ASSESSING THE ENABLERS: LESSONS FROM PRACTICE ON THE DISTURBING IMPLEMENTATION OF RIGHTS OF ACCESS TO INFORMATION AND PROTEST IN SOUTH AFRICA

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Introduction

There are some rights in the South African Bill of Rights that are valuable not just for their own sake, but also because they assist in the realisation of other rights. These are the 'enablers', the worker bees in a bill of rights. Access to information and the right to protest are examples of rights falling within this category. The South African Constitution enshrines both of these. However, the reality is that accessing information and holding a lawful protest are two of the most difficult things to do as a poor community living in South Africa – and both are indispensable to the realisation of the full array of rights in the Bill of Rights.

The idea of enabling rights

All rights in the Bill of Rights are valuable, and the Constitutional Court has been at pains to avoid establishing a hierarchy of rights.[1] What is interesting, however, is to consider the different kinds of work that categories of rights in the Bill of Rights do. The realisation of some rights - like equality, freedom of expression or the environmental right for example - are an end in themselves. At the same time, the realisation of almost every right in the Constitution contributes to the realisation of the right to dignity. In this way the realisation of the right of access to adequate housing can be understood as both an end (the realisation of the housing right) and a means to another end (the realisation of the right to dignity).

Pursuing this line of thought, I would like to suggest that there is a category of rights which can be termed 'enablers' in that the rights in this category serve to enable the realisation of other rights. Realisation of these enabling rights is a necessary precondition for full enjoyment of other rights. There are various rights which might be said to fall within this category of 'enablers' including the right of access to information, the right to protest and the right to participate in decision-making which is inherent in the administrative justice right. This paper will focus on the right to protest (enshrined in section 17 of the Constitution) and the right of access to information (contained in section 32 of the Constitution).

From the outset it is important to acknowledge that enabling rights are valuable for their own sake. Staging a protest is an important exercise of agency and sometimes getting hold of information is useful just because of a 'right to know'. More often, however, we seek to protest and obtain information because there is something further that we seek to achieve by doing so.

Consider the following example: large-scale industrial development takes place in a thriving peri-urban agricultural community. Over time, cattle owned by the members of the community begin to get sick and die. The community notices a grey haze which has settled over their homes, shops and farms and they begin to

* I would like to thank my research assistant, Ashleigh Dore, for her useful assistance in putting this paper together.

[1] See for example *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC), as well as *Mthembi-Mahanyele v Mail & Guardian Ltd and Another* 2004 (11) BCLR 1182 (SCA) at para 42.

suffer from a range of respiratory ailments. They find it increasingly difficult to grow crops on their farms and plants in their gardens, and the water in their taps comes out milky and bitter-tasting. People begin to move away from the once-prosperous area. Those that remain, suspect that their troubles are as a result of pollution caused by the factories down the road. If they are right, the companies that own and run those factories have violated their right to an environment that is not harmful to their health and wellbeing enshrined in section 24 of the Constitution. However, they also know that suspicion alone is not enough to prove a rights violation and vindicate their rights. They need information in order to establish this.

This is not just a hypothetical example. It is the story of the struggles of the Vaal Environmental Justice Alliance (VEJA)[2] to obtain documents necessary in their fight against ArcelorMittal. This case will be discussed further below.

Both the constitutional rights of access to information and protest have accompanying legislation which fleshes out the nuts and bolts of the relevant associated processes. These are the Promotion of Access to Information Act 2 of 2000 (PAIA) and the Regulation of Gatherings Act 205 of 1993 (the Gatherings Act) respectively. Despite the very different contexts in which PAIA and the Gatherings Act were promulgated, their implementation bears striking similarities – similarities which help us understand the limitations of rights realisation in the last 20 years of democracy in South Africa.

In both contexts the very legal mechanisms designed to give effect to these rights are being administered in a way which undermines the rights themselves. The consequences are severe. Communities' attempts to follow the correct legal processes are thwarted and they are belittled in the process. Furthermore, if realising enabling rights like protest and access to information are preconditions to the realisation of other rights like socio-economic rights and dignity, then the South African democratic system is faltering at one of the first hurdles. And perhaps most worrying of all, those most affected by the denial of these rights are South Africa's poorest communities.

The operation of the access to information system

Section 32 of the Constitution entrenches the right of everyone to access information held by the state, and to information held by private parties and which is required for the exercise or protection of any rights. The courts have confirmed that "access to information is fundamental to the realisation of the rights guaranteed in the Bill of Rights".[3] It is interesting to note that the idea of access to information as an enabling right is supported by the language of section 32 which makes a connection between access to information and the 'exercise or protection of any rights', at least in relation to information from private bodies.

Access to information is important in South Africa in 2014 for a variety of reasons. Access to information is understood as an important part of the model of democracy to which we have committed. This hybrid model, discussed at length by the Constitutional Court in *Doctors for Life*,[4] exhibits elements of both representative and participatory democracy thereby indicating that voting every few years at the polls is not enough but some greater form of participation in governance and decision-making is envisaged. It is in this participatory form of democracy that access to information is important, because participation is only meaningful if it is

[2] See https://www.facebook.com/pages/Vaal-Environmental-Justice-Alliance-VEJA/322703054542182.
[3] *Brümmer v Minister for Social Development and Others* 2009 (6) SA 323 (CC) at para 63.
[4] *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC).

informed. The more people know about a proposed law, policy, development or decision, the more useful their contribution in public participation processes can be, and therefore the more the ultimate quality of government decision-making can be enhanced.

In addition to enhancing the actual quality of decision-making through fostering improved participation, transparency also enhances the credibility with which decisions and decision-makers are perceived. Transparency also serves as a powerful counter to corruption. It forces human rights violations into the light thereby facilitating responses to such violations. Furthermore if communities have access to information, they can partner with government in activities such as compliance-monitoring, exposing non-compliance and highlighting best practice. All of this must of course also be seen against the backdrop of a racist history in which the majority of people in South Africa were denied access to information. The express inclusion of this right in the Constitution therefore signals a significant break from the past and plots the contours of a new kind of informed, inclusive and therefore active South African society.

As indicated above, several years after the transition to democracy, PAIA was promulgated in 2000 (and came into effect in 2001)[5] in accordance with the directive in section 32(2) of the Constitution that national legislation be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state. The long title of PAIA confirms this. The relationship between the constitutional right in section 32 and PAIA is succinctly summed up by Hoexter who explains that PAIA does not replace the constitutional right, but because it purports to 'give effect to' it, parties must now assert the right via PAIA.[6]

PAIA provides for a request system,[7] requires the appointment of personnel to process requests for information,[8] the publication of a manual designed to make submitting requests easy to do,[9] provides for time periods for responses to requests,[10] allows for partial redaction of confidential material,[11] and in the case of requests to a public body, for an appeal mechanism.[12] It even goes so far as to make provision for the identification by each government department of the kinds of documents which are automatically available without the need for a specific request[13]. These are all features of the access to information system designed to pave the way for affordable, quick, fuss-free access to information by people living in South Africa.

Sadly the experience of communities and civil society organisations using PAIA over the years has not lived up to this promise of ease and efficiency. Rather it is an experience characterised by information requests being met with attitudes of extreme suspicion (whether from government or private companies), very poor levels of understanding of PAIA, particularly at state level, and general disregard for the access to information rights of

[5] See *Institute for Democracy in South Africa and Others v African National Congress and Others* 2005 (5) SA 39 (C) at para 13.
[6] Cora Hoexter *The New Constitutional & Administrative Law* vol 2 at 57.
[7] Sections 11, 18, 50 and 53 of PAIA.
[8] Section 17 of PAIA.
[9] Sections 10, 14 and 51 of PAIA.
[10] Sections 20, 56 and 57 of PAIA.
[11] Sections 28, 37, 59 and 65 of PAIA.
[12] Section 74 of PAIA.
[13] Section 10, 15 and 52 of PAIA.

communities. This uphill struggle is captured in an annual report published by the PAIA Civil Society Network (PAIA CSN)[14] which documents civil society's collective experience in working with PAIA.[15]

The Centre for Environmental Rights[16] has also done some valuable work in documenting the civil society experience of using PAIA in the environmental sector in particular.[17] They confirm the general culture of suspicion and low levels of familiarity with PAIA referred to above. In addition, they record other prevalent trends as being that requests for information go unanswered or are refused on inappropriate grounds, important provisions of PAIA such as that allowing for redaction[18] are under-utilised, and that private and public bodies both refer requesters to each other (particularly in the environmental sector when the information sought relates to permitting and authorisations and is therefore held by both private and public bodies).

The trend of relying on technical grounds of refusal to thwart access to information at serious cost to human rights can be clearly seen in the case of *MEC for Roads and Public Works, Eastern Cape, and Another v Intertrade Two (Pty) Ltd* which concerned the rights of an unsuccessful tenderer (Intertrade) who instituted review proceedings against the public body that called for tenders to obtain information relating to the tender adjudication process. The tender in question was for preventative maintenance and repairs of plant infrastructure and equipment at various provincial hospitals in the Eastern Cape. The State had taken the technical point that section 7 of PAIA[19] precluded Intertrade from demanding additional documents before it had exhausted its procedural remedies under certain provisions of the Uniform Rules of Court.[20]

The Court held that:

> "The appellants' resistance to Intertrade's request for documentation on technical grounds was, in my opinion, most reprehensible. Important issues are at stake here. Intertrade seeks to establish the truth about an extraordinarily extended tender process to exercise and protect its rights. The appellants knew precisely what documents it required from the outset. They did not raise any impediment which would prevent them from producing the documents. Neither did they deny that they had the documents in their possession. Their response is rendered more deplorable by the report contained in the department's own correspondence which shows that, whilst they were embarking on delaying tactics at the taxpayer's expense, sick and vulnerable citizens were suffering and children

[14] The PAIA CSN, established in 2008, is a collection of organisations committed to access to information and the realisation of a culture of openness and accountability.

[15] These reports are available at http://www.saha.org.za/projects/national_paia_civil_society_network.htm.

[16] The Centre for Environmental Rights is a civil society organisation working in the environmental and environmental justice sector to provide legal and related support to environmental CSOs and communities. More information on the Centre for Environmental Rights can be found on their website http://cer.org.za/.

[17] The Centre for Environmental Rights has published several reports in respect of transparency and PAIA, these reports can be found at http://cer.org.za/programmes/transparency.

[18] Section 28 of PAIA.

[19] Section 7 provides that:

(1) This Act does not apply to a record of a public body or a private body if—
  (a) that record is requested for the purpose of criminal or civil proceedings;
  (b) so requested after the commencement of such criminal or civil proceedings, as the case may be; and
  (c) the production of or access to that record for the purpose referred to in paragraph (a) is provided for in any other law.

(2) Any record obtained in a manner that contravenes subsection (1) is not admissible as evidence in the criminal or civil proceedings referred to in that subsection unless the exclusion of such record by the court in question would, in its opinion, be detrimental to the interests of justice.

[20] Rule 53 and Rule 35(12).

> were dying in poorly maintained hospitals as a direct result of their failure to comply with their constitutional obligations."[21]

The general obstructiveness from state departments in relation to access to information requests also received attention in *Garden Cities Inc v City of Cape Town and Another*.[22] The Court held that:

> "Access to information is a fundamental right in the Bill of Rights. The State, as well as organs of State such as the City of Cape Town, is under a duty to respect, protect, promote and fulfil the rights in the Bill of Rights. It is unfortunate that, in decisions such as *Geyser and Another v Msunduzi Municipality and Others* 2003 (5) SA 18 (N); *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (Kwazulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC), as also this matter before me, organs of State appear to be wanting in fulfilling this right. There is thus a duty on organs of State, in adopting systems and measures that are meant to facilitate service delivery, not to adopt measures, such as in the present case, that are likely to compromise the citizens' rights of access to information."[23]

One of the most interesting, uplifting and alarming access to information cases we have seen is currently playing itself out in the courts. This the case of the Vaal Environmental Justice Alliance (VEJA) v ArcelorMittal (AMSA) mentioned above. In 2011 VEJA asked AMSA for a copy of its Environmental Master Plan, in order to determine how AMSA planned to rehabilitate the pollution at its Vanderbijlpark site. This request was refused by AMSA including the basis that the Environmental Plan was technically flawed, out of date and irrelevant. This position is interesting given that it was on the basis of this Plan that AMSA was awarded various environmental licences by the state.[24]

In September 2013 the South Gauteng High Court ordered AMSA to hand over the requested information. The High Court should be commended for resisting AMSA's argument that the public has no right to monitor the operations of private companies to ensure environmental compliance. On the role of communities and civil society organisations, the Court held that:

> "*the participation in environmental governance, the assessment of compliance, the motivation of the public, the mobilisation of the public, the dissemination of information does not usurp the role of the state but constitutes a vital collaboration between the State and private entities in order to ensure achievement of constitutional objectives*".[25]

AMSA has appealed this ruling and the matter was heard by the Supreme Court of Appeal (SCA) on 6 November 2014. Importantly, this case clearly demonstrates how critical it is for communities and civil society

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[21] *MEC for Roads and Public Works, Eastern Cape, and Another v Intertrade Two (Pty) Ltd* 2006 (5) SA 1 (SCA) at para 20.

[22] Garden Cities Inc v City of Cape Town and Another 2009 (6) SA 33 (WCC). In this case, the applicant launched an application in the High Court for an order compelling the local authority and its city manager to comply with a request for access to documents relating to outstanding rates, water, electricity and sewerage accounts in respect of several properties owned by the applicant, which had been lodged in terms of PAIA. The respondents resisted the application on the basis that, due to a technical problem in its system, the first respondent was unable to furnish the applicant with copies of the original invoices, since they either no longer existed or were never duplicated or retained.

[23] Garden Cities Inc v City of Cape Town and Another at para 24.

[24] This case is the subject of a documentary produced by the Centre for Applied Legal Studies, the South African Human Rights Commission and One Way Up Productions which is available here http://www.wits.ac.za/law/cals/16858/home.html.

[25] *Vaal Environmental Justice Alliance v ArcelorMittal* SGHC at para 18.

organisations to have the ability to compel companies to provide the documentation needed to ensure that the other rights contained in the Bill of Rights (in this case the environmental right) are promoted and protected. The SCA has reserved judgment and civil society organisations are hopeful that the ruling will confirm the right of communities to access the information needed to realise their environmental right.[26]

The contours of lawful protest in South Africa

Section 17 of the Constitution provides that "everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket, and to present petitions."[27] The Right2Know Campaign[28] takes the position that now more than ever, all who live and work in South Africa need to not only know about the right to protest but to be able to exercise it.[29]

The Constitutional Court has acknowledged that the right to protest is central to our constitutional democracy as it exists primarily to give a voice to the powerless including groups that do not have political or economic power. It provides an outlet for their frustrations. This right will, in many cases, be the only mechanism available to them to express their legitimate concerns.[30] Furthermore, as in the case of the right of access to information, the importance of the right to protest must be understood against the backdrop of a past in which the apartheid state brutally denied this right to the majority of people living in South Africa. The Court also acknowledges the connection between section 17 and other rights in the Constitution thereby supporting the notion of 'enabling rights'.[31]

The legislative accompaniment to section 17 is the Gatherings Act which came into operation in the dawn of South Africa's democracy. The Gatherings Act is a product of the Goldstone Commission of Inquiry's attempt to bring South Africa's assembly jurisprudence in line with international practice.[32] The preamble to the Gatherings Act recognises that "every person has the right to assemble with other persons and to express his views on any matter freely in public and to enjoy the protection of the State while doing so" although this right is qualified by the duty to protest "peacefully and with due regard to the rights of others". This reflects the language of section 17.

The Gatherings Act defines a gathering as 'any assembly, concourse or procession of more than 15 people on any public road[33] or any other public place wholly or partly open to the air'. The purpose of such a gathering can be:

[26] The South Gauteng High Court ruling, press releases and related articles in respect of the matter between VEJA and AMSA can be found on the Centre for Environmental Right website http://cer.org.za/.
[27] I will refer to this right collectively as the right to protest.
[28] The Right2Know Campaign began as an coalition of organisations and people responding to the Protection of State Information Bill, today it focuses on four main initiatives, Stop Secrecy, InfoAccessNow!, Media Freedom to All and Justice for Whistle Blowers.
[29] R2K Activists Guide 'Protesting your rights: The Regulation of Gatherings Act, Arrests and Court Processes' available at http://www.r2k.org.za/wp-content/uploads/gatheringsGuide_WEB.pdf.
[30] *South African Transport and Allied Workers Union and Another v Garvas and Others* 2013 (1) SA 83 (CC).
[31] Ibid.
[32] Mzi Memeza 'A Critical Review of the Implementation of the Regulation of Gatherings Act 205 of 1993: A Local Government and Civil Society Perspective' (July 2006) Report commissioned by the GOF Foundation and completed by the Freedom of Expression Institute at 12.
[33] As defined in the Road Traffic Act 29 of 1989.

- to discuss, attack, criticise, promote or propagate the principles, policy, actions or failure to act, of any government, political party or political organization;
- to form pressure groups;
- to hand over petitions; or
- to mobilise or demonstrate either support for, or opposition to, the views, principles, policy, actions or omissions of any person or institution.[34]

A gathering is distinct from a demonstration which consists of an assembly of 15 or fewer people "for or against any person, cause, action or failure to take action."[35] This distinction is significant because demonstrations are not governed by the Gatherings Act.

In terms of the Gatherings Act, a gathering requires prior notification to the relevant local authority by the convener of the gathering. This is the leader of the gathering and is appointed by the person or organisation that is organising the gathering to be the point of contact.[36] Notification is typically to the municipality as the 'relevant local authority' and is done using a standard form which is supposed to be available at all municipal offices. Notice must be given at least 7 days before the planned gathering. If this is not possible, the convener must explain why. On receipt of the notification, the municipality must call the convener to a meeting at which the logistics of the gathering are discussed with the South African Police Services (SAPS) and any other necessary service providers, such as paramedics. If it does not do so with 24 hours, the gathering is deemed legal and can proceed without any further formalities.[37] This meeting is often referred to as the 'section 4 meeting' or the 'triangle meeting' (referring to the three-way participation by the convener, the municipality and the SAPS). It is this triangle meeting which is the site of contestation for communities across the country trying to organise lawful protests.

Interestingly, the only textual qualifiers on the right to protest contained in section 17 of the Constitution are that protest must be peaceful and protestors must be unarmed. Yet the Gatherings Act goes further than this and prescribes circumstances in which a municipality can in fact refuse to allow a protest to proceed. Nevertheless it is likely that this does not render the Act unconstitutional as it may be saved by a limitations clause analysis in terms of section 36 of the Constitution.

If the protest has not yet commenced, the municipality may refuse to allow it to go ahead if less than 48 hours' notice is given.[38] More importantly for the purposes of this discussion, if the municipality has been given credible information on affidavit indicating that the gathering poses a serious threat of disruption of traffic, injury to participants or others or extensive damage to property AND which police and traffic officers cannot contain, the responsible officer from the municipality must meet with the convener and any other necessary person to try and negotiate a safe gathering.[39] Only once this has been done and the municipality remains unconvinced that the gathering can go ahead, can it prohibit the gathering.[40] In such circumstances, written reasons must be provided to the convener.

[34] Including any government, administration or governmental institution.
[35] Section 1 of the Gatherings Act.
[36] Section 2(1) of the Gatherings Act.
[37] See sections 2, 3 and 4 of the Gatherings Act.
[38] Section 3(2) of the Gatherings Act. Note that no reasons need be given in these circumstances.
[39] See Johnson and Griffiths at 78.
[40] Section 5(2) of the Gatherings Act. Note that there are further sections which allow police officers to disperse a gathering once it is already in progress but these are beyond the scope of this discussion.

In order to bring these somewhat dry provisions to life, in the section below I outline CALS' experience in assisting the women of Marikana in trying to live their constitutional right to peacefully protest. In August 2012, South Africa witnessed a degree of police brutality unprecedented in the democratic era when 44 mineworkers were killed during a strike on the platinum belt near Lonmin's mine at Marikana. In response, the women of the Marikana community, having organised themselves into the Wonderkop Community Women's Association, sought to express their voices with a march ending at the local police station. They sought an end to police brutality in Marikana, the withdrawal of additional police and the army which had been deployed in the area, and a chance to express their grief at the death of their husbands, sons, lovers, fathers, brothers and friends.[41] In the context of a discussion of protest as an enabling right, it is also pertinent to mention that they also wanted to draw attention to longstanding and on-going violations of their rights to housing, adequate water and electricity, schools, medical facilities, sanitation, roads and other basic infrastructure in their communities.

However all notices to the Rustenburg and Madibeng Municipalities were turned down with frivolous reasons provided thus denying the women their rights to assemble, demonstrate and express themselves. After trying to resolve this with the Municipalities, in desperation, the women eventually sought assistance from the Centre for Applied Legal Studies (CALS).[42] Late into the night on 28 September 2012, CALS eventually prevailed in an urgent High Court application in the North West High Court, Mafikeng. The court order set aside the Municipalities' decision to prohibit the march, recognised the women's rights and allowed the march to proceed.[43]

Unfortunately the struggles of the women of Marikana to peacefully exercise their protest rights did not end there. When in 2014, they again sought to hold a march, they again met with hostility and obstruction from the local municipality. This time the women sought to gather on 21 March 2014 (Human Rights Day in South Africa) in an attempt to support members of their community who were at the time engaged in the most protracted strike the South African mining sector has seen. Again, it was only due to the intervention of lawyers that the women of Marikana were able to proceed.

Resonance between protest and information practice

The purpose of this paper is to draw on lived experience and lessons from practice in order to highlight similarities between the way in which the realisation of access to information and protest rights are being thwarted.

1. Legislation deliberately or incompetently misinterpreted

The first and probably the most significant similarity that must be identified, relates to the role of government officials in the interpretation of legislation. Both PAIA and the Gatherings Act are misunderstood – or deliberately improperly applied – by the government officials tasked with implementing them. In relation to

[41] See http://www.sabc.co.za/news/a/57633c004ccf33729a3fdbb8fc2f576b/Womans-death-in-Marikana-prompts-march-20120922.

[42] CALS is a human rights organisation based at Wits University which engages in research, advocacy and impact litigation across its five programmes: Basic Services, Business and Human Rights, Environmental Justice, Gender and Rule of Law. More information on CALS can be found on their website http://www.wits.ac.za/law/cals/16858/home.html.

[43] CALS media release of 28 September 2012 drafted by Kathleen Hardy. See also http://www.citypress.co.za/news/marikanas-women-win-right-to-march-20120929/.

the Gatherings Act, municipal officials routinely operate on the basis that the conveners of a protest are required by the Gatherings Act to ask for permission to protest when this is in fact not the case. The requirement is notification not consent. Section 2 of the Gatherings Act requires municipalities to be involved in the *administration* of the right to protest but not in providing consent thereto. Local officials thus substitute an obligation to facilitate with a right to veto. There is a groundswell of comment on this phenomenon in South Africa.[44]

Notably there is Constitutional Court authority on the subject. In *South African Transport and Allied Workers Union and Another v Garvas and Others*[45] the Constitutional Court upheld the validity of provisions of the Gatherings Act which impose (at least partial) liability for damage caused to property during a gathering on the conveners of the gathering unless they took all reasonable steps to avoid the damage and did not reasonably foresee the damage.[46] SATAWU challenged the constitutionality of the Gatherings Act on the basis that it unjustifiably infringed section 17. The Court ruled that section 17 was limited but that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Importantly, on the topic at hand, the Court in *Garvas* seems to indicate that the Gatherings Act envisages a process of notification and administration of logistics, not permission-seeking.

Similar misinterpretation problems are occurring in the access to information context where state officials administering PAIA erroneously demand requesters of information to justify why they seek such information; PAIA requires no such justification. Requestors seeking information from a private entity must explain which right they seek to exercise or protect by obtaining the information sought, but when asking a state entity for information, there is no such requirement.

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[44] See Mzi Memeza 'A Critical Review of the Implementation of the Regulation of Gatherings Act 205 of 1993: A Local Government and Civil Society Perspective' (July 2006) Report commissioned by the GOF Foundation and completed by the Freedom of Expression Institute; M Johnson and J Griffith 'Controlling Gatherings – Great in Theory' in Without Prejudice June 2012 at 77; R2K Activists Guide and various publications by Jane Duncan who has written extensively on the subject.

[45] *South African Transport and Allied Workers Union and Another v Garvas and Others* 2012 (8) BCLR 840 (CC); 2013 (1) SA 83 (CC).

[46] The South African Transport and Allied Workers Union (SATAWU) had organised a gathering of thousands of people through the City of Cape Town to register employment-related concerns. About 50 people had died in the course of SATAWU's protracted strike action before the gathering. During the gathering, much property was damaged. SATAWU was sued for damages by those who claimed that they suffered loss as a result of the gathering. In preparation for the gathering, SATAWU took steps to meet the procedural requirements set out in the Gatherings Act. It gave notice of the gathering to the local authority and appointed about 500 marshals to manage the crowd. It apparently advised its members to refrain from any unlawful and violent behaviour and requested the local authority to clear the roads of vehicles and erect barricades along the prescribed route on the day of the gathering. In spite of these precautionary measures, the gathering allegedly resulted in riot damage estimated at R1.5 million.

Section 11(1) provides that if any riot damage occurs as a result of a gathering, the conveners shall be liable for that riot damage as a joint wrongdoer contemplated in the Apportionment of Damages Act, together with any other person who unlawfully caused or contributed to such riot damage. Section 11(2) provided a defence to a gathering convener in such circumstances – so you could evade liability if you could prove:

(a) that you did not permit or connive at the act or omission which caused the damage in question; and

(b) that the act or omission in question did not fall within the scope of the objectives of the gathering or demonstration in question and was not reasonably foreseeable; and

(c) that you took all reasonable steps within your power to prevent the act or omission in question: Provided that proof that you forbade an act of the kind in question shall not by itself be regarded as sufficient proof that you took all reasonable steps to prevent the act in question.

These interpretation problems must be understood in a context where section 39(2) of the Constitution requires courts to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation. While this obligation refers specifically to courts, the spirit of the Bill of Rights would seem to require state officials to do the same given that the Constitution is the supreme law in South Africa.[47]

Officials in both contexts are either demonstrating a pervasive misreading of the legislation or there is a more sinister, deliberate 'misunderstanding' at play. In both cases, the purpose of the legislation is to spell out the nuts and bolts of the process of making the right a reality. Yet the way it is being administered in practice is having the completely opposite effect – rather than facilitating the rights in question the processes are used to impede them. This results in widespread regression in relation to realising the rights of access to information and protest in South Africa. In summary, the exercise of the constitutional right to protest does not require permission and the exercise of the constitutional right of access to information from state bodies does not require justification. Government officials need to know this and stop using the wilful or negligent misunderstanding to undermine the realisation of these rights.

2. Legislation administered by low level bureaucrats

Both PAIA and the Gatherings Act are administered by low level bureaucrats, revealing the way in which protest and access to information are valued by the State. Low level bureaucrats are able to make unlawful decisions with impunity - as one official noted in a CALS case: 'take me to court and get a judge to tell me I'm wrong.'

3. Tardiness in response by government officials and criminalisation of the poor

Requests for information and gathering notifications are routinely ignored or left to the very last minute before a response is given. While this may again demonstrate a prioritisation problem, it illustrates a far more serious problem of impact. Non-compliance with statutory timeframes has a debilitating effect on the rights-holder when their recourse is urgent litigation, with all of the difficulties associated with such litigation.

Furthermore, the Gatherings Act imposes criminal sanctions on the convenor of a gathering who fails to comply with the procedural requirements set out in section 2, 3 and 4 of the Act.[48] Heed must be paid to the possible chilling effect that this may have on the willingness of community leaders to take on the important function of mobilising protest. This is compounded by the spectre of liability for damage as outlined in *Garvas* where the Constitutional Court acknowledges that compliance with the requirements of section 11 of the Gatherings Act (which regulate liability for damage) significantly increases the costs of organising protest action, and that it may well be that poorly resourced organisations that wish to organise protest action about controversial causes that are nonetheless vital to society could be inhibited from doing so. It even goes so far as to say that this amounts to a limitation of the right to protest. In addition, the Court points out that it is not only the protest rights of conveners alone that is affected. If the convener of a gathering who anticipates the

[47] Section 2 of the Constitution provides that "[t]his Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

[48] The possible penalty is a fine not exceeding R20 000 or imprisonment not exceeding a period of one year, or both. Johnson and Griffith point out that in terms of severity, this is the same level of penalty levelled against those who fail to comply with a condition of bail while out on bail or who subsequently fail to appear at trial. See Johnson and Griffith at 78.

involvement of a few thousand people suspects that a few participants may cause mayhem in the protest, and is therefore forced to cancel it, the right of thousands of people to protest peacefully and unarmed is affected. Nevertheless, in *Garvas*, this limitation was found to be reasonable and justifiable in terms of section 36 of the Constitution.

The criminal sanctions and liability for damages faced by conveners must be compared to the consequences for municipal officials who merely ignore protest notifications or are deliberately obstructive is trying to avert the holding of a triangle meeting. What are the consequences for such officials? Typically, absolutely nothing. The kinds of communities seeking both to protest and to access information in order to realise their rights are poor, vulnerable and marginalised. We therefore need to acknowledge that the current system skews power heavily in favour of the State and effectively criminalises the poor.

This cannot be allowed to continue. The Social Justice Coalition, a social movement based in Cape Town which campaigns for safe, healthy and dignified communities, is currently involved in ongoing criminal litigation in which they have challenged the constitutionality on section 12(1)(a) of the Gatherings Act, among other things. This section is the provision which criminalises the convening of a gathering in respect of which no or inadequate notice was given. Their concern is precisely that the Gatherings Act makes criminals of people who seek merely to exercise their democratic right to protest, and has a chilling effect on protest because people are concerned that they will be arrested.[49]

4. Need for legal assistance

The processes have been constructed in such a way that your chances of realising both of these rights are considerably increased by the presence of an intermediary. In CALS' experience, communities are far more likely to be able to stage a lawful protest if there is a lawyer present at the triangle meetings discussed above. Likewise, lawyerly follow-up to an access to information request also significantly increases your chances that the request gets taken seriously. This intermediary problem is not unique to access to information or protest, but for a country which has been committed to access to justice for 20 years, it is a disquieting reality that is slowly suffocating rights realisation.

5. Interplay between state and private entities

There are also interesting parallels in the way in which the state and private sector bounce off each other in their attempts to avoid accountability. In the access to information context, state officials often use the third party notification mechanism to delay having to make a decision on an information request, hiding behind the cloak of supposed 'responsible handling of information'. If the same request for information is made to the company involved, the response is often that the information sought is held by the state and should be requested from them.

This kind of strategy was evident in the Marikana women's march discussed above. In the 2014 protest, the women sought to march along a road on property owned by mining company Lonmin. One of the ways in which the municipality sought to obstruct the march was to take the position that the women would need permission from Lonmin to go ahead.

[49] See http://www.sjc.org.za/posts/trial-of-sjc-21-continues.

Sending communities with limited access to resources from pillar to post like this serves to further undermine access to justice in a country supposedly committed to making human rights real. Furthermore while PAIA makes includes third party notifications in its envisaged regulation, the Gatherings Act does not provide guidance as to how to manage the inclusion of a private company in protest action.

Conclusion and recommendations

[to be developed]