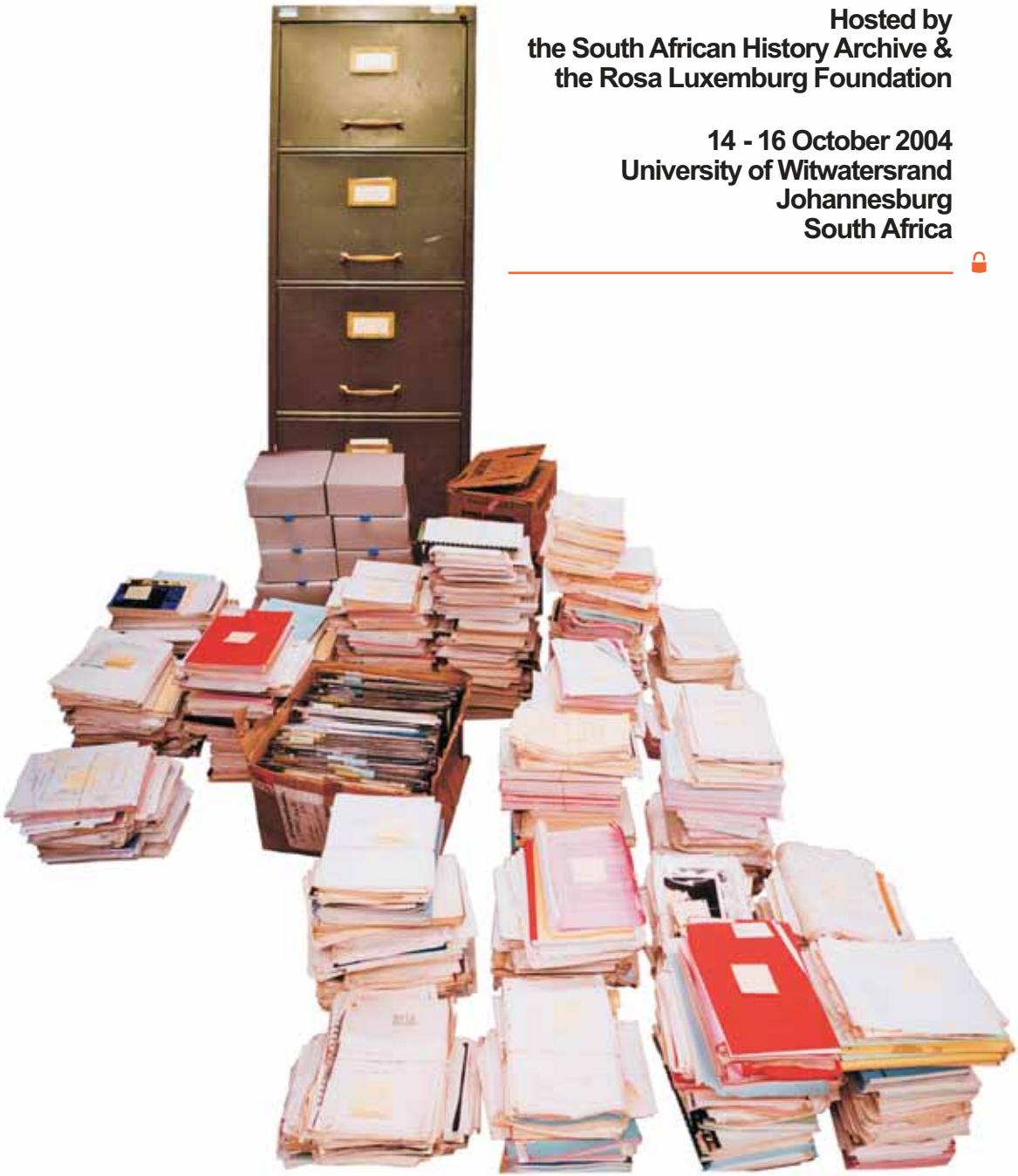
Texts from the Conference

Justice, Unfinished Business and Access to Information

Hosted by
the South African History Archive &
the Rosa Luxemburg Foundation

14 - 16 October 2004
University of Witwatersrand
Johannesburg
South Africa



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“Without a free exchange of opinions, life dies out in every public institution and only bureaucracy remains active.”

Rosa Luxemburg

Conference Opening and Introduction

The conference was officially opened at the site of the Old Fort on Constitution Hill in Braamfontein, Johannesburg, where South Africa's infamous past is juxtaposed with the site of its new constitutional court. The conference brought together South African and German academics working in the correlated fields of access to information and the protection of privacy, in order to explore the dynamics of these subjects as they relate to dealing with justice and accountability in the contexts of post unification Germany and post-apartheid South Africa.

In late 1989, the government of the German Democratic Republic (GDR) lost control after forty years in power. Among other things, this enabled uncontrolled access to the files of the Stasi, the GDR's state security/intelligence service. The new authorities established the Gauck Institute, tasked with providing controlled access to these files. Civil society groupings expected that the Institute would be complemented by the development of a special law to facilitate access to relevant files and intelligence from both the former East and West German states. This did not materialize, however, and access was only granted to East Germany's Stasi files. It had also been envisaged that access to files would take cognizance of individual privacy considerations but information was leaked and used to discredit individuals, often with transparent political intent.

In South Africa, a negotiated settlement in 1995 facilitated the introduction of a Truth and Reconciliation Commission (TRC) to establish 'the truth' regarding the conflicts of the apartheid past. The TRC was given unprecedented powers to access documentation to facilitate its mission. Despite these efforts, powers of inquiry and access to information in the new South Africa are tempered by resource constraints, political interests, and constitutional imperatives that seek to 'respect, protect, promote and fulfill' fundamental individual and community rights.

Introductory Address

Hans Jochen Tschiche, protestant priest, civil society activist and member of the Green Party delivered the opening conference address. Tschiche spoke from personal experiences and recounted the virtual surrender of the East German state to what he described as a 'subterranean earthquake', as thousands took peacefully to the streets forcing the GDR authorities to open the borders with the West. What followed was an unprecedented push to dismantle the system in the East and to embrace the West, resulting in what many believe was a hasty unification treaty.

Tschiche outlined the widespread need for justice in the GDR by holding the former power elites of the East German state and their security services accountable for the past. This meant using the criminal justice system of a newly unified Germany and for many the results of their experience were that justice was not served. Focusing on the East only engaged with one side of the story while the experiences of the Cold War required an examination of the responsibilities of Western nations. The process provided some mitigation for the actions of the GDR state but it did not excuse the systemic abuse and violations against the public.

Herr Tschiche highlighted the difficulties of pointing out responsible individuals in a context where so many people participated in the system, even people from the opposition camp. The church provided a platform for freedom, but many individuals and their families paid a heavy price for involvement and association with opposition activities. Although there is considerable collective guilt, there is a tendency to fall back on selective scapegoats for past responsibilities. For the GDR, the current PES and former East German President, Honecker, are singled out.

Dealing with the past through the courts failed as there were no legal precepts upon which to base the case. Herr Tschiche argued that German’s were too close to the events to deal with them effectively. The confidence levels of East Germans faltered during the unification process, which effected how justice and accountability considerations were addressed. As Tschiche stated, the real discourse is likely to only take place in later generations in conjunction with a comprehensive review of what transpired in West Germany during the Cold War. Only then will a more holistic picture emerge that will provide a solid and just foundation upon which to build and develop.

Tschiche went on to expose how calls for an examination into West German intelligence and operational agencies raised concerns that the activities of other Western countries would be exposed. The majority of GDR's last parliament wanted the exposure of all secret services, but interests in the West opposed this.

In this way, the interests of victims and their families were supplanted by assertions of state security. Amongst opposition groupings in the GDR there were various ideas on how best to deal with the Stasi and other perpetrators. Some opposition groupings had suspect links to Nazi elements, others pressed for unification. As of post 1961, many groupings were orientated towards establishing a socialist agenda. This included the Protestant Church that took a leading role in efforts to improve the situation in the GDR, under the slogan, "Stay here and defend yourself". Many wanted reform and change, but did not identify with the process of becoming a part of the West.

Tschiche introduced the subject of the Stasi files by posing the question of whether they contain lies or the pure truth. He stated that the veracity of their contents remains contested. From Tschiche's experience, the work of the secret service vacillated between intimidation and comic-tragedy. Although the security services were obviously involved in serious and systemic misdemeanors, the 'banality of evil' was alive and well in the fastidious and petty nature of the repression. Having reviewed his own files, Herr Tschiche pointed out that while they did not necessarily contain 'untruths', the files revealed how little was known, and were constructed in a bizarre language. Although the Stasi employed about 80,000 people, it was an essentially weak organization that did not appear to be convinced of what it was doing.

In January 1992, GDR citizens were allowed to access their files. According to Tschiche many were upset to find that no files existed surrounding their activities. Of the sixteen million citizens in the GDR, the Stasi had very limited intelligence on the state of the opposition.

While some were exposed as guilty others were publicly accused though they were not guilty of anything. The GDR's opposition was unable to take advantage or influence the situation, and although a groundswell of East German opposition was responsible for 'opening the doors' for a fundamental transition, the politics was done by others. As a result notions of access to information and the protection of privacy, as well as the interests of justice and accountability were selectively served.

The GDR did not fall because of armed resistance or because of public demonstrations, but because it was a corrupt system from top to bottom. It took the smallest of elements to make the whole edifice collapse.

Texts from the Conference

Session 1, 14th October 2004
University of Witwatersrand
Johannesburg
South Africa

Session One: Dealing with the Past

Introduction

In recent decades there have been an increasing number of efforts, both internationally and domestically, to confront the past and to hold perpetrators of gross human rights violations accountable. South Africa and Germany share recent histories characterized by widespread repression and human rights violations. Dealing with the past in these and other contexts presents a range of practical obstacles and opportunities in terms of determining what information is available about past violations, who should have access to this information and how it should be accessed. This, in turn, presents us with options with regards to what actions are pursued officially or otherwise.

In South Africa a range of initiatives, new laws and institutions have been developed to deal with the socio-economic and political inequities of the past. None of these are uncontested, and in many respects the legacies of the past continue to influence, as well as compromise and constrain what can be achieved in the present. Although there have been no systematic efforts to address past violations in the German context, some controversial aspects of South Africa's processes resonate with the German experience. Inevitably, there is an ongoing negotiation between the past and present, a negotiation in which the truth remains provisional and contested. While this provides the basis for healthy debate and discussion, it also provides the potential for ongoing division and discord. Striking the right balance is imperative, and accommodating considerations for the right of access to information and the protection of privacy must be understood within the parameters of the very specific conditions of each context.

There are no universal models used to confront past violations. What has become increasingly clear, however, is that perpetrators can no longer automatically rely on blanket impunity, and that the interests of victims and survivors are, at least rhetorically, a central concern. Acknowledgement and recognition of past violations have become accepted requirements that are designed to tackle the politics of denial, resentment and a sense of being perpetually victimised.

Several generic approaches to dealing with the past can be identified including trials, truth-seeking and fact-finding initiatives, institutional reform, memorialisation and reparations. Some argue against such efforts, fearing that they will exacerbate division and upset fragile transitional arrangements. Others call for confronting the past arguing that the potential problems outweigh the benefits, and that confronting the past is imperative for laying a meaningful foundation of accountability necessary for building a sustainable democracy. There is also a moral imperative to validate and acknowledge victims and survivors, and a failure to do so is a form of re-victimization and insult.

Whatever approaches are adopted in confronting past human rights abuses, issues relating to access to information and personal privacy invariably surface. The imperative is to identify what has been achieved, what bold and imaginative options can still be developed and, importantly, to avoid being trapped within the confines of singular authoritarian histories devoid of critique.

Dealing with the Past

The first session, chaired by **Professor Carolyn Hamilton,** reflected upon the role of the past in contemporary justice debates and examined the choices made in pursuit of retrospective justice and accountability. The session focused on the South African experience and included inputs from the National Archivist, **Mr. Graham Dominy**, and two independent researchers, **Ms. Thembeka Mufamadi** and **Mr. Terry Bell**, both of whom have been closely involved in South Africa's Truth and Reconciliation processes. In addition, the conference received a written input from **Ms. Chandre Gould**, who worked as an investigator with the Truth and Reconciliation Commission. Poet, novelist and social commentator, **Mr. Don Mattera**, made a final input, reflecting on what had been said and considering how to avoid the imposition of a two-dimensional and selective application of historical experiences.

Graham Dominy focused his input on the legal, resource and technical considerations that provide the operational framework for engaging with the past. As the government agency responsible for much of the relevant archival material, the National Archives deal with a spectrum of information that has been developed as a by-product of government and other official processes. There is a very distinct relationship between the records that are generated by specific government departments and the actual work of these departments.

South Africa's constitution stipulates that the South Africa's National Archives is responsible for facilitating the public's access to state information and records. These rights of access are not absolute, but defined within the context of recently introduced legislation (the Promotion of Access to Information Act - PAIA), and will be further defined by enabling legislation on the right to privacy that has yet to be introduced. In addition, the National Archives Act lays down conditions for the collection and preservation of government records as well as its relationship with government departments and the general public. This Act was passed before the adoption of the Constitution in 1996 and PAIA, and as a result there is some disjuncture and legal blurring within the overall framework. It is hoped that forthcoming legislation on the right to privacy will resolve any existing contradictions.

According to legislation (Promotion of National Unity and Reconciliation Act), the records of the Truth Commission 'belong' to the Department of Justice. Despite this, the TRC recommended that their records be held and managed by the National Archives. As a result, a 'dual control' has been put in place with a joint committee established to manage access and make determinations about sensitive records. The joint committee works within PAIA, but the process has been slow and somewhat cumbersome. To expedite access, the National Archives have recently decided that all information generated around public TRC processes will be voluntarily disclosed, and accordingly permission will not needed from the joint committee to access this information.

The process of accessing TRC records remains a work in progress. Dominy pointed out that access is also somewhat frustrated by a lack of resources to conduct a comprehensive audio-visual, electronic and paper archive appraisal and as such, there is still no complete control over the TRC records.

In terms of other relevant apartheid-era documentation, Dominy pointed out that the South African government established a 'classification/declassification committee' under the auspices of the National Intelligence Minister. This committee has reviewed a range of available documentation and has compiled a report that was submitted to the Minister during 2003. This report has yet to be taken to the Cabinet, and until this is done there can be no public engagement around the committee's findings and recommendations.

Dominy asked conference participants to assess the role of the archivist as 'trustee', who gathers and holds records in trust for the future. As civil servants, government archivists also have a responsibility to the state and its future. Considering the rights of access (especially to information that is sensitive and potentially harmful) requires that a range of interests be taken into account.

Thembeka Mufamadi's contribution was based on her experiences as a researcher, firstly looking into issues relating to gross human rights violations for the TRC, and secondly, researching the life histories of former Rivonia trialists and Robben Island prisoners, Raymond Mhlaba (who later became democratic South Africa's first Premier for the Eastern Cape) and former President Nelson Mandela.

Working for the TRC, Mufamadi was responsible for researching violations that took place in the former homeland of Venda and the self-governing territories of Lebowa and Gazankulu in the former Northern Transvaal, now known as Limpopo Province. These were areas where little relevant research (independent or otherwise)

had been conducted, and where pertinent records and documentation (including government, media and others) were also extremely limited. As a result of these drawbacks, Mufamadi relied heavily on primary research methodologies and in particular on oral accounts relating to past conflicts. Unique and previously unrecorded accounts of repression and struggle were captured from these communities. This included, for example, the role and experiences of indigenous farmers in the Venda region who worked closely with the liberation movement.

Mufamadi's research experiences outlined that more information could have been collected under the banner of the TRC. Much of what was secured came from the perspectives of those involved in the anti-apartheid struggle, and for the most part was not matched by accounts from those on the side of apartheid security forces. With the exception of some amnesty applications, this reflects a general and widespread lack of engagement from both black and white elements from either side of the conflict. Consequently, the picture that has emerged remains patchy, and much of the truth of what transpired in many parts of South Africa has yet to be pieced together.

After leaving the TRC, Mufamadi worked for the Human Science Research Council where she was responsible for assisting Raymond Mhlaba to write his personal memoirs, and at the same time also began to help Nelson Mandela with research for his forthcoming account of life as South Africa's first democratic president. Both Mhlaba and Mandela facilitated Mufamadi's access to records by providing formal letters of introduction requesting cooperation, and as a result she was able to secure unprecedented access to a wide range of primary and secondary sources of information from both official and unofficial sources. Despite this, it was evident that certain official structures continued to withhold information, and access appeared to depend on the specifics of what was requested. Files held by the Department of Correctional Services on these Rivonia Trialists, for example, also contained personal information which neither man was aware of and some which they were not comfortable with.

Mufamadi concluded that despite constraints there are considerable opportunities to access information about the past. Whatever the legal framework, access to information is not automatic and is dependent on the goodwill of individuals who act as custodians and doorkeepers to the data. Having the support of liberation icons such as Mandela and Mhlaba provided an immeasurable stimulus, and Mufamadi felt that is was unlikely that other researchers would have secured the same level of support without this sort of backing.

Terry Bell, an independent writer and researcher, has worked closely on issues

relating to the TRC and past conflicts. He has also worked with the South African History Archive (SAHA) in efforts to access TRC documents that the State has been reluctant to disclose.

Bell's input located the importance of access to information as an imperative for building a vibrant and sustainable democracy. He referred to the Constitution and Bill of Rights as important 'symbols of intent', but that they could only function in 'an environment that encourages informed debate and the involvement of the majority'. It is critical that the public is not seduced by a veneer of democratic norms and that the substance of what has been achieved, and what is still needed to be done, is addressed.

Bell emphasised that comparisons between the GDR and South African experiences are limited and perhaps best characterised by their distinctions. There are certain similarities - both apartheid South Africa and the GDR were intensely bureaucratic and generated a lot of records. Unlike South Africa, however, transformation was rapid and the East German authorities did not have time to systematically destroy evidence, as was the case in South Africa, in what Bell described as a "paper Auschwitz". The process and mechanics of transition in South Africa facilitated this conspiracy by enabling the apartheid state to retain control of such records to the last moment.

There are echoes of the German experience in South Africa in relation to the opposition, some of whom were compromised by their association with the apartheid state. The latter actively infiltrated the liberation movements, and it is widely believed that there are elements in senior positions of government today that have a distinct interest in ensuring certain information is not disclosed.

Bell noted that transition in South Africa had been a top-down, elite-led process that had come about due to compromise, and that the transition itself had resulted in more compromise. This required placating the anger and demands for justice of the victimised, exploited and oppressed majority. The much flawed, yet widely hailed TRC was established to address these demands. It was, in the words of former Truth Commissioner, Dumisa Ntsebeza, the "best we could hope for in the circumstances". Indeed, it has provided an exceptional insight into aspects of South Africa's secret past, but it is evident that much more remains uncovered and that there is more work to be done.

Bell pointed to the work of the South African History Archive, which has actively campaigned for greater access to apartheid-era records and the TRC archive, often resorting to legal action to pursue its claims. In so doing, SAHA has actively used

PAIA since its introduction in 2000. When introduced, the promise and potential of PAIA seemed overwhelming, but in reality, Bell has found that in some areas it was easier to access information before the Act was promulgated than after it.

Bell has also applied for his own personal file compiled by the Directorate for Security Legislation, a former section of the Justice Department. Having initially been refused access, it was eventually granted. As with several other files relating to anti-apartheid activists, his files were suspiciously diluted and clearly not a reflection of the kind or volume of intelligence that would most likely have been collected by the apartheid security and intelligence agencies.

One particular case that Bell and SAHA have been actively engaged with for several years relates to thirty four boxes of TRC files that vanished and finally reappeared for classification after a litany of obfuscation and what Bell described as "downright lies". Most of the contents of these boxes were actually public documents, and the case illustrates the lengths that some bureaucrats are prepared to go to in order to prevent access at any cost.

These and other examples illustrate the importance of a vigilant civil society that is prepared to engage with and where necessary challenge the State. There are, however, other disturbing signs that elements in the State are intent on backtracking from the initial promises and potential of PAIA. The classification and declassification process referred to by Graham Dominy, for example, is regarded with considerable suspicion in some quarters, as is the employment by the previous Minister of Justice of the waiver clause in PAIA which allows the National Intelligence Agency not to declare what records it holds. This has serious implications vis-à-vis impeding insight into apartheid-era records, and provides a 'black hole' for potentially embarrassing governmental records. This waiver holds for a five-year period, but can be repeatedly extended if the relevant Minister deems it necessary.

Civil society's response to these developments has been relatively muted, save for a handful of non-governmental organisations and individuals. These examples and other retrogressive steps highlight the necessity of developing a culture of enquiry and interrogation. In Bell's opinion, "there can only be one dogma, and that is - there is no dogma".

Chandre Gould's input, while not discussed at the Conference, is worth including in this report as it provides a fascinating account of personal experiences as a lead investigator for the TRC into the apartheid military's chemical and biological warfare (CBW) programme, Project Coast - probably the Commission's most

sensitive investigation. Gould's account examines why the ANC government and State agencies were so reluctant to co-operate with the TRC to expose a programme that was designed and executed to suppress opposition to apartheid through the development of crowd control agents and covert assassination weapons.

At the time of the TRC enquiry, two other state agencies - the National Intelligence Agency (NIA) and the National Prosecution Authority (NPA) - were already engaged in related investigations. The NIA repeatedly tried to dissuade the TRC from continuing its inquiries, arguing that the Commission's investigation would expose the scientists involved to danger and recruitment by rogue countries intent on developing their own CBW programmes. The NPA also raised its concerns that the Commission's investigations would undermine prospects for successful prosecutions. Gould argues that while the NPA's opinion seemed quite reasonable, given that they would be relying on the same witnesses and information, Gould argues that the NIA's position seemed to reflect direct political interference by the South African government to protect its scientists.

The NIA refused TRC investigators access to relevant documents, despite being promised they would be available. The Commission was, however, able to secure the support of a third government agency, the Office for Serious Economic Offences (OSEO), which had spent over three years investigating financial irregularities around Project Coast. OSEO investigators faced acute resistance to their inquiries, but had collected valuable material, which they shared with the Commission. Grudgingly, the NIA gave limited access to other requested documentation, but despite this further efforts were made to undermine the inquiry, which included in some instances, openly lying about aspects of the programme.

In a last effort to stop the TRC proceeding with public hearings into the CBW programme, senior government officials called a series of meetings with TRC Commissioners and investigators at which they again tried to dissuade the Commission from proceeding. Even though the hearings went ahead, the sensitivities around these issues continued for some time.

The arguments presented to dissuade the TRC from continuing its inquiries were not convincing. Concerns that making public certain documents would facilitate proliferation were justified, and could be addressed by simply withholding documents that provided the manufacturing details for chemical agents.

Gould suggests other reasons as to why the South African government, in particular, was indisposed towards the process. Both the USA and UK were aware of the South African CBW programme from the 1980s, but did not take steps to stop it until the

eve of democratic transition in 1993. This pressure continued on the new government post 1994 through a demarche to President Mandela. Public disclosure of links between Project Coast and the US and UK would have been severely embarrassing and clear evidence of both countries selective engagement with issues of non-proliferation. Gould argues that pressure on the Commission from the South African government appears to reflect its primary interest in maintaining good relations with both governments. Indeed, the TRC agreed to not make documents referring to the 1994 demarche public at its hearings.

Another suggested reason for the pressure brought to bear was the fact that even by 1998, when the TRC hearings were convened, no senior government official had been briefed about the programme. This reflects a lack of insight and control by the new political leadership, as well as the capacity of the security and intelligence agencies to contain sensitive security-related information, even from their political masters.

In the end, the TRC hearings went ahead without incident, diplomatic fallout or negative security consequences. As with the subsequent (and unsuccessful) criminal prosecution of Dr. Wouter Basson, the head of Project Coast, these processes have enabled an array of documents detailing the programmes activities and motivations into the public domain, and provide an important public record of the apartheid military's intentions under the guise of security concerns.

In response to these inputs, **Don Mattera** focused on the problems associated with the writing of history that tend to reflect the interests of the powerful and is widely accepted by the powerless - "History is debauchery, and history itself is being debauched". Mattera questioned the extent to which the present government is able and committed to making information available to the public. Mattera, as is the case with so many others, has struggled to access his own security files. Selective disclosures and foci have left many issues unaddressed. The history of collusion with apartheid - for example the role of white corporate South Africa - has not been exposed. Why is the history of black consciousness on Robben Island and elsewhere not available and seemingly airbrushed out of much of South Africa's history?

Mattera felt that instead of facilitating access to available records, the authorities were acting as doorkeepers, classifying what we can and cannot see. This is antithetical to the ethos of the liberation movements - why can't we know about certain people and institutions?

Mattera argues that to counter selective and revisionist tendencies, it is necessary to develop a research fraternity that is not afflicted - politically, religiously and

socially. The TRC was a product of appeasement, a façade for reconciliation, part of the larger mirage of the new 'rainbow nation'. The TRC, he suggested, also pursued vested interests, elevating the role of some - either as liberators or perpetrators - above the role of others. This has contributed to the emergence of a singular authoritarian history, where the contribution of Africanist, Black Consciousness and socialist movements have been pushed to the periphery. This reflects the history of the dominant ruling party, a history that has been cleansed to suit and promote the politics of 'non-racialism', a history that fails to give space to the role of the 'anti-racists'.

The TRC was not an acceptable forum for many elements involved in the South African struggle. Victims and survivors were asked to forgive, while perpetrators were not asked to truly atone for their actions. Tremendous pressure was brought to bear by icons, such as Mandela and Tutu, to acquiesce in this process. This has worked in favour of the perpetrators, who continue to 'walk, talk and eat amongst us.'

Mattera urged participants to continue interrogating the purpose of history, and to honestly identify whose histories are being captured. History has a critical role to play in the restoration of compassion and human dignity - indeed, the ideology of compassion should be the lodestar of anyone truly interested in these important processes. It is necessary to honestly reflect on what has thus far been achieved, and what more there is still to be done.

Discussion

The subsequent discussion underscored the importance of seeing history as an ongoing process - not 'conclusive' but that requires continuous exposure, and rigorous public debate. Truth is provisional and it is necessary to understand that there is a negotiation of knowledge about the past. Any open discussion is inevitably facilitated by access to information, not all of which is controlled by official agencies. Still, the State is custodian of archival materials and is cautious about disclosure, showing a desire to contain and control. Transitional States that embrace a 'rights-based' dispensation are faced with a host of constraints. Inherited State structures are responsible for security and consolidation, but to the people from whom they draw their mandate, and to whom they are accountable.

State and citizens should embrace the opportunity to engage with diverse opinions and experiences so as not to exclude the other in pursuit of a 'singular' history. It is of critical importance to understand the other and to develop an appreciation of

different viewpoints. The extent to which efforts in South Africa or indeed Germany have succeeded in this regard is certainly moot.

The South African TRC examined violations from the perspective of survivors and perpetrators and has developed into a resource of publicly available information that can help in understanding past conflicts. But there remains a considerable amount of unfinished business, and it is wrong to assume that the process is completed simply because the official mandate of the TRC has expired. Views and versions that are missing or excluded from these processes highlight the importance of undertaking a proactive approach to engage elements that would not ordinarily participate. This may include individuals or groups unwilling to engage, and those who have not been approached or able to connect with the available processes.

There must be political will to engage sensitive issues. Collusion and collaboration, which play a central part in the politics of repression, have not been exposed in South Africa and remain a central part of dealing with the past.

Continuing the examination of the past may endanger the carefully crafted narrative - or mirage, as Don Mattera described it - of a rainbow nation. The TRC did not adequately scrutinise the organisation and infrastructure of apartheid's oppressive machinery, nor its relationship to current realities. To do so would challenge the construction of the new South Africa.

The introduction of PAIA has been widely applauded, despite the absence of regulations four years after it became law. PAIA also overlaps several existing pieces of legislation. It is necessary to conduct an audit of legislation as it relates to the Act in order to avoid contradiction. It is not clear who is responsible for resolving these problems. The South African Human Rights Commission has a 'promotional' and 'guardianship' role, while the Department of Justice has functional responsibility for the legislation.

The South African government needs to take a proactive role in facilitating the Act, and should avoid sending mixed messages about its commitment to transparency and the rights of access. The government's active opposition to various legal actions by civil society litigants in US courts to secure reparations from international corporations colluding with the apartheid regime is an area of concern. Selective commercial and political interests appear to supersede a principled commitment to justice and accountability, and it is suspected in some quarters that the South African government has access to relevant information and evidence that would have supported the plaintiffs' cases.

Principled support for access to information must be balanced by a commitment to retain the 'health of the information', and to ensure that no 'harm' is done as a result of disclosure. Determining harm depends on a range of factors, and requires interpretation not only in terms of individual interests, but also from a community and societal perspective. In this regard, victim and survivor interests must be taken into consideration, but may not always be paramount. There is no straightforward formula, but those responsible for collecting, collating and safeguarding records should not be involved in influencing history by deciding what can or cannot be disclosed.

Determining what is secret or potentially damaging for state security is contested terrain. Issues of 'national security' and 'sovereignty' are frequently employed as reasons for non-disclosure. While this is appropriate in certain circumstances, there is a need for national debate to explore the diverse set of opinions on this subject. South Africa looked to Eastern European experiences as a model of the best way to handle the classification of records from an authoritarian regime. There is no standard approach to this, and different countries have employed different approaches. In Czechoslovakia, for example, following a widespread public debate, listings of every informer were made public. A similar debate is necessary in South Africa to discuss whether the country is ready to open up.

Texts from the Conference

Session 2, 15th October 2004
University of Witwatersrand
Johannesburg
South Africa

Session Two: Measuring Freedom of Information

Measuring Freedom of Information

This session was chaired by **Professor Iain Currie** from the University of the Witwatersrand, who posed the question, "How much freedom of information do we really have?" Currie reiterated comments from the first session about the disparities between the promise and reality of PAIA. He said that although the introduction of the legislation had been greeted with considerable acclaim, it was now necessary to assess what had been achieved in order to measure success and failure. To date, although there is anecdotal evidence of problems and shortfalls, there is less available 'hard data'. This void is being filled by the Open Democracy Advice Centre (ODAC) and the Open Society Initiative (OSI), and the South African Human Rights Commission (SAHRC), all of whom asses the impact of the Act.

Richard Calland, the executive director of ODAC, assessed the progress of establishing legal remedies for securing access to information. In the last ten years approximately forty countries have introduced legislation that seeks to facilitate access to information in one guise or another. Tailoring access to information with socio-economic rights presents the greatest challenge and potential. Access to information promotes greater access to power, and greater leverage over initiatives designed to deliver social and economic programmes.

Calland warned that in seeking to measure the consolidation of an access to information regime it is important not to fall into the trap of regarding measurement as only technical, and that it is necessary to locate the 'human dimension'. The ODAC/OSI study determined whether employing rights of access to information had in fact improved people's lives. The study also sought to assess if the law and compliance with it had contributed to the development of political space and the deepening of democracy. In so doing, it set out to diagnose country-specific and generic problems, and to suggest solutions.

Calland pointed out that while technical aptitude and compliance are necessary, it is important to avoid purely technocratic solutions for measuring compliance. This requires engaging with the politics and mindset behind those engaged in facilitating access to the rights, (i.e. civil servants). How interested are they in ensuring ordinary citizens can exercise their rights? In South Africa, civil society groups have called for the establishment of an intermediary mechanism to broker and resolve access problems. The findings of the ODAC/OSI study support this sentiment.

The ODAC/OSI study assessed legal compliance with Access to Information laws in five countries (Armenia, Macedonia, South Africa, Peru and Bulgaria), and

evaluated five hundred requests (one hundred from each country) for information from four types of 'requesters' - journalists, NGO's, 'ordinary Joes', and members of 'excluded groups'. Requests with different levels of difficulty were made to a number of government agencies at national, provincial and local level. This did not include requests for information that were clearly exempted. These were differentiated as 'routine', 'difficult' or 'sensitive'.

In South Africa bureaucrats were found to be more likely to ignore a request for information than respond to it. Over half the requests made received no response from the respective agencies. South Africa performed poorly in the study (worse then any other country), although the 36% average of 'no responses' indicates the problem is a common phenomenon.

NGO's received a relatively good response rate while the worst affected groups were the 'ordinary Joes' (81% 'no response'). Excluded groups experienced similar problems as oral and other facilitated requests were not accommodated in most cases. In theory there is a legal remedy through the courts for non-compliance, but access to the courts is dependent on resources and limited to very few. Nevertheless, the courts and an effective rule of law remain a critical condition for effective implementation.

The ODAC/OSI study concludes that in South Africa there is neither a strong supply, nor demand for information. Compliance varies across government departments with small pockets of excellence, but is generally categorized by non-compliance. This failure has resulted in ODAC submitting a formal complaint to the Office of the Public Protector inviting him to conduct an inquiry into the reasons for the mal-administration in the handling of requests under PAIA.

Calland concluded that the ODAC/OSI study identified the importance of ensuring that newly adopted laws are supported by political incentives for compliance. In addition, proactive support to raise awareness within government and wider civil society is necessary. This requires a two-stream approach that supports the development of a supply of information from government, and a demand for information from civil society. Different strategies should be defined according to specific conditions, opportunities and constraints. By systematically testing the data, the ODAC/OSI study provides an opportunity to develop creative awareness raising and advocacy strategies towards improving compliance.

Ms. Teboho Makhalemele, a senior researcher with ODAC presented an overview of the ODAC/OSI study. At the time of the study only Peru, South Africa and Bulgaria had access to information laws.

One hundred requests were made from each of the five participating countries. These included submissions to eighteen public bodies, including The Presidency and six national departments, Supreme Courts and lower courts, three Provincial governments, three local governments and three Parastatals or privatized entities. Ten requestors from each country included three NGOs, two journalists, three 'ordinary Joes' and two 'excluded people'.

Each of the one hundred requests consisted of thirty four separate requests for information, as specific individual requests were repeated by three different types of requesters, providing an opportunity for comparative analysis of compliance. There were fourteen standard requests made in each of the five countries, and twenty country-specific requests formulated by the requester.

From the four-hundred and ninety-six requests submitted, 35.7% received the information requested, and 64% did not (as a result of written or oral refusals, an inability to submit, and in the majority of these cases, no response). In terms of fulfilled requests, South Africa performed the worst, with only 23% of applicants receiving the information requested (compared with Macedonia - 34%, Bulgaria - 38%, Armenia - 41%, and Peru - 42%).

An average of 14.5% of all applicants were unable to submit requests for information. In Armenia this affected 15% of applicants, in South Africa 17% and Bulgaria 22%. Written refusals were received by 8.1% of applicants, 11% from Armenia, 13% from Bulgaria and 14% from Peru. In South Africa only two applications received written refusals. In terms of non-responses, 52% of South African applications received no response, compared with 47% in Macedonia, 31% in Peru, 28% in Armenia and 22% in Bulgaria.

Despite having the most progressive legislation, which affords government departments thirty days to respond to requests, South Africa recorded the highest number of 'mute responses' and the lowest number of successful requests.

Teboho suggested that the major stumbling blocks are failure of response, failure to develop adequate systems of response, a lack of education and awareness amongst agencies as well as the general public, a lack of capacity to respond to requests, and importantly, a lack of political will to ensure the effective developments of systems. Some departments fared better than others, with the Department of Defence being singled out for its proactive and cooperative approach to implementing PAIA.

The ODAC/OSI report recommends a targeted awareness-raising process, that

information officers should be appointed and trained within each agency, and that the systems handling and monitoring (the South African Human Rights Commission) request be strengthened. In addition, agencies should develop manuals of information held, especially information that is available to the public.

Theboho stated that the situation in South Africa necessitates the creation of a new enforcement capacity (along the lines of an 'Information Commission'), which provides a legal and enforceable remedy that is accessible, speedy and inexpensive. This mechanism should enable people to challenge mute refusals and actual denials, establish good institutional practice and build up a body of jurisprudence and precedents.

Adv. Mothusi Lepheane heads the PAIA Unit at the South African Human Rights Commission. The SAHRC has a statutory responsibility for monitoring the implementation of PAIA and recently assessed the general aspects of compliance. Lepheane admitted that the SAHRC was shocked and embarrassed by the ODAC/ OSI survey results. Following release, the SAHRC received numerous feedbacks about the report and they registered some level of disagreement vis-à-vis its findings. He acknowledged, however, that the SAHRC has much to do regarding the monitoring and implementation of PAIA.

The SAHRC is tasked to receive reports from all government departments and agencies regarding compliance and steps taken to facilitate PAIA. Of the plus/minus eight hundred reports the Commission should receive, only sixty four were submitted. Once again, it was the Department of Defence that was singled out as the most cooperative and efficient of all departments. A top line analysis of the reports received shows that there are fundamental gaps in the knowledge of PAIA and that Information Officers responsible for implementing the Act are not properly trained.

Lepheane believed that the statistics did not show the whole picture. A number of departments claimed that they did not receive requests from the SAHRC, but had nevertheless dealt with a range of information requests. Others did not include detail of handling information requests, because the requests had not been framed in accordance with PAIA. The available SAHRC stats do not, therefore, reflect the status of the information regime in South Africa. In response, the SAHRC is developing more relevant protocols to capture this information.

The SAHRC supports the need to establish an 'Information Commission' as a key instrument in facilitating access to information in South Africa. Such a Commission could be located within the SAHRC, and meetings will be held with relevant stakeholders to discuss how this might be put in place.

Lepheane acknowledged that there is much to be done in terms of addressing the negative mindset of government officials, many of whom seemed more interested, during the training process, in finding ways in which they could deny access to information. This appeared to reflect a widespread attitude, as civil servants have forgotten (or never supported) the intentions of the legislation. Many government departments appear to have failed to take seriously Section 15 of PAIA, which makes provision for the voluntary disclosure of all information that can be made publicly available. Some departments, such as the Department of Safety and Security, have responded positively to this and it is evident that the creation of an Information Commission would facilitate voluntary disclosure. These measures are necessary to break the culture of secrecy that pervades South Africa's bureaucracy.

Sello Hatang, director of the South African History Archive pointed out that the ODAC/OSI report findings correlate with SAHA's experience (i.e. the relative 'excellence' of the Department of Defence in comparison with the poor responsiveness of the Presidency).

SAHA's experience confirms that there is no point in having good legislation if there is poor record keeping. The reason the Department of Defence receives glowing reports is that it has a good sense of what records it has. This is not the case in most other government departments where systems and processes of record keeping are not co-coordinated.

Hatang provided further detail on the thirty four boxes of TRC materials that were removed by the National Intelligence Agency, and the subsequent three years of effort to locate these files, amidst the lies, denials and obfuscation. This case demonstrates that the processes of access to information are neither expeditious nor cost-effective (SAHA spent approximately R300 000 pursuing this matter). These materials have now been located and handed over to the National Archives, which at another level demonstrates that PAIA can be effective, even in the face of fierce resistance.

SAHA's general experience of government compliance to PAIA has been negative. Some departments, including the Presidency have not appointed Information Officers to facilitate access. The Department of Justice, responsible for implementation of PAIA, has been found wanting on many occasions and does not appear to take its responsibilities seriously.

In terms of undisclosed information relating to the conflicts of the past, Hatang emphasized that archived documentation represents only a sliver of that past. It is

critical to ensure that these records are preserved, protected, and made accessible. The TRC was an extremely open process that set a remarkable precedent. However, as the Commission closed up shop, so too it appears did notions of access, as illustrated by the sudden disappearance of the TRC website (which subsequently reappeared several months later as a component of the Department of Justice's website).

Hatang reminded delegates that South Africa is only at the beginning of its efforts to bring about a new mindset and era of openness. Despite worrying signals of regression, there are still openings and opportunities to pursue. This requires a multi-faceted approach that will provide human and material resources to ensure that both the supply and demand for information augmented and enhanced.

Professor Mark Arenhovel's presentation focused on the contentious post-German unification handling of one hundred and twenty five miles of shelves filled with files that the East German Ministry of State Security had developed and maintained on about one third of the East German population.

The question of what sort of association individuals had with the former communist regime in East Germany remains a highly emotional and politicized issue. This affects both people from the former East, as well as some from the West, who have been accused of collaborating with the former regime. A number of countries that have gone through transition have unconditionally 'closed the book' on the past this was never an option in the German scenario.

The German experience was unique in that the western part of the country played a pivotal role in determining what actions were taken. Although this had many positive components, to some degree it was West Germany putting the East on trial. Dealing with the East German experience must also be assessed in the context of reluctance of the West German authorities to confront the crimes of the Nazi era and yet to contextualise and compare the communist regime with the former National Socialist regime. At the same time there was also tremendous pressure from the citizens of the former East Germany to ensure that the *Stasi* archive was preserved.

In January 2002 the Stasi Records Act opened the files for public inspection. Within two years over two million applications for individual files have been lodged. At present, this number has grown to over five million applications. The new law authorized the use of the files for background checks on government employees. Thousands of public servants have been dismissed because of incriminating information found in their Stasi files.

Professor Arenhovel reminded the conference that dealing with such a past presents a number of inter-related political, juridical and moral problems. Questions remain as to whether dealing with the past consolidated or undermined democracy. In terms of 'the law', consideration must be given to what sort of justice is employed, what law is applicable and what mechanisms and systems are utilized. In this regard, the issues of legitimacy and credibility are pivotal.

It is evident that significant gaps remain between the politico-juridical and moral dimension of the East German transition. The institution of the rule of law (and West German law at that) did not result in the attainment of justice for many people.

Although there were efforts and some initial agreement between the GDR government and the Federal government to keep a lid on the *Stasi* files, this did not materialize due to pressure from GDR parliamentarians and other elements. The Stasi Records Act regulates the custody, preparation, administration and use of the *Stasi* records. It has been widely praised as an important way of handling the files of the former secret police.

Professor Arenhovel points to several crucial concerns that have arisen, namely: how the data should be used, the purges that have arisen as a result of the information contained in the files and the problem of securing equitable access to the files.

Although the files focus on individuals, they provide enormous potential for understanding how and what institutional dynamics were at play in the system. It is important to remember who was compiling these reports and files, which in turn raises questions regarding the veracity, bias and nuance of what is contained in them. Ironically, considerable credence has been given to the contents of these files, so much so that anyone incriminated is effectively tasked with proving their innocence. In the words of one legal expert, "it is almost as if the assumption of the infallibility of State Security has replaced the presumption of innocence". It follows that what information is used and how it is handled be done so sensitively and with due regard for the methods of operation and the effects of such organizations.

The State employed initiatives to purge the civil service of elements deemed to be associated with the former regime. Arenhovel points out that in many cases, issues of complicity were not so clear-cut or malevolent. International human rights monitors raised their concerns regarding the defensibility of certain actions, especially as they were largely taken on the basis of information drawn from files compiled by the *Stasi*, and therefore by suspect means and suspect elements.

Subsequent developments have seen some attention paid to privacy rights, although these appear to benefit celebrities and politicians, and do not apply to *Stasi* employees or others deemed to have benefited from the system.
The struggle between rights of access to information, privacy and data protection looks set to continue although it appears currently to be applied inconsistently. Dealing with the past necessitates an engagement with records that might shed light on specific and systemic concerns, but it must be done in a manner that seeks to eliminate arbitrary and uneven implementation.

Discussion

The ODAC/OSI study findings prompted several comments on the importance of understanding what record and information management systems were being employed and how they could be improved. If these systems are not enhanced, especially within government departments and agencies, PAIA will remain a costly, onerous burden. This shortcoming is reflected in the difficulties of securing the development of information manuals that must be submitted to the South African Human Rights Commission. The manual is designed as part of efforts to improve information management, but it is not possible to secure greater adherence to the process with the absence of sanction, remedial mechanisms and powers of intervention. It remains unclear just how many public entities have failed to finalize their PAIA manuals for submission to the SAHRC despite the Department of Justice's continued extension of the deadlines for submission. The ODAC/OSI study found that about 50% of government bodies had not completed their manuals, indicating that compliance levels are disturbingly low.

The SAHRC's capacity to engage with such a widespread problem is limited. With a staff of under ten and a limited budget, the PAIA unit has tried to ensure that issues are 'mainstreamed' through various programmes - advocacy, training, legal and monitoring.

There is some contention as to whether the SAHRC should be engaged in the manual process. There have been very few requests for manuals from the public, and the costs of establishing an accessible repository seem to outweigh the benefit of having one. It was suggested that alternative sources and options could be developed.

Concerns about the role and rights of victims and survivors of past repression were also raised, and participants felt more attention was needed to address issues of privilege and bias around access to information, and privacy protections in relation to these groups.

Texts from the Conference

Session 3, 16th October 2004
University of Witwatersrand
Johannesburg
South Africa

Session Three: Protecting Privacy

Protecting Privacy

The final session of the conference examined issues of protecting privacy and was chaired by **Mr. Rolf Sorensen** of SAHA. As with freedom of information, privacy considerations are a constitutional or statutory right in many dispensations. Privacy and information rights can be both competing and complementary. Neither are automatic grounds for exemption from the other and a range of difficult and contested issues arise when trying to balance the various considerations, especially when dealing with the past. There is an imperative to reveal the record, but the possibilities of excessive and unwarranted intrusion must be recognised. Considerate approaches that seek to place a proper context on the files and their content should be employed. In some situations it is necessary to assess available materials in circumstances where there has been a significant destruction of records. It must also be asked as to what extent such files should be used as a basis for getting at the truth. On the other hand, privacy protections can frustrate truth recovery efforts and have the effect of discouraging disclosure. Striking a realistic and defensible balance remains an ongoing challenge.

Professor Heinrich Fink, a former chancellor of the Humboldt University in Berlin, examined the role of universities and tertiary institutions in the GDR following the re-unification of Germany after October 1990. These establishments were caught in the midst of the post-unification purges as thousands were accused of previous involvement with the former security services. 70% of all East German scientists were sacked from their positions. This required a process of justification and calculated efforts were made to compare the GDR regime with the earlier Nazi past under the rubric of "the two German dictatorships". The comparisons are without meaningful foundations and the consequences of maligning the socialist experiment and broader ideology have had the effect of rendering Nazi fascism more acceptable.

It is important to remember that there was no display of public remorse in Germany about the systematic murder and abuse of Jews and others peoples that were subjected to Nazi atrocities. Rather, there was widespread complicity and acceptance of the need for deportations, forced labour camps and so on. After the war there was no effort to confront the realities of this past and to address the needs of the real victims and survivors. Many Germans felt themselves to be the victims of a Nazi government that had failed to deliver on its promises, and felt betrayed because their policies had resulted in the widespread destruction of property, infrastructure and loss of life. People who

were the direct victims of Nazi atrocities were only recognized as such in areas that were occupied by the Soviet Union. In areas occupied by the western allies many victims had great difficulty in being recognized.

The Nuremberg Trials resulted in a series of convictions of senior Nazis, but many sentences were commuted and subsequently amnestied. By 1949, the reality of two Germany's was already reinforced and the 'antifascist conception' of the GDR was already understood in the context of new 'communist' perpetrators. In the GDR the causes of the rise of fascism and war were identified first and foremost as being in the interests of big business and capital, which had led to a radical change in the ownership of arable land and the industrial means of production. After the war, in the east, the concept of people's property was introduced, but this was regarded in West German civil law as a fundamental violation of individual rights. Following re-unification there was a radical re-privatization campaign designed to reinstate old relationships of ownership and private property. All the records and files that documented the socialist structures changes were designated as documents of an 'illegal' state, even though the GDR had been a recognised member of the United Nations.

The manner in which the files of the former East German state and its secret police have been handled highlight the complexities of evaluating files. The opening of the files reflected the deep paranoia that permeated the State security services. The manner in which the files were decoded and interpreted however, reflects some of the ongoing challenges faced by the juridical re-unification of Germany. Experiences at the Humboldt University demonstrate the limitations and dubious nature of the assessments and judgements made about academics based on the information contained in Stasi files.

Many people were very close to the East German State, and many people contributed directly to what they perceived as a legitimate 'anti-fascist' option. In 1989 there was a genuine feeling within the east of possibilities for a freer socialist beginning. At Humboldt University, a roundtable was established with representation from the academic, staff and student body. A democratic model imported from Poland was employed, and Professor Fink was elected as moderator. This process laid the basis for democratic representation akin to the experiences of 1968. Fink was subsequently elected as Rector of Humboldt.

After re-unification, various civil society groups in Berlin demanded that all lectures at former East German universities should access their Stasi files and if necessary admit to any complicity. In 1991, Professor Fink applied for his

own file and subsequently received a “Persil” certificate that cleared him of involvement in any wrong doing. Every academic had to undergo an assessment, which could result in suspension and dismissal. Many of Fink’s colleagues at Humboldt and other institutions were affected in a process that did not include adequate checks and balances. About 15% of colleagues whose files were evaluated were dismissed for having Stasi connections. Not surprisingly, the one group of professionals that benefited from this process was the legal profession.

Despite being cleared by the Gauck evaluation committee, Fink was subjected to a public vilification campaign that prevented him from being re-elected as Humboldt’s Rector. Because of his previous position as Dean of the Theological Faculty he had met with a number of members of the GDR government. Details of these meetings were submitted to and recorded in the Stasi’s files. This provided an opening to smear Fink and elements in the media engaged in a campaign to discredit him, asserting that files had not been fully disclosed. Although his name was publicly cleared, the damage had been done. Fink was, however, able to continue contributing to the democratization process as a parliamentary candidate for the PDS. The question remained, however, as to what had been behind this slander campaign. Fink proposes it was aimed at undermining the democratic processes that unfolded at Humboldt under his Rectorship. It provided an example of how Gauck’s authority was abused and misused to undermine progressive elements from the east that presented a challenge to western hegemony. Issues of protecting his privacy were not considered, and the contents of files were not examined in their proper context, but on interpretations of selected portions of text. Under the guise of pursuing justice and accountability, particular agendas came to the fore that undermined those noble objectives.

David Banisar, the director of the Freedom of Information (FOI) Project at Privacy International set out some of the global trends emerging in relation to freedom of information.

Approximately half the world’s nations have either adopted (sixty countries) or are in the process of developing (forty countries) access laws, although these laws vary and in some places (i.e. Zimbabwe) they are little more than a façade.

In general, FOI laws provide a regulatory framework for the effective implementation of rights and responsibilities relating to access. These include first, the rights of individuals, organizations and legal entities to demand

information from public (and in some cases, private) bodies without having to demonstrate a legal interest and second, the responsibilities of public (and in some cases, private) bodies to provide information and the development of mechanisms to facilitate access, address appeals, and review decisions.

In instances of national security, international relations, personal privacy, commercial confidentiality, law enforcement etc. exemptions to disclosure may be employed. In some situations, such as that articulated by the Council of Europe, information should be made available, unless “there is an overriding public interest in disclosure”.

Most constitutions around the world recognize privacy as a fundamental human right. Exactly what constitutes privacy may vary and can be divided into several separate yet related concepts:

☒ Information privacy - often referred to as “data protection”, involves the establishment of rules governing the collection and handling of personal data such as credit, medical and government records.

☒ Bodily privacy - refers to the protection of individual and group physical selves against invasive procedures such as genetic testing, drug testing, cavity searches and so on.

☒ Communication privacy - covers the security and privacy of electronic and physical mail, telephones and other forms of electronic communication.

☒ Territorial privacy - addresses the parameters of permissible intrusions relating to workplace and environmental spaces, to searches, camera surveillance and so on.

About fifty countries have adopted data protection laws (country specific details are available on http://www.privacyinternational.org/phr). The most comprehensive laws oblige fair information practices relating to the collection, use and dissemination of personal information. Consequently, a number of best practices have been developed, which relate to issues of accountability, justification, consent, as well as the limited collection, use, disclosure and retention of personal information. In addition, they also address issues of accuracy, safeguards, openness, access and challenging compliance.

South Africa does not currently have a law on data protection, although the Law Commission is in consultation and is expected to complete its work at the end of 2005.

A central point of discussion relates to the definition of personal information, as a very broad definition can be misused as a cover to prevent access. Such actions abuse and discredit what is really intended by such protections and undermine notions of access to information.

There is not always a clear interface between FOI and Privacy laws in terms of what information should be protected. Not surprisingly conflicts have arisen in a number of circumstances, especially in relation to government officials acting in their capacity. Most countries recognize that privacy does not apply to official information. Levels of protection and privacy exemptions vary from country to country, with some FOI laws (i.e. UK, Romania, Croatia) referring to laws on data protection for the definition of personal information to be protected and the rules on its release. Other laws (i.e. Estonia) set out detail on the types of information that is to be protected. There is also considerable variance among countries regarding access to the personal information of deceased people. In the UK, no such protections exist, whereas in Canada and South Africa privacy protections fall away after twenty years.

Such considerations have an important bearing on initiatives designed to address past conflicts. There are a spectrum of experiences in this regard, and it is evident that the German law was one of the most open. In Czechoslovakia, an amended law allowed the government to publish the name of 77,000 informers on an official website. Similar efforts in Romania forced the Commission responsible for interrogating the files to close its doors. In Lithuania they introduced a lustration commission that was able to force public disclosure.

In these and other cases, the interaction between FOI and privacy laws necessitates the development of processes that ensure harmony. The general approach in countries with both laws is to apply the data protection act to requests for personal information by the individual and requests for information about other parties are handled by the Freedom of Information Act. In some jurisdictions requests can be made for personal information under both acts.

It is therefore important to minimize, where possible, conflicts between FOI and privacy interests. This requires the provision of an unambiguous definition of what constitutes private information, and reasonable limitations to be placed on what personal information can be collected and held by government departments. It is also important that persons providing personal information will be made aware that this will or will not form part of a public record and may require some form of consent. Certain categories of information may be

subject to limited disclosure, ensuring that it is used only for its intended purpose. Personal information can also be masked allowing for the utilization of other related information for evaluation of statistical purposes. In South Africa, for example, a detailed examination of the TRC database remains a practical option as personal details can be masked to protect confidentiality.

The public interest test is one of the most effective ways to ensure that personal information be released. If the information is determined to be private and would cause harm if released, it can be revealed if the public interest is more important than the privacy interest. Such a test requires an independent arbiter (i.e. court, ombudsman etc). Such bodies exist in some jurisdictions (i.e. New Zealand and Canada) to deal with the specific requests. In others (i.e. UK, Estonia), a single body that reviews both FOI and privacy considerations has been established.

When dealing with the activities of a former authoritarian and repressive regime it is necessary to recognize that certain access and privacy issues are likely to be hotly contested. It is critical to avoid the destruction of files, as this will undermine the development of history and can create problems at a later stage, as shards of the past resurface from the 'private collection' of individuals. Withholding files from the public can result in embarrassing and problematic 'leaks'.

There is no template on how best to proceed, although a principled commitment to openness and the progressive release of information is necessary. Where possible this commitment to transparency and access to records should be demonstrated by governments, and should include efforts to declassify documents, which can involve varying levels of disclosure. Privacy provisions remain important and necessary, but they can be manipulated and misused. There is no simple solution, but employing "clear definitions in legislation, guidelines, techniques and oversight bodies" could alleviate many difficulties.

Professor Iain Currie from the University of Witwatersrand has been a member of the South African Law Commission's committee examining the development of data protection provisions. Currie looked at the difference the introduction of such a law might have in terms of the potential conflicts between and complementarities of FOI and privacy considerations in the South African context.

South Africa has constitutional rights of access to information (Section 32) and privacy (Section 14). There is no hierarchy of rights and any conflict should be

avoided by an interpretation of these rights. If conflict is unavoidable, a balance should be struck that will involve compromise.

Conflicts will arise in terms of informational privacy (i.e. individual's interest in controlling the acquisition and subsequent handling of information about themselves). With no data protection laws, PAIA is the main legislative source of protection for information privacy, as PAIA regulates the disclosure of existing records, but places no restrictions on the creation of records.

PAIA regulates access to information on request, and acts essentially as a dispute resolution mechanism between information-seekers and information-holders over access to information. PAIA does not regulate the processing of information outside the context of a request, and does not prohibit the disclosure of personal information to a third party unless that information has been requested in terms of the Act. PAIA provides for refusing requests for disclosure if it involves unreasonable disclosure of personal information about a third party. Disclosure outside of the context of PAIA in certain circumstances can be an infringement of common-law rights of privacy - and as such can protect disclosure of files and documents relating to complicity in malevolent structures and activities.

The right to privacy can be relinquished, but in the absence of clear data protection rules, FOI imperatives must yield to privacy considerations unless there is a compelling and overriding public interest in the information. This might include, for example, information about a serious breach of the law or a serious and imminent environmental risk, and if the public interest in disclosure outweighs the interests protected by the grounds for refusal.

While disclosure of personal information is prohibited in most cases, in some cases it is not. Indeed, not all disclosures of personal information violate the right to privacy, and even if it does, in some situations the limitation of privacy rights might be justifiable in order to protect important interests, including the right of access to information.

At the heart of this debate is the development of an understanding of privacy. At present there is no clear agreement on what privacy means. Currie suggested a definition that any violation of privacy would occur with the disclosure of personal facts that the individual has willed to be excluded from the knowledge of outsiders.

Privacy legislation would ensure the regulation of acquisition and subsequent

handling of personal information, and in so doing would provide a powerful complement to PAIA. Unlike PAIA, however, it will regulate the collection of personal information. A new law would not resolve the tensions and contradictions between FOI and privacy considerations, but would reinforce the notion that freedom of information must yield to personal privacy considerations unless there is a compelling and overriding public interest in the information. This underscores the importance of having a statutory body such as an Information Commission, which has been recommended by the Law Commission's committee. The creation of such a Commission with individual dispute resolution powers to enforce the informational privacy rights created by the legislation will be an important procedural reform.

Anita Kleinschmidt, from the Bioethics Division of the Faculty of Health Sciences at the University of Witwatersrand looked at some of the practical issues relating to issues of HIV/AIDS and privacy, which remain at the cutting edge of the privacy debate. This has particular relevance in the context of the pandemic affecting South Africa.

A key issue in this regard is whether there is an obligation on medical professionals to disclose a patient's HIV status to the patient's partner if the patient refuses to make such a disclosure him or herself. This is not a straightforward issue, especially when it relates to gendered power relations or when disclosure could increase levels of vulnerability, stigma and discrimination.

Medical professionals are guided by doctor-patient privilege, but there are limitations on this privilege, particularly if required to contain the spread of highly contagious diseases. In this regard, compulsory notification, mandatory testing and even quarantine might be required. As such, doctors must be guided by the necessity of protecting a third party that is in risk.

In the South African context there is not much guidance available, and decisions are left to individual doctors. There is, however, a procedure to follow, should the doctor elect to disclose against the wishes of the patient. In such cases, doctors are expected to advise the patient that this will be done and to offer to assist with the disclosure process. This is particularly difficult in a context where social norms around disclosure are affected by a range of variables outside of the control of the medical practitioner.

Case law regarding disclosure is limited in South Africa, although one doctor was legally sanctioned for disclosing his patient's HIV/AIDS status to other

colleagues while out at a social occasion. In this matter (*Jansen versus Vurren versus Kruger, 1993*), the court found that this disclosure was not justifiable, but that it would be "lawful to publish a statement in the discharge of a duty or the exercise of a right of a person who has a corresponding right or duty to receive it". As such, the duty may be legal, social or moral. In this case, there was no social or moral duty to disclose the patient's status as there was no risk for the doctor's colleagues. In addition, the patient should have been informed of the doctor's obligation to make the disclosure, thereby affording the patient an opportunity to say why the disclosure should not be made.

As we have seen, privacy rights are provided for in Section 36 of the South African Constitution. They are not absolute and may be limited in terms of the law of general application. This provides some scope for interpretation, and therefore a defence to the disclosure to a partner in risk. While this gives some room for maneuver, it leaves unanswered a number of pertinent questions, such as whether there can be a defence to non-disclosure to a partner in risk (i.e. do resource restrictions count?), whether there should be an obligation on medical professionals to disclose in these circumstances and to whom they are obliged to disclose.

Concluding Remarks

Sello Hatang, the director of SAHA, provided an overview of the basic themes and numerous sub-issues that had arisen during the conference.

It is important to recognize that there are ongoing differences concerning what should be revealed about repressive pasts and how this should be done. This is closely tied to the contested notions of accountability, justice and reconciliation. History does not present us with finality and absolute truth but must be an ongoing interrogation in which the disclosure of information and documentation plays a vital and stimulating role. The authorities decision not to release certain information will remain a permanent unless debates and discussions continue in an effort to establish criteria for what can be released, and what is withheld and why.

The Conference also highlighted the imperative of individual fairness - whether alleged perpetrator or victim - in dealing with past information and documentation. Particular concerns were raised about the unreliability of information contained in security service files. Concerns have also been raised about the inconsistent manner in which disclosure issues have been handled, the impact of bias, secrecy and deliberate smears. This highlighted the important role that can be played by archivists and others engaged with securing official records.

The conference highlighted a range of basic implementation problems relating to FOI legislation. In South Africa, this is best illustrated by the difficulties associated with compliance and monitoring of the PAIA manual production. Resource restrictions and the absence of effective information management raised the importance of ensuring that there is adequate capacity to support the implementation of legislation.

Although formal responsibility for monitoring PAIA compliance lies with the SAHRC and the Department of Justice, there are a host of legitimately contested areas of debate, which necessitate the inclusion of a broader cross-section of government and civil society components. Civil society has a central role to play in facilitating this debate.

Despite the potential of PAIA, lack of compliance has rendered the legislation impotent in many areas. The absence of enforcement mechanisms has allowed many government agencies to pay little or no attention to their obligations and access remains extremely problematic. This is illustrated in the findings of the

ODAC/OSI study. The situation demands for the institution of an accessible, efficient and authoritative dispute resolution mechanism that would avert having to seek remedy through the courts. A strategic approach that tests and helps to develop the parameters and core content of the Act is necessary - testing legislative requirements, such as the stipulation that reasons must be supplied for non-disclosure.

The conference has highlighted the importance of developing a regime of sound record-keeping and management in accordance with the importance of monitoring the implementation of PAIA. Better record-keeping would enable agencies to make informed decisions with respect to voluntary disclosures, and assist the SAHRC to make a more informed analysis as part of its monitoring efforts.

More attention must be paid to the issue of privacy and its role in and relationship to the access to information debate. The conference has highlighted the importance of ensuring that efforts to secure retrospective justice and accountability are based on sound and defensible methodologies and not the cause of further violation. Part of this process requires the sensitive and fair handling of documentation and records. Privacy concerns should not be a basis on which to stymie effort to secure accountability. In the shadow of prospective draft privacy legislation, it is important that a wider debate is stimulated to explore and interrogate these issues. The South African and German experiences may be incomparable in many ways, but the conference has demonstrated that there are similar concerns and expectations and that there is still much more to be done to secure the progressive release of information and development of effective and defensible processes.

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