ARTICLE

THE ROLE OF THE RIGHT TO INFORMATION IN THE CONTESTATION OF POWER IN SOUTH AFRICA'S CONSTITUTIONAL DEMOCRACY

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ABSTRACT

South Africa is the first country in Africa more than twenty years ago to recognise the right of access to information and to pass a law for the practical enforceability of this right through the Promotion of Access to Information Act (PAIA). The aim of the right of access to information is to establish a framework of accountability that allows the public to hold the state accountable through the promotion of transparency. However, due to misconceptions about the nature of the state, the nature of PAIA, the nature of the South African public and how it engages with the state, as well as the inherent nature of state information, the idea of transparency has been skewed in South Africa. As a result, it is necessary to critique the assumptions about transparency and access to information disclosure and to reconsider what factors need to be taken into account to promote good governance in government and to build active citizenship in South Africa.

1. INTRODUCTION

It is objected against the regime of publicity, that it is a system of distrust? This is true; and every good political institution is founded upon this base. Whom ought we to distrust, if not those to whom is committed great authority, with great temptations to abuse it?[1]

The English philosopher Jeremy Bentham argues that political institutions are founded on distrust and if public office holders are to earn the trust of the governed, the

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1 Jeremy Bentham, 'Of Publicity' in Michael James et al (eds), *Political Tactics* (Oxford University Press 1999) 37.

UNISA university of south africa PRESS

Southern African Public Law
https://upjournals.co.za/index.php/SAPL/index
Volume 31 | Number 1 | 2016 | pp. 54–72

https://doi.org/10.25159/2219-6412/2670
ISSN 2219-6412 (Print)

principle of publicity based on the availability of information to the public is necessary.[2] At the centre of Bentham's argument is that transparency can improve trust in the governors by the governed. How this assertion plays out is the central consideration in this article.

Prior to the conduct of the controversial 2002 presidential election in Zimbabwe, the former President of South Africa, Thabo Mbeki, appointed the retired Deputy Chief Justice of South Africa, Dikgang Moseneke and Constitutional Court Judge, Sisi Khampepe, to travel to Zimbabwe and assess the constitutional and legal issues relating to the upcoming election.[3] The judges submitted a report to the President, which was not released to the public for over a decade. The *Mail & Guardian* newspaper requested access to the report in terms of the Promotion of Access to Information Act (PAIA), which was refused by the Presidency. This refusal marks the beginning of what became the longest-running access to information case in the South African courts, despite the courts deciding on all occasions on different points of law that favoured the public release of the report.

The attitude of the South African government in resisting the public release of the Khampepe report demonstrates how secrecy has come to be the rule and not the exception in public governance. This has elevated a failure of administrative justice by the state to a battle for the protection of constitutional rights and has given civil society organisations contesting these administrative decisions in court the status of defenders of constitutional freedoms. The public debate on the public release of the Khampepe report over the several years of court battle was framed along the lines of a public demand for transparency in government. The underlying assumption here is that the resistance on the part of the government is an indication of an attempt to contravene the law. A further assumption is that the public interest in disclosure outweighs the harm that any exemption to disclosure protects. In respect of the government's actions, the repeated and unsuccessful attempts to prevent disclosure create the impression that the government did not believe in the public's blanket right to know. The government seemed to suggest that the exercise of discretion by government should be trusted, and found suspicious the curiosity of civil society in seeking access to the Khampepe report. In essence, what the prolonged contest for access to the Khampepe report reveals is a fundamental divide between the state and civil society and a breakdown of trust on both sides.

The conduct of the state in the *Mail & Guardian* case aptly demonstrates the persistent and perceived resistance to disclosure that has frustrated the realisation of the right of access to information in South Africa. Such resistance by the government further raises the level of distrust within a broader context of a perceived agenda of secrecy in government. However, the absence of trust in the relationship between the state and the governed is not as simplistic as a breakdown in communication that can

2 See Bentham (n1) at 29–44

3 [2011] ZACC 32.

be cured by access to information, as suggested by Bentham, or through compliance with transparency laws like PAIA. As Hardin argues, to ask any question about trust is implicitly to ask about the reasons for thinking the relevant party to be trustworthy.[4] Based on this premise, the assumption that increased transparency implies a more trustworthy government needs to be questioned. This questioning will be done by using examples from South African political discourse, particularly in relation to the supply and demand of information in order to argue that the expected outcomes of transparency in terms of good governance, public trust and accountability are improbable as a result of the flawed assumptions often made about the nature of the state, the nature of the law, the nature of the 'public',[5] and the inherent nature of information.[6]

The assumption made within the transparency discourse is that increased access to information disclosure by government will increase trust by the public in government. This discounts a number of factors and presumes a number of others as well. The purpose in this article is to critique these assumptions about transparency and access to information disclosure. However, the purpose of the critique is not intended to argue that the transparency agenda for open government should be abandoned, but to argue that transparency and access to information has little relevance to the idea of a trustworthy government and that other factors need to be taken into account to give more weight to the value of the right of access to information and its role in building active citizenship.

2. THE STATE, TRANSPARENCY AND TRUST

Bentham argues that where there is no publicity there is no justice.[7] For Bentham publicity is the modern-day concepts of transparency and openness. Whether described as publicity, transparency, or access to information, the values attached to these concepts have been consistently heralded as the ultimate tool to challenge state authority and to remove the public perception of distrust. The evil that transparency is perceived to fight, according to Bentham, is secrecy; but as O'Neill argues, to increase trust, what needs to be avoided is deception and not secrecy.[8] Transparency does not reduce deception and a flow of information in some cases may be deliberately released to further mislead

4 Russel Hardin, *Trust and Worthiness* (The Russell Sage Foundation Series on Trust, New York 2002) 1.

5 I deal with the notion of the public in the context of the scepticism expressed by Foucault on the idealised view of public opinion as an expression of the entire social body and the public exercising a sort of democratic surveillance over the state. See Michel Foucault, 'L'oeil du pouvoir' in *Dits et ecrits II 1976-1988* (Gallimard 2011) 204.

6 In Fenster's work critiquing transparency as a theory of communication, he speaks of an invisible open government, the non-existence of government information and the imaginary public. Mark Fenster, 'Transparency as a Theory of Communication' (3rd Global Conference on Transparency Research, France 2013).

7 Jeremy Bentham, 'Constitutional Code' in J Bowring (ed), *The Works of J Bentham* (Tait 1843) 493.

8 Onora O'Neill, *A Question of Trust* (Cambridge University Press 2003) 72–73.

the public, leading to more uncertainty rather than trust.[9] Also, O'Neill's position assumes that distrust of government arises, firstly, as a result of lack of information, and when information is disseminated; such information is devoid of manipulation by the discloser. It further assumes that disseminated information is used in a particular and rational way to formulate a particular public opinion that constitutes a form of democratic surveillance.[10]

With this element of trust at play, avenues such as whistle-blowing have risen to prominence within the transparency discourse. Over the last few decades, the tools of transparency have changed. The sources of information used to be predominantly the press; today information technology is the contemporary tool and is an aid to the modern-day whistle-blower. Information is no longer perceived as being the prerogative of government or even the private corporation to determine whether or not to release to the public. It has become a commodity which the public can obtain through unauthorised disclosures. In addition, the manner in which information is officially requested, either in passive or aggressive ways, and how that determines the outcome, has been tested.

In a study conducted through a randomised-control trial using access to information requests to measure the impact of emotional 'affect' on municipal budget transparency in South Africa, the researchers used a behavioural economic theory to model the extent to which a requester can manipulate an otherwise standardised process to influence information officers' decision to provide information or to refuse the requests.[11] By differentiating the tone and appearance of otherwise similar requests, the trial sought to induce affect by composing an unusually aggressive request and compared responses to an emotionally neutral version of the same request.[12] The aggressive requests created a sense of urgency by pressurising the information officer to respond immediately despite the statutory period of thirty days. The legal consequences of failure to respond were stressed whereas the neutral requests made no mention of potential consequences.[13] The collected data suggested that aggressive requests could cause a quicker response time.[14] The various forms in which information is now accessed suggest that information holders no longer hold such powerful positions as they previously commanded.

However, Bauhr et al suggest that within the context of the state and the citizen transparency may not incite citizens to take action but may give rise to resentment

9 ibid.

10 Fenster (n 6).

11 Stephanie van der Mey and Katherine Eyal, 'The impact of Emotional "Affect" on Municipal Budget Transparency in South Africa: A randomized control trial using PAIA requests' (2014), 4 <https://open.uct.ac.za/bitstream/item/10148/Stephanie%20van%20der%20Mey%20Transparency%20in%20Municipal%20Budgets%20PAIA%20Final%20Version.pdf?sequence=1> accessed 15 May 2017.

12 ibid.

13 ibid at 12.

14 ibid at 19.

and resignation where a flood of information confirms citizens' worst suspicions.[15] Transparency therefore has a disempowering effect on the seekers of information as well, which cultivates a desire to withdraw from political matters and the public sphere.[16] Bauhr et al suggest that two conditions influence the confidence-building effect of transparency. These are the actual prevalence of corruption and the existence of what they call voice opportunities – when citizens do not see a political way to influence institutions.[17] In a country with weak rule of law and government, Bauhr et al argue that transparency may have deleterious effects on institutional trust where venality is exposed and expectations for reform are raised but do not happen.[18] Transparency therefore becomes valuable depending on the intended outcome, whether it is intended to provoke public reactions to impunity. If otherwise, distrust is increased. They argue that if distrust is the result of transparency, then increasing transparency too early in the political development of a country may in fact produce a crisis of credibility, which demobilises citizens from action.[19]

The operability of transparency emanates from principles and bureaucratic strictures of administrative justice consistent with Bentham's position that where there is no publicity there is no justice. Freedom of information laws, like South Africa's PAIA, give effect to this administrative-law principle that is mandated by section 32 of the South African Constitution, which recognises the right of access to information. The running narrative here is that with a right of access to information the public can be active citizens that engage in reasoned decision-making as is equally expected of administrative officials in government, and this decision-making leads to democratic participation that holds government accountable.

This narrative however is flawed in many respects, not least for its underestimation of the bureaucratic nature of government, but also for the optimistic expectations of the desire of the public to interact with government on this platform, ignoring the historical context of South Africa and how power tussles have been, and continue to be, contested between the state and the governed.

2.1. The right to be heard: the distrust between the state and the governed

A 2013 research report by Global Financial Integrity stated that South Africa has suffered an illegal outflow of over $100 billion due to corruption in both the public

15 Monika Bauhr, Marcia Grimes and Niklas Harring, 'Seeing the State: The implications of transparency for societal accountability' (2010) QoG working paper series, 7 <http://qog.pol.gu.se/digitalAssets/1350/1350160_2010_15_bauhr_grimes_harring.pdf> accessed 15 May 2017.

16 ibid.

17 ibid at 8.

18 ibid.

19 ibid at 19.

and private sectors since 2002.[20] The adverse effects of corruption have significant impact on the lives and livelihoods of South Africans, affecting the lofty ideals of the Constitution to improve the quality of life of all citizens and free the potential of each person, founded in the Constitution's preamble. As a result, at the heart of twenty years of constitutional democracy in South Africa remains the struggle for wealth creation and poverty reduction.

In addressing the imbalance of power between the state and the governed, the corrupt and those who suffer the effects, a power struggle emerges in which the right of access to information, perceived as an egalitarian right and recognised in section 32 of the South African Constitution, is central. The promise of the right of access to information by its proponents was the delivery of a powerful tool to empower the public to hold government accountable and demand service delivery, particularly at a local government level. These claims about what access to information can achieve were spurred by the successes recorded in other countries, like India. Here, before the law of access to information was passed or the right to information recognised, there were documented successes of active citizenship which included public accountability by government officials of monies allocated to local councils.[21]

These claims and the expected successes in South Africa ignored the political history of South Africa and the role of culture in demanding accountability by the public from government. South Africa's socio-political history is one that has been characterised by disruptions to traditional forms of social engagement in the struggle for power. The African National Congress, (ANC) alongside other liberation movements, used various methods, including sabotage, to wrestle control of South Africa from the former apartheid government. Street protests also frequently characterised the daily lives of the previously marginalised majority in South Africa, as groups protested against various policies, laws and regulations of the former government.[22] Historically, South Africans therefore often found themselves resorting to protests in making their voices heard and this has continued in democratic South Africa.[23] The frequency of these protests has been aided by the failure of the former and current governments to satisfactorily engage in open government practices.

In the annual report of the Department of Police for 2014/15, the government reported a total of 14 470 crowd-related incidents. The Minister of Police referred to these incidents as protests and 2 289 incidents were classified as violent, yet it has

20 Dev Kar and Brian Le Blanc, *Illicit Financial Flows from Developing Countries: 2002 – 2011* (Global Financial Integrity 2013).

21 See Richard Calland (ed), *Right to Know Right to Live* (Open Democracy Advice Centre 2002).

22 'Public Protest in Democratic South Africa' (*South African History Online*, 17 March 2014) <www.sahistory.org.za/article/public-protest-democratic-south-africa> accessed 6 October 2016.

23 Jane Duncan, 'The politics of counting protests' (*Mail & Guardian*, 16 April 2014) <http://mg.co.za/article/2014-04-16-the-politics-of-counting-protests/> accessed 6 October 2016. Professor Jane Duncan works in the school of journalism and media studies at Rhodes University.

been disputed that these crowd-related incidents are service delivery protests.[24] A more comprehensive study reports that between 2008 and 2013 there have been more than 3 000 protests in South Africa.[25] According to Ngwane, of the Social Change Research Unit at the University of Johannesburg, 'when protests get disruptive it often means that peaceful means, such as imbizos, local councils, and even the president's hotline and the public protector, have been exhausted.'[26] Ngwane stated further that the top grievances for protests relate to 'service delivery in general, housing, water and sanitation, political representation and electricity, corruption, municipal administration, roads, unemployment, demarcation, land, health and crime'.[27]

Ngwane's insight is telling. At the heart of South African protests is the failure of administrative justice in the enforcement of both civil and political rights, socio-economic rights encapsulated in the Bill of Rights, as well as ineffective administration of the functions of the state. Can increased transparency and access to information disclosure about the state's intended plans around the various protest issues alone appease a frustrated community? Attempts have been made to use the right of access to information as a tool for the contestation of power to create fundamental social change by bridging the power-knowledge gap between government and society and ultimately to create a paradigm shift for engagement.[28] While there have been modest successes in using the right of access to information as a tool for power leverage, the potential of the right remains underwhelming due to the numerous bureaucratic constraints considered below.

One of the requirements in South Africa's PAIA is for the SAHRC to monitor the implementation of PAIA in government departments. A consistent trend in monitoring is the lack of delegation of decision-making powers from the senior management of state institutions to other employees on the release of requested information.[29] As a result, the requirement for institutions to respond to a request for records within thirty days is often

24 P Alexander, C Runciman, B Maruping, 'South African Police Service Data on Crowd Incidents: A Preliminary Analysis' (University of Johannesburg 2015) 58.

25 ibid.

26 Laura Grant, 'Research shows sharp increase in service delivery protests' (*Mail & Guardian* 10 June 2016) <http://mg.co.za/article/2014-02-12-research-shows-sharp-increase-in-service-delivery-protests> accessed 6 October 2016.

27 ibid.

28 Examples of these include using the Promotion of Access to Information Act (PAIA), the law enacted to give effect to the right of access to information to demand access to housing on behalf of community groups, enforce compliance with environmental standards and in seeking restitution for the victims of the apartheid regime who failed to receive compensation through the truth and reconciliation commission. Catherine Kennedy, 'PAIA Civil Society Network Report' (2014) <http://foip.saha.org.za/uploads/images/PCSN_ShadowRep2014_final_20150202.pdf> accessed 1 December 2015.

29 South African Human Rights Commission '2012/2013 Promotion of Access to Information Act Annual Report' 2013 (hereinafter SAHRC PAIA Annual Report) 17 and 24.

violated.[30] The chain of command in access to information disclosure firmly rests with the top echelons of power where the interests of public institutions to refuse requests for information remain a priority over public disclosure and public officials fear that making information available will make their departments vulnerable.[31]

The lack of internal administrative systems in state institutions with respect to records management, classification systems for information, as well as decentralisation of functions, remains highly problematic.[32] With institutions using classification policies approved by the National Intelligence Agency and not co-ordinated to PAIA and an underwhelming appreciation of the relevance of record-keeping and management to aid information disclosure, access to government records is a frustrating and complicated process.[33]

The implementation of PAIA in the public sector is affected by the bureaucracy of the state as described above, and the theoretical understanding of the concept of the right of access to information also affects the implementation of PAIA. The notion of providing access to information to the public without a qualified obligation on the part of the public to give reasons why the record is requested, has led to state officials incorrectly relying on the grounds for refusal in PAIA to deny requests for information. State officials operate under the assumption that state information can be controlled from public access and as a result, operate from a default position of denying access to information for reasons beyond the ground of refusals to be found in PAIA.[34] This flawed position assumes that perpetual secrecy is probable but the South African experience has shown that documents intended by government for public disclosure eventually are released, if not through access to information requests. An example of this is the recently released 'spy tapes' to the official opposition party by government after a protracted legal battle relating to the decision by the Prosecuting Authority of South Africa not to charge the current President of South Africa for corruption over five years ago.

It is difficult to create a complete state of either transparency or secrecy. Government cannot perfectly control the prevention of information disclosure to the public in an age of information technology and increasing incentives for whistleblowing. As a result, state secrets often become public knowledge eventually. On the other hand, it must be recognised that an attempt at complete transparency is difficult for a number of reasons.

30 SAHRC, '2013/2014 PAIA Annual Report' 2015 at 24.

31 Colin Darch and Peter Underwood, *Freedom of Information and The Developing World: The Citizen, The State and Models of Openness* (Chandos Publishing 2010) 241; SAHRC PAIA Annual Report (n 30) at 7.

32 See SAHRC PAIA Annual Reports to Parliament on <www.sahrc.org.za>.

33 The SAHRC conducted a records management assessment of 43 national departments in 2013, which showed that a high number of national departments are not complying with the records management requirement under PAIA. See SAHRC PAIA Annual Report (n 30) at 25.

34 See Darch (n 31).

First, although the government may disclose information, the intent of the government behind certain decisions or actions cannot truly be fully determined. A reason for this failure includes the fluid nature of state information, which is discussed in the next section. Second, secrecy is not always a hostile concept for democracy in order not to undermine the effective operation of government. What is needed is to find the appropriate balance between transparency and secrecy and how accountability can still be achieved where government secrecy is legitimate.

3. THE NATURE OF STATE INFORMATION

Darch and Underwood argue that it is possible to write about freedom of information in terms of the citizen's ability to gain access to records without engaging much with social theory.[35] Such an approach, they argue, accepts the concept of freedom of information as virtuous and applicable across societies or cultures.[36] However they believe that freedom of information requires a more complex reading of social reality because it aims in a subversive way to reconfigure the relationship between the state and the citizen by specifying how and under what terms politicised knowledge is shared and as a result there is resistance by state bureaucracies the world over.[37]

Politicised knowledge applies to both state and private institutions, it is about the nature of the information and not necessarily the institution. Both state and corporate bureaucracies resist access if such contested information challenges their position and weakens their position of power. By their nature access to information laws assign roles and responsibilities to suppliers and recipients of information. The consequence establishes the suppliers in a position of power that makes the recipients subservient to the suppliers. As a result, the manner in which information is successfully obtained requires innovation. This change is particularly important in the context of corporate transparency where mechanisms of access are voluntary and compliance with obligations is not enforceable and relies on good faith. These voluntary mechanisms are an intellectual contradiction to the ideology of transparency given the fact that there will be limits to accountability and transparency. In fact, they become a self-legitimising tool for corporations and aid corporations' social license to operate. As a result, a question that looms large is the intention behind information proactively disclosed, as well as the resulting consequence in terms of what inferences can be drawn from the disclosed information and how that shapes the opinions and perceptions of the public consumers of such information.

35 Colin Darch and Peter Underwood, 'Freedom of Information Legislation, state compliance and the discourse of knowledge: The South African experience' Review (2005) International Information & Library 37 at 78.

36 ibid.

37 ibid.

Within the transparency discourse and consistent with Foucault's argument about public opinion referred to earlier, the assumption is often made that if government information is released, it should be capable of being interpreted in a singular, unified fashion by the public. In a South African society, which is extremely polarised by politics, a singular, unified response to government information is not possible. Various institutions, including constitutionally established institutions such as the Public Protector, media organisations, and opposition political parties, urge the release of government information. The actions of these institutions sometimes are perceived as anti-state, which is an unacceptable situation in a political setting where there is little tolerance for dissent. As a result, the inferences drawn from state information by the various recipients are often not read objectively.

Furthermore, the entire length and breadth of government information cannot be fully known. In recent times, a legitimate perception has emerged that government is clamping down on the public disclosure of information. This is exemplified by Parliament's passage into law of the Protection of State Information Bill[38], still awaiting the President's signature before it fully becomes law. In addition, the increasing use of apartheid era laws, such as the National Key Points Act of 1974 and the Protection of Information Act No. 84 of 1982, to deter investigative journalism from matters of public interest have fuelled the perception that government is systematically controlling information released to the public.[39] In this context, where information is classified and release is controlled, the extent of information that is in fact undocumented, redacted, and destroyed cannot be fully known. As a result, the existence of government information that in the first place may be capable of release cannot fully capture the intentions behind state actions.

In instances where information is made available, the conclusions that can be drawn from the released information also demonstrate the extent to which government information cannot fully achieve the objectives of accountability that transparency through access to information seeks to promote. In the infamous case of the investigations conducted by the Public Protector and the Special Investigations Unit on the expenditure by the state to upgrade the private residence of the President, different conclusions were drawn by both investigating institutions from the same set of documents released by the state on the irregular expenditure.[40]

38 B6-2010. Dario Milo, 'Press Freedom Day Speech at South African National Editors Forum meeting' (2012).

39 Examples include criminal charges being laid against journalist, wa Afrika after his report on the irregular expenditure on the police headquarters lease, criminal charges were also laid against *Mail & Guardian* journalists Sam Sole and Stefaans Brummer by the Presidential spokesperson after their report on the spokesperson's involvement in the arms procurement corruption allegations currently the subject of a commission of inquiry in South Africa. ibid Milo (n 38).

40 See minutes of the Parliamentary ad hoc Committee on the Nkandla security upgrades at <www.pmg.org.za/report/20140926-nkandla-security-upgrades-public-protector-and-siu-reports-consideration> accessed 8 October 2016.

Where state information is misrepresented to this extent, recognition must be given to the role of whistle-blowing in the disclosure of a more accurate and complete information to the public. Where whistle-blowers form part of the decision-making process of a state institution, their value goes beyond the release of documents to also disclosing the intention behind certain state actions that makes the distortion of information far harder. In South Africa, there have been two sides to the role of whistle-blowing. Within the context of a chapter 9 institution, the Public Protector, the investigative work of the institution has been aided by whistle-blowers who report public maladministration to the institution. In a wider society context, the safety of whistle-blowers is largely at risk, not only in the context of the guarantee of the employment of the whistle-blower but also in terms of their lives and property.[41] A relevant role and function of the South African Human Rights Commission, which has not been taken on to date, is the protection of this special category of people in South Africa and the need to promote a culture that recognises the importance of whistleblowing for constitutional democracy in South Africa.

As suggested earlier, the right of access to information is an egalitarian human right. Calland has argued that for the right to live up to its true potential, it must be subject to at least three conditions, namely, it must escape legal formalism; it must be articulated and enforced as a collective, communitarian right, as well as an individual one and it must encompass privately-held as well as publicly-held information.[42] This escape from legal formalism and the attempt by the SAHRC to promote access to information as a communitarian right is considered below.

4. THE IMPERFECTIONS OF THE LAW

Transparency advocates hold the expectation that one of the constitutional promises that the right of access to information, through PAIA, would deliver is the exercise of the right to realise other tangible human rights, such as socio economic rights, which can improve the quality of life of all, and free the potential of each person. However, the delivery of these constitutional promises remains an ideal yet to be achieved in twenty years of constitutional democracy.

In the wake of PAIA it becomes easy to set the standard for optimal transparency as the quality of the legislation that has been passed and the extent to which this law enables citizens to access records from government. After the passage of the PAIA in 2000, the SAHRC, the institution tasked with monitoring the implementation of the law, focused on ensuring compliance by public institutions with the minimum obligations imposed. These included the appointment of deputy information officers

41 Gabriella Razzano, 'Empowering our whistleblowers' *(Open Democracy Advice Centre*, 2014) <www.fesmedia-africa.org/fileadmin/user_upload/pdf/R2K/Empowering_Our_Whistleblowers.pdf> accessed 8 October 2016.

42 Richard Calland, 'Can freedom of information be an egalitarian idea or is it trapped by its original liberal genealogy?' (Unpublished paper, 2014) 3.

and the development of manuals detailing the records held by the public institution and the manner of access.[43] The SAHRC's focus on ensuring compliance was done under the assumption that compliance will ensure the disclosure of information to the public when requested.[44] What was underestimated was the scale of non-compliance and lack of will by public institutions to comply with the provisions of PAIA as well as the underwhelming knowledge about PAIA and trust by the public in the effectiveness of PAIA.[45]

In addressing this anomaly, the SAHRC developed a new strategy of promoting usage of the PAIA and the demand for information particularly at the community level through the development of access to information law clinics.[46] The aim of the clinics was to use law students to promote knowledge of the right of access to information, usage of PAIA by members of the public and to assist community members in understanding the relationship between their needs, and how access to information can serve as a first step in the realisation of these needs. It was expected that unsuccessful PAIA applications would lead to a challenge of the refusal in the magistrate courts, a forum not yet fully utilised in the realisation of access to information rights in South Africa.[47]

This model of promoting access to information, though successful in increasing the usage of PAIA by the public and the understanding of this unique form of administrative law by students, also revealed a number of flaws and inadequacies in the law. First, there were many mute refusals of requests, (public institutions failed to respond to the information requests) demonstrating that non-compliance with the provisions of PAIA remain high.[48] Second, in instances where information was released there were very few instances where the information could assist the requesters in realising their rights, these include access to housing, water, social grants and unemployment benefits.[49] It was also quickly realised that the provisions of PAIA and the realisation of socio economic rights are helpful only if followed by a review of administrative decisions through the Promotion of Administrative Justice Act No 3 of 2000 (PAJA), through investigations and assistance from the SAHRC or other chapter 9 institutions or, in the case of refusals or clear violations, through litigation – a luxury not afforded to most people in South Africa.[50] It is important to mention here that the biggest challenge to PAIA has been the lack of a cheap, quick and effective dispute-resolution system that can facilitate a

43 See SAHRC PAIA Annual Report (n 29) at 9.

44 ibid 14–18.

45 ibid.

46 See SAHRC PAIA Annual Report (n 29) at 10.

47 ibid.

48 Wits Law Clinic, 'Report on Implementation of Law Clinics' (Unpublished Report, 2013).

49 ibid.

50 ibid.

redress for infringements of the right to information.[51] As a result, an important lesson to draw from the South African experience is to recognise that an excellent law does not suffice in the realisation of the right but equally important is a means of redress that enables members of the public to quickly and cheaply seek recourse for the realisation of their rights.

South Africa has the oldest access to information law in Africa. Before the passage of the African Union Model Law on Access to Information, it was regarded as the gold standard for access to information to be emulated by other countries. However, the annual reports of the SAHRC to Parliament capturing full compliance by state institutions with the provisions of PAIA have struggled to reach the halfway mark at the local government level.[52]

PAIA's bureaucracy in usage by the public and compliance by government also inherently resists openness through failure to ensure the supremacy of access to information laws by decision makers in government, and the ineffective enforcement mechanisms, which require recourse to the courts where requests are denied, a forum that is complicated, prolonged and expensive.[53]

Though access to information is promoted as the all-encompassing solution to many shortcomings of accountability by the state, the potential for the right of access to information to fully achieve these ideals has been hampered by the problems highlighted in this section and will continue to affect the claims that access to information is an egalitarian and communitarian right.[54]

However, despite this condition, the mobilisation at a community level for an information request for records that exposes corruption is possible because access to information can fundamentally be a matter of politics and political economy.[55] Depending on the social context of a country, grassroots mobilisation around such issues can be achieved. An example of this is the Right to Know Campaign in South Africa, an existing campaign that was formed six years ago which constitutes a broad church of various organisations to oppose the passage of the Protection of State Information Bill.[56]

51 See SAHRC PAIA Annual Report (n 29) at 31.

52 In 2014, compliance with PAIA obligations at the local government level was eight percent. See SAHRC PAIA Annual Report (n 30) at 30.

53 Victor Brobbey, Carole Excell, Kenneth Kakuru and Alison Tilley, 'Active and passive resistance to openness: The Transparency Model for Freedom of Information Acts in Africa – Three Case Studies' (Research for the International Development Research Centre (IDRC) Canada, Commonwealth Human Rights Initiative 2013).

54 Kristina Bentley and Richard Calland, 'Access to Information' in Malcolm Langford, Ben Cousins, Jackie Dugard and Tshepo Madlingozi (eds), *Symbols of Substance? Socio-economic Rights Strategies in South Africa* (Cambridge University Press 2012) 15.

55 ibid.

56 See Gilbert Sedungwa and Tammy O'Connor, 'Global right to Information update: An analysis by region' (*FOIAnet* 2013) <http://store.aip-bg.org/documents/global_right_to_information_update.pdf> accessed 8 October 2016.

This campaign objected to the passage of the Bill because a Bill, which restricts access to information based on national security and creates a broad ground for classification of information, creates a loophole to restrict access to records that potentially could expose wrongdoing. The campaign made a direct connection between the costs of corruption and its effect on the ability of government to deliver social services. The campaign focuses broadly on transparency issues, but it highlights the importance of a different conceptual understanding of access to information where available information was used to highlight the flaws around good governance in the state. This achievement required a different kind of public engagement and required an organisation to play an active role in helping along the process of drawing the connection between publicly available information and the interpretation, as well as consequences, of these sets of information for community agitation.

The PAIA was passed to give effect to the constitutional right of access to information and to promote open democracy in South Africa. However, the weakness and insufficiency of the PAIA has come under scrutiny in the recent judgment of the Constitutional Court in the case of *My Vote Counts v Parliament of South Africa*[57]. A civil society organisation made an application to the Constitutional Court to challenge the limitations of PAIA in giving effect to the constitutional right of access to information in section 32 of the Constitution. Section 32 (1) (b) provides access to information that is held by another person and the information is required for the exercise or protection of a right. The applicant wanted a proactive disclosure of information on private funding of political parties and argued that this information was required for the protection of constitutional political rights including the right to vote in section 19 of the Constitution.

The applicant in this case did not seek to challenge the constitutionality of PAIA but alleged that PAIA was not sufficient to give effect to the ambit of section 32 which it was to protect and to which it gives effect.[58] It was argued by the applicant that PAIA is constitutionally necessary but not sufficient because it fails to exhaust all the obligations in section 32 (2) for a law to give effect to the right of access to information.[59]

In a split decision of the Constitutional Court, the minority judgment held that the right to vote is central to our constitutional democracy and for the exercise of the right to vote, knowledge of private sources of political parties' funding was required.[60] The minority judgment found the processes of PAIA to be inherently limited in providing information and not to cater adequately for the disclosure of information without the necessity of a prior request.[61] The court stated that 'PAIA compels disclosure only upon application' and as a result, 'PAIA affords only the right to gain access, upon specific

57 Case CCT 121/14.

58 ibid para 95.

59 ibid.

60 ibid para 41, 42 and 72.

61 ibid para 94.

request, to specific records held by specific bodies at specific times.'[62] The minority judgment identified a number of problems with PAIA including the lack of definition of what 'information' is, though it defines what a 'record' is. As a result, PAIA only applies to information that is recorded in some form or medium and would exclude any information not reduced to material form.[63]

In addition, the application of PAIA to a person as envisaged in section 32 (1) (b) is limited to a natural or juristic person engaged in a trade, business or profession. This implies, as suggested by the court in the *My Vote counts* judgment, that PAIA does not apply to institutions that straddle the definition of public and private bodies and are not juristic persons, a position under which political parties fall.[64] The observations made by the minority court are consistent with the submissions made by the SAHRC regarding the limitations of PAIA in several respects especially when compared to the AU model law on access to information.

The failure of PAIA to prescribe a duty to create records and the extended time frames for accessing information which can be extended to sixty days under PAIA have limited the attractiveness of the law in accessing information.[65] The AU model law prescribes twenty-one days for ordinary requests and forty-eight hours in relation to requests necessary to safeguard the life or liberty of a person.[66]

There are other constraints in relation to the oversight mechanisms in PAIA, which affect the implementation of the law. The SAHRC was previously responsible for monitoring compliance with the PAIA but the SAHRC had no powers of enforcement. The passage of the Protection of Personal Information Act 4 of 2013 has corrected this anomaly with the establishment of the Information Protection Regulator with powers to enforce and impose sanctions on institutions not complying with their duties under the PAIA. Other bureaucratic considerations constrain the relevance of the PAIA such as the requirement for information requesters to fill out forms and the payment of access and reproduction fees before requests can be processed.[67] New access to information laws in Africa do not include these constraints and are more public friendly in terms of the usage of the law to access information.[68]

These bureaucratic constraints hinder the effectiveness of the PAIA and create a number of shortcomings. The SAHRC, in its oversight role, has been unable to collect substantive data and test the veracity of the data submitted by public institutions in terms of the number of information requests they receive on an annual basis and how

62 ibid para 95.

63 ibid para 97.

64 ibid para 108.

65 SAHRC PAIA Annual report (n 29) at 29–30.

66 Clause 15 of the AU model law.

67 See section 22 and 54 of PAIA.

68 See for example, Nigeria Freedom of Information Act 2011.

these requests were handled.[69] The PAIA does not require public institutions to develop implementation plans or report on their compliance with the law in their annual reporting to parliament and, as a result, compliance with this important legislation has been left on the margin.[70]

Despite these shortcomings however, there have been notable successes in the last twenty years. For example, in partnership with the Department of Performance Monitoring and Evaluation, PAIA was introduced as a standard for assessment, under the governance and accountability performance area of the Presidency's Management Performance Assessment Tool, to monitor the extent to which public departments at the national and provincial level are complying with key legislation for better service delivery.[71] The introduction of this assessment over the last two years has significantly increased the number of public bodies complying with the minimum legislative obligations under PAIA. The many successful litigation cases brought under the PAIA have advanced the interpretation of the law and have redefined certain institutional practices. Some of these cases have successfully challenged the constitutionality of provisions in PAIA, as well as asked courts to define the narrow scope of exemptions applicable under PAIA.[72]

However, the future of the PAIA lies in the extent to which the new oversight body, the Information Protection Regulator, which is yet to be constituted, can adequately perform its protection, promotion and monitoring mandate. Enforcement of the PAIA obligations have been a big constraint for the SAHRC in the last fifteen years and the global tide towards proactive disclosure of information, which the minority in the *My vote* counts judgment recognises, will determine the continued relevance of PAIA for the greater public in accessing public information. The value of proactive disclosure is considered in the concluding section below.

69 SAHRC PAIA Annual report (n 29) at 32.

70 ibid at 31.

71 ibid at 27–28.

72 For example, the case of *Mittal Steel SA Ltd (Formerly Iscor) v Hlatshwayo* [2007] 1 SA 66 (SCA) dealt with the definition and distinctions of public and private bodies, the *Clutchco v Davis* [2005] 3 SA 486 (SCA); the case of *Stefaans Brummer v Minister of Social Development* [2009] 6 SA 323 (CC) challenged the provision in PAIA that prescribed court appeals for refusals of requests for information to be lodged within thirty days. Parliament was directed by the Constitutional Court to amend this to 180 days; the case of *Minister for Provincial & Local Government v Unrecognised Traditional Leaders, Limpopo Province, Sekhukhuneland* [2005] 2 SA 110 (SCA) dealt with exemptions in PAIA and adopted a narrow interpretation and the court in *Trustees, Biowatch Trust v Registrar: Genetic Resources & Others* [2005] 4 SA 111 (T) laid an important rule on the non-application of costs for cases brought in the public interest.

5. THE NATURE OF THE 'PUBLIC'

From a public law perspective it has been argued that transparency exists in the humdrum world of administrative laws,[73] that it exists through freedom of information laws as well as in the rights discourse as a result of the right of access to information with the legal and bureaucratic systems to enforce it, on the one hand, and in social and political theory on the other.[74] In the assertion of democratic participation and accountability, it is believed that an informed citizenry will hold the state and, in the case of South Africa, the private sector responsible for their actions and ensure that both the state and the private sector are truly representative of the public's beliefs, preferences and interests.[75]

The assumption often made here is that an informed public can make an informed decision and formulate rational public opinion that would hold the state accountable for its actions. On the other hand, the right of access to information is sometimes perceived as an elitist right that has little relevance in the economic hardships in South Africa and the prioritisation of economic issues. It has been suggested that the scholarly writing on access to information embeds the freedom of information concept firmly and without question within the universal ideology of human rights.[76] Darch and Underwood argue that the function of the right to information is based on the interest theory, which maintains that the function of a right is to advantage holders in some way by advancing their interests.[77] As a result, a person requesting information can use it to leverage the realisation of other socio-economic rights. However, this is only possible with a citizenry with the self-awareness, skills and resources necessary to confront the machinery of the State.[78] These abilities are often lacking in the South African context, which makes PAIA much less valuable without use by interested NGOs, opposition political parties and the media who serve as the check and balance institutions supporting constitutional democracy in South Africa.

A key problem that threatens constitutional democracy and creates distrust in society is corruption. While more openness may curb corruption, a shift is needed in terms of our cultural understanding of holding government accountable in a number of ways. The South African 'public', due to historical and contextual reasons discussed earlier in relation to protests, prefers to confront the state and exercise its powers to demand accountability through other means, especially where requests for access to information through various official channels have failed.

In a context in which the public distrusts the state and the state fails to respond to demands and has the ability to manipulate the information disclosed, a prescribed

73 Fenster (n 6).

74 ibid.

75 ibid.

76 Darch (n 31) at 140.

77 ibid.

78 ibid at 243.

'voluntary' disclosure of particular sets of information might correct and aid the public to exercise a democratic surveillance role. Through PAIA, members of the public file requests for information. This is a reactive process that is separate from a public or private entity disclosing information to the public at its own initiative – a proactive process.[79] With the advances in information technology and the digitisation of information, a new approach is needed in the dissemination of information to the public at a time where production of records is cheaper and can be more easily disseminated and re-used.

Globally, there is recognition of the need for greater transparency on the part of public and private institutions given the advantages that voluntary and proactive disclosure offers.[80] These advantages include, for the public sector, the duty of the state to inform the public about laws and decisions that affect them as well as how government functions so that the public can access government services.[81] It includes the ability of the public to hold government to account in the use of public funds and for the public to participate in decision-making. The more information is made available proactively, the less strain it places on government bureaucracy to process information requests, the more timely the information is available and the less arduous the process is for any member of the public who wishes to access government information.[82]

Central to the disclosure of information detailed above is how to ensure that these categories of information are accessible by members of the public; how to ensure that the organisation of the information is relevant to the users; how to ensure that the information is complete, accurate, free, timely and re-usable. Prescribing the categories of information that must be made available, as set out in the African Union Model Law on Access to Information, is useful in the practical implementation of this argument.[83] In recognition of these considerations and the digital age we live in, the concept of open data has been developed to create an online platform whereby government information can be shared freely.[84] Emerging trends, such as open data to aid proactive disclosure of information, achieve the desired objectives of open government and public participation in a way that was not previously envisaged by the drafters of PAIA. In the light of a politics of transparency and the desire to shift the balance of power from the state

79 Helen Darbishire, 'Proactive transparency: The future of the right to information?' (World Bank Institute: Governance Working Paper Series 2009) 3.

80 The Open Government Partnership, the latest of multilateral initiatives which now consists of sixty-nine member states in less than three years places great emphasis on proactive disclosure.

81 Darbishire (n 79) at 3.

82 ibid at 3–4.

83 The African Union Model Law on Access to Information 2013 has a detailed provision on proactive disclosure that is worth considering for adoption in domestic law.

84 The term open data has been defined as 'information proactively released, in an open format, accessible to the user at no cost, with no limitations on user identity or intent; it is in a digital machine readable format, reusable and interoperable and free of restriction on use.' Dale McKinley quoting Alison Tilley in 'The Right to Know, The Right to Live: Open Data in South Africa' (ODAC 2012) 10.

to the citizen, proactive disclosure of information creates a new form of engagement between the citizen and the state, which increases the ability of the public to make better and informed choices when engaging with the private sector or accessing government services and monitoring the usage of public funds. In the context of South Africa, proactive disclosure of information is seen as a tool that might lessen the confrontation of the state by citizens through protests about the delivery of social services. It is also a possible anti-corruption strategy and can arguably improve trust in the state.[85]

6. CONCLUSION

The assumptions made about transparency have been explored in various forms and contexts. In all of the ways that transparency was considered, it is an ideal that is crucial to the notion of open democracy that we strive for in South Africa. In distilling the notion of transparency and the right of access to information, the ultimate lesson to be learnt in over twenty years of constitutional democracy is that access to information is more than the law and administrative justice. It is also about the contestation for power and it lies at the heart of the constitutional promise of improving the quality of life of all and freeing the potential of each person.

85 Dale McKinley, 'The Right to Know, The Right to Live: Open Data in South Africa' (Open Democracy Advice Centre 2012).