, such as the right to human dignity and privacy. (ANC Resolutions of the 52nd National Conference, 2007)
- To vigorously communicate the ANC's outlook and values (developmental state, collective rights, values of caring and community solidarity, *ubuntu*, non-sexism, etc) versus the current mainstream media's ideological outlook (neo-liberalism, a weak and

³³ These are submission made to the National Council of the Provinces (NCOP) and the Press Freedom Commission, an adhoc commission established to conduct public hearings on the Bill. The commission was headed by former and late Chief Justice, Judge Pius Langa. Others include press statements and reports.

passive state, and overemphasis on individual rights, market fundamentalism, etc.). (ANC Resolutions of the 52nd National Conference, 2007)

The excerpts above were drawn from the Consultative Conference 2007 documents detailing the resolutions adopted. These statements reinforce the point made earlier by Wasserman and Jacobs (2012) that the press is contested terrain. The first two excerpts are an indication that there is an ideological rift between the ANC and the press. The third excerpt highlights a conflict between the ANC and the press regarding the normative role of the media. What is apparent from the views gathered is that ideology plays a fundamental role in determining the role of the press. In South Africa, debates around role of the press are characterised by the “battle of ideas” between the ruling party and the press. As indicated by the ANC above, the media ought to assume its social responsibility role and contribute to the government’s beliefs and values in social solidarity, nation building and the like. The excerpt below gives the ANC’s view of the media and possibly indicates why the ANC sees a need for the POSIB and the MAT:

“[The media] has no respect for our people ... It has no time to tell people what really is going on. It ignores government programmes and focuses on scandals and issues that are private. This media, this media, this media ... The media in this country want to insult us. They publish only points of view that they agree with, points of view that paint the ANC in a bad light. I’m angry. Angry because people who sacrificed their lives for this country are being treated with contempt. And I’m not the only angry. The comrades are angry... [I want to] lead the charge to restrict the media in this country. The media needs to be controlled.” (ANC member “Mthunzi” in Rantao, Daily News: 21 August 2007.)³⁴

The arguments raise by Mthunzi allude to the tension that exists between the press and the ruling party. It is undeniable that the ANC sees the press as an enemy rather than a partner. From Mthunzi’s arguments it is clear that the ANC is not looking for a critical press but rather a press that will support the party and its developmental agenda. This is what Berger (2012), Kasoma

³⁴ Taken from Daniels, G. 2010. *The role of the media in a democracy: Unravelling the politics between the Media, the state and the ANC in South Africa*: PhD Thesis submitted to the Faculty of University of Witwatersrand, South Africa.

(1997), Wasserman (2011) and others call *sunshine journalism* – hiding the real facts and compromising democracy.

On the POSIB, the ANC states that the Bill “is a culmination of a rigorous democratic process, which entailed extensive public consultation with a wide range of representatives of our society, public debates and robust engagements amongst political parties in Parliament over the last four years”. (ANC statement issued on ANC Website 2012)

The organisation adds on its statement that all 51 clauses in the Bill “have been thoroughly and carefully examined during at least 65 meetings held by the National Assembly (NA) Ad Hoc Committee of the Protection of State Information Bill, and over 40 committee and public consultation meetings conducted by the NCOP Ad Hoc Committee of the Protection of State Information Bill. This brings the number of meetings held over this Bill to over 100, which makes it probably one of the most consulted Bill since the advent of democracy in 1994”.

It concludes that it is “satisfied that the public and civil society organisations were consulted. It would be more objective for the media and commentators to acknowledge that there is agreement on the Bill except for the inclusion of the of the Public Interest clause. It is therefore mischievous not to highlight this reality”. (ANC statement issued on ANC Website 2012)

On the statement, the ANC concludes: “Thorough consideration and plethora of amendment on this Bill in both Houses of Parliament makes a complete nonsense of the grossly absurd call that it should be scrapped”.

The narrative above makes the position of the ANC on the Bill very clear:

- a. the Bill is a product of a democratic process, due to a high number of public participation processes and involvement in reviewing and amending the bill;
- b. the problem is not with the Bill but the opposing actors involved, the press and civil society, who refuse to accept the changes made to the Bill; and
- c. claims made by movements such as the R2K to scrap the Bill are not necessary given the strong element of public participation over the contents of the Bill.

In all its national conferences post 1994, the ANC has not changed its view regarding the press. The ANC maintains that the press is indeed a contested terrain that wages ideological warfare

against the ruling party. On media transformation and ownership the party puts it this way: “Media and communications are contested terrains and therefore not neutral, but reflect the ideological battles and power relations based on race, class and gender in our society and that some sections of the media continue to adopt an anti-transformation, anti-ANC stance and are not accountable to the general public.” (ANC 53rd National Conference Resolution, 2012)

The ANC recognises that communications play a major role in deepening democracy, “promoting a culture of human rights and as a key pillar in the transformation of our country”, but the party also notes that “freedom of expression, which includes the freedom of press and other media, does not supersede human rights and other rights enshrined in the South African Constitution and the Bill of Rights”. (ANC 53rd National Conference Resolution, 2012)

While it is clear that the ANC is informed about the role of communication in promoting democracy, it seems inconsistent for the ANC to continue to place limitations on freedom of expression. Could this mean that the ANC is placing a limitation clause on freedom of expression to deter any attacks from the untransformed white-owned publishers? Could the very same justification be used to understand the reason why the ANC is refusing to insert a public defence clause in the Bill? Or is the ANC just not ready to be accountable?

2.5.2 The R2K’s documents relating to POSIB

Apart from noting that the Bill promotes fear amongst journalists, the R2K argues the Bill is draconian and threatens freedom of expression and the value of transparency required for a good democracy. The R2K has therefore made a number of submissions regarding its concern about the Bill to the Press Freedom Commission (PFC), the National Council of Provinces (NCOP) and other institutional bodies.

The following are some of the concerns raised by the R2K in their submission to the NCOP in March 2012:

- The Bill burdens all of society with what should be a state problem, namely the keeping of state secrets. Ordinary people should not be criminalised for possessing and disclosing classified information – to do so will edge South Africa

towards a “society of secrets”, where free information exchanges and debate are inhibited by a culture of fear.

- The alternative means of protecting the public and a key demand of civil society, a public interest defence, remains absent from the Bill.
- The Bill’s supposed remedies for public access, such as whistle-blower protection and access to information/declassification procedure, remain seriously defective.
- The State Security Agency remains the beneficiary of unjustifiably heightened protection, not only for its work but its organisational being. This stretches the veil of secrecy beyond what is acceptable in a Constitutional democracy such as ours.
- The Minister and State Security Agency’s role as “guardians” of other state departments’ valuable information remains a problem.
- The Classification Review Panel is not independent enough and not accessible to ordinary people.
- Bad drafting in a number of instances has left the Bill in its current form wide open to abuse.

In short, the R2K voiced the following concerns about the Bill:

- a) it promotes a secret society;
- b) there is no adequate or complete public defence clause;
- c) there is no protection of whistle-blowers;
- d) the bill promotes secrecy;
- e) there is a concentration of power by the Ministry of State Security;
- f) the classification panel is dislocated from the public; and
- g) the way the Bill was drafted makes it ambiguous and subject to abuse.

These are the issues that the R2K regards as fundamental and which need to be addressed but where little or no progress has been made. **Appendix 7** tracks the progress or lack thereof on addressing the concerns of the R2K.

In attempting to address the ANC’s concern about the lack of transformation and diversity in the media the R2K argues that “media freedom and diversity are two sides of the same coin.

Without media freedom the media would become the voice of the government, without a diversity of ownership and economic models (non-commercial and commercial) the media would be the voice of an economic elite”. (Statement by the R2K Campaign on Press Freedom Day, May 2012)

It is important to note the R2K’s view regarding media diversity converges with that of the ANC despite the fact that the two organisations are ideologically opposed. This demonstrates that progress and agreement can be reached on the way forward regarding other key issues. Differences of opinion over the POSIB between the ANC and the R2K are not zero-sum and common views clearly exist and need to be built on in future.

However, the issue of media freedom remains a source of division. For the ANC, media freedom is desirable but needs to be limited and is not more important than competing issues such as strategic interest and national security. For the R2K, limiting media freedom simply means tampering with democracy and hiding corruption by failing to hold the government to account.

In their Secret State of the Nation Address report (2013, p.1), the R2K argues that “secrecy robs us all equally of the opportunity for real social justice. Some secrets might be necessary – the criminal justice system and the state-security cluster do indeed keep secrets that save lives. However, far too much information is withheld from public view by individuals who, with increased frequency, fail to live up to the values enshrined in our Constitution.”

According to the R2K, it is legitimate to have and to keep secrets under certain circumstances, but when too much information is kept secret by the state it denies the public the right to know – a basic human right protected by the Constitution. The R2K is clearly not completely opposed to the Bill but remains concerned over its application and its potential to be abused. In the same vein it is important to note that the R2K has been happy with the achievements of PAIA and the ability of this Act to promote democracy and state accountability. However accountability and access under PAIA have been more difficult in practice than in theory.

“From South Africa’s ‘model’ constitution to our ‘model’ access to information law (PAIA), the state has been subject to a broad swathe of transparency measures to ensure accountability to citizens. However the public’s ‘right to know’, while ensured on paper, is often frustrated in practice prompting the Campaign to talk about the ‘existing state of secrecy’.” (4th R2K

National Summit, March 2014). The R2K Summit also noted that “many activists and civil society organisations battle to hold government accountable, prevent corruption, and access information they require to advance their struggles for social, economic, and environmental justice.”

In the R2K’s view the POSIB requires provisions that allow the public to hold the state to account. The central message of the R2K on the Bill has to do with is accountability, and if the Bill can allow this by inserting a public defense clause much of the contested terrain and ideological competition regarding the Bill could be resolved. The ANC, however, is not ready to entertain such a clause so the POSIB is unlikely to see the light of day anytime soon.

2.5.3 Sanef’s documents relating to the POSIB

Sanef has also made a series of submissions on the proposed legislation, including to the NCOP. Sanef listed its concerns (Extracted from Sanef’s submission to NCOP, February 2012):

- a) **Clause 36** makes it an offense to unlawfully and intentionally communicate, deliver, make available, obtain, collect or capture classified information which a person “**knows or ought reasonably to have known would directly or indirectly benefit a foreign state**”;
- b) **Clause 37** makes it an offence to receive classified information which a person “**knows or ought reasonably to have known would directly or indirectly benefit a foreign state**”;
- c) **Clause 38** makes it an offense to unlawfully and intentionally communicate, deliver, make available, obtain, collect or capture classified information which a person “**knows or ought reasonably to have known would directly or indirectly benefit a non-state actor engaged in hostile activity or prejudice the national security of the Republic**”;
- d) **Clause 40(1)** makes it an offence to intentionally access classified information without authority to do so;
- e) **Clause 43** makes it an offence to unlawfully and intentionally disclose classified information;

- f) **Clause 44** makes it an offence to fail to comply with clause 15, which in turn requires each person to return any classified information in their possession to the South African Police Service; and
- g) **Clause 49** makes it an offence to intentionally disclose, public, retain and neglect to take proper care of information which the person “**knows or reasonably should know**” is a state security matter.

From Sanef’s perspective the Bill undermines constitutional provisions on freedom of expression and the provisions of PAIA.

As a professional body, Sanef highlights the detrimental effects of the Bill on journalists and editors, and urges the ruling party to align the bill to the Constitution. For Sanef, the pressing issue regarding the Bill is the criminalisation of journalists and whistle-blowers who can be arrested for possessing classified information. The forum argues that the Bill makes it illegal for its associates to have and disseminate classified information regardless of public interest.

In trying to resolve this Sanef, like the R2K, urged the NCOP to insert a public defence clause. Their request seems to have fallen on deaf ears, with Sanef responding in a press release issued in November 2013: “MPs tasked with reviewing the unconstitutional clauses failed to reconsider all problematic provisions, opting instead to correct punctuation errors. We believe Parliament missed an opportunity to introduce a public interest defence clause and to amend some of the provisions that will effectively criminalise transparency in governance affairs.”

Sanef and the R2K share similar views on the legislation’s shortcomings and recommend similar remedies, specifically the need to insert a public interest clause. This unity of purpose helps build pressure on the ruling party.

The overall view of Sanef of the POSIB is that the Bill is bad for democracy as it undermines the fundamental rights enshrined in the Constitution. For Sanef the Bill has severe implications for journalism in that it can be used to hinder a journalist’s right to gather and disseminate information. There are also negative consequences for whistle-blowers.

In a press statement issued by Sanef in September 2011, it noted “[the bill’s] lack of any public interest defence, draconian sentencing regime, broadness of application, and excessive shielding

from scrutiny of the intelligence services are of grave concern”. It is interesting to see that Sanef’s approach to the Bill is informed by concerns for journalists and editors, perhaps suggesting only journalists will suffer harm. Sanef has said it will continue “to oppose the enactment of the Bill and will take legal action, if necessary, to ensure that it ultimately complies with constitutional principles of free speech and open democracy” (Sanef press release, September 2011).

2.6 Conclusion

From the literature and documents reviewed so far it is clear that the free flow of information is crucial for the survival of democracy. Duncan (2009), Berger (2012), Wasserman (2011) and others have made it clear that for any democracy to thrive and develop, a vibrant, independent press is a prerequisite and that any threat to this role is a threat to democracy.

South Africa can attest to this with its experience of apartheid, a regime that constricted the role of a free and independent press through the use of punitive laws. Sanef, the R2K and the ANC agree that the need and importance of freedom of expression is crucial for the survival of democracy.

Chapter 3: Theoretical framework

3.1 Introduction

This study cannot be understood outside of theoretical frameworks and normative postulations that retain relevance over time. In 1956 Siebert, Schramm and Peterson on their work on the theories of the press contextualised how the press operated under different political situations. They put together four theories that could explain the role and function of the press under different circumstances. These four theories are: authoritarian, libertarian, social responsibility and soviet communist.

The authoritarian theory postulates a closed society where rights, freedom and democracy do not exist. According to this theory the press in closed societies serve as a mouthpiece of the state and promote propaganda and the deception of the public. In apartheid South Africa the national broadcaster, the South African Broadcasting Corporation, was used to promote and protect the concept of apartheid and its implementation. The authoritarian theory is usually equated with the Propaganda Model (PM) advanced by Herman and Chomsky as they argue that, “in countries where the levers of power are in the hands of a state bureaucracy, the monopolistic control over the media, often supplemented by official censorship, makes it clear that the media serve the ends of a dominant elite (Herman and Chomsky, 1988,p.1)

The libertarian theory is also referred to as the democratic theory. This theory argues that the press in an open society plays a crucial role in promoting democracy by facilitating freedom of speech and by acting as a watchdog making government account for its actions.

The social responsibility theory is closely aligned to the ANC position on the role of the press. This theory supposes that the press ought to play an active role in nation building and supporting the agenda of the state. In this case the press is seen as a social partner to the state. Thus there is no room for critical dissent. The press supports the developmental agenda of the state and sees itself as a campaigner of a good story to tell.

The soviet communist theory explains that the ownership and management of the press need to be removed from the hands of the state and markets and that the role of the press is to uphold and

reflect the interests of the working class; focus needs to be on issues such as education, motivation and mass mobilisation (Siebert *et al*, 1956).

In the authoritarian, social responsibility and soviet communist theories the press is regulated via statutes, regulations, patents, licenses and other legislative controls. This creates a restricted public sphere, with a censored media. It is only in a libertarian society that the press enjoys largely unregulated freedom of expression.

This study uses two theories of democracy in examining the POSIB: participatory or radical.

3.2 Theoretical approaches to democracy, viz participatory and radical

Because the concept of democracy is important in the political discourse of the continent, it needs to be understood.

The concept of democracy has had a strong impact on the politics and development of Africa, driven by a neoliberal agenda in the post-colonial era. In South Africa, the history of the country was driven by the fight for democracy and human rights against apartheid, a racial oligarchy.

Ober (2007) defines democracy as the power of the people; the will of the majority is reflected in the outcome of a national vote. What is important to note from this definition is that democracy is people-centred and concerned with the voices of ordinary people regardless of class, race, gender or ethnicity. There are two types of democracy, direct or representative. The former refers to the direct involvement of citizens in decision-making. This is often associated with the concept of the public sphere (Habermas, 1991). According to Guidry and Sawyer (2003, p.275), the concept of public sphere “describes a space of freely shared political discourse and contest among equals”. The key defining features of the public sphere is that it is space that is free and independent from political and market forces. This study argues that the notion of public sphere allows autonomous individuals to engage in “rational public debates” (Gardiner, 2004, p.28). These features are usually associated with the traditional role of the press in liberal democracies, where citizens freely participate on public platforms and express their views on an equal basis. Representative democracy refers to indirect democracy where citizens make use of representatives to promote their collective interests; this type of democracy makes use of elected

officials and organisations. South Africa is a representative democracy, where various political parties represent different interests that address the needs of its constituency

Participatory democracy, Aragonés and Sánchez-Pages (2004, pg.1) theorise, is “a process of collective decision-making that combines elements from both direct and representative democracy. Citizens have the ultimate power to decide on policy and politicians assume the role of policy implementation”. Central to this approach is that in participatory democracy decision making is driven by a collective effort. Aragonés and Sánchez-Pages (2004) argue that citizens use elections to monitor the behaviour of officials thus forcing politicians to make sure that the needs of the citizens are met. It is important to note that participatory democracy is dependent on active citizenship and thrives on majority rule to make decisions. An informed citizenry is critical in making participatory democracy to work effectively, and the free flow of information is vital to the creation of an informed citizenry. When citizens are informed they will be able to deliberate on key issues that are of public interest. Aragonés and Sánchez-Pages (2004, p.7) divide participatory democracy into three stages:

- “In the first stage, each citizen decides whether to attend or not to attend a meeting in which a policy proposal will be decided.
- “In the second stage, citizens that attend the meeting come out with a policy representing their interests and their delegates make a proposal to the legislator aiming to induce the legislator to implement the assembly’s choice.
- “In the third stage, the legislator decides the policy to be implemented.”

The foundations of radical democracy can be traced to the work of Laclau and Mouffe (1985) in their work *Hegemony and Socialist Strategy*. This work, from a post-Marxist framework, argues that societies are structurally arranged between the ruling and working class, making political identities divergent and antagonistic (Laclau and Mouffe, 1985). This position views capitalist societies as fragmented, where issues of class struggle between the dominant and dominated class are common. Laclau and Mouffe (1985) argue that the “dominant trend (in capitalist societies) is the fragmentation among diverse categories of workers, between the different demands of various movements, between economic struggle and political struggle”.

The radical approach also attempts to critique liberal democracy.³⁵ Daniels (2010, p.32) writes that “one way to understand radical democracy is in a theoretically post-Marxist, post-structuralism perspective which at the same time aims to challenge liberal democracy’s lack of inclusion of all sectors of civil society. It aims for a deeper and more expansive democracy than what is currently on the table in the western world”. Radical democracy is inspired by socialism and the critique of capitalist economies, taking into account the voices of marginal actors such as the working class, women or social movements that are normally excluded in a traditional public sphere. According to Daniels (2010), civil societies are important organisations in radical democracy and useful in contesting unprogressive hegemonies.

Berger (2002, pg.25) defines civil society as “an aggregate of institutions whose members are engaged primarily in a complex of non-state activities – economic and cultural production, voluntary associations and household life – and who in this way preserve and transform their identity by exercising all sorts of pressures or controls upon state institutions”. Berger makes it clear that the role of civil society is to use pressure to challenge and oppose the state. In South Africa is a case in point; many civil societies have come to the fore to challenge the state and enforce the Constitution. One such civil organisation is the treatment Action Campaign (TAC), which uses many and varied tactics – mobilisation, lobbying and litigation – to challenge political decisions and service delivery. The TAC has challenged the state over the availability and distribution of anti-retroviral drugs to people living with HIV/Aids on the basis of the right to life, as enshrined in the Constitution. This highlights the view that civil organisations are very important in promoting and upholding issues that are in the public interest. Two other groups who take action in the public interest are the R2K and Sanef, in their actions against the POSIB.

As has become clear through this discussion, this study also looks at national and public interest. It is important to explore the difference between the two concepts. King, Chilton, and Roberts (2009, p. 957) define the public interest as a “type of commonality or common characteristics between and amongst citizens”, while Pham (2008) defines national interest as a realist principle that defines the agenda of the state. National interest is primarily concerned with the

³⁵ Liberal democracy is closely linked with Habermas’ concept of the public sphere, which Keller argues is elitist and excludes ordinary people (Keller, 2013).

accumulation of power and control. Based on these definitions, it is clear that civil organisations are advocates for the public interest while the ANC supports the national interest.

The strength of the radical democracy framework, according to Daniels (2010), is that it acknowledges ‘differences’. This includes the divergent voices of marginal actors whose voices are ignored if not rejected in the traditional public sphere.

Radical democracy is critical of class relations in capitalist societies and allows for an understanding of issues such as class struggle, materialism, hegemony and ideological conflict. Radical democracy allows for the voice of the marginal, is critical of the existing *status quo* that is driven by capitalistic and neo-liberal interests.

With these definitions in mind, the role of the media in a radical democracy, according to Daniels (2010), is to offer a pluralistic space where divergent views are expressed and deliberations and contestations can take place.

3.3 Historical analysis of the role of the ANC and democracy

South Africa has had a tumultuous history, with a protracted struggle against apartheid³⁶ which finally led to the establishment of a democratic country. South Africa’s democracy was the result of a negotiated settlement between the apartheid government and several liberation movements, including the ANC.

Maharaj (2008, p. 7) succinctly explains the history of apartheid South Africa: “... subordination was achieved and defined by laws which denied blacks the right to vote and to participate in the governance of the country, and limited their rights to own land and to engage in economic activity. Successive apartheid governments enacted and enforced a rigorous race-based set of laws which ensured that social, economic and political power remained a monopoly of the white population. The black population – African, Indian and Coloured – were physically separated by law, and accorded differentiated treatment. Apartheid’s policies towards the black majority were a classic case of ‘divide and rule’, which sought to pit one black group against another and foment a sense of rivalry and division among them. At the same time, every aspect of black life

³⁶ Apartheid was a racial oligarchy cementing white minority rule, maintaining white supremacy and hegemony through suppressing the black majority, which included indigenous Africans, Coloureds and Indians.

was predicated on the need to preserve and perpetuate white power. It was a world where the colour of your skin determined everything that would happen to you, where life's opportunities were defined at the moment of your birth if you were black, Indian or Coloured.”

The establishment of the ANC was in response to this oppression and the demand for equality. In carrying out this mandate, the ANC and its leaders defied apartheid laws such as the pass laws, which made it mandatory for Africans to carry an identity permit that restricted their freedom of movement, and the Separate Amenities Act, which made it illegal for black people to use facilities specifically demarcated for whites.

When the non-violent struggle proved fruitless, the ANC and organisations began to engage in a violent struggle against the regime. ANC leaders, including Nelson Mandela, Govan Mbeki, Oliver Tambo and Walter Sisulu, were hounded, harassed and jailed. Internal uprisings and an external armed struggle, coupled with economic sanctions and a crumbling economy, eventually forced the apartheid regime to release its political opponents, unban political organisations, allowing the return of exiles, and to negotiate a political settlement.

While the ANC played a crucial, perhaps central, role in the fight for democracy and the liberation of the oppressed, it did not act alone. Other opposition organisations included the Pan Africanist Congress (PAC), the United Democratic Front (UDF), and the Azanian People's Organisation (Azapo).

South Africa held its first democratic elections in 1994 and has held national elections every five years since then. In this way the country has built and consolidated its democracy.

3.4.1 The ANC and its discourse on the media before democracy

As indicated in the literature review, apartheid was policy was based on social injustice, inequality and white supremacy. To maintain the *status quo* the ruling National Party (NP) use draconian laws to stifle dissent. As a result many independent and critical newspapers and activists were banned. During the apartheid years, Daniels (2010, p.51) notes, the struggle for the freedom of the press (from state control) was a continuous one. Once the country entered a democratic era, press freedom became a fundamental aspect of society as encapsulated in the 1996 Constitution.

Before democracy, press freedom was a serious issue in South Africa, and hence was considered one of the priorities in the first democratic Constitution of the country. Tomaselli, in Daniels (2010), argues that before democracy the issue of media freedom was like a “second cousin” to the ANC. The party had other pressing social issues, such as health, education and land, which it needed to deal with. However, before 1994, the ANC did make some attempts to address issues involving the media even though it was not a priority³⁷. The Freedom Charter, the draft Workers’ Charter and the Media Charter were tools used by the ANC in an attempt to address freedom of the press. The ANC made both direct and indirect reference on the role of press and democracy through these charters. However, the Media Charter, according to Duncan, in Daniels (2010), was idealistic and philosophical, and lacked tentacles. The organisation failed to specify how it was going to reach its objectives.

The ANC had concerns with the media, mainly around issues of ownership, class, management and access to the media. These concerns were framed by Critical Political and Economy (CPE).

The POSIB and the proposed MAT came after democracy. The tribunal and Bill can be seen as ways that the ANC tried to address shortfalls in the Media Charter, according to Duncan (Daniels, 2010). It can be argued that prior to democracy the ANC did not have a solid policy on the media.

3.4 Theory of ideology

Van Dijk (2003) defines ideology as social representations of a group. It is the fundamental value belief system of a group and its members. Ideologies, according to Van Dijk (2003) are shaped by language/discourse and enforced by institutions. The latter may be understood as social structures that inform and socialise individuals into the norms and values of the society. Examples may include church, family, school, government bodies or the security forces. According to Van Dijk (2003), there are two functions of ideology, firstly it joins people for a collective action and secondly it legitimises dominance, control, and objectives. Apartheid itself was an ideology: it constituted the fundamental beliefs held by many whites that blacks were not equals and did not need to be treated equally. Apartheid laws were scripted to legitimise the regime and its ideology. Government, schools, police force, the defence force, and the state

³⁷ Apart from the ownership of the SABC.

media were institutions that helped to enforce the ideology of the apartheid regime. Ideology, Van Dijk (2003) argues, provides the basis by which the abuse of power is justified, legitimised, condoned and accepted.

There are three types of ideology: positive ideology, negative ideology and dominant ideology (Van Dijk, 2003). The liberation movements' struggle against apartheid can be viewed as positive ideology in action. It can be argued that apartheid was an example of negative ideology. Dominant ideology can be seen as the most widely spread and includes the promotion of human, animal and environmental rights.

3.5 Conclusion

The demise of apartheid led to the rise of democracy. In safe-guarding the new-found democracy, South Africa adopted a liberal Constitution allowing radical and participatory democracy to take place. However, while the Constitution enshrines a comprehensive list of rights, the role of active citizens and civil organisations is imperative to ensure that the constitutional protections are enforced.

The proclamation of the POSIB has tested the foundations of democracy in South Africa, challenging the ideals of liberal democracy and setting up a contested terrain between public and national interest.

Chapter 4: Methodology

4.1 Introduction

This study uses triangulation, including qualitative research, in its overall research design. Semi-structured interviews³⁸ are used to gather the information, while Critical Discourse Analysis (CDA) is used to analyse the data, including the interviews, policy documents, reports and press releases about the POSIB.

Bryman (2008) writes that qualitative research is a tradition richly rooted in text and institutions, while Gray (2009, p.164) defines qualitative research as a “naturalistic approach that seeks to understand phenomena within their own context specific setting”.

4.2 Triangulation

According to Flick (2009), triangulation refers to the use of different methods in studying the same subject. In Flick’s view triangulation plays a role in validating data, findings and analysis. Flick distinguishes between four types of triangulation:

- data triangulation, which refers to the use of different data sources to accumulate research information;
- investigator triangulation, referring to the use of different observers and interviewers to eradicate traces of bias;
- methodological triangulation, which uses different methods to collect data; and
- theoretical triangulation that looks at the use of different theoretical perspectives to validate data.

This study combines data, methodological and theoretical triangulation.

³⁸ This includes three interviews with representatives from the R2K, and two interviews with representatives of Sanef.

There are advantages and disadvantages associated with the use of triangulation. According to Flick (2009), triangulation can help increase confidence in the research data, and provide innovative ways of understanding the problem and validating the findings. On the otherhand, Thurmond (2001) and Guion *et al* (2011) argues that triangulation is time consuming and can sometimes allow disharmony and conflict between theoretical frameworks. Flick (2009), notes that triangulation can sometimes make it difficult to deal with a vast amount of data. Thurmond (2001) and Guion *et al* (2011), in their studies on triangulation, confirm that the use of mixed methods enhance the “completeness” and “confirmation” of findings while increasing confidence in the results.

Thurmond (2001, p.253) notes that the primary purpose of triangulation is to “decrease, negate, or counterbalance the deficiency of a single strategy, thereby increasing the ability to interpret the findings”. It is clear that triangulation performs a crucial task in validating the findings. It can be argued that triangulation enhances the reliability of the study given the cross-verification system employed by the method. According to Bryman (2007) the concept of triangulation has been equated to the concepts of multi-methods, multi-strategy, mixed methods or mixed methodology.

4.3 Qualitative research

The methodology used in this study is that of qualitative research. Holloway and Wheeler (2010) define methodology as a set of principles and ideas that guides the procedure and strategies of the research method.

Holloway and Wheeler (2010) use qualitative research to study behaviour and perspectives within a defined social context. They define qualitative research as a form of social inquiry that looks at the manner in which people interpret and make sense of the world (Holloway and Wheeler, 2010). Silverman (2006) points out that qualitative research seeks to provide a deeper understanding of social phenomena and seeks to address questions such as what, who, where, when. According to Gray (2009), qualitative research draws its data from observations, interviews, questionnaires and document analysis.

However, qualitative research does not adequately address why a phenomena occurs. Qualitative research has been subject to criticism by advocates of quantitative research. According to

Walliman (2001), qualitative research has been disregarded for its lack of a scientific approach to research. It has been censured for being limited, subjective and unreliable. Gray (2009, p.165) states that:

- Quantitative research can involve little or no contact with people or field setting.
- [The] statistical correlations ... [used].... may be based on ‘variables’ that are arbitrarily defined by researchers themselves.
- [And that] the pursuit of ‘measurable’ phenomena mean that difficult concepts such as ‘criminality’ or ‘intelligence’ are deemed measurable to an accurate degree.

No research model is perfect but the use of any model should be justified within its value and contribution to the research. Srivastava and Thomson (2009) suggest that the qualitative research model is the most useful method in studying discourse.

Qualitative research allows researchers to draw rich and in-depth information directly from participants and allows researchers to study the subject within a natural setting. They can observe, question and listen to their subjects.

Srivastava and Thomson (2009) have identified six principles of qualitative research: primacy of data; contextualisation; immersion in the setting; the ‘emic’ perspective; thick description; and the research relationship. Each principle contributes differently to the nature and outlook of qualitative research. What these principles mean is that qualitative research allows researchers to draw rich and in-depth information directly from participants, and allows researchers to study the subject within a natural setting. In doing so, researchers can observe, question and listen to the subject. Given the immersion principle, qualitative research then provides researchers with insights from the perspective of the participant and allows researchers a non-judgemental stance towards the participants.

Qualitative research provides researchers with insights from the perspective of the participant and allows researchers a non-judgemental stance towards the participants. However, the model also uses non-textual data such as tables, pictures, audio and video recording (Srivastava and Thomson, 2006).

As it has been indicated, qualitative research is usually preferred in studying discourse-related subjects, so it follows that qualitative research seems to offer the most useful avenue for this study to explore the ideological discourse of the POSIB.

There are two sets of paradigms associated with qualitative research: the positivist approach and interpretivist approach. They often conflict. The positivist approach emphasises the use of natural science and universal laws in studying the subject matter, while the interpretivist focuses on the use of philosophy, perhaps more suited to a study such as this.

4.4 Interviews

Interviews are important to the qualitative research approach. Stokes (2003) defines an interview as a primary source of data or as tools for background information (secondary usage).

According to Bryman (2008) an interview is the most deployed tool in qualitative research. Documents, statements and press releases are used as the primary sources of information for this study. Interviews, in this study, are used as tools for additional information from the organisations involved in the debates over the POSIB.

Qualitative interviews, according to Whiting (2008, p.35), are a “method of data collection in which one person (an interviewer) asks questions to another person (a respondent), [and that] interviews are conducted either face-to-face or by telephone”. With the emergence of new media technologies interviews can also be done electronically via electronic mail (email), video calls and other forms of digital communication. No matter the method of data collection, Whiting (2008) makes it clear that interviews are an interpersonal activity and therefore open to subjectivity given the exposure of the interviewer to the subject and context. Because of this, Whiting offers some guidelines on conducting interviews:

1. The identification of a good informant is critical. It involves the process of finding an informant who is willing to talk, demonstrates a depth of knowledge on the subject, and who can provide detailed information on the research topic.
2. Preparation must be done ahead of the interview so that the researcher can pose clear, open-ended questions that guide the flow of information.

3. The last step involves transcribing verbal interviews from audio to text. The transcription process involves sending the transcript back to the informant for verification, although this part of the process is considered optional (Whiting, 2008).

This study follows the guidance of Whiting, but, given the distances involved, all interviews for this study were done electronically through email.

Bryman (2008, p. 699 &700) distinguishes between structured, unstructured and semi-structured interviews and defines a structured interview as “a research interview in which all respondents are asked exactly the same questions in the same order”. A semi-structured interview refers to a “context in which the interviewer has a series of questions that are in a general form”. Unstructured interviews are informal and rely on open ended questions raised by a general theme.

This study uses semi-structured interviews with activists from the R2K and Sanef.³⁹ The interview participants were chosen based on their interest in the project and on their availability to answer questions. They were asked questions via email. (These questions can be viewed in Appendix 1 and 2.) These were followed by several phone calls and additional emails. Representatives of the ANC declined to participate in the study.

Interviews, according to Turner (2010, p.745), are a good source of data as they “provide in-depth information on participants experiences and views on the particular research topic”. In Turner’s view, interview questions need to be open-ended and must be neutral and clear. The interview questions attached in Appendix 1 and 2 are framed along these guiding principles.

4.5 Critical discourse analysis

According to Fairclough (2003) Critical Discourse Analysis (CDA) is used to analyse text and the spoken word. In this case CDA was used to explore the discourse and ideology surrounding the POSIB. The use of CDA will help unravel the ideological meaning surrounding the Bill and map out the links between the press, politics, power and ideology.

According to Van Dijk (1995) CDA is the study of text and talk (as defined by Fairclough). It emerged from critical linguistic and critical semiotics. In Van Dijk’s view (1995), CDA is socio-

³⁹ This study features five interviews, three from the R2K and two from Sanef.

politically conscious and uses an oppositional discourse to investigate media text and language. CDA is also problem-orientated and studies social problems and other forms of social inequalities (Van Dijk, 1995). According to Bhatia (2006), CDA is a critical tool of analysis that helps in revealing ideologies behind media text, claims, denials and assertions. In Bhatia's view, the text is embedded within a socio-cultural context and thus CDA cannot take place without looking at the context in which the text is based. CDA reveals hidden ideologies by addressing the questions of who? say what? why? how? It also reveals the implications/"underlying intensions" of the text under investigation (Bhatia, 2006, p.177). Van Dijk (1993) in Bhatia (2006, p.178) argues that CDA examines the way in which powerful gatekeepers in society influence social beliefs and values and shape ideologies through the standards they set for what is and not acceptable, therefore revealing the power asymmetry in discourse.

According to Bulcaen and Blommaert (2012) CDA refers to studies in linguistics concerned with relations between language and thought, language and society.

But Sheyholislami (1999) defines CDA as a field of study that is concerned with studying and analysing both the written and spoken word in order to reveal discursive sources of power, dominance, inequality and bias. According to Sheyholislami (1999), the general assumption of CDA is that people choose their grammar and vocabulary carefully and that their choice/selection of diction are both consciously and unconsciously "principled and systematic" and underpins a certain ideology. Sheyholislami (1999,) defines ideology as "abstract mental systems" that organises the shared values of the society embedded on the mental schemes of members of the society. The understanding of ideology by this study is informed by Marxism and his critique of German ideology (Hodge, 2012).

The account given by Sheyholislami and others indicates that there is an underlying relationship that exists between text and ideology. According to Bayram (2010) texts are forms of content structure that reflect the ideological orientation of the society. Bayram views language as an arena in which power is applied. By power Bayram means the ability of exerting compliance in others, even if it is against their will. In this case the role of a CDA scholar is to acquire more insight into the role of discourse in producing dominance and inequality (Van Dijk, 1993). According to Van Dijk (1993), there are three things that CDA seeks to address – the abuse of

power, injustice and inequality. CDA is primarily targeted at the elites who enact, sustain, legitimate and condone class struggles in the society (Van Dijk, 1993).

The discussion by Van Dijk, Bhatia and others suggests CDA is a critical tool used to demystify ideology and power relations through language. It examines texts and reveals underlying meaning and ideologies. For this reason, CDA is a suitable method to analyse the POSIB and the positions of the three parties identified for this study.

According to Wodak and Busch, in Downing *et al* (2004), discourse is a linguistic use of language by the dominant group to maintain its *status quo*. Van Dijk (1997), argues that political power is maintained by converting ideology into rules, law, norms and habits.

Discourse can be used to assert power, knowledge, resistance and critique (Bayram, 2010). Fairclough in Bulcaen (2012) argues that there are three dimensional frameworks used to analyse discourse:

- the first dimension is discourse-as-text. This dimension looks at the linguistic features and the organisation of the discourse by paying attention to diction, grammar, cohesion and the structure of the text;
- the second dimension is discourse-as-discursive practise. This looks at discourse as a phenomena that is produced, circulated, distributed and consumed by the society. This dimension pays attention to speech, acts, coherence and intertextuality; and
- the third dimension is discourse-as-social practice, which looks the ideological effect of discourse and traces of hegemony.

These frameworks are crucial and relevant to this study. For they provide a concise view that one can use to understand discourse with and in multiple ways. As labelled that a discourse on its own can be seen as text whether written or spoken, and also that it is produced through various social acts and linked to various elements of social power. Such knowledge is very useful and helpful to this study.

4.6 Conclusion

The use of CDA allows for the exposure of the underlying meaning and ideologies within the communications of the ANC, the R2K and Sanef. Interviews, documents, statements and press releases are used in order to examine the relevant discourse and positions of these organisations. This approach will allow for an examination of the power relations of the three organisations, including exposing any abuse of power, injustice or inequality.

Chapter 5: Findings and analysis

5.1 Introduction

This section interprets findings by examining the data collected from primary source documents and interviews from the two organisations involved in challenging the POSIB. This chapter addresses the fundamental question of this study: do ideological interests guide the POSIB discourse of the ANC, the R2K and Sanef? Ultimately the intention of this analysis is to address the following questions:

- a. Is the POSIB serving any particular ideological interest?
- b. Is there a need for the Bill? If there is, on what grounds?
- c. Is there a way forward, or is compromise possible between the different organisations?

The methodological and theoretical framework of CDA is used to analyse the ideological discourse of the POSIB. The concept of discourse was thoroughly discussed in Chapter 3. This chapter sees its application. Two of many theories of democracy were explored in Chapter 3 – participatory and radical. This study tests both theories on the data.

Data has been collected from each of the organisations via documents, including policies, statements and press releases, and interviews. The focus of the data has been what each organisation has had to say about the POSIB.

Interviews were conducted with members of the R2K and Sanef. However, the ANC did not participate in the interviews.⁴⁰ The organisation referred all enquiries about the Bill to previous press statements issued by the ANC. These were posted onto their various websites.

This study uses a theoretical, and sometimes empirical framework, where key concepts include the radical public sphere, active citizenship, interest, discourse, ideology, media and democracy.

⁴⁰ September 2013 this researcher made a call to the ANC officially requesting an interview. This request was refused and instead this researcher was referred by ANC national spokesperson Jackson Mthembu to search for the answers on parliament's website.

5.2 Findings on the POSIB

The latest revised Bill, of January 2014, is a 28-page typed document in English (see Appendix 6).⁴¹ Its overall objective (POSIB, 2010, pg.5) is said “to provide for the protection of sensitive state information; to provide for a system of classification, reclassification and declassification of state information; to provide for the protection of certain valuable state information against alteration, destruction or loss or unlawful disclosure; to regulate the manner in which state information may be protected; to repeal the Protection of Information Act, 1982 (Act No. 84 of 1982); and to provide for matters connected therewith”. In its introduction (Extracted from POSIB, 2010, pg.5) the Bill makes the following acknowledgements:

- RECOGNISING that national security is subject to the authority of Parliament and the national executive, as contemplated in section 198 of the Constitution;
- MINDFUL of the right of access to any information held by the State provided for in section 32 of the Constitution;
- ACCEPTING that the right of access to information is a cornerstone of our democracy;
- ACKNOWLEDGING in accordance with section 36 of the Constitution that the right of access to any information held by the state may be restricted when necessary for reasons of national security;
- RECOGNISING the harm caused by excessive secrecy;
- DESIRING to put the protection of state information within a transparent and sustainable legislative framework; and
- AIMING to promote the free flow of information within an open and democratic society without compromising the national security of the Republic.

The POSIB was first introduced in Parliament in 2008 by the Ministry of State Security. The Bill was then re-introduced in 2010 to Parliament. The National Assembly passed the Bill in November 2011. A year later, the Bill was passed, with amendments, by the National Council of Provinces (NCOP). However, in September 2013, President Jacob Zuma refused to sign the Bill into law and sent it back to Parliament for further amendments. Once again, in November 2013,

⁴¹ The Bill has 13 chapters, explained in detail in Appendix 6.

the amended Bill was submitted to and approved by Parliament (with 225 MPs in favour of the Bill and 88 MPs opposed to the Bill). As of August 2014, the Bill is still awaiting the President's signature before becoming law.

5.3 Response to the Bill by civil society: the R2K

In its founding statement, the R2K (2010, p. 1) notes that “a responsive and accountable democracy is one that can meet the basic needs of people and is built on transparency and the free flow of information. The hard won democratic gains of South Africa's struggle for freedom are deemed to be threatened by the Protection of State Information Bill (the POSIB, also known as the Secrecy Bill) currently before Parliament. While accepting the need to replace apartheid-era secrecy legislation, this Bill extends the veil of secrecy in a manner reminiscent of that apartheid past. This Bill fundamentally undermines the struggle for whistleblower protection and access to information. It is one of a number of proposed measures that could have the combined effect of undermining the right of access to information and the freedom of expression enshrined in the Constitution.” This excerpt shows the position of the R2K in rejecting the POSIB; the organisation believes that the Bill has a potential to impact negatively on South Africa's democracy and that it undermines the country's Constitution.

The civil society body position on the POSIB is that it should be rewritten or discarded completely. In an article published by Mail & Guardian online⁴², the R2K argued that “the Protection of State Information Bill remains an imminent threat to freedom and transparency, and should be scrapped and redrafted ... and the Bill will institutionalise corruption and punish whistleblowers, ordinary citizens, and journalists who expose state secrets exposing government wrongdoing”.

As noted in Chapter 2, the drafters of the POSIB argue that the Bill takes account and understands the values of freedom of speech, human rights, democracy and transparency. However, the R2K claims the state is obsessed with secrets and attempts to promote national security could increase the proliferation of corruption (Segodi, 2014).

⁴² Mail & Guardian, 2012). *Right 2 Know calls to scrap secrecy Bill*. Source: <http://mg.co.za/article/2011-09-01-right-2-know-calls-to-scrap-secrecy-bill> 01 September 2011. Accessed: 06 December 2012

The drafting of the Bill coincided with several investigations conducted by the Public Protector (PP)⁴³ into corruption and the misuse of public funds by state and government officials. On such example is the recent investigation into the excess spending of public funds to upgrade the president's private residential house in Nkandla, KwaZulu-Natal.⁴⁴ It can be argued that the R2K has solid grounds for being concerned over the potential harm the Bill could instigate in preventing such information in reaching the public. It can be said the R2K is being reasonable in its demand to have the Bill be redrafted or withdrawn.

In its submission to the NCOP⁴⁵, the R2K (extracted from R2K submission to the NCOP, 2012) raised the following concerns:

- The Bill burdens all of society with what should be a state problem, namely the keeping of state secrets. Ordinary people should not be criminalised for possessing and disclosing classified information – to do so will edge South Africa towards a “society of secrets” where free information exchanges and debate are inhibited by a culture of fear.
- The alternative means of protecting the public and a key demand of civil society – a clause in the Bill that allows a public interest defence, remains absent.
- The Bill's supposed remedies for public access, such as whistleblower protection and access to information and declassification procedures, remain defective.
- The State Security Agency remains the beneficiary of unjustifiably heightened protection, not only for its work but its organisational being. This stretches the veil of secrecy beyond what is acceptable in South Africa's constitutional democracy.
- The Minister and State Security Agency's role as “guardians” of the “valuable information” of other state structures is a problem.

⁴³ The Public Protector is a Chapter 9 Institution, like the South African Human Rights Commission (SAHRC) and the Independent Electoral Commission (IEC). These organisations have been established in terms of Chapter 9 of the Constitution and their mandate and purpose is to protect and promote the Constitution, and safe guards its values. The PP does this by investigating public complains about the conduct and services of the government. The current case that is a heat wave is the PP's report on the upgrade of the private residential house of the President at Nkandla (a birth place of President Jacob Zuma), also rural outskirts in KwaZulu Natal. There upgrades were carried at the expense of the public. For more see PP's website: <http://www.pprotect.org>

⁴⁴ For more see PP's website: <http://www.pprotect.org>

⁴⁵ R2K, 2012. *Submission to the Ad-hoc Committee of the National Council of Provinces on the Protection of State Information Bill*, South Africa

- The Classification Review Panel is not independent enough and not accessible to ordinary people.
- In a number of instances, bad drafting has left the Bill in its current form wide open to abuse.

It is clear from the R2K's submission there are a number of issues of concern over the potential negative impact of the Bill. This includes that it yields too much power to the state and its agencies; that it decrees citizens, whistle-blowers and journalists guilty of being in possession of classified information instead of being innocent until proven guilty. It is of concern that the Bill fails to protect the public, civil society, journalists and whistle blowers who may disclose classified information on grounds of public interest. More concerning is that the Bill stops the free flow of information in a democracy, creating a society of darkness and secrets.

In Chapter 11 of the POSIB (Extracted from the POSIB, 2010, pg. 17) is a list of prescribed punishments for anyone found guilty of disclosing classified state information:

Espionage and related offences

34. (1) It is an offence punishable on conviction by imprisonment for a period not less than 15 years but not exceeding 25 years –

(a) To unlawfully and intentionally communicate, deliver or make available state information classified top secret which the person knows or ought reasonably to have known would directly or indirectly benefit a foreign state or

(b) To unlawfully and intentionally make, obtain, collect, capture or copy a record containing state information classified top secret which the person knows or ought reasonably to have known would directly or indirectly benefit a foreign state.

5.4 Response to the Bill by the editors' professional body: Sanef

After the National Assembly passed the POSIB in November 2011, Sanef issued a statement noting that the organisation was “saddened by the decision of 229 ANC members of Parliament to vote in favour of the Protection of State Information Bill today. South Africans from all sectors have made it clear that they believe the Bill is a danger to democracy, and a threat to their

rights”. Sanef stated that it had hoped the MPs would “hear the clamour at the gates of the legislature, but they chose to stop their ears ... This need not be the end of the road, however. The remaining serious flaws in the Bill can still be remedied in the NCOP or returned to Parliament by President Jacob Zuma. If that doesn’t happen, the Bill has only one destination: the Constitutional Court.”

Like the R2K, Sanef also reject the Bill, arguing that if passed into law the POSIB would threaten democracy and the right to information. The forum notes that is would contradict transparency legislation such as the Promotion of Access to Information Act (PAIA) of 2000.

Sanef has raised five concerns with the POSIB:

- The authority to classify information as secret is given to too many organisations;
- The power to classify should be “strictly limited to those organs of state that guard the national security of the Republic as a whole”;
- The minimum penalties for the disclosure of secrets, including mandatory prison sentences, are too harsh;
- There is no provision for courts to condone leaking of secrets to reveal information that is in the public interest; and
- The Bill would violate several provisions of the Constitution, including the guarantee of freedom of information.

It is clear that Sanef takes issue with the Bill’s non-constitutional and anti-democratic elements.

Sanef also noted with concern the harsh and unrealistic punishments related to disclosing classified information and the lack of a public interest clause to protect such disclosure. The forum was also concerned with the distribution of power envisaged by the Bill and argued that the Bill provided every state organ the power to classify information, including all government departments, local authorities and State Owned Enterprises (SOEs), all of whom received public funding. Sanef’s view was that such distribution of power was a threat to transparency and democracy, making it difficult for journalists and whistle-blowers to expose corruption and mal-administration by the state, the government and ruling party – and also by the private sector.

According to Louw (2013) this would further hinder service delivery, already a serious issue in South Africa.⁴⁶

In its submission to the NCOP, Sanef (extracted from Sanef's submission NCOP, 2012, p.4-6) made the following assertions:

- The bill undermines section 32 of the Constitution (see **Appendix 4**) and PAIA.
- Criminal offences raised by the bill undermines media freedom.
- The bill does not explicitly provide a public interest defence clause.
- Over broad definition to national security.
- Limit the classification of information to security services only, not every state organ.
- A concern that the whole document may be classified when only a part is classifiable.⁴⁷

Sanef (extracted from Sanef's submission to the NCOP, 2012, pg.5) concludes that the Bill is “in many respects a welcome change to the national security landscape in South Africa. The Bill has the potential to play a significant role in transforming our society from a culture of secrecy and repression to one of transparency, accountability, and responsiveness, and to become a leading precedent for open and democratic governments the world over. To achieve these goals and the desirable objectives it articulates, the Bill must properly respect openness, free speech, and access to information, in the various ways that we have suggested”.

5.5 Defence by the ruling party: the ANC

In its resolutions taken at the 52nd National Conference, in 2007, the ANC (extracted from the 52nd National Conference: Resolutions of the ANC, 2007, Polokwane) noted that it was faced with a major ideological offensive, largely driven by the opposition and factions in the mainstream media. The key object of this offensive, argued the ANC, “is the promotion of market fundamentalism, control of the media and the images it creates of a new democratic dispensation in order to retain old apartheid economic and social relations”. In the resolutions the

⁴⁶ There has been a rise of service delivery protests against the government, according to a 2013 report released by Municipal IQ, an independent local government body that measures service delivery protests across the country. The report indicates that in 2012 there were 173 service delivery protests in South Africa, mostly in Gauteng and the Western Cape, see www.municipality.co.za.

⁴⁷ Sanef, 2012. *Submission to the Ad-hoc Committee of the National Council of Provinces on the Protection of State Information Bill*, South Africa

ANC identified the ideological field of contestation: the ANC's norms and values included the developmental state, collective rights, values of caring and community solidarity, Ubuntu and non-sexism, while it stated that the mainstream media's ideological outlook was based on neo-liberalism, a weak and passive state, an overemphasis on individual rights and market fundamentalism.

An understanding of the ANC's position on the commercial press gives insight into what may lie behind the organisation's proposal of the POSIB. In response to criticism of the POSIB from Sanef and the R2K, the Minister of State Security, Siyabonga Cwele, in a Mail & Guardian article⁴⁸, stated that rights embedded in the Constitution were not absolute but subject to limitation. "It needs to be emphasised that the rights in our Constitution ... are not absolute as they are subject to section 36, which limits these rights. No such limitation exists on the provisions of chapter 11 pertaining to national security and the security services and their oversight structures," Cwele stated.

Regarding the public defence clause, Cwele argued that "the problem with the public defence clause is the associated risk where any member of the public can decide what is in the public interest, when the head of [an] organ [of state] or courts for instance may be in a better position to objectively weigh up the issues".

It seems that all players involved in the battle of the POSIB use the Constitution to defend and attack one another. As in the case with the submissions and objections of Sanef and the R2K, the ANC too uses section 36 (see **Appendix 5**) of the Constitution to defend its position on the Bill.

Central to the field of contestation is the issue of a public interest clause. Unlike Sanef and the R2K, Cwele argues that a public interest clause could be abused and "public interest" may be defined too widely. In essence, the ANC believes a clause allowing disclosure in the "public interest" could render the legislation toothless. In its attack on opponents of the POSIB, the language used by the ANC is of being under threat from outside forces. It, for example, labelled the R2K as a 'spy' funded by foreign donors. In a Mail & Guardian article⁴⁹ Cwele said: "You

⁴⁸ Mail & Guardian, 2012. *ANC pushes secrecy Bill through NCOP*. Source: <http://mg.co.za/article/2012-11-29-anc-pushes-secrecy-bill-through-ncop> 29 November 2012. Accessed: 19 December 2012.

⁴⁹ Times Live, 2011. *Covert fight against info bill*. Source: <http://www.timeslive.co.za/politics/2011/11/17/covert-fight-against-info-bill> 17 November 2011. Accessed: 23 December 2012.

won't find foreign spies openly marching in the streets of Cape Town, complaining that we are removing their easy access to our sensitive information, but they will fund their local proxies to defend their illegality.”

The arguments used by Cwele indicate a culture of a deep mistrust of the press among elements of the ANC. As pointed out by Wasserman (2011) and Duncan (2009), among others, the post-democracy relationship between the ANC and media has often been frictional and marked by conflicting views on the role of the press. Cwele’s argument that foreign spies may gain access to sensitive information in part illustrates the ANC’s obsession with security and the value placed on security by the party. But the question remains, is the ANC trying to hide its failures and shortcomings with legislation designed to allow the keeping of secrets no matter what?

Looking at the manner in which Cwele tailored his argument, there is a strong element of bullying and ideological obfuscation. Often governments in liberal democracies use a persuasive language to defend their position and view on a particular subject. However, this is not the case with Cwele. What this possibly indicates is that the members of the security cluster would be willing to use their collective power to intimidate and harass opponents of the Bill.⁵⁰

The former retired Minister of State Security, Ronnie Kasrils, a custodian of the Bill upon its inception and introduction to Parliament before retiring, has joined the R2K and Sanef in opposing the Bill. Kasrils⁵¹ argues that “this all-embracing secrecy Bill, we smell and suspect is not about the real secrets that must be defended, but is to prevent those silly leaders who have egg on their face, who have been exposed by the media for doing foolish and embarrassing things, such as misusing and abusing tenders and contracts as well as tax payers money”.

As a former minister, Kasrils gives an inside view of how the POSIB should be perceived from the outside. Kasrils joined the ANC in the 1960s and was key member of Umkhonto we Sizwe, the military wing of the then exiled ANC.⁵² Post democracy Kasrils assumed various ministerial posts, the most significant from 2004 – 2008 when he was appointed Minister of Intelligence

⁵⁰ This was the case in Zimbabwe when the Access to Information and Protection of Privacy Act (AIPPA) and Public Order and Security Act (POSA) become laws in 2002. Journalists were often harassed by the police and labelled as threat to national security. For more see, Article 19 and MISA-ZIMBABWE Report on AIPPA, 2004

⁵¹ City Press, 2011. *Kasrils lashes leaders over Protection of Information Bill.* Source: <http://www.citypress.co.za/news/kasrils-lashes-leaders-over-protection-of-information-bill-20110917/>. Accessed: 19 December 2011.

⁵² See www.sahistory.org.za/people/ronald-ronnie-kasrils

Services⁵³, a post he held for four years. Kasrils headed the ministry that introduced the Bill to Parliament and on retirement was replaced by Cwele. As a former insider, Kasrils' statements probe the hidden intentions of the Bill. From Kasrils' view it is clear that the ANC intends to use the Bill to serve its own interests which is to shield its officials against publicity for wrong doing.

The ANC rejected the claims by Kasrils, with national spokesperson Jackson Mthembu⁵⁴ stating: "The African National Congress finds it strange and shocking that comrade Ronnie Kasrils... wants to rule the department ... from the grave through his negative commentary on the Information Bill. Cde Kasrils failed to deal with the mess in the then department of intelligence, where he was a minister, which left us vulnerable to machinations of foreign spies, information peddlers, and espionage activities. [And now] posing as a champion of civil society."

Mthembu's statement that Kasrils now poses as champion for civil society provides some insight into the ANC view of civil society – that it is somehow hostile and inherently anti-government. This is a view that is reinforced by the active role of civil society in the numerous service delivery protests around the country.

In its other role – that of watchdog – civil society is important in exposing wrong doing by state and government officials and departments. Perhaps the term "foreign spies" indicates the power civil society holds to reveal deep secrets the government would prefer remained locked away. In Mthembu's view Kasrils is part of the enemy camp⁵⁵, and so his views are not taken into consideration. Mthembu fails to see any merit in Kasrils arguments and does not engage Kasrils on the substance of his views. As with Cwele, Mthembu opposes any critical dissent against the Bill which may challenge the hegemonic discourse of the ANC.

The argument over Kasrils shines a spotlight on the hidden meaning and purpose of the POSIB. The ANC's reference to Kasrils as making comments from the grave is aimed at discrediting Kasrils. The party seems to view him as an enemy for having discredited the party and spilling its secrets in the public.

⁵³ Now called the Department of State Security.

⁵⁴ Independent Newspapers 2011. *ANC takes swipe at Kasrils over Info Bill*. Source: <http://www.iol.co.za/news/politics/anc-takes-swipe-at-kasrils-over-info-bill-1.1181876#.UNdXdZH6hJ4>. Accessed: 23 December 2012

⁵⁵ Just like Sanef and the R2K.

When the POSIB was first approved by Parliament in November 2011 two members of the ANC, Gloria Borman and Ben Turok, abstained from voting. Such a display of dissent, however small, shows that the ANC is not a single ideological hegemonic bloc. Turok⁵⁶, did not support the Bill at all because he believed there were too many unknowns about the powers of the Bill and how they would be used. Turok, however, said the ANC was not clear on the overall role and function of the Bill and that it was potentially dangerous to democracy. This was essentially the same argument articulated by the R2K and Sanef that the Bill was too broad and needed to be re-defined and made specific to its purpose – the protection of genuine sensitive information. The views expressed by Turok suggest he is in some agreement with the discourse of the R2K and Sanef on the POSIB. Borman seemed to have specific concerns over the Bill rather than opposing it in its entirety. She later appeared to back down slightly, suggesting that her abstention was not a sign of overall opposition to the Bill. “First of all, I’m an ANC member and very proud of that fact. I feel that the ANC is totally committed to fighting corruption, and that is certainly my own passion too. I do not believe that this Bill is the evil piece of legislation that it’s made out to be. The media – which is in a very powerful position – has not given it fair coverage. And I don’t believe that it’s going to stop investigative journalism. But it is going to make (investigative journalism) more difficult,” Borman told Independent Newspapers online (Borman, 2011, p.1)⁵⁷.

Looking at the manner in which Borman framed her argument reveals two key issues: firstly she wanted to protect the image of the party; and secondly she wanted to appear conciliatory and open to some compromise. As she framed her position, Borman had to ensure that she pleased both actors, the press and the ANC. Borman (2011) supported the views of both the R2K and Sanef, agreeing that the Bill had potential negative consequences. However, she noted that these may not have been intended and were not deliberate or sinister.

For failing to toe the ideological line and agreeing with some of the opposing institutional discourse Borman and Turok were both disciplined by the ANC whips⁵⁸.

⁵⁶ Independent Newspapers, 2011. *ANC MP: why I didn’t vote*. Source: <http://www.iol.co.za/news/politics/anc-mp-why-i-didn-t-vote-1.1184819> 23 November 2011. Accessed: 08 January 2013

⁵⁷ Independent Newspapers, 2011. *ANC MP: why I didn’t vote*. Source: <http://www.iol.co.za/news/politics/anc-mp-why-i-didn-t-vote-1.1184819> 23 November 2011. Accessed: 08 January 2013

⁵⁸ Ibid

5.6 A critical analysis of the discourse on the Bill by the R2K, Sanef and the ANC

5.6.1 Discourse of the R2K

From the beginning the R2K made it clear that the Bill is a threat to democracy and undermines constitutional values. At its submission to the NCOP the R2K expressed a concern that the centralisation of power to the office of the Minister of State Security was a problem and potentially hazardous to democracy. The history of South Africa tends to support this view – the concentration of power is dangerous and power needs to be shared to limit its misuse and abuse. Apart from championing the public interest clause, the R2K also questioned the autonomy of the review panel as contained in the Bill. On several counts then this shows that the general position of the R2K on the Bill is very critical. The organisation challenges the hegemonic discourse of the ANC and argues that the Bill was designed to safeguard the ideological and political interests of the ANC.

5.6.2 Discourse of Sanef

For Sanef the Bill is a threat to democracy and undermines crucial provisions of the Constitution, particularly sections 16 and 32. According to Sanef's view both these sections are cornerstones of democracy and allow investigative journalism to take place. The forum does not completely reject the Bill and recognises its potential value in certain areas. However, it also highlights issues that the Bill drafters need to address to alleviate concerns over its potential threat to democratic practice. The forum supports those aspects of the Bill that promote transformation (of the media specifically). For Sanef, the POSIB was not necessary because transformation could be achieved by observing all the fundamental rights enshrined in the Constitution.

5.6.3 Discourse of the ANC

Examining the statements by Kasrils and Borman, a clearer picture emerges of the different positions in the discourse around the POSIB. It also shows the different language used to protect or challenge the ANC's ideology regarding the Bill. From Kasrils' point of view it is clear that the ANC intends to use the Bill to shield it from negative publicity, corruption charges and misuse of public funds, while Borman appears to put a positive spin on her criticism by

highlighting her admiration for and loyalty toward the ANC before offering her slightly critical view of the POSIB. However she makes it clear that the party has had problems with media regarding negative publicity and admits that the Bill will make investigative journalism difficult.

The argument by Borman and the more direct one of Kasrils reinforces the opposition view that the Bill is aimed at serving the ideological interests of the ANC, curbing negative publicity. The argument - even from elements within the ANC – is there is an unintended risk of the Bill damaging democracy by restricting the free flow of information, access to such information and investigative journalism. As discussed in Chapter 3, Wodak (2006), Van Dijk (1997) and others defined discourse as both text and talk that was embedded with ideological constructs regarding the exercise of power and control. With that said, look at the opening excerpt of the 52nd National Conference of the ANC as reflected in section 5.5 of Chapter 5. The resolution makes it clear that the ANC is deeply concerned with the perceived “ideological offensive” against it by the media. The ANC voices concerns about the mainstream media and its market orientation that allegedly compromises coverage of the ANC and its programmes and platforms – the ANC is not profitable news.

It was following this national conference in Polokwane in 2007, that the ANC introduced the first draft of the POSIB to Parliament in 2008. It was not a mistake or judgement error that led to the ANC putting the flawed Bill before Parliament, but a deliberate strategy. Wasserman and Jacobs (2012) claim that the source of conflict between the press and ANC is over the normative role of the press which the ANC regards as too confrontational and with hidden (probably racial) undertones.

5.6.4 Overall analysis

It is difficult to dismiss ANC concerns that the current landscape of print media is highly concentrated, lacks diversity and lags in transformation⁵⁹. Duncan (2012) agrees with this view.

But the party has its flaws as well, with issues such as Nkandla and the allegations of illegal tendering by the Department of Public Works and the former Commander of Police, General

⁵⁹ For a further break down on the subject see Daniels (2012).

Bheki Cele⁶⁰. The cases involving Nkandla and Cele reflect the scope of corruption and mismanagement in the ANC government. It can be argued that the points made by Kasrils, the R2K, Sanef and Borman that the Bill was an attempt to hide corruption and protect the image of the ANC are valid.

With reference to the theories on democracy, it must be noted that South Africa is a constitutional and participatory democracy. With this in mind, the concept of the public sphere (Habermas, 1991) is relevant to this study. The public sphere or space is dependent on access to and participation in that sphere. Both values play a crucial role in bringing about active citizenship. However, Friedman (2011) argues that it is impossible to have active citizenship without access to information. Citizens need information in order to be able to participate in the traditional realm of the public sphere. In South Africa this is provided for by the Constitution and the progressive PAIA. In contrast, however, the POSIB undermines the role of the public sphere, democracy, and it contradicts the PAIA as well as sections 16 and 32 of the Constitution. An interesting, if unrelated question to this study is, to what extent does the Constitution empower both sides in this debate by allowing opposing views to find comfort in one or other constitutional provision? It is beyond the scope of this thesis to interrogate this, but it is worth noting. The allegation by Cwele that the R2K and Sanef were foreign spies suggests a view that demanding the right to access information implies a motive to spy on the party. That implies a great deal of insecurity and paranoia in the ruling party – and that is not conducive to free flowing information.

5.7 A critical analysis of the R2K and Sanef interviews⁶¹

This section presents a critical analysis of feedback from the interviews conducted with members of the R2K and Sanef. The first part of this section will look at feedback from members of the R2K, followed by feedback from members of Sanef. These interviews will help spell out the ideological interests of the organisations involved as they relate to the Bill. The analysis will also take account of literature reviews, theory and methodological frameworks.

⁶⁰ See the Public Protectors report *Against the Rules* published in February 2011. The report reveals the illegal lease of a building for the South African Police Services (SAPS) headquarters by the Department of Public Works. The Commander of Police was actively involved in signing a R1.7 billion deal without following due processes. Due to pressure from civil society and the public, Cele and the Minister of Public Works were recalled from office.

⁶¹ Appendix 1 and Appendix 2

5.7.1 Perceptions on the Bill

Three members of the R2K were interviewed about their perception of the Bill: Jane Duncan, Siphwe Segodi and Dale McKinley. Two representatives at Sanef were also interviewed: chairperson Mpumelelo Mkhabela and Sanef's deputy chair of the media freedom subcommittee, veteran journalist Raymond Louw.

5.7.2 The R2K perceptions

Although the R2K has a generally negative perception of the Bill, it does acknowledge the need to repeal apartheid laws and perceives this as important for a post-apartheid South Africa, with its new democracy.

“I would like POSIB to be perceived as a necessary evil, in that the apartheid era Protection of Information Act does need to be repealed and the Minimum Information Security Standards that is provisionally in force is inappropriate because it over classifies information. If we accept that there is some need in a democracy to protect information that may cause harm to the country if it were released, then we do need the Bill. However, I would like the current version of the Bill to be perceived as being overbroad and still in need of amendments to bring it into line with the Constitution. A lot of work has been done on the Bill and some welcome changes have been made, but it is still too censorious and threatens basic freedoms.” (Email interview with Jane Duncan, 30 October 2013)

However, Duncan feels that the POSIB is too broad and needs to be narrowed by limiting its focus to key sectors that deal with issues of national security. She recognises some progress in revisions of the Bill but feels strongly that the Bill in its current form is a violation of basic and fundamental rights as enshrined and protected by the Constitution. Duncan description that the Bill is a “necessary evil” informs the view that national security is indeed an important and serious issue for the country.

On the contrary, Segodi sees the Bill as a regression from the Constitution.

“Looking at the scourge of corruption, maladministration and incompetency that besiege our public sector, I would like the Bill to be perceived as a huge regression from the principles of openness, transparency and accountability espoused by the Constitution and which the passing of the Promotion of Access to Information Act in 2000 sought to promote. The latter Act clearly recognises in its preamble inter alia that “the system of government in South Africa before 27 April 1994, amongst others, resulted in a secretive and unresponsive culture in public and private bodies which often led to an abuse of power and human rights violations”. Chapter 4 of this Act also recognises the fact that certain information is sensitive and should be treated with caution and as a result clearly identifies that type of information and grounds for refusal of access to such records.” (Email interview with Siphwe Segodi, 30 October 2013).

Segodi also believes the Bill to be a regression from the values and aspirations of PAIA as adopted in South Africa in 2000. PAIA Act was passed to redress apartheid laws that restricted the flow and access to information between the state and public. Therefore, in Segodi’s view, the POSIB deviates from the progress made by the government in promoting democracy and transparency. To Segodi, the POSIB is disturbing and he is concerned it will be used to hide corruption, which is rife in the public sector.⁶² From the insight given by Segodi, it is clear that issues of corruption and maladministration could be made worse should the POSIB become law.

The interview with McKinley showed a similar train of thought.

“The POSIB is a piece of legislation that is fundamentally at odds with our constitutional right to ‘freedom to access and impart information’ as well as the constitutional guarantee of an open, accountable and transparent government/public sector. It takes us back to the apartheid-era days of a largely unaccountable and all-powerful intelligence-security sector in government, abuses the notion of ‘national security’ to prevent public knowledge of and access to necessary information and creates a climate of fear for citizen/community activists, journalists and whistleblowers. More particularly, POSIB gives almost unlimited power to the State Security Agency (SSA) – and more specifically the Minister of State Security – to decide what information can and cannot be classified, who can classify such information and the reasons for

⁶² Examples include the upgrades to the president’s private residence in Nkandla, the illegal procurement of police headquarters by the head of the police and the Department of Public Works, the overspending by former Minister of Defence, Lindiwe Sisulu on expensive private flights using state money and the inappropriate appointment of the Chief Operations Officer for the public broadcaster (SABC) Hlaudi Mostwening.

refusing access to such classified information. Further, POSIB provides for draconian consequences (in the form of heavy fines and prison sentences) for those found to be in 'violation' of its prescripts which are completely out of proportion to the purported 'damage' caused.

"R2K is a young but growing movement that began in opposition to POSIB but which has now expanded to include opposition to a range of other 'securocrat' legislation that impinges on our information and protest rights (for example, the apartheid-era National Key Points Act), a larger struggle for access to information, media freedom and diversity as well as support and solidarity with whistleblowers. Since its inception, R2K has been transformed from a small group of largely urban-based civil society activists to an ever-expanding network of urban and rural community organisations, citizen activists, NGOs and unions. The core focus of R2K has subsequently shifted to working with and through poor communities to access information necessary for an active and informed citizenry, realisation of basic rights and services as well as ensuring accountability of local and other levels of government through the provision of information." (Email interview with Dale McKinley, 23 January 2014)

McKinley views the Bill as an abuse of national security concerns to limit public knowledge while creating and promoting a culture of fear. The observation by McKinley shows that the POSIB could take the country back to the culture/norm of secrets, as was a case during apartheid. He adds that the Bill is at odds with the Constitution and violates the guarantees made by the Constitution in ensuring values of transparency and openness, fundamental for any democracy. McKinley expresses a concern that the Bill gives excessive powers to the state security agency.⁶³ In McKinley's view the Bill signals a return to the past where a series of laws and violence were used to maintain the apartheid status quo. The R2K has very definitive views on the Bill; yes, while it is a necessary evil, the Bill in its current form goes above this requirement. The Bill might hide cases of corruption and maladministration thus undermining transparency and ultimately democracy. In short, the R2K view the Bill as a threat to democracy.

⁶³ A concerning example of police misusing their power is that of former Sunday Times investigative journalist Mzilikazi wa Afrika, who was intimidated, harassed and arrested by the police at his workplace for writing an article regarding the former Commander of Police, General Bheki Cele. In the article the journalist called for the sacking of the Minister of Public Works and the General.

5.7.3 Sanef's perception

Louw rejects the Bill in its current form.

“As carefully spelled out legislation to enable the state to classify a limited amount of certain types of information that relate strictly to national security carried out in a carefully prescribed manner by civil servants occupying very senior positions in the security apparatus. This extends to certain matters relating to the defence of the country such as the strength and potency of armaments and the arms of the defence force and should take into account the Johannesburg Principles on National Security, Freedom of Expression and Access to Information drawn up under the auspices of Article XIX in 1996 by lawyers, politicians, constitutional experts and members of civil society.” (Email interview with Raymond Louw, 30 January 2014).

Louw offers a satirical view of the POSIB by arguing that Bill is a “...carefully spelled out legislation to enable the state to classify a limited amount of certain types of information that relate strictly to national security carried out in a carefully prescribed manner by civil servants occupying very senior positions in the security apparatus”. He uses irony to challenge the Bill arguing:

- the Bill is carefully spelled out legislation;
- it enables the state to classify limited information relating to national security;
- it is carried by very senior civil servants, and
- these civil servants are in the security apparatus.

The Bill is critiqued by Sanef as being too broad and ambiguous and that it needs to be limited to those in the security realm and whose role is to safeguard national security, including the army, police force, crime intelligence unit, and the Hawks. Sanef argues that “[the Bill need to] limit the classification of information to security services only, not every state organ”.

Sanef's chairperson Mkhabela views the Bill far more harshly.

“A draconian piece of legislation that seeks to curtail the freedom of the press and expression.” (Email interview with Mpumelelo Mkhabela, 30 January 2014).

Mkhabela sees the Bill as posing a fundamental threat to the press by limiting its right to editorial autonomy. According Mkhabela, the POSIB is a problem because it will, and has the potential, to limit press freedom. As indicated by Friedman (2011), the freedom of the press is an important tool for any democracy and without a guaranteed freedom of the press democracy will be at risk. The view from Mkhabela shows that Sanef perceives the Bill to be a real threat to the press and democracy.

Louw and Mkhabela believe that the Bill could potentially restrict the ability of the press to convey information crucial to the public and informed by public interest. According to Sanef there are technical and political concerns about the Bill – it is too broad and needs to be limited and specific to issues of national security. Sanef sees the Bill as draconian and a severe threat to press freedom. The term draconian is apt when applied to the harsh punishments provided for in the Bill where classified information is disclosed, even if it is in the public interest.

5.7.4 Conclusion

The R2K and Sanef share the view that the Bill is a serious threat to democracy given that it undermines the fundamental rights enshrined in the Constitution. The common view is that apart from undermining democracy, the Bill will promote corruption and hinder transparency in government. It will also impede the free flow of information and this will result in failure by civil society, media and others in holding the government to account. As argued by the R2K, the Bill promotes secrecy and that it makes it impossible for fourth estate bodies to keep an eye on the government and expose its wrong doings.

5.8 The relationship between the POSIB and Constitution

This section explores the relationship between the Bill and the Constitution by examining the Constitution, particularly sections 16, 32 and 36. The analyses of the R2K, Sanef and ANC's documents on the Bill indicate that the battle on the POSIB centres on these sections. Now the interviews are used to investigate the link between the POSIB and the Constitution.

5.8.1 The R2K's view

“POSIB is meant to protect sensitive information that threatens national security and the Constitution does recognise that rights, such as the right of access to information, can be limited if reasonable and justifiable in a democratic society. The Bill violates the right of access to information and freedom of expression in ways that are not reasonable, nor are they justifiable.” (Email interview with Jane Duncan, 30 October 2013).

From Duncan's feedback there is a direct link between the POSIB and the Constitution. The latter creates room for the former. However, section 36 provides that all rights and freedoms as enshrined in the Constitution are subject to limitations on condition that such limitations are reasonable and justifiable. But, as argued by Duncan, the limitations provided for by the POSIB, and therefore the ANC, are not reasonable and justifiable. The provisions in the Bill violate the right of access to information and freedom of expression – ultimately the POSIB violates the Constitution.

Segodi argues that:

“The Constitution provides for considerations of national security, the R2K believes that any legislation designed for this purpose should be designed in such a manner that it serves nothing else but that which it is meant for. In its current form, the Bill can be open to abuse.” (Email interview with Siphiwe Segodi, 30 October 2013).

Segodi endorses section 36 but argues that the scope of the Bill is not fully in tune with the Constitution as it serves a political agenda and is subject to abuse by the ANC. Hyden *et al* (2007) contend that the freedom of expression has been constantly and continuously tested in Africa. In the same vein Berger (2007) argues that freedom of speech is an essential ingredient of a democratic society. He views the practice of any censorship as a violation to freedom of expression. According to Hyden *et al* (2007), the abuse of power in Africa often leads to presidents, governments, and ministers intervening in seizing critical publications and detain individual reporters critical of the government. In Segodi's view there is no correlation between the POSIB and the Constitution.

On that note McKinley argues that:

“The R2K is of the view that POSIB is in direct violation of Section 32 of the Constitution (access to information) as well as Section 16 (freedom of expression - which includes freedom to receive and impart information and ideas). More broadly though, R2K is of the view that POSIB is in direct opposition to the overall spirit of the Constitution (as captured in its Preamble) to “lay the foundations for a democratic and open society ...” (Email interview with Dale McKinley, 23 January 2014).

McKinley’s view is that the Bill is a threat to the Constitution and its key provisions on the freedom of expression and right to access to information. McKinley argues that the Bill is in direct contravention to the preamble of the Constitution. The preamble reads that, “we therefore, through our freely elected representatives, adopt this constitution as the Supreme Law of the Republic so as to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights” (SA Constitution, 1996,p.3). From the preamble it is clear that South Africa committed itself to a society that is democratic and respects human rights culture. McKinley, however, believes the Bill undermines that very commitment. The POSIB, as deduced from McKinley’s arguments, undermines the democratic gains made by the country in its transition from apartheid.

From the R2K’s view it is clear that the Bill violates the Constitution by failing to uphold fundamental rights enshrined in that Constitution. The Bill also appears to undermine South Africa’s commitment to democracy and human rights as indicated in the preamble. Based on the interviews, it is clear the R2K recognises the need for the Bill, but challenges the manner in which the Bill was drafted. According to the R2K, the Bill does not serve its intended purpose, but seeks to serve other ideological purposes.

5.8.2 Sanef’s view

“Sanef’s view is that the POSIB has to be fully in compliance with the Constitution and by that is meant that the legislation has to promote and protect freedom of expression and freedom of the media as well as access to information.” (Email interview with Raymond Louw, 30 January 2014).

“We see the POSIB as an assault on certain elements of the Constitution particularly the enshrined rights to freedom of the press and expression. It also goes against the broader

constitutional framework that supports an open, transparent and accountable governance system. Such a system is impossible in an environment where free flow of information is curtailed and criminalised.” (Email interview with Mpumelelo Mkhabela, 30 January 2014).

According to Sanef, the POSIB does not comply with the constitution, as it fails to protect and promote basic freedoms, particularly of the press and its right to have access to information. Another issue with the POSIB, as Sanef points out, is that it curtails and criminalises the free flow of information, threatening to destroy the engine of democracy – freedom of expression.

5.8.3 Conclusion

Sanef needs to emphasise that the Bill is more than just about press freedom – that it affects everyone. However, this does not diminish the role of media in promoting democracy. What it does is make it clear that the potential impact of the Bill exceeds the narrow confines of press. The R2K has done a good job in stressing this view and making the public aware of the potential impact of the Bill. In doing so, the R2K has widened its focus and reached out to various civil society members, such as religious bodies, academia and the general public. Sanef needs to widen its approach as well, and not limit the discourse of the POSIB to professional editors.

5.9 The POSIB and threat to democracy

This section explores if whether the POSIB is a threat to democracy. It achieves this by looking at the views of the R2K and Sanef on the subject. The ideological discourse of the POSIB is investigated through the use of CDA.

5.9.1 The R2K’s view

“Yes, and also unconstitutional in my view as it stands. Although there have been improvements from its original form, there are still a number of areas that are of concern. The Bill still contains extremely harsh sentences, other than that relating to espionage offence. The lack of a full public interest defence will severely impact on the right of the general public to access crucial information relating to state institutions’ activities and consequently be unable to hold them accountable. While the Bill provides for prosecution for classification of information for wrong reasons such as hiding corruption, maladministration, incompetency etc, there are no clear mechanisms on how this will be monitored. Instead it gives powers to the Minister of State

Security to appoint a review panel; a task that could be performed in a more independent manner if undertaken by Parliament. (Email interview with SiphweSegodi, 30 October 2013).

Segodi says that the POSIB threatens democracy even though there have been some improvements made to it. One of the key issues is the lack of a full public defence clause. This clause provides a guarantee to the public to be protected by the law if and when an illegal disclosure is made, provided the information is in the public interest. However, in its current form this protection is limited. Should any classified information be disclosed, the person who was in possession of the information could be subjected to legal action and imprisonment.

Another issue Segodi raises is the ambiguity in the Bill regarding monitoring. The state seeks to play the dual role of player and referee. This would mean that officials could hide their own misdeeds by classifying the information about such deeds. In this way the Bill could allow for the synchronising of power, a threat to democracy. Simply looking back at South Africa's history under apartheid should be caution enough.

As Duncan points out:

“As currently drafted, yes. The definition of national security in the Bill remains overbroad, the grounds for classification of documents are also overbroad, the public interest defence is too narrow, whistleblower protection is inadequate, the oversight mechanisms to prevent abuse of the classifications system are too weak and not independent enough, and the sanctions are too harsh. The Bill classifies information in the security cluster (the police, intelligence and military), although classification can be extended to other institutions on good cause shown. A secretive security cluster is dangerous, as it could allow all manner of abuses to take place in the name of protecting national security. Recent incidents involving the security cluster, such as the killing of mineworkers at Marikana, the killing and injuring of protestors during clashes with the police, the deaths of soldiers in the Central African Republic and the controversy around the disclosure of information about the upgrading of President Zuma's residence in Nkandla (apparently a National Key Point), all suggest that the security cluster is a troubled institution and in need of public scrutiny, but the Bill will make this more difficult to achieve. (Email interview with Jane Duncan, 30 October 2013).

McKinley adds:

“Yes, if adopted in law in its present form POSIB definitely constitutes a threat to democracy. This is because at the heart of any meaningful democracy (and as clearly captured in the Constitution) is a government that is open, transparent and accountable to the people. Such ideals cannot be simply realised through democratic elections but requires the free flow of information by and through a government which represents the people (citizens) as a whole. Information is the life blood of any democracy and without such, citizens cannot be fully informed of what their government is doing, why decisions and policies are taken, how public funds are being spent, what agreements and relationships government has with the private sector and other governments and who is responsible. Without these, South Africa will have a disempowered citizenry, without which democracy is simply a set of institutional arrangements and where power is concentrated in the hands of the few. POSIB moves us in exactly the opposite direction, with provisions to cut off the flow of such information and then also to penalise those who seek to access and distribute such information in the public interest (i.e., in the interests of democracy itself). In doing so, POSIB further catalyses an overall climate of societal fear and intimidation; which is fundamentally at odds with a democratic society and its underlying principles.” (Email interview with Dale McKinley, 23 January 2014).

Both Duncan and McKinley agree that the POSIB is a threat to democracy in a number of ways:

- it is too broad;
- it fails to protect the public, journalists, and whistle blowers; and;
- it uses harsh punishments as counteractive measure to those disclosing classified information.

According to McKinley the flow of information is a crucial ingredient for democracy, as it allows citizens to make informed decisions about the activities of the government and on how the public funds are used.

The POSIB, in its current form, is disempowering citizens and limiting active citizenship while promoting a culture of fear among its citizens.

5.9.2 Sanef's view

“In its current form it is because it can be abused and information classified as secret when it should remain in the public domain. There is also no protection for publication of classified information in the public interest by journalists or citizens acting in the public interest. Democracy is harmed by such secrecy because it reduces the public's access to information and its right to know. The public's right to know enables it to make choices especially at elections for national, provincial and local government.” (Email interview with Raymond Louw, 30 January 2014).

Mkhabela points out that:

“The freedom of the press is at the heart of any functioning democracy. It is widely acknowledged in democratic theory literature and in our very own Constitution that democracy and a free press go together. Freedom of expression – which includes the rights of citizens to communicate, express their views, disseminate information either among each other or through different media platforms – is an inherent part of democratic enterprise. You take it away or temper with it, you endanger the lifeblood of democracy.” (Email interview with Mpumelelo Mkhabela, 30 January 2014).

According to Sanef the POSIB is a threat to democracy as it fails to protect publications that reveal classified information in the public interest. In Mkhabela's view, the flow of information is important should not to be tampered with.

Louw worries that the Bill may be abused by the state, which could use it to hide information and make what is public news private. According to Sanef, democracy and the free flow of information go hand-in-hand, but, in its current form, the Bill violates this structural arrangement.

5.9.3 Conclusion

Apart from the restrictions to the flow of information, Duncan, Segodi, McKinley, Louw and Mkhabela argue that the Bill also threatens democracy by creating a sense of fear in those who may be in possession of classified information. This is done through the threat of imprisonment for disclosing such information. Offenders of the Bill can face sentences of up to 25 years.

As defined in theory, democracy is about the will of the people, represented by the concept by public interest. According to Duncan, the Bill offers a narrow public interest defence, failing to protect adequately those who seek to disclose classified information on the basis of public interest.

The Bill is a challenge to both radical and participatory democracy – it restricts the flow of information and so does not allow for the creation of a knowledgeable and active citizenship, and it places excessive power in the hands of the ruling class.⁶⁴

5.10 Civil society organisations’ view of the ANC position on the Bill

This section explores the opinions of the R2K and Sanef about the ANC’s position in regards to the POSIB. The ANC has historically been seen in positive light given its role in the struggle against apartheid and its contribution to democracy in South Africa. However, this impression is changing slightly because of instances of maladministration and corruption by government and ANC officials.

5.10.1 The R2K’s view

“I am not a spokesperson for R2K, but think that there’s a consensus that the Bill shows that a group of securocrats in the ANC are driving the Bill, and they are doing this so that they can gain more power for themselves and ensure they influence government policy in their favour. When securocrats come to dominate government policy making, then democracy is threatened as basic rights and freedoms can be curtailed more and more often in the name of national security.” (Email Interview with Jane Duncan, 30 October 2013).

According to Duncan, the Bill is driven by the interests of elites in the ANC, who seeks to enhance their individual power and control. At its national conference in 2007 the ANC complained that the media tended to portray its government as weak and passive. It was after this conference that the POSIB was mooted. It can be argued that the Bill was the ANC’s reply to the press.

Duncan’s view of the ANC is that it is a party that is power hungry and uses its domination to influence government policy and its hegemonic discourse. Segodi agrees to Duncan, and adds:

⁶⁴ Many of the service delivery protests in South Africa are met with police action.

“Over the years now the ruling party has been at pains to bring to the forth sufficient evidence to support its claims around dealing with corruption in general, amongst other things, and corrupt elements in particular. While the Bill contains a clause designed to discourage classification of information based on ulterior motives, some broad definitions, lack of independent and adequate oversight mechanism opens the Bill up for abuse. It could act as a mechanism to conceal corruption and provide the ANC with grounds to claim decline in corrupt activities since little would be coming to surface.”(Email interview with SipiweSegodi, 30 October 2013).

The ANC-led government has often been challenged about corruption and maladministration, primarily in the three tiers of government, national, provincial and municipal. Such challenges are often led by the independent, commercial press. One example is the saga surround the upgrades at Nkandla. Therefore, from Segodi’s point-of-view the ANC is perceived as a corrupt organisation that is seeking to use the Bill to prevent bad press. It can be argued that the ANC is imposing a level of sunshine journalism on the profession, trying to force the media to “tell its good stories”.

McKinley argues that:

“R2K is of the view that there is an increasingly powerful leadership faction within the ANC – concentrated in the intelligence-security apparatus of the state and directly supported by and ultimately answerable to the Presidency (what R2K calls the ‘securocrats’) – that is behind the introduction and pushing through of POSIB. This faction has managed to politically and organisationally hegemonise the ANC as a whole (alongside sizeable factions within its alliance partners – COSATU and the SACP) and thus has been able to bully others within the ANC into supporting a possible law that is directly at odds with the historic and more contemporary ideals and principles of the ANC itself and more broadly, the liberation struggle of which the ANC was a leading component. R2K believes that it is hugely ironic that the very organisation which fought against apartheid secrecy and concentration of securocrat powers is now the one championing a potential law that embraces these self-same practices and accompanying politics. In doing so, R2K believes that the ANC is betraying not only its own history and that of the liberation struggle as a whole, but also consciously attacking the core foundations of the democratic Constitution which it had such a large hand in fashioning.”(Email interview with Dale McKinley, 23 January 2014).

Based on his arguments, it would appear that McKinley sees the ANC as elitist and power seeking. This view holds some sway, taking into account that the POSIB is a product of a state organ, that is, the Ministry of State Security.

McKinley argues that the ANC uses “securocrats” to “hegemonise” the party while betraying its own history of struggle against an oppressive white regime.

The consensus from the R2K is that the ANC is using the Bill to maximize power, silence criticism and dominate governance. The constant references by Duncan and McKinley to the ANC’s use of securocrats to enforce its will, speaks to Gramsci’s concept of hegemony. According to Gramsci the ruling/dominant class uses Hhegemony to enforce its dominant ideology. Nielsen (2006, pg. 7) defines hegemony as a process where “particular social demands [are] organised around particular points of dislocation [where] ... one demand or group of demands assumes, without entirely giving up its particularity, the added function of representing the positive order”.

So what is the ideology of the ANC? This question is rather hard to answer. Had it been during the apartheid era it would have been easy to identify the organisation’s ideology – to fight apartheid, promote democracy and bring about racial equality. Following the demise of apartheid, the ideological identity of the ANC has slowly been becoming less tangible. It can be said that the organisation currently lacks a philosophical orientation. Most of the time the ANC turns to the legacy of Nelson Mandela, Oliver Tambo and Walter Sisulu to brand its identity. These stalwarts were known for their stand against apartheid and the hardships they endured on the “A Long Walk to Freedom”⁶⁵. The purpose of this argument is to make it clear that post apartheid, the ideology of the ANC has weakened to the extent that it can be considered non-existent. From the R2K’s perspective, the ANC is using the POSIB to protect its ideology which is threatened by critical dissent from the opposition, the press and the public.

5.10.2 Sanef’s view

“Ever since the bill was first tabled in 2008 Sanef has viewed it as unconstitutional and that the ANC is acting unconstitutionally. It also views the ANC as acting unreasonably and failing to pay sufficient attention to the arguments outlining the bill’s undesirable features that have been

⁶⁵ Nelson Mandela’s autobiography was titled *Long Walk to Freedom*.

advanced by Sanef, lawyers and civil society organisations. Sanef regards it as surprising that it has taken a lengthy five years for the changes that have been made to improve the bill to be brought about.” (Email interview with Raymond Louw, 30 January 2014).

In addition, Mkhabela states:

“The ANC majority in Parliament has voted in support of the Bill. We consider this very unfortunate given the fact that the ruling party fully supported the adoption of the Constitution which puts the rights of the press in holding government to account at the heart of our democracy. The press cannot hold those in power to account when doing so by the press or ordinary members of the public is criminalised by the Protection of State Information Bill.” (Email Interview with Mpumelelo Mkhabela, 30 January 2014).

Louw’s view indicates that the ANC is acting unconstitutionally by bulldozing the supreme law of the country. From this analysis it is clear that the ANC is not taking into account the interests of the public. Sanef argues that it has taken the ANC a period of five years to process and administer the necessary changes to the Bill. These delaying actions show the hegemonic interest and power of the ANC. Mkhabela sees the ANC as a burden to the press and the Constitution.

5.10.3 Conclusion

Both Sanef and the R2K have a negative perception of the ANC and associate it with power and abuse. For R2K, the ANC uses its ruling elites in government to secure and maintain its hegemonic interest and power, as can be seen in the use Cwele and his ministry to contain the ideological interests of the ANC via the POSIB. The aim of the Bill is to silence dissent and promote a favourable view of the party. From the R2K’s view, it also appears that the ANC has failed to deal with corruption within the party, thereby resorting to the Bill to prevent the public from discovering unpalatable facts. This opinion can be clearly be linked to the argument made by Segodi.

5.11 Perceptions of one another

This section looks at the R2K’s perception of Sanef, and *vice versa*. This is done to understand the common view each of organisations have of one another, and as dominant actors in the opposition against the POSIB. Both Sanef and R2K seem to share the same discourse and

sentiments on the POSIB. This study touches on the discourse that informs their ideological and philosophical identity against the discourse of the POSIB. While they have much in common, there are, nonetheless, some tensions between the two organisations.

5.11.1 The R2K's perception of Sanef

“There’s been a lot of unhappiness about the fact that Sanef tends to portray the Bill as a threat to media freedom, whereas it’s a threat to freedom beyond the media. Furthermore, there’s a tendency to claim changes to the Bill as their victories, failing to recognise the role of R2K and other civil society groupings. So in other words, their approach has been very self-regarding, with little effort being put into joint approaches and coalition building. Very few journalists are actively involved in R2K, which is an additional irritation. That said, the M&G has really been a great, consistent supporter of R2K, but they’re the only ones, really.” (Email interview with Jane Duncan, 30 October 2013).

From Duncan’s perspective Sanef is self centric and uses the fight against the POSIB to advance and highlight its own interests, which are limited to the needs of the press. The R2K emphasises its broad mandate, stressing the collective right of public interest applicable to all members of the public. Duncan notes that the forum does not work with partners in the fight against the POSIB. She also accuses Sanef of often claiming any victories on the POSIB as being due solely to their efforts.

What this clearly shows is that opposition against the Bill may appear united it is in fact not so.

Nonetheless, Segodi says that:

“R2K shares a number of concerns raised by Sanef. However, R2K is convinced that the Bill’s potential consequence cuts across different sectors of society, hence the broad church that it has come to be. Sanef on the other hand argues that the Bill, if enacted, will impact on the media. There is some truth in this but it is a known fact that some Chapter 9 institutions including the Public Protector and the South African Human Right Commission also made submissions raising concerns about the potential effects of the Bill in their respective fields of work. The labour federation (Cosatu); despite being in alliance with the ANC raised a number of concerns around the potential effects of the Bill. This is a few examples indicating that Sanef’s assertion is

misplaced. The danger in this is that the latter has been taking up the issue in isolation with the broader movement.” (Email interview with Siphwe Segodi, 30 October 2013).

Segodi agrees with Duncan’s view regarding Sanef position on the Bill. He sees Sanef’s view of the Bill as limited and narrow. Could this mean that Sanef is trying to impose its counteractive hegemony on the Bill? This is the R2K’s suspicion. But what are the motivating factors leading Sanef to assume a unitary approach – if indeed they are acting in this way? Answers to these questions require another project. However, it is important to keep these questions in mind to allow a critical engagement of Sanef’s discourse.

McKinley offers the following view of Sanef:

“From the very beginning of the fight against POSIB, R2K approached Sanef to join our struggle. We were glad when Sanef took public positions opposing POSIB and indeed, began to work with R2K to mobilise public opinion around POSIB. However, R2K has felt for some time now that Sanef has allowed its opposition to POSIB to be largely presented and thus defined as one of government versus the commercial media/journalism. While R2K fully recognises the potential threats posed by POSIB to the work of the mainstream media and has raised these along with Sanef, we believe that this constitutes only one part of the challenge posed by POSIB. In our view, the ‘media’ in South Africa is made up of much more than the mainstream, commercial press and is constituted by a range of community media outlets, citizen journalists and also the online/internet citizen and global community. In our view, Sanef’s position on POSIB is thus too narrow and has unfortunately (due to Sanef’s direct involvement in and access to, the commercial/mainstream press) painted a picture to the public wherein opposition to POSIB is seen as a predominately a concern of and threat to, that press and its practitioners.” (Email interview with Dale McKinley, 23 January 2014)

McKinley agrees with Duncan and Segodi. What is interesting to note in McKinley’s feedback is a view that Sanef has often offered a misleading picture to the public by representing the fight against the POSIB as a struggle between the commercial press and the government. There are multiple actors who are also challenging the Bill. Apart from the R2K and its listed organisations, there are the Democratic Alliance (DA), the Council for Higher Education South Africa (HESA) and the Congress of South African Trade Union (Cosatu).

According to McKinley, the R2K was the first to initiate the move against the POSIB. He argues that “from the very beginning of the fight against POSIB, R2K approached Sanef to join our struggle”. The analysis given indicates that the R2K recognises and acknowledges the role of Sanef in the fight against the POSIB. The only concern that that R2K has is that Sanef has a “self-regarding” view of the Bill.

5.11.2 Sanef’s perception of the R2K

“Very supportive. R2K was brought into existence by civil society activists because of the protests and representations against the Bill that were loudly voiced by Sanef in 2008. Sanef not only acknowledges the protests voiced by R2K since its formation but believes that the public demonstrations and other public protests made by R2K have helped Sanef’s campaign against the Bill. Sanef also recognises the wide ranging support among civil society organisations that R2K has recruited and which has turned it into a powerful and influential organisation.” (Email interview with Raymond Louw, 30 January 2014).

However, according to Louw, the R2K came into being due to the civil society following the lead of Sanef in its actions against the POSIB. As has become clear, McKinley’s view is different from that of Louw’s. The confusion between Sanef and the R2K regarding the lead role is not an ideological struggle *per se*, but a struggle for leadership.

Both organisations, however, do share a similar ideology when it comes to the POSIB; that it serves the ideological interests of the ANC and that it is a threat to the Constitution and democracy.

But separates the R2K and Sanef is their different views regarding the lead role in the challenge against the POSIB and the limited interests of Sanef in focusing on the media. But Sanef’s Chairperson views the R2K in a positive light:

“R2K is an interest group established to fight for citizens’ right to know. Their campaign is perfectly legitimate and our Constitution guarantees the existence of civil society groups such as R2K.” (Email interview with MpumeleloMkhabela, 30 January 2014).

The statement from Mkhabela indicates that relations between Sanef and R2K are not necessarily bad, even though there are few points of differences between both organisations. Sanef

recognises the constitutional mandate of the R2K and its role in promoting and protecting democracy.

It can be argued that the partnership between both organisations has been fruitful and provide good results by exerting pressure to the ANC in making amendments to the Bill. Had there not been sufficient pressure from the R2K, Sanef and other actors, the Bill would most likely have been approved and made it into law a long time ago.

While there are some difference, the oppositional role and discourse against the POSIB by the R2K and Sanef cannot be questioned.

5.11.3 Conclusion

The dichotomy of views on the Bill between Sanef and R2K is at times confusing. Many people think the POSIB was a media Bill. It is not, it is an information Bill aimed at members of the public, the media and civil society institutions.

5.12 Perceptions of public vs. national interest

This section looks at value the R2K and Sanef place on public and national interest. This study defined public interest as a type of commonality amongst citizens, while national interest was defined as principles informing the agenda of the state. As it has been indicated earlier, from the comments by Cwele and Mthembu, the ANC places a great priority over national interest.

5.12.1 The R2K's perception of public vs. national interest

“The public interest, as long as it is not an elite public, but genuinely representative of the public. National interest can be abused to protect the interests of the state.” (Email interview with Jane Duncan, 30 October 2013).

Segodi points out that:

“Ideally, there should not be distinction between national and public interest since government is elected by the people to pursue their interests.” (Email interview with Siphwe Segodi, 30 October 2013).

According to Duncan public interest is more important than national interest. But, she explains, this public interest should rather reflect on the common need. For Segodi, however, there is no need for any distinction between public and national interest. Segodi bases his view on the understanding that the government is elected by the public and should therefore use public interest to define national interest.

A view was made that national interest is defined by a selective few, that is, those who hold power. It is because of this view that Duncan argues that public interest should not be elite but concerned with the people on the ground.

What this study has observed is that there is confusion when defining and putting both terms into practice. This confusion is centred on the notion and value of the ‘public’. In terms of the POSIB, the ANC limited the value of the public when drafting the Bill.

McKinley argues that:

“In R2K’s view, the ‘public’ (which after all, is simply another way of saying, the ‘people’) is at the heart of any democracy. As such, what is in the ‘public interest’ is no more and no less than the regular activities and functioning of a democracy (and thus, by extension and association, the government which that public chooses to represent it). As such, the ‘public interest’ has to be privileged – without it there can be no meaningful democracy and thus no meaningful democratic accountability, transparency and empowerment of citizens. Conversely, the ‘nation’ is but a geographic and ultimately politicised construct/ arrangement wherein there are institutional arrangements for purpose of governance. Given that the very construct of the ‘nation’ is grounded in specific power (racial and class) relations, the notion of a ‘national interest’ is likewise moulded by, engaged and pursued in line with such power (institutional) configurations. It therefore is largely defined by those who hold such power at any given point and time, not to the very public in whose name the ‘nation’ exists and operates.” (Email interview with Dale McKinley, 23 January 2014).

According to McKinley, it is impossible to have democracy without public interest. McKinley affirms the traditional definition of democracy as a form of governance that relies on the will of the people. It is also evident that without the will of people there is no democracy. For

democracy to be seen as a working machine, governments should cater for the voices of the people on the ground.

It is clear that, for the R2K, public interest is more important than national interest.

5.12.2 Sanef's perception of public vs. national interest

For Louw both national and public interest are important and need to equally be view the same:

“The two values are almost equally potent. The public interest is the more important because it is the core value of democracy and all action taken by the state and the country at large is in the public interest or it should be. National interest is important because it relates to all matters that benefit the state. The public interest, however, goes further in the sense that it encompasses all matters of national interest but extends to issues and the public beyond the borders of the country.” (Email interview with Raymond Louw, 30 January 2014).

According to Louw, links between the national and the public interest can be made. He argues that the national interest is important because it addresses issues relating to the state. The 9/11 event of two aeroplanes flying in the World Trade Centre in New York shows just how important national interest can be. Using the US example, it can be argued that if national interest is threatened, public interest will be threatened too.

To Mkhabela, both public and national interest are important and interdependent.

“None is more important than the other. It also depends on how you define them. But we invoke public interest to explain that which we think the public has a legitimate right to know but which, in some cases, those in power may interpret as against the national interests. The national interest, properly defined in line with the Constitution and not for narrow party political purposes, is best served when the public interest is served too. Those propagating the national interests to justify the enactment of the POSIB have reduced the term to issues of national security – again narrowly defined. We believe the security of the state – and by extension the national interest - is vulnerable in a political environment whose guiding value is “secrecy first” and public interest later. It should be the other way around.” (Email interview with Mpumelelo Mkhabela, 30 January 2014]

Mkhabela argues that the national interest is best served when public interest is served. This is an important view for South Africa. The ANC government is plagued with issues of service delivery and corruption. What this means is that the country is failing in serving public interest. It makes no sense for the POSIB to be implemented, given the socio-economic challenges on the ground. The ANC needs to follow Mkhabela's argument to solve the dispute around the POSIB, solving issues related public interest first.

5.12.3 Conclusion

Both the R2K and Sanef prioritise public interest; Sanef notes that the national interest is better served when the public interest is served. While the 9/11 event has made it important for states to regard national security as an important aspect of national interest, such a scenario is not applicable in all situations. Situational factors need to be taken into account. In South Africa, for example, the government led by the ANC has many times lost the trust of the public because of maladministration and corruption revealed by the press. These can be used as primary indicators that the democratically elected government is failing the people. The R2K and Sanef need to continue their fight against the POSIB, until the ANC realises that it need to address the needs of the people on the ground.

Overall Analysis

The POSIB has been, and is, a source of struggle between the ANC, Sanef and the R2K. From the analysis made from the documents and press releases it is possible to postulate that the Constitution is a catalyst that fuels the conflict. The Constitution is not clear-cut and all the organisations use the Constitution to justify their causes. The ANC, the R2K and Sanef all use sections of the Constitution to legitimise their discourse and position on the POSIB.

Nonetheless, the study has found that there is an ideological segmentation amongst the organisations involved in the POSIB. As informed by findings, the ANC – challenged by a critical press and vibrant civil society – intends to use the Bill to prevent its hegemony from unravelling. The civil societies assume a critical role in a democracy, being a watchdog.

For Sanef the war is focussed on the whether the press will be able to continue with its critical and investigative journalism⁶⁶. For the R2K the battle is for information in the public interest. In South Africa most of rural and poor communities are dependent on the state for their needs such as water and housing. If the Bill was to come into law it would be difficult for civil society and the press to hold the state to account.

The practice of radical and participatory democracy in South Africa is a challenge. The Constitution allows both forms of democracy, but the ANC government is making this impossible. Parliament, which offers a traditional realm for the public sphere as well as a platform for participatory democracy, is now subject to ‘one party’ rule. The ANC uses its majority in Parliament to legitimise policies that reflect its ideological discourse and interest. While its actions are legitimate – it was elected by the majority – questions can be asked about the use of its majority in Parliament. Does the ANC use its domination to advocate the needs of its electorates or of ‘securocrats’?

The Bill is against public interest, it violates fundamental rights and ‘silences’ the nation. It can be argued that the ANC is self-serving and has no regard for what the public really needs. One example is the debate on the e-tolls.⁶⁷

5.13 Language and power

CDA is built on examining language. It looks at the manner in which language is used and the context thereof. Fairclough (2013) and Van Dijk (1997) argue that sometimes discourse is used to inscribe and enforce power. As argued by Kasrils, Sanef and the R2K, this is how this study views the POSIB – as an ideological tool used or intended to enforce the uncontested hegemony of the ruling party. The hegemonic rule of the ANC was made clear following the resolutions of its 2007 national conference. Post the conference, the party assumed a critical and radical view of itself and society. As part of its self-retrospection the party was led to believe that its

⁶⁶ The ANC views this practice as driven by market fundamentalism.

⁶⁷ E-toll refers to the electronic toll gate system that automatically debits motorists for using national freeways. The public has broadly rejected the system arguing that it adds a financial burden to road users who are already struggling to make ends meet. Various protests have been carried against the South African National Roads Agency (Sanral), a state organ that oversees the implementation of e-tolls. According to the opposition party, Democratic Alliance (DA), the Congress of South African Trade Unions (Cosatu) and others, the system will increase the cost of living. Others opposing the system view it as an attempt by the government get more money out of citizens, adding another tax burden, Despite these protests, the ANC is continuing to implement e-tolls.

hegemony was at stake following challenge by a critical and independent press and sectors of civil society. As part of an attempt to restore its hegemony, the party resorted to the use of discourse and the ideological state apparatus to maintain its power. This is made clear in the proposal of a MAT and the POSIB. The former was to play an institutional role of enforcing the ANC's power and discourse by monitoring media coverage and enforce harsh correction measures against the press for defaulting on the rules of the 'game'.⁶⁸ When public pressure prevented the implementation of the MAT, the ANC proceeded with the POSIB. Once again, pressure, this time from the R2K and Sanef, forced the ANC to retreat.

5.14 Conclusion

The struggle for freedom and democracy still continues in South Africa, with the Constitution at risk of being used and abused for self-serving interests. What is currently unfolding in South Africa is, as Nyamnjoh (2005) observed, "something old is always present in the new". Could this mean that the Bill is a reincarnation of apartheid-type legislation in disguise? What type of democracy will South Africa have if freedom of expression and the right to access information are not guaranteed? Should President Jacob Zuma approve the POSIB could this country be considered a democracy? As the R2K has said , it is indeed sad that the party that brought democracy in South Africa could now responsible for its demise. The POSIB is indeed an ideological tool that serves the ideological interests of the ruling party, which is to silence a critical discourse, while undermining the fundamental rights of democracy.

⁶⁸ That is, the Press Code.

Chapter 6: Conclusion

This chapter looks at the overall arguments made around the Bill , and offers insight into the respective positions of the ANC, the R2K and Sanef. This chapter will also synchronise the key arguments made in the literature review, with the theoretical and methodological framework infusing these findings. To begin, it is important to note that since the inception of a democratic system in South Africa the government, led by the ANC, has achieved a great deal in consolidating democracy. The drafting and adoption of a democratic Constitution that catered for the needs and aspirations of the people of South Africa was first and foremost among these achievements.

Friedman (2011), Berger (2012), McKinley (2014), Louw (2014), Kasrils (2011) and others have indicated how crucial the flow of information and freedom of expression was for any democracy. These arguments proved persuasive and several high profile cases of maladministration and corruption at all level of government was possible due to these constitutional protections of free flow and access to information. This indicates that Sections 16 and 32 of the Constitution that provide for this free flow and access to information are practical and meaningful tools in the protection of democracy. Literature defines democracy as the will of the people. As argued by Duncan, McKinley, Louw and others the POSIB in its current form does not serve the will of the people and violates the Constitution and is clearly an ideological tool of the ruling party. The concept of ideology simply refers to a generalised scheme of ideas. The analysis of the POSIB suggests the Bill is an ideological tool or project meant to enforce the ideological discourse of the ruling party, linked to its hegemony.

But given the democratic context of the country, the ANC had to succumb to a lot of pressure and opposition from the R2K and Sanef. The move by both organizations in challenging the discourse of the POSIB reflects what Daniels (2010) calls an attempt to challenge the unprogressive hegemony of the ANC. The case of Mzilikazi wa Afrika proved the validity of Daniel's argument, together with the argument made by this study that the ANC's ideology and hegemony was constantly weakening, prompting the use of force, violence and power abuse as a means by which the party seeks to retain its dominant position in society. POSIB is just another tool to achieve this goal as indicated by Kasrils and others.

Another important observation is that, civil society organs play a crucial and key role in the protection and consolidation of democracy. The analysis of POSIB reveals that the Bill is an ideological project, filled with ideological interests as reflected by the critical analysis of the discourse of the ANC, the R2K and Sanef. Sanef is a professional body that advocates for its journalistic interests and members. The ANC is a political body and advocates for the interest of the party and its elites. However for the R2K the fight is for public interest applicable to all members of the South African community regardless of s class, race, gender and affiliation. The position of the R2K on the Bill is public orientated and not self involved. For Sanef the fight against POSIB has two sides, one for the general private press and other for the general public. However, Sanef does not place a stronger emphasis on the latter. This has been made clear by Segodi, Duncan and McKinley. This leads to the conclusion that POSIB is indeed an ideological discourse used to wage an ideological war. This is also made evident by Cwele's reference to activists and journalists as foreign spies.

The case of Mzilikazi wa Afrika, Marikana and Tatane as referenced in footnotes indicates a shrinking space for radical and participatory democracy in South Africa. Laclau and Mouffe made it clear that in radical democracy societies need to recompose themselves and rearticulate their struggles against the dominant class and challenge its hegemony. However, the ANC's response to Laclau and Mouffe's argument has been the direct opposite in the case of the POSIB and e-tolls among others. The violent response by the police is also an indication that the ANC is using its power to safeguard its hegemony that is constantly challenged by the commercial press through critical discourse.

6.1 Response to Main Research Question

a. What is the role of Ideology in the discourse of the ANC, R2K and Sanef around the Protection of State Information Bill (POSIB)

The ideology of the ANC on the Bill as indicated by findings from both Sanef and R2K is to impose the Bill in order to safeguard its weakening hegemony due to critical dissent by the press and civil society. However, the biggest challenge for the ANC is the independent press and its critical dissent. This is captured well on the 52nd ANC's National Conference Resolution on the Battle of Ideas. Following the conference resolution the ANC claimed to be under constant

ideological attack by the private press as evidenced by the overwhelmingly negative coverage and portrayal of the ANC by the press. The ANC argues that it is often portrayed as weak and passive by the press as was the case of Marikana tragedy. The press is deemed by the ANC to ignore its values of collectivism and the African spirit of social values linked to ubuntu. The competing discourse on ethics and the functional role of the press drives the ideological struggle between the press and ANC. This view is captured well by scholars such as Duncan, Wasserman, Friedman and others.

The role of the ideology in the ANC is used to reinforce its weakening hegemony and to counter-balance the negative role of the press and the Bill serves part of this function. This view is supported by Sanef's position on the Bill – the concern that the Bill will make investigative journalism difficult, and make it hard for the press to expose state corruption. This paper believes that this could be the intended purpose of POSIB by the ANC. The ideology of Sanef as regards the Bill is to safeguard its journalistic interest as indicated by Segodi and Duncan. The R2K has expressed a concern that Sanef's view of the Bill is limited and one sided, given that the organisation addresses only concerns as they relate directly to the press and ignoring other sectors of the society. From the R2K's view, the Bill affects everyone and it makes no sense for Sanef to prioritise its interest. The ideology of the R2K which is informed by the principles of democracy, a watchdog role, and theory is used in the discourse of POSIB to protect a broad public interest, consolidate democracy and limit the negative effects of the Bill on the general public.

6.2 Response to sub-questions

b. *Is the POSIB serving any particular ideological interest?*

Yes, POSIB is an ideological tool aimed at serving the ideological interest of the ANC, which is to silence critical dissent and promote a favourable image of the party as argued by Segodi. The image of the ANC has been tainted by negative coverage in the private press. The coming of New Age into scene validates this claim, and follows precisely the recommendations tabled at the 52nd ANC's National Conference. On the findings: Kasrils, Borman, Sanef and R2K have made it clear that purpose of POSIB is to hide state corruption, this particularly includes irregularities in the awarding of tenders, and the misuse of public money. The work done by the

Public Protector on case of Bheki Cele, and Nkandla saga validates the view made by these organisations opposing the Bill . In its current form the Bill gives every state organ a right to classify information, which by definition is anti-transparent and promotes secrecy and hiding information. Transparency and accountability are very important values for any democracy but under this Bill these values are now under threat.

c. *Is there a need for the information Bill ? If so, then on what ground?*

Professor Duncan from the R2K labelled the Bill as a “necessary evil”. In short, there is a need for the Bill . The event of 9/11 in US offered a great lesson to the world that national security is very important, the economy of the country and the wellness of its citizen relies on it. It surely will not be good for South Africa to lend the same experience. The safety and security of the country is very important, however it should not be enforced in a manner that undermines fundamental rights and the constitution as the Bill does. In its current form the Bill is too broad and need to be narrowed and made to speak to the constitution. This argument is not new, and is what the R2K and Sanef have been proposing. The ANC as the government voted into power by the people needs to listen to the people.

d. *Is there a way forward, or a possible compromise between the different parties, that can be reached?*

The only party that need to compromise is the ANC, Sanef and the R2K have played their part by welcoming elements of the Bill and supporting its national mandate. However, a problem arises when the Bill turns to undermine Sections 16 and 32 of the constitution. These sections are very important for democracy. The compromise that needs to be made is that the ANC needs to follow the recommendations of the R2K and Sanef - recommendations that provides a way for the ANC to promote national security without violating fundamental rights.

6.3 Way forward

This dissertation opposes the ideological discourse of the ANC on the Bill and argues that the ANC needs to accept the recommendations on POSIB by the R2K and Sanef. The ANC needs to uphold the constitution of the country in all the laws it drafts as was the case with PAIA. However, should President Jacob Zuma sign the Bill into law, the R2K and Sanef need to use

the last remaining option and challenge the law in the Constitutional Court. However, should the ANC feel that the changes demanded weakens the Bill too much then the ANC should do as Sanef and the R2K have suggested - throw out the Bill and come up with a new one that complies fully with the constitution.

6.4 Closure

Using discourse analysis this study has explored the ideological discourse of POSIB. And has explored the discourse of the organisations involved around the fight for and against the Bill . This study therefore concludes that POSIB is an ideological discourse that is driven by the ideological interests mainly of the ANC. This study notes that both Sanef and the R2K use the fight against POSIB to promote their own ideological interests as driven by their organisational mandate. For Sanef its interest on the Bill is driven by needs of independent press i.e. press freedom, while R2K interest on the Bill is driven by public interest, a fundamental discourse for any democracy.

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Appendix 1

Interview questions for the R2K

Question 1: How would you like the POSIB and R2K to be perceived?

Question 2: What is R2K's view of the relationship between POSIB and the Constitution?

Question 3: Is POSIB a threat to democracy? If so how?

Question 4: How does R2K view the position made on the Bill by the ANC

Question 5: What is R2K's view of Sanef's position on the Bill?

Question 6: Between public and national interest, which interest does R2K view as the most important and why?

Appendix 2

Interview questions for Sanef

Question 1: How would you like the POSIB to be perceived?

Question 2: What is Sanef's view of the relationship between POSIB and the Constitution?

Question 3: Is POSIB a threat to democracy?

Question 4: How does Sanef view the positions made on the bill by ANC?

Question 5: What is Sanef's view of R2K's position on the bill?

Question 6: Between public and national interest, which interest does Sanef view as the most important and why?

Appendix 3

The South African Constitution, Section 16

16. Freedom of expression

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 or
- c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm

Extracted from the South African Constitution (1996, p.9)

Appendix 4

The South African Constitution, Section 32

32. Access to Information

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.

Extracted from the South African Constitution (1996, p.15)

Appendix 5

The South African Constitution, Section 36

36. Limitation of right

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 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

2) Except as provided in subsection (1) or in any other provisions of the Constitution no law may limit any rights entrenched in the Bill of Rights

Extracted from the South African Constitution (1996, p.18)

Appendix 6

Summary of the POSIB

MEMORANDUM ON THE OBJECTS OF THE PROTECTION OF INFORMATION BILL

1. BACKGROUND

1.1 The Protection of Information Bill (the Bill) will ensure a coherent approach to the protection of State information and the classification and declassification of State information and will create a legislative framework for the State to respond to espionage and other associated hostile activities.

1.2 The Bill sets out procedures on how classified documents are to be handled during court proceedings, and requires courts to prevent public disclosure of classified documents that form part of court records.

2. OBJECTS OF BILL

2.1 The Bill seeks to

- a) create a statutory framework for the protection of State information. State information is information generated by organs of state or is in the possession or control of organs of state;
- b) set out criteria and processes in terms of which State information may be protected from destruction or from unlawful disclosure;
- c) set out criteria and processes in terms of which information which is protected from disclosure and which is classified, may be declassified;
- d) create offences and proposed sentences for unlawful disclosure of information, including the crime of espionage;
- e) make it an offence for an individual to knowingly supply false information to the national intelligence structures;

- f) establish guidelines for the treatment by courts of classified documents;
- g) provide for the Minister of State Security to issue regulations on information security across government; and
- h) repeal the existing Protection of Information Act (Act No. 84 of 1982).

2.2 Structure of the Bill

Chapter 1: Definitions, objects and application of the Bill

This chapter provides detailed definitions of all technical terms and concepts. The statute will apply to all organs of state and natural and juristic persons. The Minister of State Security may, on good cause shown, exempt organs of state from certain provisions of the Act.

Chapter 2: General principles of information

This chapter outlines the principles which underpin the Act and which inform its implementation and interpretation.

Chapter 3: National information security standards and departmental policies and procedures

Within 12 months of the date on which this Act comes to effect, the Minister of State Security must issue national information security standards prescribing broad categories of information that may be protected (classified or protected against destruction, alteration or loss). This chapter sets out what matters such standards may cover.

Chapter 4: Information that requires protection against alteration, destruction or loss

This chapter sets out what information may be protected against alteration, destruction or loss (known as “valuable information”); the process of determining information as valuable; and how such information is to be protected.

Chapter 5: Information which requires protection against disclosure

This chapter sets out what information may be protected from unlawful disclosure, and divides such information into two categories: “**sensitive**” and “**commercial**”.

Chapter 6: Classification of information

This chapter sets out principles that must be observed when classifying information; and outlines the method of classifying information. It also describes the three levels of classification: confidential, secret and top secret; and specifies who has the authority to classify information. Sensitive, commercial or personal information which is in material form may be protected by way of classification. Information may not remain classified for more than 20 years unless the head of the organ of state that classified the information certifies to the satisfaction of his or her Minister that continued protection against disclosure is critical to the national security of South Africa; necessary to prevent identifiable damage to the national interest; or necessary to prevent demonstrable physical or life-threatening harm to a person or persons.

Chapter 7: Criteria for continued classification of information

This chapter outlines the criteria that a head of an organ of State must consider in reviewing the classified status of information. It further sets out the procedure in terms of which interested third parties may request the head of an organ of state to review the status of classified material. Heads of organs of state are required to review the status of classified information at least once every 10 years.

Chapter 8: Transfer of records to national archives

Organs of State are required to review the status of information before transferring such information to the National Archives. Information transferred to the National Archives may not hold a classified status and shall be deemed to be automatically declassified. Existing classified information within the National Archives shall be subject to the declassification stipulations set out in the Act.

Chapter 9: Release of declassified information to public

Information that is declassified may be made available to the public in accordance with applicable national and departmental policies. A request made in terms of the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000), for a classified record proceeds as determined in that Act. The classification must be reviewed and if it is decided that access is to

be granted, the record must be declassified before it is made available. The National Archives shall, in conjunction with those organs of state that originate classified information, establish a government-wide database of declassified information that heads of organs of state have determined may be made available to the public. Information contained within the database shall, at a reasonable cost, be made available and accessible to members of the public.

Chapter 10: Implementation and Monitoring

The Department of State Security shall have the responsibility to develop, coordinate and facilitate the implementation of national policies in an efficient and consistent manner across all organs of state. The responsibilities of this Department do not extend to the national intelligence structures such as the Department of Police and the Department of Defence and War Veterans given that these departments have the necessary capacity and competence to implement the provisions contained in the Act.

Chapter 11: Offences and penalties

This chapter provides for the following offences: Espionage offences; hostile activity offences; harbouring or concealing persons involved in espionage or hostile activities; unauthorised access to, interception of or interference with classified information; registration of agents and related offences; attempt, conspiracy, and inducing another person to commit an offence; disclosure of classified and related information; knowing possession of classified information; destruction of valuable information; improper classification; disclosure of a State security matter. The penalties assigned vary on the basis of the nature of the offence and the actual or potential harm caused. This chapter further provides for the minimum sentences of offences.

Chapter 12: Protection of information before courts

This chapter outlines the process to be adopted by courts in the handling of classified documents that form part of court records. All documents with a classification shall remain protected by courts unless the courts direct otherwise.

General provisions







This chapter deals with the submission of reports by organs of state and the National Intelligence Agency; the issuing of regulations by the Minister of State Security; and the institution of certain transitional provisions. The provisions of the Act are suspended pending the establishment of the standards, policies and procedures and the regulations, or for a period of 18 months from the commencement of the Act, whichever occurs first, with the exception of several identified sections.

For a full version of the POSIB visit, <http://www.r2k.org.za/secretcy-bill/>

Appendix 7

The R2K Seven Point Freedom Test

Right2Know Freedom Test (detailed assessment below)

1. Limit secrecy to core state bodies in the security sector, such as the police, defence and intelligence agencies. - ALMOST MET	
2. Limit secrecy to strictly defined national security matters and no more. Officials must give reasons for making information secret. - PARTLY MET	
3. Exclude commercial information from this Bill. - ALMOST MET	
4. Do not exempt the intelligence agencies from public scrutiny - PARTLY MET	
5. Do not apply penalties for unauthorised disclosure to society at large. - NOT MET	
6. Do not criminalise the legitimate disclosure of secrets in the public interest. - PARTLY MET	
7. An independent body appointed by Parliament, and not the Minister of State Security, should review decisions about what may be made secret. - PARTLY MET	