

SOUTH AFRICA'S ACCESS TO INFORMATION LEGISLATION AND SOCIO-ECONOMIC RIGHTS: CIVIL SOCIETY AND MEANINGFUL ENGAGEMENT AS DRIVERS

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ABSTRACT

The inclusion of access to information (ATI) in the Constitution of the Republic of South Africa (Act No. 108 of 1996, hereafter the Constitution) and its concomitant legislation, the Promotion of Access to Information Act (PAIA) (No. 2 of 2000), is aimed at promoting transparency, accountability and democratic governance in the hitherto closed, authoritarian and apartheid society. The Constitution goes further to entrench socio-economic rights (SERs) in order to address the past injustices of ignorance, fear and want that impair the dignity of the majority of South Africans. ATI is described as the 'touchstone' of all human rights and upon which the other human rights, including SERs, are buttressed. SERs are, supposedly, enforced by the courts of law. However, their justiciability has become acrimonious and adversarial because it may include the courts making orders that may have budgetary implications, which usually fall under the purview of the executive-cum-legislation, thus undermining the separation



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of powers doctrine. The study suggests the concept of *meaningful engagement* to break the impasse, arguing that the concept is more 'user-friendly' and grounded in the Constitution and other statutory instrument and practices in the governance of South Africa.

Keywords: Constitution of the Republic of South Africa, access to information, socio-economic rights, justiciability of socio-economic rights, meaningful engagement, transparency, accountability, citizen participation, good governance, South Africa, Promotion of Access to Information Act

1. INTRODUCTION

For some time now there has been considerable interest in the promotion and protection of social, economic and cultural rights around the globe. Civil society organisations (CSOs), governments, the academia, and the judiciary, among others, have become more concerned with the promotion of these rights, and rightly so! This concern that has been accentuated by the adoption of the Millennium Development Goals (MDGs) by the United Nations (UN), including various legislation, policies and programmes, highlights the need to respect social, economic and cultural rights as a key to ensuring greater overall enjoyment of human rights.

Alongside the above rights, is the free access to information (ATI) regime, which has been recognised as a basic fundamental right of citizens of free society. It is a right that is enshrined in Article 19 of the Universal Declaration of Human Rights (UNDHR) (UN 1948) and the International Covenant on Civil and Political Rights (ICCPR). It is a component of the broader right to freedom of expression. Other fundamental human rights naturally flow freely from this very basic right. It can, therefore, be regarded as a multi-dimensional human right that is critical to other human rights, especially the realisation of socio-economic rights (SERs). However, despite constitutional and other legislative imperatives, the enforcement of SERs in South Africa has been acrimonious and adversarial. This study explores and suggests the concept of 'meaningful engagement' both as a stand-alone or a supplement to the quest for the realisation of SERs as envisaged by the Constitution of the Republic of South Africa (Act No. 108 of 1996, hereafter the Constitution).

1.1. Background and purpose of the study

In his inaugural address to Parliament on 24 May 1994, the late former President Nelson Mandela (1994) made this solemn declaration:

My government's commitment to create a people-centred society of liberty binds us to the pursuit of the goals of freedom from want, freedom from ignorance, freedom from deprivation, freedom from suppression and freedom from fear. These freedoms are fundamental to the

guarantee of human dignity. They will therefore constitute part of the centrepiece of what the Government will seek to achieve.

The 'Mandela declaration' underlies the problem of inequalities brought about by so many years of apartheid policies and practices. The Constitution provides the foundation for building a democratic and inclusive state and it has been hailed as one of the most progressive constitutions in the world. The Bill of Rights, which is enshrined in the Constitution, guarantees a wide array of human rights, which includes civil and political rights as well as SERs. As the Foundation for Human Rights (FHR 2015, 3) has pointed out, the Constitution, therefore, gives proper meaning to the 'indivisibility and interdependence of all human rights by giving recognition to the enforceability of both civil and political rights as well as socio-economic rights'. However, the real test for the realisation of human rights, in general, is not their mere inclusion in the Bill of Rights, but rather the extent to which they are being realised and the real impact made in people's lives. Fortunately for South Africa, the Constitution places a special emphasis on the enforcement of SERs through the courts and other monitoring mechanisms, such as the South African Human Rights Commission (SAHRC) to ensure the state's compliance with its obligation in this respect.

In spite of SERs being given a constitutional recognition, supported by ATI legislation (i.e. the Promotion of Access to Information Act (PAIA) (No. 2 of 2000)) and commitment to its delivery in the National Development Plan (NDP 2012), the great majority of South Africans remain poor or experience a continual vulnerability to poverty. A large number of households are unable to have access to education, health care, food, energy, proper sanitation and clean water. Lamentably, therefore, South Africa remains one of the most unequal societies in the world, as observed by the FHR (2015, 4). Tissington (2010, 3) re-echoes the chagrin of South African politicians and political observers thus: 'While South Africa is a middle-income country with resources and infrastructure akin to many so-called first-world countries, it is also one of the most unequal societies in the world, with inequality showing no sign of decreasing in the future', a comment similar to former President Thabo Mbeki's 'two-country' lamentation! The country is, therefore, incessantly riddled with service delivery protests, which turn violent in a number of cases, thereby threatening the nation's social, economic and political stability. Mbazira (2008, 1) 'dramatizes' the thoughts of the ordinary men and women who fought apartheid thus:

While they might not have expected to drive expensive cars and live in up-market suburbs, they expected, at the very least, to move out of their shacks, have greater access to sufficient food and water, and access to health care services.

No doubt a lot of pressure was put on the constitutional architects to make SERs justiciable, against all odds.

1.2. Research problem

The foundational proposition that underlies the approach of an ATI regime, according to Calland (2010b, 3) is that,

in order for citizens to hold those in power to account, and to be able to *engage meaningfully* with state institutions, if and when they do explain and justify their decision-making, they need to know what is going on; they need to have sufficient grasp of the information matrix to be able to understand and thereby interrogate effectively [own emphasis].

ATI legislation correlates with improved government responsiveness, transparency, participation and accountability because information is power. It provides people with the knowledge to demand political, economic and social rights from the government. Where ATI thrives alongside a robust civil society and virile press media, there is openness in governance and thus human development. The overarching question and the theoretical basis of an ATI regime, therefore, link it to freedom of expression, citizenship and political rights. This study, therefore, suggests *a causal linkage* between ATI and SERs, which can be realised through meaningful engagement.

1.3. Objectives of the study

The study was guided by the following objectives, namely, to:

- assess the implementation of freedom of expression and its concomitant ATI regime as prerequisites for ensuring openness, the 'voice' and 'participation' necessary for a democratic society and the realisation of SERs;
- argue in support of the concept, 'meaningful engagement', combined with robust civil society as tools for the implementation of SERs.

1.4. Research methodology

The methodology adopted to address the above topic was based on existing studies of an ATI regime and its linkage to SERs. A desk review of the principal literature that brings to the fore implementation realities of ATI and SERs as provided in the Constitution and the PAIA, including information from various reviews, policy documents and reports, articles and case law reports of rulings made by the Constitutional Court (in particular) was undertaken. The documentation helped in reaching the state of the art that enabled the study in affirming the concept of meaningful engagement, as pronounced by Justice Albie Sachs (2004, par. 39) as:

A mode of achieving sustainable reconciliations of different ... parties to engage with each other in a proactive and honest endeavour to find mutually acceptable solutions [and]

wherever possible, respectful face-to-face engagement or mediation through a third party should replace arms-length combat by intransigent opponents.

1.5. Conceptual framework

It is sometimes argued that, 'Freedom of Information (FOI) lacks a firm theoretical basis (or, at least, that there is more than one theory of FOI, leading to a bi-focalism in the efforts of both thinkers and practitioners' and this contributes to the 'profound conceptual uncertainties and confusions' (Calland 2010b, 2). Though there is an element of 'bi-focalism' on the 'philosophical and conceptual underpinnings of FOI', as argued by Calland (2010b), this does not render access to information a confused concept.

As argued by the Media Institute of Southern Africa (MISA 2013), the perception that knowledge and information are abstract concepts can be challenged because the power of information to either make or destroy lives is immeasurable. The adage, 'information is power' has proven to be more relevant in an age where information is at the centre of political, social and economic life. Today, more than any period in history, information rules and James Madison, one of the founding fathers of America, was absolutely right when he quipped that, 'Knowledge will forever govern ignorance'. This section aims at designing a more inclusive and collaborative theoretical approach to the implementation of the constitutional imperative of SERs that is more societally acceptable, practical and capable of implementation. Three theoretical frameworks will be considered in this connection, namely:

- **The Theory of Dialogical Constitutionalism:** South Africa's SERs are justiciable because they are based on the Constitution, and the Theory of Dialogical Constitutionalism affirms the capacity of the societal actors to reach a common understanding and to coordinate their actions through reasoned argument, consensus as well as cooperation (Bolton 2005). The Theory of Dialogical Constitutionalism, according to Orago (2013, iv) is based on the 'constitutionally entrenched principle of popular participation in governance and public decision-making, is aimed at the realisation of both political and socio-economic empowerment'.
- **Transformative Constitutionalism:** Klare (1998, 150) defines Transformative Constitutionalism as 'a long-term project of constitutional enactment, interpretation, and enforcement committed ... to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction'. The Constitution has been dubbed a transformative constitution because, for all intents and purposes, it is an instrument that is sensitive and committed to social transformation and reconstruction. Its primary concern is to stimulate 'a fundamental change in unjust, economic and

social relations in South Africa', observes Liebenberg (2006, 6). Achieving this requires courts that are willing to develop a 'jurisprudence which opens up sustained and serious engagement with the normative purposes and values which socio-economic rights should advance within the historical and social context of South African society', (Liebenberg 2006, 14). More specifically, Liebenberg (2006, 22) expects the courts to be willing to abandon traditional, formalistic approaches to legal interpretation and understanding of separation of powers in favour of more 'flexible and dialogic models'. According to Rapatsa (2014, 890), the core of transformative constitutionalism is: 'A permanent ideal concerning openness ... commitment to inclusive, democratic dialogue, and a sharing of responsibility of transformation ... in partnership with a vibrant, independent civil society' with the view of healing the nation and transforming its political, social, economic and legal landscape.

- **The concept of 'meaningful engagement':** According to Chenwi and Tissington (2010, 9), the concept of 'meaningful engagement' was first properly defined by the South African Constitutional Court (2008) in the *Olivia Road Case*, which dealt with the right to have access to adequate housing for those facing eviction from rundown buildings in the inner city of Johannesburg. Muller (2011, 742) observes the definition of meaningful engagement as provided by the Constitutional Court as 'a two-way process' in which the local authority and those that stand to be evicted would talk to each other meaningfully in order to achieve certain objectives, adding that the court was of the opinion that meaningful engagement had the potential to contribute towards the resolution of disputes and to 'increased understanding and sympathetic care'. The case is touted as 'a good example of where engagement has worked' (Chenwi and Tissington 2010, 9). The enforcement of SERs has become so emotive and normative laden that a way should be found to break the logjam. The study sought to do just that

2. BASIC PRINCIPLES AND PRACTICES OF AN ACCESS TO INFORMATION REGIME

According to Fach (2013, 19), the rationale for the right to information is manifold, as well as being of importance in its own regard. ATI is important for the functioning of democracy, especially freedom of expression. Thus, without information, people cannot make informed choices or participate in decision making processes in any meaningful way. ATI serves as a gateway to the enjoyment of other rights, including SERs, as argued by Dimba (2008). The argument is effectively articulated when Calland (2010a), supported by Miriyoga (2011) affirms that it is the realisation of the multiple roles of ATI that marks a shift in the theory and practice of ATI away from

seeing it more as a companion of the right to freedom of expression only towards seeing it, 'as a leverage that can be used as one of the strategies for advancing social justice'. Its importance is also seen in ensuring accountability of governments and other powerful actors in society. However, for the above benefits to be realised it is necessary for certain principles to be incorporated in an ATI regime and its practices.

A good ATI law can, for example, support citizens and communities to understand and claim the benefits they are entitled to; to exercise their rights; and to access the recourse mechanisms at their disposal. It should also help civil society to hold government to account more effectively. Therefore, various governments and intergovernmental bodies, such as the United Nations Development Programme (UNDP 2006), Amnesty International and Article 19 of the UNDHR (UN 1948), have published ATI principles and practices, model legislation and other guidance detailing best practice based more or less on similar concepts and ideas.

2.1. Access to information as an essential leverage right

According to the Open Democracy Advice Centre (ODAC 2011), the right to information forms part of human rights and freedoms, and it is, therefore, essential to be able to access information from public authorities in order to exercise individual human rights and freedoms. The right to information has long been recognised as a 'Fundamental Right' of a free citizenry, and from it flow the other human rights. As the Commonwealth Human Rights Initiative (CHRI 2007) rightly points out, no society can claim to be truly free unless it has both the instruments and the practice of providing its people with ATI. It is a unique human right not only because its status as a fundamental right has been recognised internationally as human rights law, but its power and influence can be testified, globally, as a tool in the hands of everyday people. Through international instruments, such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), 'states agree to respect fundamental rights which have their roots in the universal principles of human dignity and equality' (CHRI 2007, 14). Access to information is, indeed a fundamental human right because, as argued by Mathiesen (2008), it allows human beings to live a 'minimally good life' in, at least, three ways:

- capacity and a quest for knowledge, what Aristotle describes as 'desire to know';
- that knowledge is not only good in itself but provides the capacity to exercise their other rights, or what John Rawls called a 'primary good';
- enables people to effectively exercise and protect their other rights, such as SERs.

ATI should not be seen as just a fundamental right of an individual but also as a means to power because once an individual has the right to information, they will be in a

position to make informed decisions concerning how they are governed. In its very first session in 1946, the UN General Assembly adopted Resolution 59(1), stating, 'Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated' (UN 1946). Highlighting the link between freedom of expression and information, as pointed out by Jagwanth (2002, 5) Article 10 of the European Convention on Human Rights (ECHR 1950) provides that, 'Everyone has the right to freedom of expression. This right shall include freedom to hold opinion and to receive and impart information and ideas without interference by public authorities and regardless of frontiers'. Furthermore, Section 33 of the Constitution (RSA 1996) connects the right to access information to 'just administrative action ... not only textually but also in relation to the goals of transparent, efficient and accountable administration that they both seek to uphold and protect' (Jagwanth 2002, 5).

It is therefore argued by Jagwanth (2002) that access to information is a 'leverage right' because given that rights are interdependent, in order for people to be able to exercise their rights more generally there is the need for people to be given access to information. Mathiesen (2008) also argues that the mere freedom to access information is an insufficient protection of the right to information unless, 'they are understood as encompassing a welfare right that places duties on governments and others to supply people with the necessary information and knowledge' that includes the state of their SERs. In other words, the right to ATI is not only a right in itself, but a tool for exercising other rights that relate 'to the realization of social, economic and cultural rights ... in order to facilitate public examination of policies and stimulate participation among diverse sectors of society' (Article 19 and ADC 2007, 13).

3. THE ROLE OF CIVIL SOCIETY IN DEMOCRATIC GOVERNANCE

Civil society is made up of both formal and informal groups and organisations, which act independently of the state and market with the aim of promoting various interests in society, and 'represents self-generating, self-supporting, state-independent organizations that allow citizens to act collectively in the *public* sphere to express their interests' (Jaysawal 2013, 1). These organisations, generally, include nongovernmental organisations, labour unions, community-based organisations, professional associations, ethnic associations, faith-based associations, social movements and others.

Democratic governance, which is regarded as people-centred rule, provides an institutional framework for citizen participation in the political and economic processes of the country and civil society plays an overwhelming role in this regard. Jaysawal (2013, 4) names, among others, the following indicators as civil society contribution in ensuring democracy and good governance:

- **public education and mass awareness** by enlightening citizens through various means, such as organising workshops and seminars and through the publication of various literature;
- **empowering disenfranchised communities** through ATI, transparency, and consultation in the decision-making process in order to ensure that the interests of the marginalised and the neglected are catered for in the democratic realm;
- **providing space for pluralism** through the facilitation of information sharing among citizens through debates and other deliberative techniques of various issues;
- **promoting transparency and accountability in the governance structure** by using its potent position to initiate civic mobilisation and connectivity with mass media to ensure public transparency and accountability in governance, and enhance access of the poor to justice through paralegal and other advocacy services;
- **assisting in resolution of conflicts** by initiating conciliation between individuals and government to enhance smooth communication between both parties, promoting civic engagement and social trust, acting as a catalyst in removing disagreements.

A cursory observation of the roles played by civil society in advancing the democratic process, as pointed out above, will confirm the contributions made by civil society in ensuring the SERs of citizens, especially the poor and the marginalised in the society. For example in South Africa a number of CSOs, such as the Treatment Action Campaign (TAC), SECTION 27 and ODAC, conduct public interest litigation and advocacy around health care, education and rule of law issues. It is further deducible that ATI is incontrovertibly connected with the above identified roles of civil society, including spearheading meaningful engagement on behalf of certain communities with the government.

4. AN OVERVIEW OF THE PROMOTION OF ACCESS TO INFORMATION ACT

The purpose of the PAIA (RSA 2000a) is: 'To give effect to the constitutional right of access to any information held by the state and any information that is held by another person and that is required for the exercise or protection of any rights'. Section 9 of the Act clearly sets out the objectives of the PAIA thus:

- to generally promote transparency, accountability and effective governance of public and private institutions;
- to put in place voluntary and mandatory mechanisms or procedures aimed at enabling information requesters to obtain access to records held by both the

State and private bodies as swiftly, inexpensively, and effortlessly as reasonably possible;

- to regularise the need for certain justifiable limitations, such as privacy, commercial confidentiality and effective, efficient and good governance;
- to empower and educate the public to understanding their right to access information, so as to exercise such rights in relation to public and private bodies, to understand the functions and operation of public institutions and to effectively scrutinize and participate in the decision-making process in the country.

As McKinley (2003) points out, the PAIA, in recognition of the connection between the right of ATI and democratic accountability and transparency, makes a direct link between the 'secretive and unresponsive culture in public and private bodies' during the apartheid-era and the 'abuse of power and human rights violations'.

The PAIA sets out certain enabling provisions for requesters of information, among which is the provision that the right of access of a requester is not affected by 'any reasons the requester gives for requesting access' or by the relevant information officer's 'belief as to what the requester's reasons are ...' (RSA 2000a). Public and private organisations are requested by the PAIA to publish manuals describing their structure, functions, contact information, access guide, services and description of the categories of records held by the organisation. The SAHRC is designated, under Section 84 of the Act, to see the functioning of the Act and to issue a guide on the Act and submit reports to Parliament. The SAHRC is also expected to promote the Act, make recommendations and monitor its implementation (sections 83 and 84). As pointed out by Klaaren (2010), though the SAHRC has played an enforcement role to some extent, it has never seen itself nor been seen as primarily charged with or executing that role. Instead, its role has been primarily one of promotion. For some time past various CSOs such as ODAC have increasingly been calling for a change to the enforcement structure of the PAIA, demanding an Ombudsman or Information Commission(er) as observed by Arko-Cobbah (2008), Klaaren (2010) and Neuman and Calland (2007). The Act has been lauded the world over as a fairly radical law or 'the golden standard' in the words of Harris (quoted by McKinley 2003). Thus, it convincingly complies with the basic principles set by Article 19 (UN 1948).

5. SOUTH AFRICA'S SOCIO-ECONOMIC RIGHTS AND IMPLEMENTATION CHALLENGES

SERs are defined as those rights that give people, especially the poor and the most vulnerable in society, access to certain basic needs necessary for human beings to lead a dignified life (Streak 2007). Development and poverty eradication are some of the major human rights challenges facing South Africa today and these challenges lie at the heart of the Constitution (RSA 1996), which recognises a wide range of SERs,

including: the right to labour relations; a healthy and sustainable environment; land and property; adequate housing and protection from arbitrary evictions; health care services; and the right to education. Some of these rights bind the state to immediately realise them and some of them make it obligatory on the state, 'to take measures, within available resources, to realise the rights progressively (over time)' (Khoza 2002). According to Liebenberg and Pillay (2000, 27), the government is further bound to formulate and implement reasonable legislative and policy measures to, among other things:

- Remove the barriers that make it difficult for people to access these rights.
- Protect people against violations of their rights.
- Create an 'enabling environment' to access.
- Assist people to meet their basic needs.

5.1. South African courts and the realisation of SERS

The Constitution acknowledges the fact that political arms of the government provide a framework for the progressive realisation of socio-economic rights. According to Section 7(2) of the Constitution (RSA 1996), it is the responsibility of the state to respect, protect, promote and fulfil the range of SERs as a matter of obligation, that is, a rule of law that must be enforced (Ngang 2014). However, there is a contestation between some constitutional experts and a section of the legal fraternity on this issue, which has marred the efficacy of the courts in enforcing this constitutional mandate. Mbazira (2009, 17) sums up the impasse as follows:

... the judiciary is viewed as inappropriate to deal with the complex matters of social justice and the concern among others, draws ... on majoritarian democracy. Issues of social justice are viewed as matters whose determination is within the jurisdiction of the representatives of the people and not the unelected judges.

because, as argued, it would give judges, 'the power to dictate to Parliament and the executive what its social policies and budget priorities should be ... this would go against the constitutional principle of separation of powers' (Streak 2007, 24). The 'controversy' has, therefore, increasingly restricted the role of the courts and limited the purpose of judicial enforcement as envisaged by the 'transformative vision' of the Constitution.

The doctrine of the separation of powers, though not explicitly enshrined in the Constitution, conveys the idea of power-sharing between the executive, the legislature and the judiciary to ensure checks and balances aimed at counteracting the abuse of power by any one of these organs. Thus, the legislature is to enact laws, the judiciary to interpret and apply laws and the executive to implement laws (Wiles 2006). In spite of the so-called separation of powers doctrine, the implementation of

South Africa's SERs, as argued by Ngang (2014, 660), should be considered from the perspective of the transformative vision of the Constitution, which has as its guiding principles to:

- heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
- lay the foundations of a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
- improve the quality of life of all citizens and free the potential of each person.

With the above guiding principles, as outlined in the Preamble to the Constitution, it is compelling for the courts, as guardians of the Constitution, to ensure that the government is responsive and accountable to the people, not only through democratic processes, but also through litigation, as envisaged by the courts and civil society.

6. MEANINGFUL ENGAGEMENT AS FRAMEWORK FOR THE REALISATION OF SERs

Under the Constitution, as pointed out by Jagwanth (2002: 7), the state must take 'reasonable measures' to ensure the progressive realisation of SERs. These measures may include legislative enforcement and meaningful engagement with stakeholders, as ruled by the Constitutional Court in a series of cases on SERs brought before it. It is this reason, among others, that the study, convincingly, expounds and affirms 'meaningful engagement' as a tool in the realisation of SERs under South Africa's Bill of Rights. Moreover, the two conceptual frameworks, 'Dialogical Constitutionalism' and 'Transformative Constitutionalism', discussed earlier, are buttressed on meaningful engagement, which is supported by the South African legislative and other political practices and programmes. Generally speaking, meaningful engagement in the governance and policy context connotes 'a relatively sustained and systematic interaction between stakeholders', and involves 'the sharing of information, the offering of accounts, the giving and receiving of reasons, and the articulation of values' (Holmes 2011, 13). It is not a single process or set of activities but an on-going process or conversation that builds trust and relationships, with the hope of resulting in the joint determination of outcomes and conferring legitimacy upon them.

Analytical discussions about the practice of meaningful engagement, as pointed out by Holmes (2011), identify the following as its main elements:

- **access to information** from diverse sources as a bedrock condition for effective citizens' participation in any meaningful engagement due to principles of openness, transparency, quality and integrity that mark democratic governance;

- **consultation**, which serves as 'a second order of engagement' and aims at including all relevant stakeholders in the decision-making process, involving gathering citizens' views with regard to particular initiatives;
- **citizen participation**, which Holmes (2011) describes as 'the highest form of meaningful engagement', conveys a strong sense of participants being active agents (not mere responders or passive followers) playing a special role in dialogue and *deliberative* process that is information rich, rationally-grounded, attentive to values, and providing genuine opportunities for learning and individuals' re-thinking of their positions.

The concept of meaningful engagement is an important development in the approach of the South African courts to enforce the realisation of SERs and the promotion of active participation in service delivery. As observed by the Socio-Economic Rights Institute (SERI 2010) and the Community Law Centre (CLC) at their roundtable discussion, meaningful engagement is an 'innovative mechanism for realising socio-economic rights and could *become central to their enforcement*' [own emphasis]. According to Pillay (2012, 739), the Constitutional Court's 'reasonableness-centred approach' attracted both praise and criticism. Critics saw it, among others, as a focus on procedure rather than substance. Others saw it as 'an admirable attempt to balance social and economic rights implementation with respect for democratic decision-making process'. Its adoption in the current study is informed, among others, by the observations made by Bradlow (2010) that:

- Meaningful engagement, despite gaining currency in South Africa over the last few years primarily through a series of Constitutional Court cases, is essentially a political process that needs to be sustained and not one-off encounters of the sort mandated by South African courts or those that constantly require the intervention of lawyers.
- As a political process, the inherently technocratic orientation of the law that led to its introduction in the enforcement of SERs by the courts should not, necessarily, be the determining factor.
- For meaningful engagement to play an effective role in the realisation of SERs, poor communities, especially with the help of CSOs, need to prepare themselves fully, since meaningful engagements with government is part of a greater struggle by ordinary poor people to reclaim their humanity in their relations with the state.
- From the point of view of civil society, a 'right-based' approach is part of a much larger effort to empower communities, especially of the urban poor, to organise around their own resources and capacities, accumulate local knowledge, set priorities, and engage the state in order to broker deals on issues directly impacting on their lives.

The Constitutional Court of South Africa (2008) in the judgement of the *Olivia Road Case* defined meaningful engagement as, 'a two-way process in which the City and those about to become homeless would talk to each other *meaningfully* in order to achieve certain objectives.' According to Van der Berg (2012):

Meaningful engagement requires government to engage meaningfully with citizens ... in an effort to resolve the differences and difficulties aired ... in the light of the values of the Constitution, the constitutional and statutory duties of the municipality and the rights and duties of the citizens concerned.

Justice Albie Sachs was also reported to have said in the *Joe Slovo Informal Settlement Case* that meaningful engagement promotes,

the reciprocal duty of citizens to be active, participatory and responsible and to make their own individual and collective contributions towards the realisation of the benefits and entitlements they claim for themselves, not to speak of wellbeing of the community as a whole (Liebenberg 2014, 3).

Therefore, broadly speaking, meaningful engagement occurs when communities and government talk and listen to each other, and try to understand each other's perspectives, so as to achieve a particular goal.

6.1. Statutory and policy framework of meaningful engagement

There are many legislative and policy instruments that promote citizen participation in service delivery and can, arguably, be considered as contributing to meaningful engagement in the realisation of SERs. As Chenwi and Tissington (2010, 11) rightly point out, although the Constitution does not 'expressly use the words *meaningful engagement* ... there are sections in it that specifically protect the right to participate in service delivery processes and decisions' through talking. For example:

- **The Preamble to the Constitution** makes it imperative for the state to 'improve the quality of life of all citizens and free the potential of each person'.
- In **Section 7(2) of the Constitution**, it is incumbent upon the state to respect, promote and protect and fulfil the rights enshrined in the Bill of Rights, which includes SERs.
- **Section 26(2) of the Constitution** expects *the state to act reasonably* to make sure the right of access to housing (a socio-economic right) is realised.
- **Section 152 of the Constitution** enjoins local government to provide services to communities in a sustainable way, encouraging communities and CSOs to be involved in local government, an allusion to meaningful engagement.
- **Section 33 of the Constitution** requests the government to respect 'procedural fairness' of any administrative action taken that affects people's rights. This

principle of 'procedural fairness' is reinforced further by legislation, the Promotion of Administrative Justice Act (PAJA) (No. 3 of 2000) (RSA 2000b).

The implication of 'procedural fairness', as suggested by Chenwi and Tissington (2010, 12), is that the government must, in effect, engage meaningfully with the stakeholders. There are other legislative instruments that promote the concept of meaningful engagement, therefore, public participation in the decision-making process, that are aimed at the realisation of SERs. For example, the Municipal Systems Act (No. 32 of 2000) (RSA 2000c) makes it incumbent upon municipal administration to put in place appropriate mechanisms, processes and procedures to enable the local community to take part in the affairs of the municipality, and when establishing an 'appropriate mechanisms ... for participation in municipal governance ... it must take into account the special needs of people who cannot read or write ...'. The influence of the PAIA is being 'insinuated' in the above clause, especially, when read *in tandem* with comments by the SAHRC (2013, 23) report that refers to the said Act of being protecting and upholding '... the rights of people to access information, and seeks to enhance the transparency, accountability and effectiveness of government ...'.

There are other policy documents, programmes and democratic practices that, equally, support meaningful engagement in the promotion of SERs. In an effort to ensure service delivery and promote the realization of SERs, the Department of Performance Monitoring and Evaluation (DPME 2003, iv) came out with a document that has, as its main purpose, the placing of citizens 'as active participants in shaping what is monitored, how monitoring is done ... and routine mechanisms to *bring the voice of the citizen into the service delivery process*' [own emphasis]. This approach to monitoring government performance focuses on the experiences of ordinary citizens in order to strengthen public accountability and drive service delivery improvements, and the instruments used include citizen report cards, social audits, community monitoring and public hearings (DPME 2013). The document provides a set of principles, which among others, recognise that:

- The voice of citizens is integral to building a capable, developmental state in South Africa.
- Government monitoring systems need to include the views and experiences of citizens.

Commenting on its observation in the study of social audit in monitoring local government performance, the Human Sciences Research Council (HSRC) through its researchers Vivier and Betancourt (2015), comments that:

Meaningful engagement between local governments and communities, especially the poor and most vulnerable, is a fundamental part of good governance ... and the process should

therefore enable and realise citizen agency as an integral component of governance, where citizens are partners in decision-making and service-delivery processes.

Vivier and Betancourt (2015) further observe in their investigations that:

The right of access to information is provided for in the South African constitution, which gives every person the right to access information held by the state or private entities that is required for the exercise or protection of any rights ... In this way social audits contribute to building a culture of transparency, as citizens identify, source and engage with relevant information.

Notwithstanding constitutional and other legislative demands, common sense supports the view that good governance should be based on the principle of a citizen-driven democratic system, if it is to be truly transformative and sustainable, as observed by Archbishop Njongonkulu Ndugane, the President of the African Monitor. Ndugane (2013) was, therefore, forthright in stressing the importance of meaningful engagement thus:

Evidence from the work African Monitor has done over the years, shows that ordinary citizens want to be able to effect decisions that affect their lives. They want meaningful engagement about how their monies are spent by those they have placed in government; they want to inform strategic and planning decisions about the development path in their countries. They want to share the power they have bestowed upon those elected, especially because those in government have been found wanting when it comes to making decisions that benefit the majority [... and] only through democratic systems of governance such as transparency and accountability that we can manage and control humanity's inclination towards injustice ... there is a strong role for civil society and citizens to play in promoting that accountability.

The NDP (2012), which is a plan for the country to 'eliminate poverty and reduce inequality by 2030 through uniting South Africans', acknowledges that 'too many people are trapped in poverty and we remain a highly unequal society', stressing that, 'the approach of the Plan revolves around citizens being active in development'.

6.2. Building blocks of meaningful engagement

For engagement to be meaningful certain principles or conditions are necessary. Chenwi and Tissington (2010, 21–22) have identified the following set of principles and guidelines, some of which were also captured in the Constitutional Court decisions in the *Olivia Road* and *Joe Slovo cases*:

- Residents or communities must be treated as partners in decision-making, instead of just having information about decisions passed down to them.
- Engagement must be done with residents or communities both individually and collectively.

- The engagement process should preferably be managed by careful and sensitive people.
- Engagement should involve other stakeholders, for example, CSOs that support the people's claims should, preferably, facilitate the engagement process in every possible way, putting in place structures that are staffed by competent and sensitive members that are skilled in engagement.
- Dependable and meaningful lines of communication, which are open, must be maintained and the engagement must be a two-way communication process, where both parties listen and try to understand the other's perspective, acting reasonably and in good faith.
- The process must be done in a transparent manner, providing complete and accurate accounts of the process, and participants being able to freely express themselves.
- The engagement process must be structured, coordinated, consistent and comprehensive.
- The parties must be proactive and not only defensive, showing some resourcefulness in seeking a solution, avoiding narrow-mindedness or stubborn attitudes that aim at sabotaging the engagement process by making non-negotiable, unreasonable demands.
- Meaningful engagement depends mainly on access to relevant information to all parties concerned, and this should, of necessity, NOT be a one-way (government to community) process, and must take into account language preferences and the special needs of participants.

7. INFORMATION ACCESS AND MEANINGFUL ENGAGEMENT: NEXUS IN THE REALISATION OF SERS

Luyt (2008) contends that ATI has a dual purpose when discussing the realisation of SERS and this can be used to advance the argument for the interconnectedness of information and meaningful engagement. Firstly, ATI serves as a legal right for citizens to know about the range of government policies, decisions and activities. Secondly, it empowers citizens to position themselves at the centre of political discourse in the country. This 'dual purpose' claim, Miriyoga (2011) suggests, points to the centrality of information in the inclusion of the poor and the marginalised in the process of governance, reflecting Madison's landmark pronouncement that 'knowledge is power'. The UNDP (2006, 4) makes this assertion succinctly: 'Information can empower poor communities to battle the circumstances in which

they find themselves and help balance the unequal power dynamic that exists between people marginalised through poverty and their governments.'

Moreover, Liebenberg (2014, 2) has also described the importance of meaningful engagement as a 'participatory constitutional remedy', which stimulates direct engagement between parties in SERs litigation. Similarly, Chenwi and Tissington (2010, 6) regard 'participatory democracy' as the type of government, which is 'accountable, transparent, responsive and open', making provision for 'individuals and communities to take part in service delivery processes and decisions'. Cornell and Muvangua (2012) further argue that, 'sustainable reconciliation is only possible through direct democracy in which everyone in the community must have a voice and must be heard'. They describe participatory democracy as organic to the communities in conflict and 'the actual voices of the human beings involved in the conflict that must be heard in order to enable genuine reconciliation between the parties'. It is no secret that South Africa is in conflict, a country of 'two worlds', the 'haves' and the 'have-nots', as evidenced in the constant township protestations of service delivery and labour unrest that, at times, become fatal, and racial slur that has gained momentum in the social media of late. This 'two-world' situation, among others, epitomizes the argument of the use of meaningful engagement as a tool to aid the implementation of the constitutional imperative of SERs. If ATI is the touchstone of all freedoms (closely linking it to other rights) then, it plays an over-arching and enabling role in meaningful engagement in the realisation of SERs. Furthermore, transparency, openness, *accountability* and participation, which form 'the axis' of free access to information, are clearly evident in meaningful engagement as the above analysis shows. As pointed out by Mendell (2011), at a more principal level:

Democracy is quintessentially about ensuring that governments perform in accordance with the will of the people ... this sort of basic accountability is clearly impossible unless governments operate in an open, transparent fashion, including by allowing people to access the information they hold.

There is, therefore, a clear convergence between democratic principles – with free ATI – and meaningful engagement with citizens about their socio-economic rights.

8. CONCLUSION

If meaningful engagement is taken as a concept that relates to how citizens interact with the state, then, as Bradlow (2010) rightly suggests, it points to a 'bottom-up approach that is not limited to the Constitution or any other legal framework', despite various references to the constitutional and legislative imperatives and other legal tussles experienced in the enforcement of SERs in the country. Furthermore, while a court can enforce specific obligations and rights, democratic governance is the sum of much more than just constitutionalism and legal adherence, though rule of law is an essential feature of democracy. The state can meaningfully engage with

its citizens and communities by pursuing policies and interactions that empower and grow the capacities of ordinary poor citizens. Organised communities can use their tools of association to work with the state to enhance their own development. It is, indeed, this kind of bottom-up governance that most effectively empowers citizens to engage with the state to help fulfil the social rights agenda that South Africa's legal framework demands. The law can, on occasion, protect the most vulnerable to defend their rights. However, the law alone cannot ensure the growth of the necessary capacities to allow the most vulnerable to take hold of their destinies as proper democratic citizens. The South African poor have both the legislation, such as the Constitution and PAIA, supported by a vibrant civil society, such as ODAC and SERI, at their disposal. Pillay (2012, 747) is, therefore right in her support: 'Meaningful engagement may be used as an effective tool in providing substantive relief to people attempting to assert their social and economic rights'; and Chenwi (2009, 373) sums it all up, just as argued in the current study: 'meaningful engagement remedy is a progressive and effective remedy capable of promoting social transformation and enhancing participatory democracy and transparency and accountability in the delivery of socio-economic goods and services'.

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