

TWENTY YEARS OF SOUTH AFRICAN CONSTITUTIONALISM
A CRITICAL ANALYSIS OF THE JOURNEY OF THE RIGHT OF ACCESS TO
INFORMATION IN SOUTH AFRICA¹

*'Give me the liberty to know, to utter, and to argue
freely according to conscience, above all liberties'*

John Milton *Areopagitica* 1644²

*'You delight in laying down laws,
Yet you delight more in breaking them.
Like children play by the ocean who build sand-towers with constancy
and then destroy them with laughter.
But while you build your sand-towers the ocean brings more sand to the
shore,
And when you destroy them the ocean laughs with you.
Verily the ocean laughs always with the innocent.'*

Kahlin Gibran *On Laws* 1923³

ABSTRACT

On the 10th of December in 1996, Nelson Mandela, South Africa's first democratically elected president, signed into law the Constitution of the Republic of South Africa.⁴ Considered one of the most progressive of its time, the South African Constitution embedded the right of access to information in Chapter 2, the Bill of Rights. The inclusion of this right within the constitutional framework was pioneering, particularly in its extension to compel information from private as well as public bodies. Four years after the Constitution was enacted, the Promotion of Access to Information Act (PAIA)⁵ was established to give effect to the constitutional right of access to information. Yet despite its progressive framework, PAIA has borne witness to a dismal compliance record by both public and private bodies, and an even more meagre number of information requests from citizens. Further, the South

¹ Rachel Ward and Kelly Stone

² John Milton, *Areopagitica* (1868) E. Arber, London.

³ Kahlin Gibran, 'On Laws' from *The Prophet*. A. Knopf, New York. (1923).

⁴ Constitution of the Republic of South Africa, Act 108 of 1996. [Hereinafter 'Constitution'].

⁵ Promotion of Access to Information, Act 2 of 2000. [Hereinafter 'PAIA'].

African access to information regime has arguably been threatened by recent legislative developments. In response to the above, this paper considers the existentialist value of the right of access to information, and critically analyses the conception and development of the right of access to information at the dawn of democracy, as a means of understanding its condition today. This paper proffers that the constitutional and legislative statutes under which the right of access to information was promulgated were not as progressive as imagined, in so far as they failed to take into account local cultural values and were designed to support a particular political ideology, which are evident in South Africa's recent legislative developments. Accordingly, this paper examines the failure of PAIA to take into account local and cultural norms and values in South Africa, and the extent to which this has been a critical factor for the lack of assimilation of the right of access to information in South African society. In doing so, this paper presents a critique of the apparent discontent between access to information as a liberal right and African value systems, such as Ubuntuism.

I. Introduction

The right of access to information is, arguably, an extraordinary human right. It cannot be said to occupy the same ahistorical moral territory as other traditional human rights; nor can it be squarely understood within the traditional language of positive and negative rights, as this right places both a positive and negative burden on the state to provide access to information and to create conditions in which access can be realised.⁶ For John Milton, in the 17th Century, it was a right, or liberty, that held an intrinsic connection to a kind of Christian existentialism, as a vehicle through which to reach a higher form of humanity, and one which was fundamentally more connected to the divine.⁷ Milton's ideas about the search for knowledge sublimating and enlightening the individual is, indeed, at no disjuncture to a certain discourse currently surrounding the right of access to information in South Africa, which conceptualises this right as a leverage right for the realisation of other rights, and, in this way, enhances human dignity as the essential pillar of human rights. The right of access to information, therefore, stands apart from other rights in its ability to transcend the human

⁶ Calland, R. (2013) 'The Right of Access to Information: The State of the Art and the Emerging Theory of Change', in: Diallo, F., Calland, R. (Eds), *Access to Information in Africa*. Brill Academic Publishers, pp. 21-22.

⁷ McDill, J.M. (1942) *Milton and the Pattern of Calvinism*. Vanderbilt University, Nashville. See also, Grayling, A.C. (2008) *Towards the Light: the Story of the Struggles for Liberty and the Rights That Made the Modern West*. Bloomsbury, London.

rights discourse and to bring about the transformation to humanity that this discourse intended to achieve by enhancing individual capability.

The story of the right of access to information in South Africa began in the wake of apartheid with a firm commitment by South Africa's new political order to embed this right as a constitutional value. The conceptualisation of this right within South Africa's constitutional framework set new global standards, appeasing the international community.⁸ Four years later the Promotion of Access to Information Act (PAIA) was established to give effect to this right and to 'actively promote a society in which the people of South Africa have effective access to information to enable them to more fully exercise and protect all of their rights.'⁹ In the fourteen years since its passing, requests to both governmental bodies and private institutions for access to information have been made: some have been successful, some have been denied, many have been ignored, and a small number have been taken to court. The central question posed by this paper is how far has PAIA advanced the widespread enjoyment of the right of access to information by South African people? It is argued here that, in a number of ways which will be discussed below, PAIA has stood as a barricade to accessing information, particularly for groups of people who have been disadvantaged by South Africa's past.

In order to substantiate this premise, this paper first considers the conceptualisation of the right of access to information at the dawn of democracy and the subsequent creation of the PAIA. The paper then moves to consider how the access to information regime in South Africa has played out since the passing of PAIA, with particular concern given to the usage of PAIA by South Africans and to the recent legislative developments that are threatening the national rubric of this right. The third section of this paper presents a discussion on the extent to which PAIA itself threatens the enjoyment of the right of access to information, looking specifically at the ways in which the nomothetic ordering of the right fails to consider the local South African context in preference of advancing a globally influenced neo-liberalist agenda. Lastly, this paper will put forward a theory of change for the right of access to information that is currently being developed within this discourse in South Africa, and will consider how reimagining the right may advance its widespread enjoyment by all people.

⁸ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171. [Online] Available at:

<http://www.refworld.org/docid/3ae6b3aa0.html>. [Accessed 2 October 2014].

⁹ Preamble to PAIA

II. The Right of Access to Information in South Africa

a) *South Africa's Constitution*

The new political order of South Africa set out to readjust the power imbalance that had existed under apartheid by entitling citizens to a series of rights and obligating the state to a series of duties in order to achieve the nation's sought-after transformation from authoritarian rule to constitutional democracy. The right of access to information was a central part of South Africa's transition and constitutional promise, included as one of thirty-four Constitutional Principles that were to form the foundation of South Africa's new democracy.¹⁰ Developed during the negotiation process of the post-apartheid state in 1993, the Constitutional Principles were a list of fundamental rights and interests that provided the framework for South Africa's new constitutional state, and upon which an imperative was placed to ensure each principle was included in the final text of the Constitution before it could be certified by the Constitutional Court.¹¹ Constitutional Principle IX related to freedom of information and stated that:

Provision shall be made for freedom of information so that there can be open and accountable administration at all levels of government.¹²

The decision to include freedom of information as one of the Constitutional Principles demonstrated an understanding by the new political order that this right was central to the establishment of a legitimate democracy which could be held to account by its people. The secrecy under which the apartheid regime had operated was a key strategy of its oppression;¹³ therefore, the requirement created by Constitutional Principle IX to create mechanisms through which the state could be held to account was integral to South Africa's new constitutional state and marked clear distinction from the old order to the new. Yet more than this, South Africa's Constitutional Principle IX laid the foundation for the creation of the first constitutional right of access to information.

¹⁰ Sachs, A. (1996-1997) 'The Creation of the Constitution', at 669. 41 N.Y.L. Sch. L. Rev. 669 (1996-1997).

¹¹ O'Regan, K. (2000) 'Democracy and Access to Information in the South African Constitution: Some Reflections', at 12. Paper presented at Constitutional Right of Access to Information Conference in Pretoria on 4 September 2000. University of South Africa: Pretoria.

¹² Constitution of the Republic of South Africa, Act No. 200 of 1993, (as amended), Schedule 4 ("Constitutional Principles; Principle IX"). [Hereinafter 'Interim Constitution'].

¹³ Calland, R. (2009) 'Illuminating the Politics and the Practice of Access to Information in South Africa', at 3-4. Chapter 1 in *Paper Wars: Access to Information in South Africa*. Johannesburg: Wits University Press.

One year later, in April 1994, the Interim Constitution was adopted by the Constitutional Assembly¹⁴ which provided not for freedom of information, but for the right of *access* to information. Section 23 of the Interim Constitution states that:

Every person shall have the right of access to information held by the State or any of its organs at any level of government in so far as such information is required for the exercise or protection of any of his or her rights.¹⁵

The difference in language between Constitutional Principle IX and Section 23 is significant, marking a semantic shift from ‘freedom of information’ to ‘access to information’ in circumstances where the information is necessary for the exercise or protection of another right. The language providing for ‘freedom of information’ in Constitutional Principle IX had not created a human right as such, but rather had set forth the conditions for an open and accountable system of government. In this regard, Section 23 of the Interim Constitution was the first time a *right* of access to information had been created, which not only entitled an individual to access information, but also created what Richard Calland has described as both a positive and negative duty upon the state to create the conditions in which information can be accessed and to refrain from interfering with the exercise of this right.¹⁶

By the time the 1996 Constitution of the Republic of South Africa was passed three years later, the right of access to information had been strengthened even further. Not only had the condition restricting access only to information held by the state and necessary for the realisation of other rights been removed, the right had been further extended to include a right to access information held by private bodies needed for the realisation of other rights.¹⁷ The final language of Section 32 of the Constitution of 1996 states that:

- (1) Everyone has the right of access to –
 - a) Any information held by the state; and
 - b) Any information that is held by another person and that is required for the exercise and protection of any rights.

¹⁴ Interim Constitution at 1.

¹⁵ Constitution of the Republic of South Africa [No. 200 of 1993], at section 23.

¹⁶ Calland (2013), *supra* at 21-22.

(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.¹⁸

Once again, South Africa took an unprecedented step in the development of the global theory and practice of access to information when it framed the right in such a way as to connect it to the realisation of all other rights. The unique capacity of this right to connect to other rights is what arguably makes it so extraordinary. In the introductory chapter of *Paper Wars*, Richard Calland discusses the final drafting of the wording of Section 32 and explains how local pressure from civil society organisations in particular, had worked to ensure that the right of access to information was framed in a way as to enable the realisation of other human rights.¹⁹ In addition, the right as defined in Section 32 was even more progressive than originally imagined, not only because it had recognised the power of private actors on the realisation of human rights, but also because it had acknowledged the colluded efforts between public and private to prevent certain information from entering the public domain. Lastly, the requirement that national legislation be enacted to give full effect to this right under Section 32(2) demonstrated the commitment by the new democratic order to create an access to information culture in South Africa.²⁰

When certifying the Constitution in 1996, the Constitutional Court stated that the right of access to information had been given greater significance in South Africa than in any other country in the Africa, and additionally had ‘a particular function to play in promoting good governance’.²¹ Prior to this point in history, international human rights law had only understood freedom of information as a qualification of the right to freedom of expression, rather than as its own right.²² Therefore, in this regard, the newly-formed constitutional state of South Africa had essentially created a new and independent human right.

b) The Promotion of Access to Information Act

¹⁸ Constitution of the Republic of South Africa [No. 108 of 1996], at section 32.

¹⁹ Calland (2009), *supra* at 2.

²⁰ PAIA, section 32(2).

²¹ Klaaren, J. (2004). “The Right of Access to Information at Age Ten, at 168. Chapter 18 in Reflections on Democracy and Human Rights: A decade of the South African Constitution (Act 108 of 1996). South African Human Rights Commission: Cape Town, South Africa.

²² Article 19 of the UDHR had stated that: Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers. It was not until 2006 that the right of access to information was formally recognised on an international level as being a distinct right in and of itself.

Four years after the adoption of the Constitution, the Promotion of Access to Information Act (PAIA) was passed in February 2000, giving effect to the right of access to information under Section 32 of the Constitution.²³ The central objective of PAIA was to establish a set of mechanisms through which requests for access to information held by both public and private bodies could be made by all South Africans.²⁴ Accordingly, PAIA provides for a set of procedures through which information requests can be made, as well as the grounds upon which access could be refused, including, for example, the protection of commercial information and issues relating to national security.²⁵

When PAIA emerged in February 2000, it was ‘widely lauded at home and abroad.’²⁶ The passing of PAIA enjoyed a presumption of constitutional supremacy over other pieces of legislation because it had given effect to a constitutional right²⁷, which meant that only its own provisions and other constitutional grounds, namely the right to privacy and national security, could limit its reach.²⁸ Like the Constitution, PAIA was internationally regarded as ‘progressive’ not only because it trumped most other pieces of legislation of this kind, but also because it provided for access to information held by private bodies that was required for the protection of any other right. Further, although PAIA provided a list of grounds upon which access to information could be refused, it included a public interest override clause which had to be applied to all information denials, including those made by private bodies. Embedded within this clause was the principle that the public’s interest in certain types of information was paramount over the needs of state and non-state bodies. By international standards, the inclusion of a public interest clause was ground-breaking, in so far as it firmly established a legal principle that the interests of the people supersede the interests of the state and private enterprise.

In this regard, PAIA has been called ‘a fairly radical law’²⁹ and a ‘golden standard’³⁰, which has influenced the development, in part, of other access to information laws, including the Model Law on Access to Information for Africa.³¹ What makes PAIA even more unique,

²³ McKinley, D. (2003) ‘The State of Access to Information in South Africa’, at 3. Centre for the Study of Violence and Reconciliation. Cape Town: South Africa.

²⁴ PAIA at section 9(d).

²⁵ *Ibid* at sections 36, 41, 64.

²⁶ McKinley, *supra* at 5.

²⁷ PAIA at section 5.

²⁸ Klaaren, *supra* at 168.

²⁹ McKinley, *supra* at 5, quoting interview with Verne Harris (2003b), South African History Archive.

³⁰ *Ibid*.

³¹ Memeza, M. (2004) ‘An Analysis of Weaknesses in Access to Information Laws in SADC and in Developing Countries’, quoting interview with George Dor of the South African Centre for Economic Justice on 17 June

however, is that it empowered the South African Human Rights Commission (SAHRC) as its monitoring body³², which further demonstrated the country's commitment at this point in history to recognising the right of access to information as a fundamental human right and the role of national institutions in the promotion of the Constitution.

The mere existence of ATI legislation, however, does little to reveal how effective the system is in practice.³³ Against this context, the next section of the paper will discuss how the access to information regime in South Africa has played out since the passing of PAIA, paying particular attention to the usage of PAIA by South Africans and to recent legislative developments which arguably serve to threaten the very nature of this right.

III. The Development of the Right of Access to Information: 2000 – 2014

a) PAIA in practice

It has been eighteen years since the creation of the right of access to information in South Africa's Constitution and fourteen years since PAIA passed into law. In short, this section seeks to understand the extent to which PAIA has enabled the widespread enjoyment of the right of access to information within South Africa, by presenting a picture of the state of its practice, paying particularly attention to the usage of PAIA by those living within South Africa. This section then moves to address recent legislative developments which will impact the strength of the access to information regime within South Africa, and the levels of enjoyment of this right.

Despite the globally renowned formulation of the right of access to information within South Africa's Constitution, the extent to which this right has been enjoyed by all South Africans is limited. In practice, PAIA is not often used by South African citizenry, who are mostly unaware of its existence and the procedures for requesting access to public or private body information. Colin Darch, an expert on PAIA, has commented that the levels of demand

2005. Freedom of Expression Institute, p 6. [Online] Available at <http://www.fx.org.za/PDFs/ATIP/ATI%20weaknesses%20analysis%20sadc1.pdf>. [Accessed on 10 October 2014]

³² PAIA section 83(3).

³³ Darch, C. (2013) 'The Problem of Access to Information in African Jurisdictions: Constitutionalism, Citizenship, and Human Rights Discourse'. Chapter 2 in *Access to Information in Africa: Law, Culture and Practice*. Brill Academic Publishers, p. 29.

for access to information by the South African citizenry ‘started at a low level and has remained so’.³⁴ Although there is no complete set of statistics regarding usage of PAIA, the SAHRC, as its monitoring body, is obliged to collect information from all government departments relating to the number of PAIA requests received each year.³⁵ Of the 65% of national government departments that submitted statistics from April 2012 to March 2013, the SAHRC reported that approximately two thousand PAIA requests had been received, and that about 75% of these requests were granted in full.³⁶ It is important to note, however, that these statistics only reflect the information received from those departments that submitted statistics – a total of 28 out of 43 national government departments - and do not include PAIA requests received by municipal and provincial government departments, nor private bodies. In addition, the information provided by government departments is not verified by the SAHRC or an independent reviewer, putting in doubt their accuracy.

To supplement the statistics released by the SAHRC, a network of civil society groups that use PAIA regularly publish an annual shadow report.³⁷ The shadow report arguably offers a more complete and accurate reflection of the state of practice of PAIA in South Africa than the report produced by the SAHRC, given that it contains information from requests made by the drafters of the report themselves, rather than from information submitted by government departments. In 2012/2013, the PAIA shadow report revealed a decrease in overall levels of compliance from both public and private bodies - a trend also reflected in the 2012/2013 SAHRC report³⁸ - as well as an overall decrease in the levels of access to information that was granted.³⁹ The report noted that:

In particular there has been a decrease in the full release of records by information holders – from 35% in 2009, to 22% in 2011, and now down to an all time low of 16% for the 2012/2013 reporting period.⁴⁰

³⁴ Darch, C., Underwood, P.G., 2005. Freedom of Information Legislation, State Compliance and the Discourse of Knowledge: The South African Experience. *The International Information & Library Review* 37, 77–86. doi:10.1016/j.iilr.2005.05.003

³⁵ Each year, Information Officers from all public bodies must submit a report to the SAHRC in relation to the number of request received, those granted in full, those granted in part, those refused, those where an extension was requested, those where internal appeals were lodged, and those which were taken to court. PAIA, Section 32.

³⁶ SAHRC PAIA Annual Report 2012/2013, available at www.sahrc.org.za. These figures do not include the 20817 requests received by the South African Police Service.

³⁷ For more information on the PAIA Civil Society Network see www.saha.org.za.

³⁸ *Supra* at 38.

³⁹ PAIA Civil Society Network Shadow report 2013, available at www.saha.org.za.

⁴⁰ *Ibid*.

Decreasing levels of compliance with PAIA coupled with increasing levels of refusals of access to information, demonstrates what is arguably an institutional denial of the right of access to information. Indeed, PAIA is viewed by many governmental departments as an administrative burden rather than a constitutional imperative, as reflected in the high number of requests that are simply ignored, (referred to as a ‘deemed refusal’⁴¹), with the SAHRC noting each year the continuous failure of many government departments to develop internal mechanisms for handling PAIA requests.⁴²

The proffered reasons why PAIA has received such a lukewarm response from the South African public will be discussed in more detail in section III below, but it is important to note the low levels of enjoyment of the right of access to information across South Africa that is reflected by the low levels of usage of PAIA. Notwithstanding the lack of assimilation of the right of access to information by the South African citizenry, the right is set to face additional challenges with the passing of the Protection of State information Bill⁴³ and the Protection of Personal Information Act⁴⁴.

b) Legislative challenges to the right of access to information

PAIA was never intended to stand alone as South Africa’s only piece of legislation regulating the disclosure of information. Whilst PAIA was being deliberated, intentions were made to repeal the 1982 Protection of Information Act, which stood as a lasting symbol of the apartheid regime in its blanket classification of state information.⁴⁵ A new piece of legislation regulating the classification of state information was envisaged to complement PAIA by extending the conditions surrounding the non-disclosure of information relating to national security. Similarly, and in keeping with international trends, South Africa was considering the development of a privacy law to regulate data protection, and to extend the ambit of PAIA relating to grounds of refusal for disclosure of personal information.⁴⁶ By 2008-2009

⁴¹ PAIA sections 27, 58.

⁴² SAHRC PAIA Annual reports, available at www.sahrc.org.za.

⁴³ Protection of State Information Bill, B6D-2010.

⁴⁴ Protection of Personal Information Act 4 of 2013.

⁴⁵ ‘Evaluating the Information Bills: A Briefing Paper on the Protection of Information Bill’, prepared by Iain Currie and Jonathan Klaaren, University of Witwatersrand, Johannesburg, On behalf of the Centre of Memory at the Nelson Mandela Foundation, 17 June 2011, available at http://www.nelsonmandela.org/images/uploads/Info_bills_evaluation_final.pdf.

⁴⁶ South African Law Reform Commission, Privacy and Data Protection, Discussion Paper 109, 2006., available at <http://www.justice.gov.za/salrc/dpapers/dp109.pdf>.

two bills were before Parliament: the Protection of Information Bill (later to become the Protection of State Information Bill⁴⁷) and the Protection of Personal Information Bill.

Colloquially known as the “Secrecy Bill”, the Protection of State Information Bill has been signed off by both houses of the South African Parliament (National Assembly and National Council of Provinces) after much deliberation, amendments and public controversy. Numerous concerns have been raised by civil society, the South African press, and even the international community⁴⁸ which express that the Bill is simply unconstitutional. Specifically, submissions have been made to Parliament concerning the criminalisation and imposition of heavy penalties upon persons found in possession of classified state information, which place severe limitations upon the freedom of the South African press as well as potential whistleblowers.⁴⁹

In addition, despite earlier drafts of the Bill, which sought to ‘harmonize the implementation of this Act with the Promotion of Access to Information Act, 2000’⁵⁰ and which provided for access requests for the declassification of state information to be made through the PAIA information request process, the final version of the Secrecy Bill makes no reference to PAIA for requested classified information, instead creating a separate process for requesting access to classified records.⁵¹ In doing so, the Secrecy Bill creates a parallel system of access to state information, rendering PAIA a far less powerful tool only to be used for accessing state information categorized as unclassified and powerless to challenge the classification itself of state information.

Further, a large part of the criticism lodged against the Secrecy Bill related to the lack of a public interest override clause. This is particularly problematic in light of the deletion of the application of PAIA to the Secrecy Bill, as such an application would have automatically meant that PAIA’s public interest override clause would have been applicable in circumstances where the harm caused by the classification of information clearly outweighed

⁴⁷ ‘Evaluating the Information Bills: A Briefing Paper on the Protection of Information Bill’, prepared by Iain Currie and Jonathan Klaaren, University of Witwatersrand, Johannesburg, On behalf of the Centre of Memory at the Nelson Mandela Foundation, 17 June 2011, available at

http://www.nelsonmandela.org/images/uploads/Info_bills_evaluation_final.pdf.

⁴⁸ See highlights from South Africa’s Universal Periodic Review, 2012,

<http://www.ohchr.org/EN/HRBodies/UPR/Pages/Highlights31May2012pm.aspx>.

⁴⁹ Clause 11 of B6D-2010 which lays out a possible 25 year jail term for intentionally accessing classified information.

⁵⁰ B6-2010.

⁵¹ Clause 17 of B6D-2010.

the contemplated harm caused by the disclosure of information.⁵² The lack of a coherent public interest clause creates a direct challenge to South Africa's constitutional democracy, in so far as it legitimises state authoritarianism and renders the will and wellbeing of the public or citizenry as secondary to the needs of an authoritarian and bureaucratic state.

In addition, the passage of the Secrecy Bill raises some other concerns associated with the conceptual promise of the constitutional right of access to information. As discussed earlier, the right of access to information arose in part as a response to the authoritarian secrecy of the apartheid state which exercised its power through parliamentary supremacy. It is indeed ironic that the way in which Members of Parliament, and particularly those of the African National Congress (ANC), have exercised their power over the drafting and amendment of the various versions of the Secrecy Bill is resonant of the parliamentary supremacy and secrecy of the Apartheid era. For Colin Darch, this connection between ANC politics and secrecy is historical, noting that a 'disciplined ability to keep a secret – even under torture – was a prized virtue'.⁵³ This paper does not intend on bringing into the discussion the exclusive and clandestine politics and culture of the ANC, however, what can be noted is the way in which the passage of the Secrecy Bill demonstrates a regression in the constitutional order and commitment of the government to the right of access to information.

The second Bill, first brought before Parliament in 2009, was the Protection of Personal Information Bill, which was assented by the President in 2013, becoming law. The ways in which the Protection of Personal Information Act (POPI) threatens the access to information regime of South Africa are far less obvious than the Secrecy Bill and have been far less controversial. POPI seeks to regulate the processing of personal information and, in doing so, serves both as an enabling legislation for the right to privacy⁵⁴ and augments the provisions relating to the disclosure of personal information listed under PAIA⁵⁵. In a number of ways POPI has been lauded for the protection it offers over the right to privacy and for the enforcement mechanisms it places upon both POPI and PAIA through the establishment of an Information Regulator mandated to monitor the implementation both Acts, repealing the role

⁵² See Clause 17 B6D-2010.

⁵³ Colin Darch, "A less than fertile environment": promoting access to information in South Africa. Presentation made to the Regional Workshop "Towards More Open and Transparent Governance in South Asia", organised by the Indian Institute of Public Administration, New Delhi, in collaboration with the World Bank, 27-29 April, 2010, in the IIPA Conference Hall, 29 April 2010.

⁵⁴ Enshrined in Section 14 of the Constitution.

⁵⁵ Sections 34 and 63.

of the SAHRC in relation to PAIA.⁵⁶ Despite the much needed enforcement mechanism for PAIA outside of the courts, the proposed establishment of an Information Regulator demonstrates a continued lack of commitment by the South African state to the human right to access information. Unlike the SAHRC, which is an independent human rights institution established by the Constitution with direct reporting lines to Parliament and the United Nations⁵⁷, the Information Regulator will be a government institution with reporting lines to the Department of Justice and Correctional Services, the department which ironically receives the largest number of PAIA requests each year. However, more fundamentally, the replacement of PAIA's monitoring body from an independent human rights institution to a governmentally-aligned establishment signifies an institutionalised regression from South Africa's pioneering recognition of access to information as a fundamental human right.

IV. (Neo)liberalism, ubuntuism and the pursuit of the right of access to information

It may be an unfairly critical statement to say that PAIA has failed. However, there are two important points that are going to be taken forward from the above: first, that PAIA has not lived up to the constitutional promise of the human right of access to information; and second, that the access to information project in South Africa is being threatened. Developing on from a modest but significant body of literature on the issues surrounding PAIA and the right of access to information in South Africa, this section of the paper proffers three explanations for the two points above. These include, the bureaucratic nature of PAIA; the manifestation of neoliberalist state agenda in the information laws through the protection of commercial information; and the clash of cultures between liberalism and African values associated with communitarianism that form an inherent discontent in the application of the right of access to information within the South African contexts. This section concludes with an attempt to reconcile the liberal (and, by extension, neoliberal) agenda of the right of access to information by examining the particular and transcendent nature of this right to bridge the divide between the African context and the human rights utopia.

⁵⁶ One of the main criticisms of PAIA has been the lack of enforcement mechanisms and the limited power of the SAHRC to protect the right and enforce compliance.

⁵⁷ The SAHRC enjoys an A status amongst the International Coordinating Committee of National Human Rights Institutions which grants it speaking rights at the United Nations. See www.sahrc.org.za for more information.

a) *Bureaucracy and the legitimisation of state authority*

The bureaucratic nature of PAIA has been well espoused upon by access to information critics. For Darch and Underwood, access to information laws, such as PAIA, are ‘meaningless outside the framework of the modern bureaucratic state’, in so far as they require a hierarchical and systemically organised governmental administration that keeps and categorizes records according to formal laws and regulations.⁵⁸ Certainly, the low levels of usage of PAIA by the South African citizenry is in large part due to a lack of willing and capacity to engage in the bureaucratic nature of a PAIA request – a form which must be duly filled out and submitted within certain timeframes to particular individuals within particular public or private bodies (it is hard to define which). Further, the appeal process that PAIA puts in place only applies to requests made to the three tiers of government – national, provincial and local – and involves a reassessment of the information request by an official higher up in the bureaucratic food chain.⁵⁹ The only other alternative where information requests have been ignored or refused is to seek recourse through the courts – itself a challenging and expensive process, requiring legal capacity as well as accessibility to this system of justice, which many South Africans are without (this will be discussed further in section c) below). Bureaucracy is therefore understood in this context to denote the self-interested means through which state power manages itself in a system that is structurally exclusive and impenetrable to those outside of it.

In the context of PAIA, the very nature of this law as bureaucratic is antagonistic to its ultimate purpose of shifting the power/knowledge divide between the state and its citizens through the release of information. Indeed, if the citizen is required to go through such a complex and pedantic process as that set out in PAIA in order to gain access to information held by another body, then how far does this really enable a shift in power? Is it not rather that PAIA’s formal recognition of the state as the holder of information - and by extension, power - and the paternalistic allowance by the law for citizens only to *request access* to this information, a clear demonstration that PAIA serves to legitimise the authority and power of

⁵⁸ Colin Darch and P G Underwood (2010) *Freedom of Information and the Developing World: The Citizen, the State and Models of Openness*. Chandos Pub., Oxford.

⁵⁹ Section 74-77 of PAIA.

the state, and to relegate the citizen as a subject who must deferentially “request” “access” to the state’s records.⁶⁰

Indeed, the very fact that PAIA provides only for access to records⁶¹, rather than more broadly to information as stated in Section 32 of the Constitution, is demonstrative of the bureaucracy of the law which sought to reduce the human right of access to information into a concrete administrative principle which could be properly affected and regulated. The translation, therefore, by PAIA of the constitutional human right to access information into a complex and bureaucratic piece of legislation that allowed only “access” to “records” upon formal “request”, has ultimately resulted in a challenge to the right of access to information by the very law that was conceived to enable it.

The role of the state in watering down the constitutional project of the right of access to information into a power game whereby citizens were required to formally request access to state records, is demonstrative of a broader trend to redefine this constitutional value and human right into something that works more closely to serve the needs of the state.

b) The protection of private or commercial interests in the information laws

We argue here that one of the critical needs of the state regarding the right of access to information is to ensure that this right does not clash with the state’s neoliberalised agenda to promote the free market and to participate in the global economy.⁶² In this context, neoliberalism is understood as the globally dominant contemporary ideology which considers the free market as central to the governance of the state and the means through which to participate in the global economic community.⁶³

When the right of access to information was conceived in the 1996 Constitution to extend to private actors, South Africa set a new global standard in addressing the role of the private sector in the modern state.⁶⁴ On the one hand, this demonstrated an understanding by

⁶⁰ This idea is found in R Ward, ‘African Regional System of Access to Information’, unpublished paper (2014).

⁶¹ See sections 3 and 4 of PAIA.

⁶² Although there are arguably other needs of the state, the neoliberalist agenda is the one that will be discussed here.

⁶³ See also, Garry Rodan ‘Neoliberalism and Transparency: Political versus Economic Liberalism’ Asia Research Centre Working Paper No 112.

⁶⁴ Alasdair Roberts, ‘Structural Pluralism and the Right to Know’, Paper presented at the international conference, Beyond the Washington Consensus -- Governance and the Public Domain in Contrasting Economies: The Cases of India and Canada, Organised by Roberts Centre for Canadian Studies, York

South Africa of the role private businesses often play in the violation of, or complicity with, human rights violations – a fact that was notably recorded by South Africa’s Truth and Reconciliation Commission in relation to apartheid crimes.⁶⁵ On the other hand, however, the formulation of Section 32 demonstrated South Africa’s commitment to neoliberalist principles which place private actors within the sphere of the state through increasing privatisation, and enabling them to participate and influence public governance and policy. Indeed, to speak of the state in the modern context necessarily denotes a collusion between government and business actors, as no longer can these two sectors be strictly separated and treated as independent agents: a point which was raised in Parliamentary discussions on the provisions of PAIA by one of South Africa’s leading access to information advocates, Alison Tilley:

There is often not a substantial difference when dealing with the private or public sectors. A person dealing with a bank or a Department over a welfare grant usually experiences that the two are similar. The divide between what is government and what is not is eroding and the relationship a person has with one is not necessarily different to that which they have with the other. It has become merely a question of power relations and the focus should be on the balance of power rather than whether a body is public or private.⁶⁶

Yet despite the rather radical understandings by the constitutional assembly regarding the role of the private sector in the modern state, what has ensued in the legislative development of this right is a neoliberal motivation by the state to protect private and commercial interests, which often errs on the side of secrecy and non-disclosure of information, or as Alasdair Roberts describes it: ‘we call this the private sector precisely because we are prepared to refuse demands for transparency except in unusual circumstances.’⁶⁷

Legislated efforts to reduce the constitutional right of access to information with regards to private and commercial interests were present at the outset of the drafting of PAIA in 1995. One of the earlier drafts of PAIA tabled before Parliament provided only for the conditions and processes through which information could be requested from a public body.

University; Canada Institute for Studies in Industrial Development; and New Delhi Centre for Research in Rural and Industrial Development, Chandigarh, at Chandigarh, February 12-14, 2001.

⁶⁵ Final Report of the South Africa Truth and Reconciliation Commission, available at <http://www.justice.gov.za/trc/report/finalreport/Volume%204.pdf>.

⁶⁶ Parliamentary minutes available at <http://www.pmg.org.za/taxonomy/term/85/0?page=3>.

⁶⁷ *Supra* at 66.

In short, no enabling legislation for section 32 (b) and the right of access to information from private bodies was drafted. It was only after pressure was placed on Parliament by civil society organisations, particularly the Open Democracy Campaign Group, to develop an enabling framework for Section 32 (1)(b) that PAIA was revised into its current form.⁶⁸

This reluctance by the state to concretise the right of access to information held by private bodies continued to be played out in the drafting of the second half of PAIA. The resultant Sections 50 – 73 of PAIA created the process and conditions through which access to information from private bodies could be sought, including a list of mandatory grounds for refusal of access to records. One of these grounds involves the mandatory protection of commercial information of a third party⁶⁹, an exemption that is similarly echoed in Section 36 of PAIA pertaining to the grounds of refusal of access to information from public bodies. For Dale McKinley the mandatory protection of commercial information of a third party is inherently problematic:

This provision has the potential to prevent access, on the grounds of ‘commercial confidentiality’, to information emanating from the privatisation and/or corporatisation initiatives of the government that fundamentally affect the realisation of certain socio-economic rights (for example, contract records setting out the operational requirements of public-private partnerships in the area of water provision).⁷⁰

Indeed, the term “commercial information” remains undefined by PAIA or through the interpretation of this Act by the courts, leaving copious room for information disclosures to be denied and legally justified for commercial reasons, and allowing for the neoliberalist agenda of the state to continue uninterrupted.

In 2008, when the Secrecy Bill was before Parliament, this term “commercial information” again resurfaced as the drafters of the Bill pushed to include commercial information as a category of classifiable information.⁷¹ Although public outcry ensued and the provisions were eventually removed from the Bill, the push to include commercial information as a category of classifiable information demonstrated a clearly neoliberalist

⁶⁸ See, <http://www.pmg.org.za/docs/1999/appendices/991015ODCGbriefing.htm>. Accordingly, sections 50-73 of PAIA lays out the conditions and process through which requests to information held by private bodies can be made.

⁶⁹ Section 64 PAIA

⁷⁰ McKinley, *Supra* note 5.

⁷¹ B6 -2010 available at <http://www.pmg.org.za/files/bills/b6-10.pdf>.

attitude that commercial enterprises were central to the functioning and stability of the state, and must be protected as paramount alongside national security. The drive by the state to rework access to information legislation in a way to protect its commercial interests again became evident in POPI with its loose language surrounding derogation from its provisions where necessary to serve the “legitimate interests of responsible parties” (who would by and large be state actors and corporate bodies). Appearing at the end of numerous provisions within POPI, this language acts as a kind of claw-back clause, which permits businesses (and government bodies) to derogate from the provisions of the Act for “legitimate interests”, which would likely be interpreted by such bodies as including commercial and financial interests.

There is not the scope within this paper to examine the effect of globalisation and neoliberalist ideologies upon the national realisation of human rights. However, two points can be drawn from the above that relate to the discussion here. Firstly, that the desire by the South African state (the state meaning both government and Parliament) to protect commercial interests from public scrutiny demonstrates a broader commitment to neoliberal principles which aim, above all else, to protect the market from collapse or instability, which was articulated as the central fear arising from information disclosure controlled by the public. And secondly, that there is a tension between the vision of the Constitution and the imperatives of the legislature to ensure that draft legislation does not conflict with the macro-economic agenda of the state, a statement that finds support in the loose language of “commercial information” and “legitimate interests” found within the information laws. The broader point being made here is that the constitutional vision has been frustrated by the power of the legislature and the state to push its own politically ideological agenda that may or may not be directly concerned with the full realisation of the Bill of Rights.

c) The nomothetic order of the right of access to information: A clash of cultures

The position proffered throughout this paper that PAIA in fact limits rather than enables the right of access to information is an idea that holds particularly relevance to South Africa’s traditional and customary communities which make up approximately one third of the South African population, and where the formal legal system has not been fully adopted nor fully represents the values and justice systems of all cultural, or customary, groups. Embedded in this discussion is the inherent discontent that exists between human rights as liberal

principles, and value systems within South Africa which are fundamentally communitarian. In an attempt to simplify this broader debate for the purpose of understanding the reasons behind the lack of assimilation of PAIA within South Africa, this paper will discuss African value systems broadly under the term “ubuntu”.

There are two reasons proffered here as to why the right of access to information has witnessed a particular lack of assimilation across South Africa’s traditional and customary communities: the first reason is practical, the second is ideological. With regards to practicality, the PAIA request process, as discussed above, is highly exclusionary because of its bureaucratic nature. It is available only to those with the education, capacity and financial resources to submit a request – a concern that is heightened when requests are denied or ignored, as recourse through the courts becomes the only means through which an information dispute can be resolved after PAIA has failed.⁷² For Colin Darch, the exclusionary nature of PAIA relates to what he terms the ‘discourse of power’ which ‘remains inaccessible to many of the historically excluded sections of society’.⁷³ This discourse of power represents both the formal system of governance by the state and its accompanying justice system by the courts, a system that is largely inaccessible to many South Africans, especially those living in rural and customary communities. (The recent Traditional Courts Bill⁷⁴ arose precisely to combat this issue and to provide for the traditional system of justice to be formally recognized alongside Roman Dutch Law.) It is because of the isolation experienced by many cultural and customary communities from the formal system of law - within which PAIA is located - that the nomothetic order of the right of access to information as contained in PAIA is doubted. It is proffered here that although the original constitutional value of access to information was significant and held the potential to transform South African society and chip away at the power imbalances and inequality within the nation, its legal ordering within PAIA reduced the human right to a legal principle, only accessible to those with the means, resources and capacity with which to participate in and negotiate this paradigm, or in Darch’s words, ‘discourse of power’. In this way, the conceptualisation of PAIA to enable the realisation of the right of access to information only worked to further deny cultural and customary communities this right through their isolation from the formal legal system within which PAIA was conceived.

⁷² See McKinley.

⁷³ Darch, C., Underwood, P.G., 2005. Freedom of Information Legislation, State Compliance and the Discourse of Knowledge: The South African Experience. *The International Information & Library Review* 37, 77–86. doi:10.1016/j.iilr.2005.05.003.

⁷⁴ This Bill has now been withdrawn from Parliament.

On an ideological level, the right of access to information represents a liberal right which arguably stands at odds with the communitarian value system of traditional communities. The right of access to information traces its lineage to the right of freedom of expression, or in the language of Article 19 of the Universal Declaration of Human Rights (UDHR) and the International Covenant of Civil and Political Rights (ICCPR), the right to ‘seek, receive and impart information and ideas’. This right was fundamentally liberal in its situation within the UDHR and ICCPR – the two international human rights law documents which Makua Wa Mutua sees as the quintessential manifestation of the (Western) liberal phenomenon,⁷⁵ and in its conceptualisation as a principle to promote a certain kind of autonomous individual who engaged with information in a journey of self-, and ultimately political-, discovery. The reference made in the opening of this paper to Milton and his insistence of the supremacy of the pursuit of knowledge ‘above all liberties’ is rooted in an acceptance of liberal values of individualism.

More fundamentally, however, the South African conceptualisation of this right as an enabling right for the realisation of other rights is a tautological expression of the country’s commitment to liberalism – a commitment that later came to manifest itself as neoliberalist, as described above. Indeed, the liberal agenda sought to maximise individual independence and self-actualisation, a desire that was thought to be intrinsically connected to freedom, be it a rationalised idea of freedom to be found within the parameters of the law.⁷⁶ The conceptualisation, therefore, of the right of access to information as a right to be utilized by the right holder them self in order to exercise or protect their own rights, is undoubtedly evident of a liberal agenda that requires the individual to take control of their own life. PAIA extended the liberalist content of the right of access to information by allowing the right only to those citizens who were willing to take the realisation of this right into their own hands through a formal request for access. It is, then, a right only available to the liberalised citizen capable of the self-realisation of their rights.

Yet, the extent to which this liberalist individualism is celebrated and sought after within traditional communities across South Africa is arguably minimal. The concept of “Ubuntu” broadly represents the African value system within contemporary discourse of

⁷⁵ Makua Wa Mutua, ‘The Ideology of Human Rights’ (1996) *Virginia Journal of International Law*

⁷⁶ See Gavin Kendall, ‘From Liberalism to Neoliberalism’, Paper presented to the Social Change in the 21st Century Conference, Centre for Social Change Research, Queensland University of Technology, 21 November 2003, available at http://eprints.qut.edu.au/134/1/Gavin_Kendall.pdf.

South Africa. The concept is only ever loosely defined, but is generally associated with ideas of brotherhood, group solidarity, and collectivity. For Justice Mokgoro,

It has also been described as a philosophy of life, which in its most fundamental sense represents personhood, humanity, humaneness and morality; a metaphor that describes group solidarity where such group solidarity is central to the survival of communities with a scarcity of resources, where the fundamental belief is that *motho ke motho ba batho ba bangwe/umuntu ngumuntu ngabantu* which, literally translated, means a person can only be a person through others. In other words the individual's whole existence is relative to that of the group: this is manifested in anti-individualistic conduct towards the survival of the group if the individual is to survive.⁷⁷

Its essence, therefore, appears to stand at odds with liberal individualism, with Hanno Olinger et al stating that:

The strong collective thinking of Ubuntu implies that the individual members of the group cannot imagine ordering their lives individualistically without the consent of their family, clan or tribe.⁷⁸

And that, 'in the context of Ubuntu, a man cannot exist of himself, by himself, or for himself'.⁷⁹ In this vein, this paper proffers that the discontent between communitarian value system of Ubuntu and the liberalism of the right of access to information and PAIA which sought to promote individual autonomy and self-actualisation in the face of state and non-state power, is a significant part of the basis behind the inability of PAIA to embed, or give effect to, this right across South Africa. Further, this clash of cultures gives rise to the question of the extent to which PAIA was actually progressive at the time of its drafting, or whether it was in fact an expression of the state's desire to contribute to a globally emerging liberalist trend surrounding government transparency and international human rights,⁸⁰ rather than to create a genuine freedom of information culture locally.

⁷⁷ Y Mokgoro, 'Ubuntu and the Law in South Africa', PER/PELJ 1998 (1) 1, available at http://www.nwu.ac.za/files/images/1998x1x_Mokgoro_sum.pdf.

⁷⁸ H.N.Olinger, J.J.Britz, and H.S.Olivier, 'Western Privacy and Ubuntu: Influences in the Forthcoming Data Privacy Bill', University of Pretoria, available at <http://mo.co.za/open/ubuntu.pdf>.

⁷⁹ Ibid.

⁸⁰ See also Makua Wa Mutua, 'The Ideology of Human Rights' (1996) *Virginia Journal of International Law*

d) Reconciling liberalism and neoliberalism in the context of South Africa and the realisation of the right of access to information

The South African liberalist agenda was abandoned precisely at the moment in which it was achieved: the moment when *neoliberalist* thought began to infiltrate the mentality of the state and produce exemptions for disclosure of commercial information and protection of the private business interests in its information laws. With regards to the right of access to information, its need to be realised by a liberal citizen capable of self-actualisation, turned into a claim for a neoliberalist citizen to use the right in order to improve their socio-economic condition through the realisation of socio-economic rights (where the lexical compounding of the social to the economic is itself a neoliberalist expression of the collusion of the two spheres). Yet, this theory of the right of access to information being a leverage tool for the realisation of socio-economic rights has in fact allowed the right to, as has been argued by Richard Calland, ‘out-reach its liberal origins’.⁸¹ For Calland, the use of the right to bring about collective socio-economic benefit – a position qualified by a body of empirical cases – has brought about a radical re-evaluation of the once liberal right into one that serves an egalitarian and fundamentally more transformative purpose.⁸² Certainly, the developing theory of change surrounding the right of access to information to a right best used for collective purposes within the South African context to transform socio-economic conditions, is a paradigm that provides a reconciliation between its liberal roots and its necessary application to local contexts. For Michael Goodhart, this is the kind of necessary end that critics of liberalism hoped for: ‘they argued that such [liberal] rights, taken to their logical conclusion, entailed much more than liberals were wont to imagine. That is, they sought to win such rights for themselves and put them to new purposes.’⁸³ The new purpose of the right of access to information that seeks to promote this right on a collective level provides,⁸⁴ perhaps, a theoretical entry point to further rationalise this right with communitarian African

for a discussion on Western liberalism and international human rights law.

⁸¹ Richard Calland, ‘Exploring the Liberal Genealogy and the Changing Praxis of the Right of Access to Information: Towards an Egalitarian Realisation’, in *Theoria* Volume 61, No 140, p. 87.

⁸² *Ibid.*

⁸³ Michael Goodhart, ‘Origins and Universality in the Human Rights Debate: Cultural Essentialism and the Challenge of Globalization’, in *Human Rights Quarterly* Vol 25 No 4 2003 p. 958.

⁸⁴ Darch, C., Underwood, P.G., 2005. Freedom of Information Legislation, State Compliance and the Discourse of Knowledge: The South African Experience. *The International Information & Library Review* 37, 77–86. doi:10.1016/j.iilr.2005.05.003

value systems, and particularly those which find formal recognition within Africa's unique ideology of human rights.

The African human rights ideology is distinct from the international human rights ideology propagated through such organisations as the United Nations. One of the reasons for this distinction lies in relation to the concept of collective rights, found in the African Charter on Human and Peoples' Rights.⁸⁵ In many ways the concept of collective rights constitutes a radical departure from traditional and Western understandings of rights as individual and liberal claims.⁸⁶ And further, collective rights represent a fundamentally political expression in their unified response to state measures. William Felice explains:

Collective human rights are subversive to nation-state sovereignty in that they present the people (in the Rousseauian sense) as being the ultimate repository of sovereign rights. As Rousseau wrote: "Sovereignty, being nothing less than the exercise of the general will, can never be alienated ... [P]ower indeed may be transmitted, but not the will". Our conception of collective human rights rests on the assertion of the sovereignty of peoples over any government and/or nation-state.⁸⁷

If the right of access to information is, therefore, to be understood as an enabling right for the realisation of other, and particularly, socio-economic rights, then it too must be considered a kind of collective right in so far as its material outcomes provides benefit to all people affected by the delivery of such rights, of which socio-economic rights are only delivered on a collective rather than individual level. Moreover, particularly as a collective right, the right of access to information can more fully serve its constitutional promise of social transformation as a vehicle through which to challenge state power through 'subversive' community action.

V. Conclusion

In an effort to understand the extent to which the right of access to information has been realised in South Africa, this paper examined the journey of the right since the dawn of South Africa's democracy through the present day. This history discussed how the constitutional

⁸⁵ Articles 19 to 26 of the African Charter on Human and Peoples' Rights.

⁸⁶ William F. Felice. *Taking Suffering Seriously: The Importance of Collective Human Rights*. 1996. State University of New York Press. New York. "Conceptualizing Collective Human Rights" Chapter.

⁸⁷ *Ibid.*

promise of an open and accountable system of governance has been threatened by recent legislative developments which work more closely to serve the political ideology of the state than to promote the constitutional right of access to information. This paper presented an analysis of three interrelated issues we believe have contributed to the frustration of the realisation of the right of access to information in South Africa. Indeed, we argue that PAIA was designed in such a way as to support a bureaucratic state aimed at securing the continuation of its own political order, one that was originally liberalist and is now becoming neoliberalist. However, this paper concluded with an attempt to reconcile the clash between the liberalist, and later neoliberalist, modification by the legislature of the nature of the access to information and the communitarianism inherent in South African value systems, in an effort to recognise how this unique right can be utilized to transcend these boundaries to achieve collective purposes.

The discussion of the state of the access to information regime presented here is intended to inspire a deeper examination of South Africa's commitment to its constitutional vision. In this regard, we argue here that the right of access to information needs to be localised within South Africa. The transformative capacity of the right access to information has the ability to transcend and to initiate the social transformation that was imagined at the dawn of South Africa's democracy for all people, regardless of their social, cultural and economic context, a quality that is particularly important in the context of South Africa.

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