Access to Justice and Freedom of Information: The Case of South Africa

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Introduction

One of the central ideals in the Constitution of any country is an aspiration to an open democracy. For the realization of an open democracy, people should be empowered to participate in government and the government should be required to account to them for its decisions. In order to participate meaningfully in government and in order to hold government to account, the right of access to information is a central factor. The apartheid era was characterized by secrecy which prevented the public from gaining access to information held by government institutions. This led to abuse of power, human rights violations and corruption. In the new constitutional democracy, there is a constitutional commitment to openness and transparency in government. South Africa has the oldest and until recently, the broadest regime of access to information in Africa.[1] Section 32 of the Constitution of 1996 states:

> "Everyone has the right of access to (a) any information held by the state, and (b) any information that is held by another person and that is required for the exercise or protection of any rights; (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state".

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[1] The new Kenyan Constitution and other progressive FOI laws across the African continent are more recent developments which have drawn from the South African experience.

Section 32 offers a robust formulation of the protection of the right of access to information, with everyone enjoying access to government held information subject to the exceptions provided in the Promotion of Access to Information Act (PAIA) 2000, the legislation established in terms of s 32 as well as information held by another person, so long as such information is necessary for the exercise or protection of a right. As a result, aside from the participation in government and holding government to account, PAIA can also be used to exercise and protect socio economic rights in the South African Constitution which includes the right to adequate housing, healthcare services, sufficient food, water and social security and the right to basic education. Despite its potential, usage of the South African Act has been limited over the last twelve years. There are various factors responsible for this dismal record and these are discussed in this paper as 'access to justice' problems.

The notion of access to justice has been defined as the right of every individual to require the state to provide a means of dispute resolution that is equally accessible and socially just.[2] This definition goes to substance and form and requires not only affordable procedures but also the administration of the law based on social justice principles that takes into account the social, cultural and economic disadvantage of litigants.[3] This definition has been used to argue that the concept of access to justice includes the right of access to courts (including tribunals) and the right to a fair hearing before a court.[4] The Constitutional Court of South Africa has developed the notion of what it terms 'open justice' and it did so in the context of transparency and access to court proceedings. In *Independent Newspapers (Pty) Ltd v Minister for*

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[2]Cappelletti M. and Garth R. (1978) 'Access to Justice: The Worldwide Movement to Make Rights Effective', *A General Report,* in Mauro Cappelletti and Robert Garth (eds) 'Access to Justice: A World Survey; Vol 1 Milan, Dott. A Guiffre Editore at 6.

[3] *Ibid.*

[4] Budlender G. (2004) 'Access to Courts', 2 *SALJ* at 340.

Intelligence Services[5], the dismissal of the Head of Intelligence Services by the President was being challenged on constitutional grounds. Some of the documents that were being used in this case had been classified. The documents had been previously made available to the public but later withdrawn from the public domain. The majority judgment in the case referred to the constitutional rights of freedom of expression, access to information, access to courts, and the right to a public trial as embodying the right to open justice. The court found on the notion of open justice that the right to access court proceedings existed but stated that this right could be legitimately limited in some instances, in this case, on grounds of national security.

Applying the notion of access to justice as understood above to the issue this paper seeks to discuss, the right of access to information, it is imperative to look at the architecture of the PAIA in terms of the procedure, the obligations of the supplier of information in meeting the exercise of the right, and the challenges that may constrain the demand for information by the public.

The first section provides an overview of PAIA and the challenges faced in the exercise of the right that PAIA seeks to govern, measures introduced to improve the usage and to what extent they have been effective. The second section looks at how the courts have developed the access to information regime in the context of access to justice. This will be followed by an analysis of the trend of the usage of the law, and lastly, a discussion of the role and challenges facing the South African Human Rights Commission (SAHRC), the body tasked with the responsibility to ensure compliance with the Act. The objective of this paper is to discuss ways of addressing the problem of access to justice and to consider whether there should be an alternative to the judicial

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[5] *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services (Freedom of Expression Institute as Amicus Curiae)* In re: *Masetlha v President of the Republic of South Africa and Another* (2008) 5 SA 31 (CC).

enforcement model of resolving disputes relating to access to information outside the forum of the courts.

PAIA: Overview & Challenges of Implementation

PAIA applies to records of a public or private body which means any recorded information regardless of form or medium, in the possession or under the control of a public or private body and whether or not it was created by that public or private body.[6] The Act does not impose any obligations on public or private bodies to create or retain records.

Public and private bodies in terms of the Act must have both an information and deputy information officer, an information manual containing the prescribed procedure for accessing information, voluntary disclosure mechanisms for automatically available information, a system for internal appeals as well as a system for reporting to the Human Rights Commission, the body tasked with ensuring compliance with the Act.[7] Anyone can ask for records from a public body for any reason and anyone including the government can ask for records from a private body but the record must be needed for the exercise or protection of a right.[8] For private bodies, the requester must also go through the same process applicable to public bodies but must however specify why the record is needed.

The mandatory exempted information which must not be given in terms of PAIA includes private information about someone else, certain records of the revenue service, commercial information about someone, information that was given in confidence to government by a foreign state, police dockets in bail proceedings, privileged legal records and information about someone else's research.[9] Other information which are exempted but are deemed

[6] Promotion of Access to Information Act 2 of 2000 (PAIA, the Act).
[7] *Ibid.*
[8] S. 32 of the 1996 Constitution.
[9] *Ibid.* Part 2, Chapter 4.

non-mandatory exemptions in terms of the Act are information about defence, security and international relations, information on law enforcement and legal proceedings, information about commercial and financial interests of public bodies, research information about public bodies and information about operations of public bodies.[10] Many of the exemptions must be balanced against a public-interest test that require disclosure if the information shows a serious contravention or failure to comply with the law or an imminent and serious public safety or environmental risk.[11]

If a government department refuses to give access to a record, there is first an internal appeal process.[12] After this, the requester can take the matter to court. If a private body or any other public body refuses a request, the requester can take the matter straight to court.[13] South Africa's law is laden with bureaucratic hurdles that must be crossed for the effective realization of access to information from both the demand side (the public) and the supply side (the public body). All these affect the right of access to justice of the public. The problem of access to justice in South Africa however must be explored in the historical context of the country and other relevant factors such as the procedure and costs of accessing the justice system. The next section discusses these factors and possible measures for addressing these problems.

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[10] *Ibid.*
[11] S. 46 of PAIA.
[12] *Ibid.* Part 4 Chapter 1.
[13] *Ibid.* Part 4 Chapter 2.

Challenges of Implementation

The proposition has been made that the right of access to information should be a process that is managed in its social circumstances [14]. which in the South African case would include the ability of public entities to comply with their obligations in terms of PAIA, the ability of the public to make the demand given their social and economic circumstances. The annual reports of the South African Human Rights Commission (SAHRC), the body tasked with ensuring PAIA compliance by both public and private bodies, shows that compliance levels have never reached the 50 percent mark in the last 10 years with an equally low level of awareness and usage of the Act by the public.[15] As far as the supply of information from the side of the government is concerned, the level of internal administrative readiness such as weak or non-existent institutional policies on accessing information by the public, poor records management and the lack of compliance with other legislative requirements all affect the levels of compliance by government institutions. The SAHRC cannot enforce compliance with these obligations in the absence of provisions penalising non-compliance in PAIA.[16]

On the demand side of information by the public, the exercise of the right of access to information by the general public is constrained by a lack of awareness of the existence of the right as well as poor knowledge of its usefulness and relevance in realizing other tangible socio-economic rights. [17] This is an unfortunate

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[14] Kearney & Stapleton (1998), quoted by C. Darch and P. G. Underwood in 'Freedom of information legislation, state compliance and the discourse of knowledge: The South African experience', *The International Information & Library Review* (2005) 37 at 78.

[15] While the author worked for ODAC, a national department in South Africa responded to a request for access to information exactly a year later indicating they were still in the process of implementing PAIA procedures, hence, the request could not be granted.

[16] Kisoon C. (2010), 'Ten years of Access to Information: Some Challenges of Implementation', Commissioned Paper by the Open Democracy Advice Centre (ODAC) for the Open Democracy Charter Process.

[17] *Ibid.*

situation as access to information is a means of realizing socio-economic rights and not merely a luxury right that is of no value to ordinary people.[18]

The statutory requirement that allows a public body to deal with an information request over a period of 60 days also waters down the attractiveness in using this right for the exercise and protection of other rights.[19] This 60 day period applies before the commencement of an inevitable prolonged dispute in court where there has been an appeal against an adverse decision. In *Stefaans Brummer v Minister of Social Development*[20] the journalist who made an initial application for access to information in 2009 is still in court challenging the refusal of access to documents. This goes to the heart of the principle of justice delayed is justice denied.

As previously argued in an earlier work, the most important barrier to exercising the right of access to information is the enforcement model in South Africa which is judicial based. Enforcement powers rest with the courts and given the harsh economic realities not only in South Africa but generally across the continent, an infringement of the right of access to information will most likely go unchallenged by requesters of information because while the doors of the courts remain open for recourse, high legal fees and long-time delays bar entry to the courts.[21]

Recognising the challenges that requesters of access to information are confronted with which includes the expertise needed to overcome government bureaucracy in accessing information, the financial resources needed to litigate access to information disputes and the lacunae of knowledge on the subject, an NGO in South

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[18] *Ibid.*
[19] Section 25 & 26 of PAIA.
[20] 2009 (6) SA 323 (CC).
[21] Adeleke F., 'Domestication of the Right of Access to Information: Retrospect and Prospects', *Paper delivered at the African Network of Constitutional Lawyers (ANCL) Conference on the Internationalisation of Constitutional Rights, Feb2-4 2011, Rabat Morocco.*

Africa in partnership with a University Law Clinic came up with the idea of using clinical legal education to address the socio-economic needs of communities.[22] Using law students as legal consultants, community members were consulted about their various socio-economic problems with the aim of using the right of access to information to initiate the first step towards the realization of the rights of these community members. In one case, over 200 families were assisted in seeking information from government about the realization of their right of access to housing and in another community; the activities of the clinic assisted over 500 persons. Using law clinics to assist communities exercise PAIA rights is a significant way of addressing access to justice problems since the law clinic offers its expertise free of charge to communities that would otherwise not have the resources or the knowledge to utilize FOI in realizing socio-economic rights. The replication of this model if successfully implemented not only in South Africa but other African states could radically change the nature of social justice as we know it and grant greater access to courts for ordinary citizens.

The next section evaluates the impact of court decisions on the exercise of the right of access to justice in the context of FOI disputes.

Elaborating the PAIA procedural regime through the courts

In *Stefaans Brummer v Minister of Social Development*[23], the Constitutional Court ruled on s. 78(2) of PAIA which allowed an applicant only 30 days to institute proceedings before a court should such applicant wish to challenge an adverse decision that refused the release of the information sought. The applicant in this case argued that s. 78(2) limited the right of access to court and the amicus curiae in this case; NGOs and the SAHRC affirmed this

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[22] The Open Democracy Advice Centre executed an initiative of the Open Society Initiative by partnering with the University of the Western Cape Law Clinic to develop a 'FOI Law Clinic'.

[23] (2009) 6 SA 323 (CC).

argument. A unanimous court held that 'delays in litigation hamper the interests of justice.'[24] According to the court:

> "Whether a time bar provision is consistent with the right of access to court depends upon the availability of the opportunity to exercise the right to judicial redress. To pass constitutional muster, a time bar provision must afford a potential litigant an adequate and fair opportunity to seek judicial redress for a wrong allegedly committed. It must allow sufficient or adequate time between the cause of action coming to the knowledge of the claimant and the time during which litigation may be launched...Both NGO and individual requestors have a critical role to play in ensuring that our democratic government is accountable, responsive and open. Indeed, the Constitution contemplates a public administration that is accountable and requires that "[t]ransparency must be fostered by providing the public with timely, accessible and accurate information" Thus the public and the NGOs must be encouraged and not obstructed in carrying out their civic duties."[25]

The court subsequently found that s. 78(2) did not afford litigants 'an adequate and fair opportunity to seek judicial redress' hence it limited not only the right of access to court but also the right of access to information guaranteed in the Constitution.[26] Here, it is important to note the direct link made by the highest court on the importance of access to justice and how the violation of procedural rights is equally a violation of substantive rights.

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[24] Para. 64.

[25] Para. 51 and 55.

[26] Para. 56 and 57.

In *Sumbana v Head, Department of Public Works, Limpopo Province*[27], a High Court considered the constitutionality of the internal appeal requirements of PAIA in respect of a public body. The Court dismissed challenges to constitutionality of the internal appeal mechanisms in PAIA. The court in dismissing the application held that the Act envisaged an approach to the court only after the exhaustion of the internal appeal procedure which was mandatory.[28] The court dismissed the application of the applicants because they had launched the application without going through the internal appeal procedure in terms of PAIA for access to the documents.

In *Garden Cities Inc v City of Cape Town and Another*[29], the city manager of the respondent in terms of the Municipal Systems Act ruled that according to the credit control and debt collection policy of the city, the applicant was due to pay up certain accounts in respect of properties owned by the applicant. The applicant requested the respondent to make available to it, documents used in the appeal process on the basis of which the City Manager made his determination in respect of rates, electricity, water and sewerage accounts in respect of each property identified in the request for information. This information was refused because the records could not be accessed and on application to the court, the High Court determined that the failure of internal system on the part of a municipality receiving a request for access was an invalid ground for refusal of access to record in terms of PAIA.[30] The Court held that there is a duty on organs of state, in adopting systems and measure that are meant to facilitate service delivery, not to adopt measures that are likely to compromise the citizens' rights of access to information.[31]

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[27] 2009 (3) SA 64 (V).
[28] Para. 21.
[29] 2009 (6) SA 33 (WCC).
[30] Para. 25.
[31] Para. 24.

expectation that the information would be protected and this expectation was objectively reasonable in societal terms.[48] The Court held that while the details of the personal lives of members of Parliament were protected, information relating to their official activities was not, and claims in respect of travel vouchers issued to them in their official capacities clearly fell into the category of official activities.[49] The Court further held that the conduct in question was in any event of such a nature that it warranted disclosure in the public interest as intended in s 46 of PAIA. The court stated that although s 46 was written in restrictive language, it had to be read as requiring disclosure where it was shown that it would, on a balance of probabilities, reveal evidence of a substantial contravention of the law[50]. The court accordingly ordered the respondents to furnish the applicant with the required information.

PAIA also provides for the voluntary disclosure of information by public bodies. The bizarre decision by the public bodies to refuse access to the final report in the *unrecognised traditional leaders* case as well as the unabridged report in the *public service accountability monitor* case show that this statutory requirement has also been observed in the breach. The conduct by public bodies not to disclose information in the public interest or comply with voluntary disclosure mechanisms gives added weight to the argument that a body separate from the courts should have enforcement powers to order compliance with the Act to achieve the objectives of openness and transparency. Although the courts have ultimately been progressive in their interpretation of transparency and access to information, reliance on the judicial process is constrained by long delays and high legal costs and a more timely resolution of FOI disputes through an affordable means would be more ideal.

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[48] Paras. 72, 76 and 81.
[49] Para. 80.
[50] Para. 90.

In fairness, it must be noted that the Constitutional Court has been responsive on the issue of high legal costs. In the case of *Trustees, Biowatch Trust v Registrar: Genetic Resources & Others*[51], after a number of unsuccessful requests for information from governmental authorities responsible for monitoring the development of Genetically Modified Organisms (GMOs), Biowatch, a public interest non-governmental organisation (NGO) launched an application in the North Gauteng High Court for an order requiring the furnishing of the information. The High Court granted eight out of eleven requests. The Court held that the non-disclosure constituted an infringement of Biowatch's constitutionally protected right of access to information but granted costs against Biowatch.[52] The Constitutional Court, in dealing with the costs issue, held that it was clear that the High Court had misdirected itself in not giving appropriate attention to the fact that this was a constitutional matter in which Biowatch was seeking to exercise constitutional rights.[53] The general rule in constitutional litigation is that an unsuccessful litigant in proceedings against the State ought not to be ordered to pay costs, unless the application is frivolous or vexatious or in any other way manifestly inappropriate.[54] Despite this laudable approach taken by the Constitutional Court however, the reality is that poor individuals who are most likely to seek the enforcement of their socio-economic rights through requests for access to information do not have the resources to take on the state when they are denied access to documents. This has led to the trend where most access to information disputes that have been heard in the courts of South Africa have been brought by NGOs acting in the public interest rather than private individuals. In line with this, the next section briefly discusses the use of PAIA as well as the users who have generated the robust jurisprudence on access to information in South Africa over the past 12 years.

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[51] (2005) 4 SA 111 (T).

[52] *Trustees, Biowatch Trust v Registrar: Genetic Resources, and Others* 2005 (4) SA 111 (T) para. 66.

[53] Para. 57.

[54] Para. 24.

The Major Users of PAIA: Civil Society and the Media

NGOs in South Africa have been instrumental to the development of PAIA through challenges of the law in the courts. Aside from offering pro bono legal services as was done in the *Brummer* case, participation as amicus curiae and direct litigation on PAIA as in the *Biowatch Trust and Public Service Accountability Monitor* cases are ways in which PAIA provisions have been invoked.

Community groups have however been absent as major users of the PAIA. This is indeed an unfortunate situation because when PAIA came into force, information activists within civil society in South Africa visited India to learn from its rich experience of using law to assist community groups in an attempt to replicate such success in South Africa. Unfortunately, such success has been minimal in South Africa and the reality is that without a credible alternative for rights assertion, public bodies in South Africa may relax in the knowledge that refusal of access to information will most likely go unchallenged by requesters of information and the status quo of secrecy will remain.

Access to information is expected to aid the work of the media as a force that holds government accountable, but in practice, PAIA is still underutiliszed by the media in South Africa.[55] This is attributable to the bureaucratic process of accessing information prescribed in PAIA and the evasive habit of public bodies which frustrates access on the basis of frivolous exemptions. This is further complicated by the statutory requirement that allows a public body to seek an additional extension of 30 days over and above the prescribed 30 day requirement to deal with requests for information. News is a perishable commodity and its delayed publication, even for a short period, may well deprive it of all its

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[55] There have been two significant cases initiated by a particular media entity however, the Mail & Guardian, in *President of the Republic of South Africa v Mail & Guardian* CCT03/11 and *Mail & Guardian v Local Organising Committee* 09/51422. These cases have significantly contributed to the FOI jurisprudence in South Africa.

value and interest.[56] In this respect, journalists in South Africa have not found PAIA media-friendly.

The case of *Brummer* discussed earlier demonstrates the ineffectiveness of using PAIA to access timely information that would be of public interest but also positively illustrates the role of the media in developing South Africa's PAIA regime. The journalist in the *Brummer* case is still in court in 2012 seeking to access information for a request that was originally lodged in 2008. While this case reflects the flaws in relying on the judicial enforcement model to promote access to information, through challenges of PAIA by the media, successful challenges like in the *Brummer* and *Independent Newspapers* cases already discussed have nevertheless expanded the procedural regime of the court.

Ensuring Compliance with PAIA: The Role of the Human Rights Commission

PAIA creates an elaborate framework for the public to access information but does not create a separate information commission to oversee the implementation of the system. PAIA rather mandates the South African Human Rights Commission (SAHRC) to ensure the effective implementation and operation of the law. It requires the SAHRC to take a lead in educating and informing the public about the way the PAIA works.[57] The SAHRC is further required to compile and regularly update a guide on how to use the Act and the guide must be published in each official language of the Republic.[58] It also requires that the SAHRC commission monitor the implementation of the Act and submit detailed annual reports to the National Assembly on the number of cases lodged in terms of the Act, their outcomes and how many decisions were appealed internally or to the courts.[59] The SAHRC lacks enforcement powers in relation to ensuring compliance by public

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[56] In *Sanoma Uitgevers BV v Netherlands* 38224/03 European Court of Human Rights.
[57] PAIA Part 5.
[58] *Ibid.*
[59] *Ibid.*

and private bodies in terms of the Act. The Commission, handicapped by the lack of enforcement powers and the absence of provisions penalising non-compliance by public bodies cannot sanction these bodies when they flout their mandatory obligations. This has led to the call for an information commission similar to the Indian model. The Protection of Personal Information Bill currently before Parliament recommends the establishment of an Information Protection Regulator which will have enforcement powers over both data protection and access to information. It remains to be seen whether this proposal will be carried forward.

Conclusion

It is the responsibility of relevant and interested stakeholders to ensure to the fullest extent possible, that governments comply with their obligations in terms of the applicable freedom of information laws to deliver on the constitutional promises that will improve the lives of their citizens. This duty can however not exist in isolation. People need to be educated about the usefulness of the right of access to information in order for them to assert it in a non-violent manner for the realization of other rights. To achieve this, where access to information requests are ignored or refused by public entities, the requester should be able to approach a dispute forum to lodge a grievance and have it addressed in a timely and affordable manner.

South African courts have demonstrated a commitment to the task of promoting access to justice in the context of FOI where it has been called to do so. However, despite this success, the litigants on FOI have largely been the media and civil society organisations who can afford the resources to go to court. There is a long way to go, firstly in equipping ordinary citizens with the necessary knowledge to use PAIA effectively to exercise and protect other socio-economic rights and secondly in providing the opportunity to dispute the outcome of decisions that are adverse to an information requester who does not have the luxury of time or money for litigation. Use of FOI laws will be more attractive if the procedural hurdles in accessing information or disputing the outcome of

decisions are not onerous. It could be argued that South African courts have perhaps been successful in their responsibilities because they have greater access to resources than the judiciary in other African states. The South African jurisprudence has been slowly shaped over the course of 12 years. As new FOI laws are passed in other African states, the slow pace in the development of FOI laws in the case of South Africa need not be replicated elsewhere. An enforcement model separate from the courts for access to information disputes should be a standard feature of FOI laws. Such a model would take into account the unique African context where access to justice through the courts presents a clear and present challenge. It is important that the political will of the government is kept strong through the work of "information champions" who without procedural and bureaucratic constraints, will campaign for openness and public participation for the realization of a widening spectrum of human rights.