

**THE CONTRIBUTION OF LEGAL FRAMEWORKS ON ACCESS TO INFORMATION
TO SOCIO-ECONOMIC PROGRESS IN AFRICA: CASE STUDIES OF NIGERIA,
SOUTH AFRICA AND UGANDA**

By

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DECLARATION

I, Ololade Olakitan Shyllon declare that this thesis is my original work and that it has not been previously submitted by me for the award of a degree at any other university or tertiary institution.

Signed

Date

DEDICATION

This work is dedicated to my Almighty Father.

To you I owe all I am and all I will ever be.

You are the wind beneath my wings.

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Above all, thank you Lord because indeed 'the end of a thing is better than its beginning'. (Ecclesiastes 7:8)

SUMMARY

The wanting state of socio-economic development in Africa is well documented. The regrettable paradox is that, with the abundance of natural resources in the form of mineral deposits, arable land and human resources, most African States are well placed to ensure a the standard of living necessary for a dignified life for its people. However, corruption, bad governance, lack of transparency and accountability continue to deprive most on the continent of their basic socio-economic needs.

Although not explicitly provided as a right in any of the international human rights instruments, access to information has come to be recognised internationally as a right, separate and distinct from the right of freedom of expression from which it originates. As a result, African States are increasingly adopting legal frameworks to give effect to this right within their domestic legal systems. This thesis adopts a descriptive, analytical and qualitative case study approach in demonstrating the utility of the constitutional, legislative and alternative generic frameworks on access to information in contributing to socio-economic progress. Using Nigeria, South Africa and Uganda as case studies, empirical evidence is provided of the enabling role of access to information in improving socio-economic progress in Africa.

Despite the general historical deficiencies in their development and implementation in Africa, the combination of constitutional provisions and specific legislation on access to information, provide the best domestic legal framework for the effective domestic implementation of the right of access to information. Furthermore, beyond successful reliance on these legal frameworks, socio-economic progress can only be attained with the strategic use of information so acquired. However, given that majority of African States have neither of these frameworks, the use of alternative legal frameworks such as those on public procurement, environmental impact assessment and anti-corruption should continuously be explored and exploited as viable alternatives. To achieve more widespread and impactful contribution of access to information on socio-economic progress in Africa, this thesis recommends not only increased efforts towards the adoption and effective implementation of all three layers of legal frameworks but also calls for reinvigorated civil society efforts focusing on strategic advocacy, litigation, capacity building and collaboration.

LIST OF ABBREVIATIONS AND ACRONYMS

ABM	Abahlali BaseMjondolo (Shack Dwellers)
ACHPR	African Commission on Human and Peoples' Rights
ACODE	Advocates Coalition for Development and Environment
ADB	African Development Bank
AESNP	AES Nile Power
AMSA	Arcelor Mittal South Africa
APAI	African Platform on Access to Information
APRM	African Peer Review Mechanism
ATI	Access to Information
ATIP	Access To Information Plan
ATIA	Access to Information Act
AU	African Union
BAR	Basic Assessment Report
BEL	Bujugali Energy Limited
BDC	Bushenyi District Council
BMPI	Budget Monitoring and Price Intelligence Unit
BPP	Bureau of Public Procurement
CAO	Chief Administration Officer
CCB	Code of Conduct Bureau
CDC	Constitution Drafting Committee
CEDAW	Convention on the Elimination Against Women
CEHURD	Centre for Health Human Rights and Development

CER	Centre for Environmental Rights
CESCR	Committee on Economic Social and Cultural Rights
CISLAC	Civil Society Legislative Advocacy Centre
CLO	Civil Liberties Organisation
CMG	Community Monitoring Group
CODESA	Convention for a Democratic South Africa
COFI	Coalition on Freedom of Information
COMESA	Common Market for Eastern and Southern Africa
CPAR	Country Procurement Assessment Report
DAEA	Department of Agriculture and Environmental Affairs
EAC	East African Community
EAP	Environmental Assessment Practitioner
EBSU	Ebonyi State University
ECHR	European Court on Human Rights
ECOSOC	Economic and Social Council
ECOWAS	Economic Community of West African States
EEDC	Enugu Electricity Distribution Company
EFFC	Economic and Financial Crimes Commission
EIA	Environmental Impact Assessment
EITI	Extractive Industries Transparency Initiative
ELAW	Environmental Law Alliance Worldwide
EMPr	Environmental Management Programme
FCT	Federal Capital Territory

FOI	freedom of information
FOIA	Freedom of Information Act
GM	Genetically Modified
GMO	Genetically Modified Organisms
GPA	Global Political Agreement
HDI	Human Development Index
HIM	Hub for Investigative Media
HURINET-U	Human Rights Network Uganda
IACHR	Inter-American Court on Human Rights
IAJC	Inter-American Juridical Committee
ICCPR	International Covenant on Civil and Political Rights
IDP	Integrated Development Plan
IG	Inspectorate of Government
IGG	Inspector General of Government
JCPC	Judicial Committee of the Privy Council
LRA	Lord's Resistance Army
MOU	Memorandum of Understanding
MPNP	Multi-Party Negotiating Process
MRA	Media Rights Agenda
NAPE	National Association of Professional Environmentalists
NCPP	National Council on Public Procurement
NDA	National Department of Agriculture
NEPAD	New Partnership for Africa's Development

NRA	National Resistance Army
NRC	National Resistance Council
NRM	National Resistance Movement
NUJ	Nigerian Union of Journalists
NULAI	Network of University Legal Aid Institutions
NUSAF	Northern Uganda Social Action Fund
OAS	Organisation of American States
OAU	Organisation of African Unity
ODAC	Open Democracy Advice Centre
OSJI	Open Society Justice Initiative
PAIA	Protection of Access to Information Act
PSA	Production Sharing Agreement
PPA	Power Purchase Agreement
PPC	Procurement Planning Committee
PPDC	Public and Private Development Centre
SACM	Social Accountability and Community Monitoring
SADC	Southern Africa Development Community
SAHA	South African History Archive
SAHRC	South African Human Rights Commission
SBC	Save Bujugali Crusade
SDCEA	South Durban Community Environmental Alliance
S&EIAR	Social and Environmental Impact Assessment Report
SLA	Service Level Agreement

TAAC	Transparency, Accountability and Anti-Corruption
UBEC	Universal Basic Education Commission
UBEB	Universal Basic Education Board
UEB	Uganda Electricity Board
UETC	Uganda Electricity Transmission Company
UDHR	Universal Declaration of Human Rights
UDN	Uganda Debt Network
ULC	Uganda Land Commission
ULF	Uganda Land Fund
UN	United Nations
UNCAC	United Nations Convention Against Corruption
UNEP	United Nations Environmental Programme
UNICTRAL	United Nations Commission for International Trade Law
UCC	Uganda Constitutional Commission
UPC	Uganda Peoples Congress
WHO	World Health Organisation
UNDP	United Nations Development Programme
VIP	Ventilated Improved Pit
VEJA	Vaal Environmental Justice Alliance
WAEMU	West African Economic Monetary Union

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CHAPTER ONE: INTRODUCTION

1.1 Background to the study

Access to information (ATI), commonly referred to also as 'freedom of information', the 'right to information' or the 'right to know', is an invaluable component of democracy. Access to information goes a long way in ensuring transparency and accountability of elected representatives and ensuring public participation in the planning and implementation of government policies affecting the day to day life of citizens. It is a tool for combating arbitrary exercise of government power, corruption and mismanagement of national resources and in ensuring that in all its dealings, governments act 'rationally and with due deliberation'.¹

According to Jody Kollapen:

The Right to Information is not something that lives in the air, or something that thrives within Academia, but in the day-to-day lives of citizens and in the important decisions they take around bread and butter issues. Access to credible, reliable and accurate information is so important in the kind of decisions they make. Not just decisions about the kind of government they want, but decisions about the kind of house they want, the kind of education for their children, the kind of accountability they are entitled to demand from local government officials and elected representatives.²

The importance of the right of access to information in any society is underpinned by the fact that it is a cross-cutting right, in that it is interconnected with all other human rights, whether civil and political or economic, social or cultural.³ Thus, access to information is at the core of the human rights system because it enables citizens to more meaningfully

¹ Currie, I. and De Waal, J. (2005) *The Bill of Rights Handbook*, South Africa: JUTA, 684.

² This statement was made by Jody Kollapen, then Chairperson of the South African Human Rights Commission, at a conference on the South African protection of Access to Information, held in May 2003 in South Africa. Quoted by Klaaren, J. in 'A Second Look at the South African Human Rights Commission, Access to Information, and the Promotion of Socioeconomic Rights' (2005) 27 *Human Rights Quarterly* 539. The meeting took place in May 2003.

³ Odinkalu, C. 'Implementing economic, social and cultural rights under the African Charter on Human and Peoples' Rights' in Evans, M. and Murray, R. (eds) (2002) *The African Charter on Human and Peoples' Rights: The system in practice, 1986 – 2000* United Kingdom: Cambridge University Press.

exercise their rights, assess when their rights are at risk and determine who is responsible for any violation.⁴

For many, access to information is viewed not necessarily as a right in itself but a component of the right to freedom of expression. This position is supported by the fact that the closest reference to information as a 'right', i.e. the right to 'seek, receive and impart information' is contained in freedom of expression guarantees in international and regional human rights treaties.⁵ This is equally the case with the vast majority of Constitutions of African states and beyond, which at the very least creates a connection between these two rights.⁶

However, the right to freedom of expression as provided in international human rights law comprises two aspects: freedom of opinion, the right to hold opinion without interference and the freedom to seek, receive and impart information subject to the rights and reputation of others or the protection of national security, public order, public health or morals. In this sense, freedom of expression can be regarded as 'serving the private interests of the individual' allowing participation in public discuss by articulating views on issues affecting her personally or the citizenry in general.⁷

Access to information on the other hand is a much narrower concept, focusing on the right to access information held by government or public agencies in respect of individuals and government actions or policies.⁸ In essence, access to information is more than a

⁴ <http://www.humanrightsinitiative.org/programs/ai/rti/international/cw_standards.htm>.

⁵ Article 19(2) of the ICCPR provides that: "Everyone shall have the right to freedom of Expression; this right shall include the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any media of his choice".

Article 13 (1) of the American Convention on Human Rights states: "Everyone shall have the right to freedom of thought and expression. This right includes freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice".

Article 10 (1) of the European Convention of Human Rights provides that: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers".

⁶ See for example section 20 of The Constitution of Zambia 1991, which provides in the context of freedom of expression that 'the freedom to impart and communicate ideas and information without interference'.

⁷ Mason, A 'The Relationship Between Freedom of Expression and Freedom of Information' in Beatson, J. and Cripss, Y. (eds) (2000) *Freedom of Expression and Freedom of Information* Oxford: Oxford University Press, 225.

⁸Typically, access to information laws apply in respect of government-held information. However, there has been a recent trend of adopting access to information laws which also apply to private bodies. For example,

corollary of freedom of expression but ‘a right in and of itself’.⁹ Thus, access to information ‘occupies a special place in the human rights family. Without the transparency and accountability of public institutions which constitute a fundamental part of its core elements, the right to express and disseminate opinions for the purpose of ensuring good governance and strengthening democracy cannot be enjoyed in its totality.’¹⁰

Nowhere more than in Africa, a grossly underdeveloped continent, is an enforceable right of access to information necessary, especially in ensuring good governance through transparency, accountability and popular participation in the formulation and implementation of ‘bread and butter issues’ affecting the day to day lives of citizens. In establishing the New Partnership for Africa’s Development (NEPAD) over a decade ago to address the impact of poor socio-economic conditions on the continent, African leaders acknowledged that:¹¹

In Africa, 340 million people, or half the population, live on less than US\$1 per day. The mortality rate of children under 5 years of age is 140 per 1000, and life expectancy at birth is only 54 years. Only 58 percent of the population have access to safe water. The rate of illiteracy for people over 15 is 41 percent. There are only 18 mainline telephones per 1000 people in Africa, compared with 146 for the world as a whole and 567 for high-income countries.¹²

the South African Act applies to information held by any person where’ it is required for the exercise or protection of any rights’. The Liberian Freedom of Information Act 2010 expressly applies to public bodies ‘performing public functions and or public services’ and that ‘receive public funds or benefits of whatever nature. In Nigeria, the Freedom of Information Act 2011 applies to public institutions, which is defined to include ‘private companies utilising public funds, providing public services or performing public functions’.

⁹ See the Report of the UN Special Rapporteur on Freedom of Expression to the 56th Session of the Commission on Human Rights, 18 January 2000. E/CN.4/2000/63, page 15 and 16.

¹⁰ Activity Report of the Special Rapporteur on Freedom of Expression and Access to Information in Africa presented to the 44th Ordinary Session of the African Commission on Human and Peoples’ Rights, 10 – 24 November 2008, Abuja Nigeria. Available at <http://www.achpr.org/files/sessions/44th/inter-act-reps/104/freedom_of_expression.pdf> (accessed 24 November 2015).

¹² Paragraph 4, preamble to the New Partnership for Africa’s Development (NEPAD) Framework Document 2001. Available at <<http://www.nepad.org/nepad/knowledge/doc/1767/nepad-framework-document>> (accessed 24 November 2015). The NEPAD Declaration was adopted by the OAU (now AU) Assembly meeting in Zambia, July 2001 as the New African Initiative NIA and renamed New Partnership for Africa’s Development at the First meeting of the implementation Committee, in Nigeria, October 2001.

Regrettably, socio-economic conditions on the continent remain dire. Today, in sub-Saharan Africa, 41 percent of the population live on less than \$1.25 a day.¹³ Nearly 50 percent of women deliver children without skilled healthcare assistance.¹⁴ Half of the 3 million children under the age of five who died in 2015, were in sub-Saharan Africa, at a rate of 86 deaths per 1,000 live births.¹⁵ Thirty three million children, representing 58 percent of children of school-going age, are not enrolled in school.¹⁶ 66 percent of all AIDS-related deaths occur in Sub-Saharan Africa,¹⁷ where only 30 percent of children requiring antiretroviral drugs for HIV treatment receive it.¹⁸

Thus, despite efforts to transform Africa into a beacon of good governance, socio-economic conditions in Africa continue to be desperate, indicating that minimal progress has been made in infusing good governance practices into governance structures in Africa. The 2009 Africa Governance Report, which assessed progress on governance in Africa confirmed this. The report stated that the 'overall governance picture for Africa' is one of 'limited progress' and that 'there is a need to scale up efforts to improve governance in Africa, because good governance is central to economic development and to realising the Millennium Development Goals'.¹⁹ Admittedly, one-party systems have given way to multi-party democracies,²⁰ military dictatorships have become a thing of the

¹³ The Millennium Development Goals Report 2015 (MDG Report 2015) estimates that 41 percent of people in Sub-Saharan Africa live below the poverty line. While this shows a marked improvement from 57 percent in 2009 and 47 percent in 2011, this level of poverty remains unacceptably high. See 'Millennium Development Goals Report 2015', page 16. <[http://www.un.org/millenniumgoals/2015_MDG_Report/pdf/MDG%202015%20rev%20\(July%201.pdf](http://www.un.org/millenniumgoals/2015_MDG_Report/pdf/MDG%202015%20rev%20(July%201.pdf)> (accessed 24 November 2015).

¹⁴ MDG Report 2015, n.13 above, 41. See also World Health Organisation (WHO) World Health Statistics 2015, page 18. Available at <http://apps.who.int/iris/bitstream/10665/170250/1/9789240694439_eng.pdf?ua=1&ua=1> (accessed 24 November 2015).

¹⁵ 'MDG Report 2015 (n 13 above) 35.

¹⁶ As above, 27.

¹⁷ UNAIDS Fact Sheet 2015, 2. Available at <http://www.unaids.org/sites/default/files/media_asset/20150901_FactSheet_2015_en.pdf> (accessed 20 December 2015).

¹⁸ As above, p 8

¹⁹ See African Governance Report II, 2009. Available at <<http://www.uneca.org/ecaresources/Publication/s/books/agr2/AGR2-English.pdf>> (accessed 29 December 2015).

²⁰ Over 40 African States practiced one party system immediately after independence. Examples include Benin (1975-1990), Egypt (1953-1976), Tanzania (1977-1992), Togo (1962-1991) Uganda (1969-1971), and Zambia (1972-1990). All these countries have since transformed to multi-party 'democracies' with the exception to this being Eritrea, where the Peoples Front for Democracy and Justice (PFDJ) has continued to rule the country since 1993.

past,²¹ and overwhelming continental preoccupation with the consolidation of independence, and neo-colonialism²² has been exchanged for an emphasis on democracy, human rights and sustainable development in Africa. However, steps towards achieving good governance by most African States have been largely superficial.²³ As a result, socio-economic progress has been weak.

In line with the general recognition of access to information as an important element of transparency, accountability and the prevention of corruption and mismanagement of national resources, there is an increasing realisation of the unique opportunities that access to information presents for States in achieving socio-economic progress. Numerous cases exist of the use of access to information as a tool for improving socio-economic conditions around the world.²⁴ Ranging from uncovering corruption by government-approved shops in the allocation of food rations for the poor in India, the revelation of corruption in public schools in Serbia and the uncovering of inaction by local

²¹ Between 1956 and 1985, there were 60 successful coups in Africa. See Hutchful, E. 'Reconstructing Political Systems: Militarism and Constitutionalism' in Shivji, I. (ed) *State and Constitutionalism: An African Debate on Democracy*, Harare: SAPES. Today, there is no existing military dictatorship in Africa, although previous military rulers have metamorphosed into civilian leaders. An example is President Yahya Jammeh of The Gambia who has ruled The Gambia for almost 20 years, after taking over power in a July 1994 military coup.

²² This is reflected in articles 2 (purposes) and 3 (principles) of the 1963 Charter of the Organisation of African Unity (OAU). As one writer observed, the OAU was at its inception mainly concerned with the 'fragility of new states' and the 'emancipation of the continent's liberated colonies'. Thus, 'the emphasis of the OAU over the first twenty years of its existence was political liberation, inter-State conflict resolution and State-oriented economic co-operation and development. In the last decade of its existence, from the early 1980's to the 1990's this focus narrowed to the twin phenomena of Namibian independence and the liberation of apartheid South Africa. See Oloka-Onyango, J. 'Beyond the Rhetoric: Reinvigorating the Struggle for Economic and Social Rights in Africa' (1995) 26 *California Western International Law Journal* 53.

²³ See for example Mbazira, C. 'Dream Deferred? Democracy and Good Governance: An Assessment of the Findings of Uganda's Country Self-Assessment Report under the African Peer Review Mechanism, HURIPEC Working paper No.19, October 2008. Available at http://www.huripec.mak.ac.ug/working_per_19.pdf (accessed 4 December 2015). In this paper, the author concludes that the present Ugandan government in its Self-Assessment was only able to record marginal progress when assessed in comparison with previous dictatorial regimes of Milton Obete and Idi Amin, adding that, 'the problem of incumbency still afflicts the country, being run by a political party and president not about to relinquish power through peaceful means. The rule of law has been relegated to the background and the country is facing unprecedented levels of interference in judicial functions'.

²⁴ See *Our Rights, Our Information: Empowering People to Demand Rights Through Knowledge*, 2007, 55-61. Available at < http://www.humanrightsinitiative.org/publications/rti/our_rights_our_information.pdf > (accessed 5 January 2015). See also *Access to Information: An instrumental right for empowerment* July 2007. Available at <http://www.humanrightsinitiative.org/publications/rti/our_rights_our_information.pdf> (accessed 22 January 2015), pages 17-20.

government despite suspected bid-rigging in local government projects in Japan.²⁵ Other examples include the provision of safe drinking water and housing for villagers of the Ntambanana Municipality and shack dwellers, in KwaZulu-Natal, South Africa,²⁶ and the successful fight for an equal right to education in Thailand.²⁷

A common feature of these instances in which access to information has been successfully utilised for realising socio-economic progress, is the existence of domestic legal frameworks in the form of constitutional provisions guaranteeing access to information as a human right, and/or specific laws laying down the processes and procedure for requesting access to information. Presently in Africa, only 13 countries have specific constitutional provisions on access to information,²⁸ while 18 have adopted specific legislation laying down the process for enforcing the right of access to information.²⁹

Thus, the opportunities for utilising access to information laws to facilitate a real improvement in socio-economic conditions in Africa, through existing legal frameworks is greatly limited. However, there is also growing awareness of the availability of alternative generic normative and institutional frameworks which facilitate access to information and

²⁵ 'The World's First Freedom of Information Act: Anders Chydenius Legacy Today' Ander Chydenius Foundation Publication 2. Available at <http://www.chydenius.net/pdf/worlds_first_foia.pdf> (accessed 28 December 2014).

²⁶ See Dimba, M. 'Access to Information as a Tool for Socio Economic justice'. A presentation on behalf of the Open Democracy Advice Centre on the occasion of the international conference on the Right to Public Information organised by the Carter Centre, 26-29 February 2008, Atlanta, Georgia. Available at <<http://www.pambazuka.net/en/category.php/comment/47179>> (accessed 20 September 2014), 7.

²⁷ As above, 5. See also 'Our Rights, Our Information: Empowering People to Demand Rights Through Knowledge', 2007, 55-21. Available at <http://www.humanrightsinitiative.org/publications/rti/our_rights_our_information.pdf> (accessed 20 September 2014), 61-63.

²⁸ See generally Chapter 3. The Constitutions of Egypt (article 47), Ethiopia (section 29(5)), Kenya (section 52), Malawi (section 37), Morocco (article 27), Niger (article 31), South Africa (section 32), Uganda (section 41) and Zimbabwe (section 62) explicitly provide for the right of access to information held by government and/or private bodies. However, many other constitutions provide for the 'right to seek, receive and impart information' or for 'the right to information' usually as components of the right to freedom of expression.

²⁹ These are Angola, Ethiopia, Côte d'Ivoire, Guinea, Kenya, Liberia, Mozambique, Niger, Nigeria, Rwanda, Sierra Leone, South Africa, South Sudan, Sudan, Togo, Tunisia, Uganda and Zimbabwe. Although these 18 laws are generally listed as the existing access to information laws on the continent, some of them have been widely criticised as doing little to facilitate access to information and a least one, as actually curtailing rather than promoting access to information.

can therefore be utilised for the realisation of socio-economic progress generally and especially in Africa.

It is against this background that this research examines the actual and potential contribution to socio-economic progress of legal and alternative frameworks on access to information in Africa, using Nigeria, South Africa and Uganda as case studies. The totality of factors that facilitate or hinder the extent of such contributions are also considered.

1.2 Research questions

The central argument of this study is that the constitutional provisions and specific legislation guaranteeing the right of access to information, as well as alternative normative and institutional mechanisms which facilitate access to information, have contributed and can further contribute to socio-economic progress in Africa.

The objective of this study is thus two-fold. First, it seeks to examine the actual and potential impact of existing constitutional and legislative frameworks related to access to information on socio-economic progress in Africa. Second, the study explores the impact of generic normative standards and institutional mechanisms that facilitate access to information, though not specifically established for that purpose, which have been or could be utilised for achieving socio-economic progress on the continent.

In summary, the research question is: What is the actual and potential contribution of relevant laws and legal institutions on access to information, to socio-economic progress in Africa? In answering this question, the study investigates three case studies, in order to answer the following specific questions:

1. Can access to information properly be regarded as a right within international human rights law? If so, are there any universally accepted normative standards embodying the right of access to information?
2. To what extent is access to information a constitutionally recognised right in Africa? What is the 'added advantage' of including access to information as a constitutional guarantee? Has the inclusion of the right of access to information as a constitutional guarantee contributed to socio-economic progress in Nigeria, South

Africa and Uganda? If so, what are the factors that enhance or restrict this contribution?

3. What role does the adoption of access to information legislation play in the promotion and protection of the right of access to information in Africa? Have specific legislation on access to information made any actual contribution to socio-economic progress in Nigeria, South Africa and Uganda? What factors enhance this contribution? In what other ways can such legislation be better utilised to further contribute to socio-economic progress in Africa?
4. Are there alternative normative standards or institutional legal frameworks that are generic in nature, which can potentially and actually facilitate access to information in Africa? Have any of these mechanisms contributed to socio-economic progress in Nigeria, South Africa and Uganda? If so, what are the factors that enhance the contribution of these frameworks to socio-economic progress?

1.3 Clarification of terminology

Arising from the research questions, the following terms require clarification, to explain how they are used in this study:

‘Contribution’

Contribution is defined by the Oxford Dictionary as ‘the part played by a person or thing in bringing about a result or helping something to advance’. On its part, the Macmillan Dictionary defines contribution as ‘something that you do to achieve something or to make it successful’. From the ordinary meaning of the word, therefore, this study uses the word ‘contribution’ to denote all possible ways in which the norms and legal frameworks on access to information under consideration by this research, can ‘help the advancement of’ or ‘assist with achieving’ socio-economic progress in Africa.

This definition is adopted after careful consideration, bearing in mind the fact that the socio-economic development of any nation is dependent on a variety of economic, political, social and other factors, and as such, legal frameworks on access to information -- no matter how well formulated or effectively implemented -- cannot in isolation provide a complete solution to the socio-economic problems facing Africa. The ‘contribution’ of

the relevant norms and legal frameworks thus has to be understood not in isolation but as framed and influenced by social, political and economic factors.

The use of the term ‘contribution’ also does not suggest that a direct causal connection is postulated between access to information and socio-economic progress or that access to information provides a direct linear advancement towards socio-economic progress. Rather, laws and institutional frameworks on access to information are treated as part of a series of factors with the potential to advance socio-economic progress.

‘Socio-economic progress’

The Oxford Dictionary defines ‘progress’ as ‘forward or onward movement towards a destination’ and ‘development towards an improved or more advanced condition’. Similarly, the Cambridge Dictionary defines ‘progress’ as ‘movement to an improved or more developed state’ or ‘to a forward position’. Thus, in the context of socio-economic conditions, the ‘socio-economic progress’ to which this study refers, is to any activity which works towards an improvement or advancement of socio-economic conditions for individuals, communities, or nations as a whole. Thus, the use of this expression embraces not only all measures that may result in the better realisation of socio-economic rights, but also those that merely mark some positive improvement or advance socio-economic conditions of persons, groups of persons or of a country as a whole.

As with ‘contribution’, the term ‘socio-economic progress’ is consciously utilised in this study following careful consideration. In this context, the term includes improvements in respect of well-established socio-economic rights such as health, housing and education. However, ‘socio-economic progress’ is also used to encompass a positive impact on broader socio-economic concepts such as life expectancy and income, which are commonly used indicators in measuring socio-economic development. However, unlike socio-economic development, ‘socio-economic progress in this thesis’ does not presuppose a well thought out or comprehensive process of positive socio-economic change. In other words, this thesis engages with socio-economic development in terms of its substantive rather than procedural aspects.

Ultimately, the term ‘socio-economic progress’ is used to highlight any improvement, no matter how small, to the socio-economic conditions of selected individuals or groups through a reliance on access to information.

1.4 Significance of study

This research is significant in that it goes beyond providing theoretical links between an enforceable right of access to information and the improvement of the dire socio-economic conditions in Africa, to identifying specific instances in which the implementation of existing frameworks on access to information has resulted in socio-economic progress on the continent. Drawing on case studies from Nigeria, Uganda and South Africa, this study undertakes an analysis of the various factors which have accounted for the successful contribution or otherwise of access to information frameworks to socio-economic progress in Africa. In doing so, past and potential pitfalls are highlighted, which would guide other African States considering or in the process of adopting constitutional provisions, legislation and any other frameworks on access to information. The study also provides empirical evidence, based on the case studies, of the actual contribution of the law on access to information to socio-economic progress in Africa; as well as insight into the conditions under which these contributions become optimal.

Furthermore, this study demonstrates that beyond the constitutional protection of and adoption of access to information laws, which are the frameworks typically considered necessary for the enforcement of access to information, various other laws and institutions can be utilised to access information for the improvement of socio-economic conditions in Africa. This is done to encourage access to information advocates across the continent to look beyond inadequate constitutional provisions on access to information or unsuccessful efforts to adopt ATI legislation, to identifying and exploiting other national laws and institutions giving effect to access to information and with that, socio-economic progress.

1.5 Research methodology

This study is based on the textual analysis of relevant primary sources and secondary sources through desktop and library research; case studies and unstructured qualitative

interviews. It must be emphasised that the aim of this study is not to comprehensively chart the impact of access to information on the continent, but only to better understand its impact on socio-economic conditions by reference to poignant information and examples.

Primary sources examined include constitutions, access to information-specific laws, generic laws that facilitate access to information, and judgements by courts relating to access to information. Secondary sources providing a background and context to these primary sources, as well as insight into their implementation, are also examined.

Case studies of three countries, Nigeria, South Africa and Uganda, are undertaken. These countries have been selected on the basis of the existence of the three different categories of legal frameworks under consideration, namely (a) constitutional protection of access to information; (b) laws specific to the enforcement of access to information; and (c) other laws and institutions that facilitate access to information, although they are not specifically or explicitly established for that purpose. In addition, the practical considerations of access to relevant primary and secondary sources as well as to information from relevant individual experts, civil society organisations and government institutions involved in the enforcement of the right of access to information in these countries, has also been a major consideration in their selection.

The case studies examining the use of the relevant legal frameworks in Nigeria, Uganda and South Africa is undertaken by way of (a) on-site visits to the three countries; and (b) unstructured face to face or telephonic interviews which are flexible and make use of open-ended questions to gain insight into the personal experiences of individuals and organisations involved in the implementation of the relevant access to information frameworks.³⁰ The aim of these visits and interviews was to obtain information which was otherwise unavailable in primary and secondary sources. The information gathered from these interviews served to increase the general understanding of various aspects of the research, as well as to provide concrete information on the use of the various legal

³⁰ See King, N. and Horrocks, C. *Interviews in Qualitative Research* (2010) Sage: London, 3. A full list of interviewees is provided in annexure 1.

frameworks on access to information for the realisation of socio-economic progress in each study country.

Thus, the on-site visits and selection of interviewees is based on the need to supplement existing information acquired through intensive research and the researcher's expertise on the subject matter, with the experiences of civil society organisations actively involved in utilising ATI laws for the improvement of socio-economic conditions. Another major practical consideration in identifying interview subjects, was their willingness and availability to partake in interviews during the scheduled on-site visits.

As a result, information such as that obtained from the Centre for Environmental Rights (CER) from the Department of Environmental Affairs (DEA) as a follow-up to successful litigation against ArcelorMittal South Africa (AMSA) on its Vanderbijl Park plant, is such that is not publicly available.

More generally however, South Africa and Uganda being countries that have had ATI laws for over a decade, provide more easily available secondary sources on the implementation of these laws and thus require less interviews compared to Nigeria which only adopted its law in 2011. Thus to fill the gap in literature, the research relies on interviews with two organisations in Nigeria actively utilising the FOI Act as a tool for accountability and transparency and also to build capacity of communities to utilise the Act through legal aid clinics across the country.

In conducting interviews, interviewees were briefed about the purpose of the interview and the nature of the research being conducted. Specifically, they were asked about their general experience with the implementation of the respective legal frameworks on access to information. Thereafter, the more specific question about experiences with the reliance on ATI laws for the furtherance of socio-economic progress are asked. Follow-up questions were then posed based on the responses obtained. It should be added that interviewees are also requested to provide, where available, documents and material in support of responses given in the course of the interview.

In terms of ethical considerations, in conducting the interviews, the research ensures that: there is full disclosure to interviewees about the objectives of the research and its future

publication as a thesis, no leading questions are posed; no relationship exists between the interviewer and interviewees capable of prejudicing the outcome of interviews. Finally, all efforts have been made to present the information gathered from interviews as accurately as possible.

With regard to the first and second research questions, an understanding of the background and context within which these legal frameworks have been adopted by South Africa, Nigeria and Uganda is undertaken through a literature review of secondary sources. A textual analysis of the relevant constitutional provisions and of the access to information legislation, as well as all other regulations, directives or guidelines that have been adopted pursuant to these laws in Nigeria, South Africa and Uganda is also done.³¹ This is carried out to identify the nature and scope of the right of access to information guaranteed, the extent to which they comply with international and regional standards on access to information, and to examine their propensity for facilitating socio-economic progress. Specifically, the preamble, principles and objectives of the laws are analysed to ascertain the extent to which they seek to contribute to socio-economic progress and whether such aspirations are reflected in and correspond with the substantive provisions of the legislation.

In addition to these intrinsic factors that have or could influence the effectiveness of these legal frameworks, other surrounding conditions which affect the extent to which constitutional provisions and access to information legislation facilitate socio-economic progress are considered. Factors such as access to justice, judicial attitudes and public education and awareness, are analysed in relation to each country of study. Overall, the lessons learnt from each case study is utilised in identifying how the potential of the

³¹ Since the adoption the Nigerian FOI Act in June 2011, the Attorney General has issued a circular to all government institutions and agencies on the implementation of the Act and the reporting requirements under the Act, as well as comprehensive guidelines on the Implementation of the Act in February and March 2012 respectively. See Guidelines on the Implementation of the Nigerian Freedom of Information Act 2011. Available at <http://r2knigeria.org/index.php?option=com_docman&Itemid=325> (accessed 10 June 2014). See also 'Implementation of the Freedom of Information Act 2011 and the Reporting Requirements Under Section 29 thereof' HAGF/MDAS/FOIA/2012/1. Available at <http://r2knigeria.org/index.php?option=com_docman&Itemid=325> (accessed 10 June 2014). In Uganda, the regulations required to bring the 2005 Access to Information Act was introduced in April 2011. Since the adoption of PAIA in South Africa in 2000, numerous regulations have also been introduced.

respective frameworks can be maximised for the improvement of socio-economic progress in these countries and in Africa as a whole.

Specific instances in which these constitutional provisions and legislation have successfully been utilised, resulting in socio-economic progress are also identified. This is done using a combination of information gathered from successful court cases based on the relevant constitutional provisions and legislation, individuals and organisations that have successfully utilised or generally monitor the implementation of these legal frameworks and institutions charged with monitoring their implementation in the countries of study. In this regard, interviews with litigants were conducted, where possible, to ascertain how these judgements have been enforced, and the actual impact this has had on the quality of lives of the individuals, groups or communities concerned. Information on other instances where these frameworks have successfully contributed to socio-economic progress without court action, was also sought mainly through interviews with individuals and organisations working on access to information and other relevant issues. Review of qualitative and quantitative data produced by organisations specialising in the enforcement of the right of access to information, as well as from reports of institutions mandated to monitor the implementation of the access to information legislation, is also undertaken.

In identifying generic non-access to information specific frameworks that can facilitate access to information in Nigeria, South Africa and Uganda under the fourth research question, reliance is placed on desk review of laws relating to transparency and accountability and those that seek to improve service delivery, strengthen democratic institutions and the rule of law.³²

A textual analysis of these laws reveals the extent to which the specific laws from these broad groups can contribute to socio-economic progress, further literature review and information gathered from individuals and organisations operating on these governance issues, as well as from officials of these institutions involved in the implementation of

³² This is based on the OHCHR's classification of four broad elements of good governance which facilitate human rights realisation. See Good Governance Practices for the Protection of Human Rights, Office of the United Nations High Commissioner for Human Rights, 2007. Available at <[http://www.ohchr.org/Documents/Publications/Good Governance.pdf](http://www.ohchr.org/Documents/Publications/Good%20Governance.pdf)>(accessed 24 November 2014).

these laws, assisted in identifying instances in which these laws have contributed to socio-economic progress. This information was also important in determining those factors that enhance the usefulness of these laws in improving socio-economic conditions in the relevant country of study.

1.6 Literature review

The United Nations (UN) as far back as 1946 stated that 'freedom of information is a fundamental human right and the touchstone for all freedoms to which the United Nations is consecrated'.³³ However, the right of access to information has only recently generated wide spread attention since the recent explosion of access to information laws around the world.³⁴ As a result, there has been a recent proliferation of literature on access to information especially in countries which have adopted access to information laws such

³³ Resolution 59(1), 65th Plenary Meeting of the United Nations General Assembly, 14 December 1946.

³⁴ 25 years ago, only about 20 countries had adopted access to information laws, today, there are over 90 Access to Information Laws in the world. See Overview of all 90 FOI Laws <<http://right2info.org/resources/publications/publications/Fringe%20Special%20-%2090%20FOIAs%20-%20sep%207%202009.pdf>> (accessed 20 December 2014).

as India,³⁵ South Africa,³⁶ Sweden,³⁷ United Kingdom,³⁸ and United States³⁹ and on the state of access to information in different continents such as Europe,⁴⁰ South America,⁴¹ and Asia.⁴²

Generally, the existing literature on access to information which is largely non-academic in nature,⁴³ deal with practical issues of implementation of access to information laws

³⁵ Mander, H. and Joshi, A. 'The Movement for Right to Information in India: People's Power for the Control of Corruption' Available at <<http://rtigateway.org.in/Documents/References/English/Reports/12.%20An%20article%20on%20RTI%20by%20Harsh%20Mander.pdf>> (accessed 20 December 2011); Roy, A. and Dey, N. 'The Right to Information: Facilitating Peoples' Participation and State Accountability' <<http://www.10iacc.org/download/workshops/cs54b.pdf>> (accessed 20 December 2014).

³⁶ See for example Klaaren J. 'PAIA Though the Courts: Case Law and Important Developments in PAIA Litigation' Available at <<http://www.opendemocracy.org.za/wp-content/uploads/2010/10/PAIA-Through-the-Courts-Case-Law-and-Important-Developments-in-PAIA-Litigation-by-Jonathan-Klaaren1.pdf>> (accessed 20 December 2014); Dimba, M and Calland R. 'Freedom of Information Law in South Africa: A Country Study'. Available at <http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_papers/southafrica/Calland%20&%20Dimba%20-%20FOI%20Country%20Study.pdf> (accessed 20 December 2014).

³⁷ See The World's First Freedom of Information Act: Anders Chydenius Legacy Today (n 25 above).

³⁸ See for example, *Freedom of Expression and Freedom of Information: Essays in Honour of Sir David Williams*, Beatson, J. and Cripps, Y. (eds) (2000) New York: Oxford University Press'. See also Freedom of Expression I: Official Secrets and Freedom of Information in 'Textbook on Civil Liberties and Human Rights (eight edition) (2010) New York: Oxford University Press. 'Town Hall Transparency? The Impact of the Freedom of Information Act on English Local Government' Available at <<http://www.ucl.ac.uk/constitution-unit/research/foi/foi-and-local-government/town-hall-transparency.pdf>> 'The Sword and the Shield: The use of FOI by Parliamentarians and the Impact of FOI on Parliament'. Available at <<http://www.ucl.ac.uk/constitution-unit/research/foi/foi-and-parliament/sword-and-the-shield.pdf>> (accessed 27 November 2014).

³⁹ Foerstel, T. *Freedom of Information and the Right to Know: The Origins and applications of the Freedom of Information Act* (1999) Westport: Greenwood Press; Davies, C.N and Splichal, S.L (eds) *Access Denied: Freedom of Information in the Information Age* (2000) Ames: Iowa State University Press.

⁴⁰ See 'Promoting Practical Access to Democracy: A Survey of Freedom of Information in Central and Eastern Europe' Article 19, 2002. Available at <<http://www.article19.org/data/files/pdfs/publications/freedom-of-information-survey-of-central-and-e.pdf>> (accessed 27 December 2014).

⁴¹ See Michener, R. 'The Surrender of Secrecy: Explaining the Emergence of Strong Access to Information Laws in Latin America. Unpublished PhD thesis, University of Texas at Austin, 2010. Available at <http://www.right2info.org/resources/publications/publications/Greg%20Michener_2010.pdf> (accessed 20 November 2014). See also Mendel, T. 'The Right to Information in Latin America: A Comparative Legal Survey' UNESCO, 2009. Available at <http://unesdoc.unesco.org/images/0018/0018_32/183273e.pdf> (accessed 5 February 2015).

⁴² *The Right to Know: Access to Information in South East Asia* Coronel, S. (ed) (2001) Philippines: Philippine Centre for Investigative Journalism, *Access to Information in South East Asia and Beyond*, Hamrell, S. and Nordberg, O. (eds) Development Dialogue Sweden: Motala Grafiska. Available at <http://www.dhf.uu.se/pdfiler/o2_1.pdf> (accessed 24 February 2015).

⁴³ An example is Ackerman, J. and Sandoval-Ballesteros, I. 'The Global Explosion of Freedom of Information Laws' (2006) 8 *Administrative Law Review*, 85-129. There are very few academic journals or books on access to information, and the few existing ones deal with the application of access to information legislation of specific countries such as Australia, Canada and the United Kingdom.

such as the structure of oversight mechanisms,⁴⁴ strategies for effective implementation,⁴⁵ and the amendment of access to information laws.⁴⁶

There are numerous publications providing an overview of the content of existing access to information laws worldwide.⁴⁷ There have also been publications attempting a comparative analysis of the implementation of access to information in a variety of jurisdictions such as that by Florini on India, China, Eastern Europe and Nigeria,⁴⁸ and by Calland and Tilley on India, Bulgaria, South Africa, United Kingdom and United States.⁴⁹ A comparative survey on the implementation of access to information laws in fourteen countries has also been done.⁵⁰ There are also publications that identify a link between

⁴⁴Torres, N. Institutional design for an effective access to public Information' (2009) 5 *Open Government: A Journal on Freedom of Information*.

⁴⁵ Calland, R 'Turning Right to Information Law into a Living Reality: Access to information and Effective Implementation' Available at <http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_papers/southafrica/Calland%20-%20Turning%20FOI%20law%20into%20living%20reality%20-%20Jan-03.pdf> (accessed 20 November 2014); Newman, L. and Calland R. 'Making the Law Work: The Challenges of Implementation' in '*The Right to Know: Transparency for an Open World*' Florini, A. (ed) (2007) Columbia: Columbia University Press.

⁴⁶ Mendel, T. 'Amending Access to Information Legislation: Legal and Political Issues' World Bank Institute Governance Working Paper Series, 2011. Available at <http://www.law-democracy.org/wp-content/uploads/2011/07/Mendel-Amending-ATI-Legislation-legal-and-political-issues_0.pdf> (accessed 20 December 2014).

⁴⁷ Mendel, T. 'Freedom of Information: A Comparative Legal Survey' (2011) (2nd edition) UNESCO. Available at <http://portal.unesco.org/ci/en/files/26159/12054862803freedom_information_en.pdf/freedom_information_en.pdf>; Banisar, D. Freedom of Information Around the World 2006: A Global Survey of Access to Government Information Laws' Privacy International <http://www.freedominfo.org/documents/global_survey2006.pdf> (accessed 20 December 2014)

⁴⁸ '*The Right to Know: Transparency for an Open World*' Florini, A. (ed) (2007) Columbia: Columbia University Press.

⁴⁹ Calland, R. and Tilley, A. (eds) (2002) *The Right to Know the Right to Live: Access to Information and Socio-economic Justice* Capetown: ODAC.

⁵⁰ See Transparency and Silence: A Survey of Access to Information Laws and Practices in 14 Countries, 2006, Open Society Justice Initiative. Available at <http://www.soros.org/initiatives/justice/articles_publications/publications/transparency_20060928/transparency_20060928.pdf> (accessed 20 November 2014).

access to information and democracy,⁵¹ combatting corruption,⁵² empowering women,⁵³ as well as the alleviation of poverty and general improvement of socio-economic conditions.⁵⁴

With specific reference to Africa, there has been a publication which identified and tested laws which facilitate access to information in the West African countries of Ghana, Liberia, Nigeria and Sierra Leone, in the absence of the adoption of specific legislation facilitating access to information.⁵⁵ There have also been publications on these same countries, which examined in detail the provisions of specific laws that promote access to information, as well as those which hinder this right.⁵⁶

In each of these publications that have been outlined above, the focus has been on assessing the state of the right of access to information in specific countries or of the

⁵¹ Newman, L. (ed) (2002) *Access to Information: A Key to Democracy* The Carter Centre. Available at <<http://www.cartercenter.org/documents/1272.pdf>> (accessed 20 December 2014).

⁵² 'Using the Right to Information as an Anti-Corruption Tool' Transparency International, 2006. Available at <http://www.humanrightsinitiative.org/programs/ai/rti/articles/using_rti_as_anti_corruption_tool.pdf> (accessed 20 December 2014).

⁵³ 'Freedom of Information (FOI) and Womens' Rights in Africa: A Collection of Case Studies from Cameroon, Ghana, Kenya, South Africa and Zambia' UNESCO, 2009. Available at <http://www.femnet.org.ke/documents/FOI_Book_2010.pdf> (accessed 20 December 2014).

⁵⁴ See Jagwanath, S. 'The Right to Information as a Leverage Right' in *The Right to Know the Right to Live: Access to Information and Socio-economic Justice* n. 49 above; See also Calland, R 'Turning Right to Information Law into a Living Reality: Access to information and Effective Implementation' Available at <http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_papers/southafrica/Calland%20-%20Turning%20FOI%20law%20into%20living%20reality%20-%20Jan-03.pdf> (accessed 20 December 2014).

⁵⁵ 'Ask, and You May Receive: Report from Monitoring of Access to Information in West Africa' 2010, Media Rights Agenda. Available at <<http://www.mediafound.org/images/stories/Ask%20And%20You%20May%20Receive.pdf>> (accessed 25 May 2014). However, Liberia, Nigeria and Sierra Leone have since adopted laws.

⁵⁶ See Windows for Transparency-Ghana, (2010) Media Rights Agenda. Available at <<http://www.mediafound.org/images/stories/Windows%20for%20Transparency%20-%20Ghana.pdf>> (accessed 20 December 2014). Windows for Transparency-Liberia (2010) Media Rights Agenda. Available at <<http://www.mediafound.org/images/stories/Windows%20for%20Transparency%20-%20Liberia.pdf>> (accessed 20 December 2014); Windows for Transparency-Nigeria (2010) Media Rights Agenda. Available at <<http://www.mediafound.org/images/stories/Windows%20for%20Transparency%20-%20Nigeria.pdf>> (accessed 20 December 2014); Windows for Transparency-Sierra Leone, (2010) Media Rights Agenda. Available at <<http://www.mediafound.org/images/stories/Windows%20for%20Transparency%20-%20Sierra%20Leone.pdf>> (accessed 20 December 2014).

implementation of ATI laws and not on the improvement of socio-economic rights through access to information.

More comprehensive literature on the use of access to the information for the realisation of socio-economic rights has been produced by non-governmental organisations focusing on access to information. In 2007, the Commonwealth Human Rights Initiative published detailed case studies from all over the world on different socio-economic rights,⁵⁷ which have been realised through the use of ATI legislation.⁵⁸ Another publication by Article 19 and Association for Civil Rights (ADC)⁵⁹ explores possible strategies available to non-governmental organisations in realising socio-economic rights through access to information,⁶⁰ which is complemented by case studies revealing successful utilisation of some of these strategies.⁶¹

Both publications only list examples, mostly from Europe and Asia, of how access to information has been useful in realising socio-economic rights generally, without analysing the specific laws or ATI mechanisms that were used. Nor do they provide any empirical evidence of the impact that accessing the relevant information has had on socio-economic conditions of the individuals or communities concerned. Furthermore, the publications do not provide any analysis or examine in detail, the existing legal frameworks on access to information, intrinsic or extrinsic factors which actually influenced the socio-economic progress achieved, nor do they explore alternative normative standards or institutional mechanisms which can be used to achieve socio-economic progress through access to information. Most importantly, both publications

⁵⁷ See *Our Rights, Our Information: Empowering People to Demand Rights Through Knowledge*, (n 27 above).

⁵⁸ However, the only African country referred to in this publication is Uganda and the specific case study did not involve the use of a legal framework on access to information, rather it focused on the activities of a local women's rights organisation to provide information on subsistence farming to local women farmers, thereby facilitating increased crop production. See pages 23 to 25.

⁵⁹ *Access to Information: An instrumental Right for Empowerment*, July 2007, 17-20. Available at <http://www.humanrightsinitiative.org/publications/rti/our_rights_our_information.pdf> (accessed 22 December 2014).

⁶⁰ As above, 22-25.

⁶¹ As above, 26-36. In this publication, case studies from Nigeria, South Africa and Uganda were included. However, the case studies for Nigeria and South Africa do not reveal how legal mechanisms of access to information have been successfully utilised for the advancement of socio-economic progress at the domestic level, but rather, they reveal the use of regional mechanisms and alternative constitutional provisions on access to information for the realisation of socio-economic rights.

make no specific contribution to the usefulness of access to information in improving socio-economic conditions in the African context.

Generally, there is a dearth of literature on the current or potential use of access to information for the advancement of socio-economic progress in Africa. However, owing to the strong protection of both access to information and socio-economic rights in its Constitution, South Africa has received substantial attention. With regard to socio-economic rights, the judgements of the Constitutional Court on socio-economic rights as contained in the Bill of Rights, has evoked extensive commentary.⁶² The adoption by South Africa of the first ATI legislation on the continent in 2000, which has been 'lauded both home and abroad' as one of the most progressive in the world and regarded as 'the golden standard',⁶³ has generated substantial literature. These include writings on the implementation of PAIA,⁶⁴ recognition of its usefulness as an anti-corruption tool⁶⁵ as well as, as a leverage right for the enforcement of social and economic rights.⁶⁶

Apart from South Africa, Uganda has also received some attention, given the fact that the right of access to information was introduced into the Constitution as far back as 1995 and an access to information Act was adopted in 2005. For example, there have been

⁶² Liebenberg, S. 'South Africa's Evolving Jurisprudence on Socio-Economic Rights: An Effective Tool in Challenging Poverty?' (2002) 6 *Law Democracy and Development*, 159; Pieterse, M. 'Coming to Terms with Judicial Enforcement of Socio-Economic Rights (2004) 20 *South African Journal on Human Rights* 383; Pieterse, M 'Eating Socio-Economic Rights' (2007) 29 *Human Rights Quarterly*, 796-822.

⁶³ See for example McKinley, D. 'The State of Access to Information in Africa', 4. Available at <http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_papers/southafrica/McKinley%20-%20FOI%20in%20South%20Africa.pdf> (accessed 20 December 2014).

⁶⁴ Tilley, A. 'The Usage of the Process of Access to Information Act: Experiences, Achievements and Challenges'. Available at <<http://www.opendemocracy.org.za/wp-content/uploads/2010/10/The-Usage-of-the-Promotion-of-Access-to-Information-Act-Experiences-Achievements-and-challenges-by-Alison-Tilley1.pdf>> (accessed 20 December 2014); Kisoona, C. 'Ten Years of Access to Information in South Africa: Some Challenges to the Effective Implementation of PAIA'. Available at <<http://www.opendemocracy.org.za/wp-content/uploads/2010/10/Ten-Years-of-Access-to-Information-in-South-Africa-Some-challenges-to-the-effective-implementation-of-PAIA-by-Chantal-Kisoona.pdf>> (accessed 20 December 2014); McKinley, D. 'The State of Access to Information in South Africa' (n 64 above).

⁶⁵ Kruuse, J. 'Access to Information as a Tool for Combatting Corruption in South Africa's Public Sector'. Available at <http://www.opendemocracy.org.za/wp-content/uploads/2010/10/Access-to-Information-as-a-tool-in-combating-corruption-in-South-Africa%E2%80%99s-public-sector-by-Jay-Kruuse.pdf> (accessed 20 November 2014).

⁶⁶ See Klaaren, J. 'A Second Look at the South African Human Rights Commission, Access to Information, and the Promotion of Socioeconomic Rights' (n 2 above; Calland, R, 'Illuminating the Policy and Practice of Access to Information in South Africa' in *Paper Wars: Access to Information in South Africa*, Allan, K. Ed. 2009 Johannesburg: Wits Law Press: Johannesburg, Dimba (n 26 above).

studies on the difficulties with the implementation of the Uganda Access to Information Act,⁶⁷ and also on the potential impact of the Petroleum (Exploration, Development and Production) Bill of 2010 on access to information in Uganda.⁶⁸ A survey has found that increased access to information within the Ugandan education sector was a 'powerful deterrent' to corruption and impacted positively on school enrolment and 'learning outcomes'.⁶⁹ However, the wholesale acceptance of the findings of this study has been cautioned against by Hubbard, who contends that though information played a critical role, there were several other surrounding factors which contributed to increased enrolment such as the introduction of free primary education after the 1997 elections.⁷⁰

This thesis goes further than existing literature, by examining intrinsic and other surrounding factors which facilitate the contribution of access to information to socio-economic progress in Africa generally and in Nigeria, South Africa and Uganda specifically. In addition, this research also examines other available legal mechanisms within these African States for access to information, with a view to identifying the alternative legal frameworks through which access to information has and can improve socio-economic conditions.

This research thus seeks to fill the gap in academic literature with respect to the actual and potential contribution of existing legal frameworks on access to information in Africa in addressing poor socio-economic conditions in Africa, the factors which influence the

⁶⁷ Brobbey, V., Excell, C, and Tilley A. 'Active and Passive Resistance to Openness: The Transparency Model for Freedom of Information Acts in Africa – Three Case Studies' 2011, Working Paper of the Access to Information in Africa Project, World Resources Institute. Available at <http://www.africaficentre.org/index.php?option=com_docman&Itemid=572&limitstart=15> (accessed 5 June 2014).

⁶⁸ Veit, P., Excell, C. and Zomer, A. 'Avoiding the Resource Curse: Spotlight on Oil in Uganda' World Resources Institute Working Paper, January 2011. Available at <http://pdf.wri.org/working_papers/avoiding_the_resource_curse.pdf> (accessed 2 June 2014).

⁶⁹ Reinikka, R, and Svensson, J. 'The Power of Information: Evidence from a Newspaper Campaign to Reduce Capture'. Available at <http://siteresources.worldbank.org/EXTHDOFFICE/Resources/5485726-1271361195921/Reinikka-Svensson-power-of-information_Uganda.pdf> (accessed 4 November 2014). This survey was recently updated by the authors. See Reinikka, R, and Svensson, J. 'The Power of Information in Public Services: Evidence from Education in Uganda' Available at <<http://perseus.iies.su.se/~jsven/PIInformation2010.pdf>> (accessed 4 November 2014).

⁷⁰ Hubbard, P. 'Putting the Power of Transparency in Context: Information's Role in Reducing Corruption in Uganda's Education Sector' Centre for Global Development Working Paper 136, December 2007. Available at <http://www.cgdev.org/files/15050_file_Uganda.pdf> (accessed 4 November 2014).

extent of this contribution and to identify alternative mechanisms for ensuring this continued contribution.

1.7 Delineation and limitation of the study

In conducting this research, certain limitations were encountered. First, grounding the study in the realm of human rights law is somewhat simplistic, especially since implementation of human rights standards by States is not only based on considerations of obligations imposed by human rights law, but is also influenced by a variety of economic, political and social factors. Accordingly, the existence of a human rights framework guaranteeing an enforceable right of access to information at the domestic level cannot be a panacea for the poor socio-economic conditions in Africa. Thus, this research from the onset acknowledges that achieving socio-economic progress through domestic legal frameworks facilitating access to information is merely one of the numerous approaches that can improve socio-economic conditions in Africa. In other words, this research understands that legal provisions and institutions have a limited role to play in influencing socio-economic progress and may thus not be sufficient, but are assumed to be necessary.

Another major limitation of this research is that while it broadly aims to identify the importance of access to information in the socio-economic advancement of Africa as a whole, only three African countries are considered in detail. This is so because it is impossible in a study of this length to analyse the actual and potential impact of all existing legal frameworks on access to information on the continent. The case study countries have thus been carefully selected. Not only is there geographic representation from three main regions of sub-Saharan Africa, there is also a balanced examination of existing legal frameworks on access to information and their contributions to socio-economic progress on the continent. In depth analysis is therefore restricted to the specific case study countries of Nigeria, South Africa and Uganda, although reference is made to other African States where suitable, to the extent possible.

A further limitation of this research is the absence of data detailing the number and nature of socio-economic related requests for information made using the legal frameworks covered by the research. Admittedly, such information would have provided a more

reliable empirical basis for assessing the capacity of access to information to contribute to socio-economic progress in the case study countries. However, in the absence of mechanisms for collating and disseminating information on implementation of constitutional protection of ATI and in view of the major challenge experienced with low complinace with reporting obligations by public (and private) institutions under ATI laws, no accurate or reliable information of such nature exists.

Another limitation is the fact that this research does not seek to examine in detail, the impact of the constitutional status of socio-economic rights on socio-economic conditions in Africa. Admittedly, the justiciability or otherwise of socio-economic rights within a domestic legal system, impacts on the ability of domestic courts to make orders granting relief to persons seeking redress for socio-economic rights violations. While this is significantly relevant to the overall improvement of socio-economic conditions in any State, an analysis of the adequacy or effectiveness of socio-economic rights framework at the domestic level is not the primary concern of this research. Rather, the focus is on highlighting the actual and potential role of access to information as a possible approach for addressing poor socio-economic conditions in Africa, irrespective of the status of socio-economic rights under African Constitutions.

Finally, this thesis, especially with regard to the legal frameworks considered and case studies discussed, has included only information available as at 31 March 2016.

1.8 Overview of chapters

This chapter gives a general introduction and background to the current socio-economic conditions on the continent, as well as the rising influence of the right of access to information as a cross-cutting human right, capable of improving socio-economic progress in Africa. Furthermore, it discusses briefly the specific questions the study seeks to answer and the methodology adopted in this pursuit. It highlights the significance of the study and also provides a literature review as well as the limitations of the study. **Chapter 2** traces the emergence of access to information as a right within international human rights law and goes on to identify key normative standards which have come to be accepted as representing essential components of the right within international, regional and domestic human rights frameworks. This chapter confirms that ATI is now recognised

as a right which is separate and distinct from freedom of expression, from which it originates.

In **Chapter 3**, the history and context of constitutions and constitution-making in Africa is undertaken as a means of understanding the utility and significance of access to information as a constitutional right. Thereafter, the constitutional history of each case study country is considered, thus providing insight into the nature and context of the rights enshrined in the Bill of Rights and the unique significance they hold within the domestic legal framework. The Chapter finds that the express inclusion of a stand-alone right of access to information in the Constitution as opposed to the option of reading-in the right into freedom of expression provisions, forms the best basis upon which the right can be implemented.

In **Chapter 4**, the impact of the constitutional protection of access to information in improving socio-economic conditions is examined, using case studies from South Africa and Uganda, as both countries have express constitutional provisions on access to information that illustrate how these provisions have directly influenced socio-economic progress in these countries is discussed. This is contrasted with the situation in Nigeria, where there is no stand-alone constitutional right of access to information. Flowing from an analysis of the findings of the case studies, factors that enhance or restrict the level of contribution of these constitutional provisions to socio-economic progress are identified. In addition, other possible ways in which these constitutional provisions can be used to promote socio-economic progress are highlighted. Ultimately, the Chapter finds that it is not only the strength of the constitutional provision on access to information, but also the progressiveness of the Constitution as a whole that facilitates socio-economic progress.

In **Chapter 5**, an overview of the extent to which existing laws in Africa comply with the international standards is undertaken, as well as more in-depth examination of the content and implementation of the ATI laws in each of the case study countries of Nigeria, South Africa and Uganda. This examination reveals that the implementation of access to information laws is generally a long, complicated and ever-evolving process that is fraught with numerous challenges. Consequently

Chapter 6 considers the actual contribution of specific legislation on access to information to socio-economic progress in Africa, using as case studies Nigeria, South Africa and Uganda, where such legislation have been adopted. As purposed, these case studies show that ATI laws have indeed contributed to socio-economic progress in each of the case study countries. Furthermore, the particular factors which enhance or limit this contribution are examined, as well as other possible ways that the legislation can be better utilised to further contribute to socio-economic progress in Africa.

To determine the usefulness of alternative legal frameworks for the enforcement of the right of access to information in the improvement of socio-economic conditions, **Chapter 7** identifies generic laws in Nigeria, South Africa and Uganda which can be used for increasing socio-economic progress. A discussion of laws relating to public procurement, environmental impact assessment and anti-corruption in Nigeria, South Africa and Uganda respectively, identifies the potential of these laws to allow for access to information.

Chapter 8 then investigates the extent to which these laws have been used for this purpose in these countries. In doing so, concrete examples of instances in which these laws have contributed to socio-economic progress are examined. As with other legal frameworks considered in this research, the factors which enhance or detract from the contribution of these frameworks to socio-economic progress is examined, drawing from lessons learned from the countries under study.

Finally, **Chapter 9** summarises the findings of the research and makes recommendations based on these findings

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CHAPTER TWO: ACCESS TO INFORMATION AS AN INTERNATIONAL HUMAN RIGHT

2.1 Introduction

Access to information as a human right, unlike most other internationally recognised human rights, is an offshoot of a separately recognised human right. Both within the UN and the regional human rights treaties which create the normative standards within these systems, there is no right of access to information as such. Rather, what exists is the right of freedom of expression which includes the 'right to' or 'freedom of' information as a component of freedom of expression and not as a right in itself. However, these provisions on freedom of expression have been expanded by regional and international human rights bodies to include the right to access information held by the State.

This Chapter thus seeks to trace the development of access to information as a human right within the United Nations and regional human rights regimes, as well as other relevant soft law standards which have over the years been developed by a broad range of stakeholders on the subject matter. An analysis is then undertaken of the numerous normative standards on access to information within these regimes, with a view to synthesising some form of catalogue of internationally recognised standards on access to information, as a benchmark for assessing the extent to which each of the legal frameworks on access to information, subsequently considered in this research, conform to these standards.

2.2 The emergence of access to information as an international human right

The Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR), both international human rights instruments adopted by the United Nations (UN), respectively guarantee the right to freedom of expression, including 'the right to seek, receive and impart information and ideas' in article 19. This provision has formed the basis of the right of access to information. Though non-binding, some provisions of the UDHR, which was adopted in 1948, is generally accepted as

having acquired the status of customary international law and is thus 'applicable' to all States.¹ Article 19 of UDHR provides:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

On its part, article 19(2) of the ICCPR states:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

Interpreting the right of access to information in the context of article 19(2), the UN Special Rapporteur on the Promotion and Protection of Freedom of Expression and Opinion (UN Special Rapporteur) has found that it 'imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government'² and that the right is not 'merely a corollary of freedom of opinion and expression' but 'a right in and of itself'.³

Flowing from the detailed elucidation of the normative content of the provisions of article 19, the new General Comment, in a section dedicated to the 'Right of Access to Information', reiterated the position of the UN Special Rapporteur that article 19(2) of the ICCPR embraces a right to access information held by public bodies,⁴ regardless of the

¹ Although there is no universal agreement on the scope and establishment of customary international law, it is generally accepted that the UDHR or at least some provisions such as the prohibition of torture and slavery has acquired the status of custom. Hannnum, H. *The Status of the Universal Declaration of Human Rights in National and International Law* (1995-1996) 25 *Georgia Journal on International and Comparative Law* 287; Henkin, L. *The Age of Rights* (New York: Columbia University Press 1990) 19;

² Report of the Special Rapporteur on Freedom of Opinion and Expression to the 54th Session of the Commission on Human Rights. UN Doc. E/CN.4/1999/64. Available at <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G99/107/66/PDF/G9910766.pdf?OpenElement>> (accessed 21 October 2014).

³ Report of the Special Rapporteur on Freedom of Opinion and Expression to the 56th Session of the Commission on Human Rights, 18 January 2000. E/CN.4/2000/63. Available at <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G00/102/59/PDF/G0010259.pdf?OpenElement>> (accessed 21 October 2014).

⁴ Public bodies are defined as the executive, legislative and judicial branches of the State; other public governmental authorities at national, regional or local levels and entities carrying out public functions. See paragraphs 7 and 18.

form in which it is stored, source and date of production.⁵ The General Comment views this right as imposing three main obligations on States Parties, which are: to make available in the public domain, 'Government information of public interest'; to ensure easy, prompt, effective and practical access to such information; and to enact procedures to give effect to this right in the form of legislation.

Within the Inter-American human rights system, access to information is recognised in the context of article 13 of the American Convention on Human Rights (American Convention) which guarantees the right to freedom of expression. Article 13(1) which is almost a verbatim replication of article 19(2) of ICCPR, provides:

Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

The Inter-American Court of Human Rights, in a land mark ruling in the case of *Claudio Reyes v Chile*,⁶ became the first international human rights court to find the right to access to information held by the State is a right in itself, though deriving its normative foundation from freedom of expression, that is, the right to seek, receive and impart information.

In Europe, the recognition of access to information as a right was initially resisted by the European Court on Human Rights, even though article 10(1) of the European Convention on Human Rights (ECHR) contains identical provisions as the UDHR, ICCPR and the American Convention.⁷ Article 10(1) of the ECHR provides:

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article

⁵ Paragraph 18.

⁶ IACHR Series C no 151 (Official Case No.), September 2006.

⁷ In previous cases such as *Leander v Sweden* Application No. 9248/81 and *Guerra v Italy* Application No. 14967/89, the court had refused to extend the interpretation of article 10 to include a positive right of access to information held by the State. Rather, it interpreted article 10 as conferring only a negative right prohibiting 'a Government from restricting a person from receiving information that others wish or may be willing to impart to him'. As a result decisions against refusal to disclose information were based on other rights such as the right to respect for private and family life (article 8).

shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

Initially, the Court consistently refused to extend the interpretation of article 10 to include a positive right of access to information held by the State.⁸ Rather, it interpreted article 10 as conferring only a negative right prohibiting 'a Government from restricting a person from receiving information that others wish or may be willing to impart to him'.⁹ As a result, decisions against refusal to disclose information were based on other rights such as the right to respect for private and family life in article 8. This position was subsequently relaxed in two cases.¹⁰ Finally, in *Gillberg v Sweden*,¹¹ the court found that article 10 does create a right a right to access information held by public authorities.¹²

Within the African regional human rights system, article 9 of the African Charter guarantees the right to freedom of expression which has been interpreted to encompass the right of access to information. It states:

1. Every individual shall have the right to receive information.
2. Every individual shall have the right to express and disseminate his opinions within the law.

This provision of the African Charter has been described as the 'weakest formulation of freedom of expression of any of the major international human rights documents' especially due to the inclusion of the broad claw back clause 'within the law' as opposed to the clear and limited restrictions provided under other human rights instruments.¹³

Thus, in an attempt to elaborate on the right to freedom of expression provided by article 9, the African Commission in October 2002 adopted the Declaration of Principles on

⁸ See for example *Gaskin v United Kingdom* Application No. 10454/83.

⁹ *Roche v United Kingdom*, [GC], Application No. 32555/96, 172.

¹⁰ *Tarasag v Hungray* (Application No 37374/05) and *Kenedi v Hungray* (Application No) 31475/05.

¹¹ See *Gillberg v. Sweden* [GC] - 41723/06, Judgment 3.4.2012.

¹² Since then, the Court has increasingly given stronger recognition of access to information as a right under article 10. See for example *Youth Initiative for Human Rights v Turkey* (Application No. 48135/06) delivered in June 2013.

¹³ Welch, C.E 'The African Charter and Freedom of Expression in Africa' in Coliver et al (eds) (2006) *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information* Martinus Nijhoff: The Hague/Boston/London:.

Freedom of Expression.¹⁴ This Declaration comprises principles to be adopted by Member States on 15 key areas of freedom of expression including access to information. Principle IV of the declaration titled 'Freedom of Information', elaborates on the scope and content of the right of access to information.

The African Court on Human and Peoples' Rights (African Court), since issuing its first ruling in March 2011,¹⁵ is yet to make a pronouncement on the right of access to information in any matter before it. However, in the light of the overwhelming international jurisprudence locating the right of access to information firmly within the right of freedom of expression, including the Declaration adopted by the African Commission, it is difficult to imagine that the African Court can arrive at a contrary conclusion.

From all of the above, it is clear that although the right of access to information derives from the provision on the right to free expression, it has been recognised internationally as a right of its own, imposing an obligation on States to allow access to documents in its possession. It thus becomes necessary to also identify what has been internationally recognised as forming the key normative components of the right of access to information.

2.3 International normative legal framework on access to information

Numerous binding and non-binding normative standards on access to information have been developed by international and regional organisations as well as civil society, setting out the core elements of an access to information law. With the benefit of the increased adoption and implementation of ATI laws and the attendant experiences and challenges these processes have presented, several of these normative standards have been progressively strengthened. The most important of these standards will be highlighted.

¹⁴ Available at <http://www.achpr.org/english/_doc_target/documentation.html?../declarations/declaration_freedom_exp_en.html> (accessed 21 October 2014).

¹⁵ *African Commission on Human and Peoples' Rights v Libya*, Application No. 004/11, was the first decision of the African Court, and was handed down on 15 March 2011.

2.3.1 The United Nations

The emergence of access to information as a human right is traceable to its earlier recognition merely as corollary of the right to freedom of expression, as a negative right which required States only to refrain from interfering with an individual's right to seek and receive information.¹⁶ This initial approach is understandable, giving that the express wording of article 19 of the UDHR and of the ICCPR both provide for the right to 'seek, receive and impart information and ideas' as a component of freedom of expression.

The subsequent elucidation of the normative standards of access to information within the UN system owes its development largely to the work of successive UN Special Rapporteurs on the Promotion and Protection of Freedom of Expression and Opinion (UN Special Rapporteur) as well as the General Comments of the Human Rights Committee.

2.3.1.1 Reports of the UN Special Rapporteur

The mandate of the UN Special Rapporteur was established by a resolution of the Commission on Human Rights¹⁷ adopted during its 49th Session, in March 1993.¹⁸ Starting with the report of the first UN Special Rapporteur in 1995, each successive UN Special Rapporteur¹⁹ has incrementally elaborated upon general principles on access to information and provided guidelines on the form and content to which any proposed legislation on access to information by States Parties ought to conform. Although these elucidations of the content of the right have generally been at the prompting of the

¹⁶ See for example paragraphs 34 and 35 of the Report of the Special Rapporteur on Freedom of Opinion and Expression to the 51st session to the Commission on Human Rights, E/CN.4/1995/32, 14 December 1994. Available at <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G94/750/76/PDF/G9475076.pdf?OpenElement>> (accessed 6 March 2015).

¹⁷ The UN Commission on Human Rights which was established in 1946 as a 'functional commission' and as a subsidiary body of the UN Economic and Social Council (ECOSOC), was responsible for the promotion and protection of human rights in Member States of the UN. The Commission on Human Rights was replaced by the UN Human Rights Council in 2006. For a summary of the process and reasons for the establishment of the Human Rights Council, see Telingen, Y. 'The Human Rights Council: A New Era in UN Human Rights Work'. Available at <https://www.carnegiecouncil.org/publications/journal/21_2/essay/001.html/_res/id=sa_File1/EIA_21_2_Terlingen.pdf> (Accessed 21 March 2015).

¹⁸ E/CN.4/RES/1993/45, available at <http://ap.ohchr.org/documents/dpage_e.aspx?m=85> (accessed 21 March 2015).

¹⁹ The mandate holders have been as follows: Mr Abid Hussain (India) 1993-2002; Mr Ambeyi Ligabio (Kenya) 2002-2008; Mr Frank La Rue (Guatemala) 2008-2014; and Mr David Kaye (USA) 2014 till present.

Commission on Human Rights (now the Human Rights Council),²⁰ the impact of these reports, has nevertheless been significant in firmly grounding the right of access to information as an important right within the legal framework of international human rights law.

The foundation of the right of access to information as a right emanating from the provisions of article 19(2) of the ICCPR guaranteeing the right of freedom of expression, made it inevitable that at the onset, access to information would be regarded by the UN Special Rapporteur as 'one of the essential elements of freedom of speech and expression'.²¹ In this way, reference to the right to 'seek and receive information' was initially made in terms of the need for public participation in the context of the right to development.²² However, the right to seek and receive information was soon declared a 'freedom on its own' and 'not simply a converse of the right to freedom of opinion and expression'.²³ Subsequently, the status of the right of access to information as an 'independent' right was expressed in stronger terms as 'a right in and of itself' and not 'merely a corollary of freedom of opinion and expression', and one which is necessary in a free and democratic society and for public participation.²⁴

With this recognition of access to information as a self-standing right, came the further elaboration of its scope and content. Thus, the right of access to information as guaranteed by article 19(2) of the ICCPR was viewed as imposing 'a positive obligation on States' to allow access to information in their possession, irrespective of the format in which it is held.²⁵ This assertion marked a break from the conception of the right of access

²⁰ Beginning in 1995, the Commission on Human Rights routinely requested the UN Special Rapporteur to 'develop further his commentary on the right to seek and receive information'. See resolutions (1995/40), (1996/53), (1997/27) and (1998/42) adopted at the 51st, 52nd, 53rd and 54th sessions respectively of the Commission on Human Rights.

²¹ See report of the UN Special Rapporteur to the 53rd session of the Commission on Human Rights, E/CN.4/1995/43, at paragraph 35.

²² See report of the UN Special Rapporteur to the 55th session of the Commission on Human Rights, E/CN.4/1997/31, at paragraphs 64 to 66.

²³ Report of the UN Special Rapporteur to the 54th session of the Commission on Human Rights, E/CN.4/1998/40, at para 11.

²⁴ Report of the UN Special Rapporteur to the 56th session of the Commission on Human Rights, E/CN.4/2000/63, at para 42.

²⁵ E/CN.4/1998/40 (n 22 above) para 14.

to information as only imposing the negative obligation of merely requiring States to refrain from interfering with individuals in their quest to seek and receive information.

By 1998, the UN Special Rapporteur concluded that the adoption by State Parties to the ICCPR, of legislation establishing a legally enforceable right of access to information is necessary for the full realisation of the right.²⁶ To be effective, such legislation must establish 'adequately resourced independent administrative bodies' empowered to compel disclosure of information, through an assessment of the legitimacy of refusals by public authorities to grant access to requested information.²⁷ Subsequently, the most detailed elaboration of the normative standards to which access to information legislation must conform, was elaborated in the UN Special Rapporteur's report of September 2013.²⁸ These key principles are summarised as follows:

a) Maximum disclosure

This principle rests on the presumption that public bodies must disclose all information in their possession, and is a principle which can only be dispensed with in limited circumstances.

b) Obligation to publish

By this principle, public bodies must grant access to requested information and also publish information of public interest widely, subject only to acceptable limitations such as lack of resources and capacity.

c) Promotion of open government

This principle requires that a culture of openness in government must be instilled through training of public officers on their responsibility to uphold the right of access to information on the one hand, while raising public awareness on the right to access information on the other.

d) Limited scope of exceptions

Here, the denial of requests for information must be clearly and narrowly defined, determined on a case-by-case basis, and be applicable only where the risk of

²⁶ As above.

²⁷ As above.

²⁸ Report of the UN Special Rapporteur to the 68th session of the General Assembly, A/68/362 at para 76.

substantial harm to the protected interest clearly outweighs public interest in the release of the information.

e) Processes to facilitate access

The general principle is that the process for requesting access to information must be fair and quick, and open and accessible internal systems must be established by public bodies in implementing the right. There must also be independent internal review processes within public bodies, as well as a right of appeal to an independent administrative body in cases of refusal of requests for information.

f) Costs

The principle is that costs must not be so prohibitive as to dissuade individuals from making requests for information.

g) Open meetings

In accordance with the principle of maximum disclosure, the presumption should be that meetings of public bodies are open to the public.

h) Disclosure takes precedence

Here, all laws inconsistent with the principle of maximum disclosure must be amended or repealed and the permitted exceptions must be all-inclusive and not made subject to the provisions of any other law.

i) Whistle-blower protection

The principle is that public officers who in good faith disclose information under an ATI law, must be protected from any legal, administrative or employment-related sanctions for disclosing information on wrongdoing such as the commission of criminal offence or non-compliance with legal obligations.

2.3.1.2 General Comment 34 of the UN Human Rights Committee

In July 2011,²⁹ the UN Human Rights Committee³⁰ adopted General Comment No.34 on Freedom of Expression and Opinion, pursuant to article 19 of the ICCPR.³¹ This General Comment replaced an earlier one, General Comment 10, adopted by the Committee in 1994,³² which had provided no real interpretation of article 19. Rather, it ironically focused on the lack of information by States in their reports to the Committee, and drew no link whatsoever between article 19 and the right of access to information.³³

Specifically, General Comment 34 elaborates the right together with article 25 of the ICCPR which guarantees the right of citizens to take part in public affairs, vote and be voted for, and to have equal access to public services. The right also encompasses the right to access personal information held by public authorities and have such information rectified if necessary.

In giving effect to the right, Member States are obliged to 'proactively put in the public domain, Government information of public interest' in an easily accessible, prompt, effective and practical manner.³⁴ To do so, access to information legislation setting out the procedure for accessing such information and which is in line with the spirit of the ICCPR must be enacted which conform to the following principles:³⁵

- a) timeous processing of request for information in accordance with the provisions of the ICCPR;
- b) fees for requesting access to information should not be such as to impede the realisation of the right;

²⁹ General Comment 34 was adopted during the 102nd Session of the Human Rights Committee, which took place from 11 to 29 July 2011, in Geneva, Switzerland.

³⁰ The UN Human Rights Committee is a committee of independent experts established under article 28 of the ICCPR to monitor the implementation of the treaty primarily through the quadrennial State Reporting mechanism. However, with the subsequent adoption of the Optional Protocol (1966) and Second Optional Protocols (1989) to the ICCPR allowing individual complaints and committing to the abolition of the death penalty respectively, the of the jurisdiction of the Committee has been considerably broadened.

³¹ CCPR/C/GC/34. Available at <<http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>> (accessed 21 March 2015).

³² See General Comment No. 10: Freedom of Expression (Article 19) 29/06/1983. Available at <<http://www.ohchr.org/Documents/Issues/Opinion/CCPRGeneralCommentNo10.pdf>> (accessed 21 March 2015).

³³ HRI/GEN/1/Rev.9 (Vol. I) 181.

³⁴ As above, para 19

³⁵ As above.

- c) reasons must be provided by public authorities for refusals to provide access to information; and
- d) adequate mechanisms must be established for appeals against refusals of access to information by public authorities and their failure to respond to requests for access to information.

2.4 Regional normative standards

With the gradual recognition of access to information as a right in terms of the freedom of expression provisions of regional human rights instruments,³⁶ regional human rights mechanisms have like the UN system, elaborated on the right. Despite most of these standards being non-binding, to the extent that they have been expressly developed to give effect to the 'binding' provisions in the respective treaties from which the right of access to information have been derived, these standards are at the very minimum persuasive. This thesis contends that such non-binding standards can thus be regarded as extensions of the binding treaty obligations of Member States. The normative standards at the level of the UN and within the African, European and Inter-American human rights systems are now examined.

2.4.1 The Council of Europe

The Committee of Ministers of the Council of Europe first adopted a recommendation to Member States, setting out eight key principles on the right to access to information held by public authorities in 1981.³⁷ Thereafter, a series of further recommendations of limited relevance were adopted,³⁸ until in February 2002, when Recommendation (2002)2 on

³⁶ Article 19 ICCPR, Article 13 American Convention, Article 9 of the African Charter.

³⁷ Council of Europe, Committee of Ministers Recommendation No. R (81)19, adopted on 25 November 1981 <http://www.coe.int/t/dghl/standardsetting/media/doc/cm/rec%281981%29019_EN.asp> (accessed 7 April 2015).

³⁸ These include: Recommendation No. R (91)10 on the communication to third parties of personal data held by public bodies, recommendation No. R (97)18 concerning the protection of personal data collected and processed for statistical purposes, Recommendation No. (2000)10 on codes of conduct for public officials, Rec (2000)13 on a European policy on access to archives and Recommendation No. (2007)7 on good administration. See the Explanatory Report to the Council of Europe Convention on Access to Official Documents Available at <<http://conventions.coe.int/Treaty/EN/Reports/Html/205.htm>> (accessed 7 April 2015).

Access to Official Documents was adopted.³⁹ This 2002 recommendation was to become the main source of inspiration for the development of the Council of Europe Convention on Access to Official Documents (the Convention), which was the first and remains the only binding international instrument recognising the right of access to information, particularly, documents held by public authorities.⁴⁰

2.4.1.1 The Council of Europe Convention on Access to Official Documents

The Convention, which was opened for signature on 18 June 2009 is yet to come into force as it has received only eight of the required 10 ratifications.⁴¹ The Convention sets out the ‘minimum core of basic provisions’ to which the national legislation of Member States must conform with its implementation overseen by an ‘international monitoring mechanism’.⁴² Like many treaties, the Convention is a compromise document that seeks to establish core basic obligations which are already accepted or could be easily accepted within the domestic legal framework of Member States, a set of best practices which could invite more misgivings from Member States and more importantly, may prove difficult to implement.⁴³

The Convention on Access to Official Documents as its name denotes, appears narrow in scope in terms of its application only to ‘administrative’ official documents held by public authorities as opposed to providing a general right of access to information as guaranteed by human rights instruments. On closer inspection however, it is clear that the Convention was drafted and adopted with the clear intention that it serves to fulfil the obligations of Member States with respect to the right of access to information as provided by the European Convention on Human Rights. An indication of this intention can be construed from the fact that the preamble to the Convention makes reference to article 19 of the UDHR, as well as articles 6, 8 and 10 of the European Convention on the Protection of

⁴⁰ Full text of Convention available at <<http://conventions.coe.int/Treaty/EN/Treaties/Html/205.htm>> (accessed 7 April 2015). The Convention was opened for signature on 18 June 2009.

⁴¹ The Convention has received 8 ratifications by the following Council of Europe Member States: Bosnia and Herzegovina, Estonia, Finland, Hungary, Lithuania, Montenegro, Netherlands and Sweden. Available at <<http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/205/signatures?pauth=5rhImpg2>> (accessed 7 February 2016).

⁴² Paragraph 3, Explanatory report (n 38 above).

⁴³ Paragraphs 3 and 4, Explanatory note (n 38 above).

Human Rights and Fundamental Freedoms, which are the provisions that the European Court on Human Rights has relied upon in upholding access to information as a right.

Furthermore, the scope of application of the Convention, by virtue of the definition of public authorities in article 1, is such that it applies to all levels of government (national, regional and local) and the judicial and legislative branches of government as well as natural and juristic persons only in so far as it relates to administrative issues.⁴⁴ Most importantly, the Convention goes further by allowing member States at the time of ratification to make a declaration further expanding the scope of its application to information held by all legislative and judicial bodies as well as natural and juristic persons performing public functions or utilising public funds irrespective of the nature of the information held by these bodies.⁴⁵

Another significant indication that this Convention is for all intents and purposes ‘an access to information treaty’ properly so called, is the broad definition given to ‘official documents’ as ‘all information recorded in any form, drawn up or received and held by public authorities’. Certainly, in the context of this definition, the words ‘public documents’ could easily have been substituted for ‘information’ in terms of the title of the Convention.

Key principles

The key principles of the Convention are as follows:

a) Scope of application

The Convention imposes an obligation on each State Party to guarantee the right of access to information to ‘everyone’ without discrimination.⁴⁶ In other words, everyone, irrespective of their citizenship, has the right to demand access to ‘public documents’. With regard to the ‘supply side’, as indicated above, the Convention applies to all levels (national, regional and local) of the executive arm of government. To apply to the legislative and judicial arms of government as well as to natural and juristic persons, these public authorities should such that ‘perform administrative functions’ or ‘exercise administrative authority’ respectively. However, pursuant to a declaration by the relevant

⁴⁴ Article 1(2)(a)(i).

⁴⁵ Article 1(2)(a)(ii).

⁴⁶ Article 2(1).

Member States, the Convention applies to all legislative and judicial bodies, as well as natural and juristic persons performing public functions or utilising public funds irrespective of the 'administrative' nature of the information held by these bodies.

b) Limitations/exemptions

State Parties may prescribe limitations on the right to access information in official documents. Such limitations must be 'precise in law, be necessary in a democratic society and be proportionate to the aim of protecting' the following: national security, defence and international relations; public safety; prevention, investigation and prosecution of criminal activities; disciplinary investigations; inspections, control and supervision by public authorities; privacy and other legitimate private interests; commercial and other economic interests; economic, monetary and exchange rate policies of the State; equality of parties in court proceedings and the effective administration of justice; the environment; and deliberations within or between public authorities on a matter.⁴⁷ Member States are encouraged to specify how these limitations/exemptions will be applied.

c) Public interest override

The right to access information contained in public documents may be refused if its disclosure 'would or would be likely to harm' any exempted information in article 3(1), unless 'there is an overriding public interest in disclosure'.⁴⁸

d) Processing of requests

Requests for information need not be accompanied by an explanation of the reasons for the request and may be made anonymously, except where identification is necessary for the processing of the request.⁴⁹ Processing of requests must be simple,⁵⁰ fair,⁵¹ and expeditious.⁵² Though the exact time frame within which information is to be provided is unspecified, a decision must be made and communicated 'as soon as possible or within a reasonable time limit' which must be clearly specified beforehand.⁵³

⁴⁷ Article 3(1).

⁴⁸ Article 3(2).

⁴⁹ Articles 4(1) and (2).

⁵⁰ Article 4(3).

⁵¹ Article 5(3).

⁵² Article 5(4).

⁵³ Article 5(4).

e) Grounds for refusal

A request for access may be refused if the request is vague, making it impossible to identify the requested information or is manifestly unreasonable.⁵⁴ Such (partial or full) refusal must be communicated to the requester and may be in writing if so requested by the requester.⁵⁵

f) Form of access

In accessing requested information, the requester can choose to inspect the original or a copy, or to obtain a copy of the information in any preferred available format, in which case the preference must be reasonable.⁵⁶ In addition, access may also be granted by referring the requester to 'easily accessible alternative sources'.⁵⁷

Where part of the information requested is subject to a limitation/exemption, access should be granted to the rest of the information, unless to do so will render the information so provided misleading, meaningless or places an 'unreasonable burden' on the public authority.⁵⁸

g) Fees

Inspection of requested information is free of charge.⁵⁹ Where a copy of the requested information is required, this should be provided at the cost of reproduction and delivery of the information, which must be reasonable.⁶⁰

h) Review/appeal process

Every express or implied denial of a request whether in whole or in part, must be subject to a review process by a court or other independent body established by law, which must be expeditious and inexpensive.⁶¹

i) Complementary/promotional measures

Members States are obliged to create public awareness on the existence and process for realising the right to access public documents and educate public authorities on their obligations in the implementation of the right. Furthermore, Member States are

⁵⁴ Article 5(5).

⁵⁵ Article 5(6).

⁵⁶ Article 6(1).

⁵⁷ Article 6(3).

⁵⁸ Article 6(2).

⁵⁹ Article 7(1). Charges may however be levied as per regular museum and archive fees.

⁶⁰ Article 7(2). Tariffs of charges must also be published.

⁶¹ Article 8.

to ensure that their public authorities provide information to the public on matters in respect of which they are responsible and maintain proper management of documents in such a manner that ensures easy accessibility and their preservation.⁶²

j) Proactive disclosure

Public authorities are required to make available information in their possession at their own initiative and when appropriate.⁶³

k) Implementation/oversight mechanism

The Convention creates a two-pronged mechanism to oversee its implementation.⁶⁴

i. Group of Specialists

This group comprised of 10-15 experts,⁶⁵ which must be independent and impartial,⁶⁶ is tasked with: reviewing the implementation of the Convention including: reporting on the adequacy of legal and other measures adopted by Member States to implement the Convention; providing opinions on any question as to its implementation; proposing measures to facilitate implementation; reporting on relevant legal, policy or technological developments; and making and formulating proposals for the amendment of the Convention.

ii. Consultation of the parties

The Consultation of the parties is responsible for considering the reports; opinions and recommendations of the Group of Specialists; making proposals and recommendations to Member States; and proposing and providing opinions on the amendment of the Convention.⁶⁷ Each Member State is entitled to one representative in this body.

⁶² Article 9.

⁶³ Article 10.

⁶⁴ Article 11(1).

⁶⁵ These experts must be 'of the highest integrity recognised in the field of access to official documents'. See article 11(3).

⁶⁶ Article 11(4).

⁶⁷ Article 12 (1).

2.4.2 The Inter-American Human Rights System

Within the regional human rights system as established by the Organisation of American States, access to information has found great recognition, no doubt as a result of the political history of the region,⁶⁸ in the context of the right to truth for gross violation of human rights and as an instrument of transitional justice.⁶⁹ At the level of the Inter-American Commission on Human Rights, considerable efforts have been made to provide greater clarity on the normative content of the right. These efforts have been mostly visible through the work of the Special Rapporteur on Freedom of Expression, the work of the Inter-American Juridical Committee and the development of the OAS Model Law on Access to Information, all of which have been greatly influenced by the jurisprudence of the Inter-American Court of Human Rights.

Article 13(1) of the American Convention which is almost a verbatim replication of article 19(2) of ICCPR, provides:

Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.

2.4.2.1. The OAS Special Rapporteur on Freedom of Expression

The office of the OAS Special Rapporteur on Freedom of Expression (OAS Special Rapporteur) was established in October 1997, as 'a permanent independent office' within the OAS human rights framework, by a decision of the Inter-American Commission on Human Rights.⁷⁰ The crux of the mandate of the OAS Special Rapporteur is to amongst other things, promote the adoption of legislative, judicial, administrative and other

⁶⁸ The phenomenon of brutal dictatorships often as a result of military rule in Latin America during the 19th and 20th Century, characterised by massive human rights violations, including forced disappearances and torture is well documented. See for example, Drake, P. (2009) *Between Tyranny and Anarchy: A History of Democracy in Latin America* Stanford University Press: Stanford.

⁶⁹ See generally 'The Right to Truth in the Americas', a publication of the Inter-American Commission on Human Rights, 13 August 2014. Available at <<http://www.oas.org/en/iachr/reports/pdfs/Right-to-Truth-en.pdf>> (accessed 15 October 2015).

⁷⁰ See the history of the OAS Special Rapporteur on Freedom of Expression. Available at <<http://www.oas.org/en/iachr/expression/showarticle.asp?artID=52&IID=2>> (accessed 20 April 2015).

measures to give effect to the right of freedom of expression as contained in article 13 of the American Convention.⁷¹

Since the establishment of the office, successive Special Rapporteurs have progressively spelt out the key principles as well as scope and content of the right of access to information.⁷² This has been through the development and adoption of the OAS Declaration of Principles on Freedom of Expression, as well as in annual reports presented to the Inter-American Commission, which have since 2003, included a chapter on access to information usually providing an overview of the situation of the right in Member States.⁷³ In addition, at the request of the General Assembly, the Special Rapporteur has undertaken research studies further elaborating the content of the right of access to information.⁷⁴

a. The Declaration of Principles on Freedom of Expression

In 2000, the Special Rapporteur developed a Declaration of Principles on Freedom of Expression (Declaration)⁷⁵ as a means of providing a uniform legal framework for Member States in the implementation of their obligations in respect of article 13 of the American Convention, which incorporated key principles of relevant international human rights standards.⁷⁶

⁷¹ The mandate of the Special Rapporteur on Freedom of Expression is available at <<http://www.oas.org/en/iachr/ expression/mandate/>> (Accessed 20 April 2015).

⁷² The mandate holders have been: Dr Santiago Canton (1998-2002); Dr Eduardo Bertoni (2002-2006); Dr Ignacio Álvarez (2006-2008); Dr Catalina Botero (2008-2014); Mr Edison Lanza (2012 to date).

⁷³ At the promoting of Resolutions of the General Assembly, beginning with Resolution 1932 (XXXIII-O/03) of 2003; Resolution 2057 (XXXIV-O/04) of 2004; Resolution 2121 (XXXV-O/05), the Special Rapporteur was requested to report on the situation of freedom of expression in the region. Notably, by (Resolution 2252 (XXVI-O-06), the Special Rapporteur was instructed to provide technical assistance to Member States who required such, in the development of access to information legislation and mechanisms.

⁷⁴ The first of such studies was the 'Special Study on the Right of Access to Information' (2007) Available only in Spanish <<http://www.cidh.oas.org/relatoria/section/Estudio%20Especial%20sobre%20el%20der echo%20de%20Acceso%20a%20la%20Informacion.pdf>> (Accessed 20 April 2015). See also 'The Right of Access to Information in the Americas: Inter-American Standards and Comparison of Legal Frameworks' (2011) <<http://www.oas.org/en/iachr/expression/docs/publications/access%20to%20information%20in%20the%20Americas%202012%2005%2015.pdf>> (accessed 21 April 2015).

⁷⁵ Available at <<http://www.oas.org/en/iachr/expression/showarticle.asp?artID=26>> (accessed 21 April 2015).

⁷⁶ See 'Background and Interpretation of the Declaration of Principles' Available at <<http://www.oas.org/en/iachr/expression/showarticle.asp?artID=132&IID=1>> (accessed 21 April 2015).

The Inter-American Commission in October 2000 adopted the Declaration as a basic document for interpreting the right of freedom of expression as guaranteed by article 13 of the American Convention on Human Rights.⁷⁷ The Declaration affirms the right of access to information in two contexts. First, it encompasses the right of everyone to access information about 'himself or herself, or his/her assets held by private or public institutions 'timeously and easily, and to update or correct such information.'⁷⁸ Second and more importantly, the right of access to information imposes an obligation on the State to 'guarantee the full exercise of this right' subject only to limitations 'previously established by law' in cases of 'real and imminent threats' to national security in a democratic society.⁷⁹

In interpreting the right of access to information as reflected in Principles 3 and 4 of the Declaration, the Special Rapporteur explains Principle 3 as dealing with the '*habeas data*' principle which encompasses three issues: the right of every person to privacy; the right of every person to access information about his/herself and to modify or correct such information and the right of everyone to use the *habeas data writ* as a tool for accountability.⁸⁰ Furthermore, by principle 4, giving the importance of access to information for transparency and strengthening democratic institutions, limitations to the right must be an exception not the norm, and the applicability of such limitations must be determined on a case by case basis.⁸¹

b. The Inter-American Legal Framework Regarding the Right to Access to Information

The Inter-American Legal Framework Regarding the Right to Access to Information,⁸² is a publication of the Office of the Special Rapporteur which enumerates the 'guiding

⁷⁷ As above.

⁷⁸ Principle 3 of the Declaration. For further elaboration of this principle, See 'Background and Interpretation of the Declaration of Principles' (n 76 above).

⁷⁹ Principle 4 of the Declaration (n 75 above).

⁸⁰ Paragraph 20, Background and Interpretation of the Declaration of Principles, (n 76 above).

⁸¹ As above.

⁸² This document was first published in 2009 and then updated and again published in 2011. See 'The Inter-American Legal Framework Regarding the Right to Access to Information'(2011) Available at <<http://www.oas.org/en/iachr/expression/docs/publications/2012%2009%2027%20ACCESS%20TO%20INFORMATION%202012%20edits.pdf>> (accessed 20 April 2015).

principles' as well as the 'scope and content' of the right of access to information within the Inter-American legal framework.

Maximum disclosure is affirmed as the key principle from which all others flow. By this principle, a legal framework on access to information must recognise as a general rule that providing access to information is the general rule and non-disclosure or secrecy, the exception.⁸³ Three further principles emanate from this general rule:⁸⁴

- i. Restrictions on the right of access to information must be extremely limited and must be interpreted narrowly, thereby favouring access;
- ii. Any denial of access to information must be well-reasoned, with the onus resting on the State to justify denial of access;⁸⁵ and
- iii. Precedence must always be given to the right of access where there is doubt or a legal vacuum.

2.4.2.2 The Inter-American Juridical Committee

The Inter-American Juridical Committee (IAJC) is an organ of the OAS,⁸⁶ established as an advisory body on legal matters to promote the development and progressive codification and harmonisation of legislation in Member States in accordance with international law.⁸⁷ The IAJC adopted a resolution on the 'Principles on the Right of Access to Information' in August 2008, detailing key principles in the drafting and implementation of access to information legislation.⁸⁸

- i. The general rule is that all information held by public bodies is accessible to everyone, subject only to a limited regime of exceptions necessary in a democratic society and proportionate to the interest to be protected.

⁸³ Para 9.

⁸⁴ See para 10.

⁸⁵ This principle has emanated from the jurisprudence of the Inter-American Court. See for example *Claude-Reyes v Chile* (Judgement of September 2006) , Series C, No. 151, para 93.

⁸⁶ The Committee is established by virtue of article 53 of the Charter of the Organisation of American States. A Statute operationalising it was adopted by the General Assembly of the OAS in 2007. It also has its own Rules of Procedure.

⁸⁷ Available at <<http://www.oas.org/en/sla/iajc/default.asp>> (accessed 21 April 2015).

⁸⁸ Available at <http://www.oas.org/cji/eng/CJI-RES_147_LXXIII-O-08_eng.pdf> (accessed 21 April 2015).

- ii. The right of access to information applies to public bodies, which includes all branches of government (executive, legislative and judicial) at all levels of government; constitutional and statutory bodies; bodies owned or controlled by government; and organisations operating with public funds or performing public functions.
- iii. Information must be defined broadly to include everything which is held or recorded in any format or medium.
- iv. Public bodies should routinely and proactively disclose, in an accessible and understandable manner, information on their functions and services such as: policies, opportunities for consultation, activities affecting the public, consultation opportunities, their budgets, subsidies, benefits and contracts.
- v. The process for requesting information should be clear, fair, non-discriminatory and simple. This process must include the following: clear and reasonable timelines; assistance provided to requesters; free or low-cost access not exceeding the copying and sending costs; and reasoned and timeous grounds for refusal of requested information.
- vi. Exceptions to the right of access to information must be established by law, clear and narrow.
- vii. Public bodies bear the onus of proof in justifying refusal of access to information.
- viii. Any refusal of a request for access to information must be subject to administrative appeal, and if unsuccessful, followed by a judicial appeal.
- ix. Wilful denial or obstruction of access to information must be subject to sanctions.
- x. Specific measures to promote, implement and enforce access to information must be undertaken, such as: creation and maintenance of public archives; training of public officials, public awareness campaigns; information management system strengthening; and reporting mechanism for public bodies on compliance with the access to information legislation.

2.4.2.3 The OAS Model Law on Access to Information

In June 2009, the OAS General Assembly adopted a resolution which amongst other things, authorised the Department of International Law,⁸⁹ to draft a 'model law on access to information and a guide for its implementation, in keeping with international standards in the field', in collaboration with the IAJC, the Special Rapporteur, Department of State Modernisation and Good Governance,⁹⁰ Member States and civil society.⁹¹ Following a year of drafting, the Model Law and Implementing Guide were adopted by a resolution of the OAS General Assembly.⁹² The Model Law, which seeks to 'provide States with the legal foundation necessary to guarantee the right to access to information',⁹³ is in effect, a consolidation of previous standard-setting documents on the right of access to information developed by the Inter-American Commission as highlighted above, as well as the Inter-American Court⁹⁴ and other institutions of the OAS.⁹⁵

In addition to some key principles enumerated above on access to information in the 'Inter-American Legal Framework Regarding the Right to Access to Information' developed by the Special Rapporteur and the 'Principles on the Right of Access to Information' developed by the (IAJC) which the Model Law reiterates, some other equally important additional principles contained in the Model Law are worth mentioning.

⁸⁹ The Department of International law is part of the OAS Secretariat of Legal Affairs responsible for providing legal advice to organs of the OAS, promoting the development of international law and acting as the depository of Inter-American Treaties. See further <http://www.oas.org/en/sla/dil/international_law.asp> (accessed 23 April 2015).

⁹⁰ This Department was initially part of the Secretariat for Political Affairs at the time of its establishment within the General Secretariat of the OAS in 2006. However, it has since ceased to exist.

⁹¹ See paragraph 9, AG/RES.2514 (XXXIX-O/09) 'Access to Information: Strengthening Democracy', adopted on 4 June 2009. Available at <http://www.oas.org/en/sla/dil/docs/AG-RES_2514-2009_eng.pdf> (accessed 22 April 2015).

⁹² AG/RES. 2607 (XL-O/10) 'Model Inter-American Law on Access to Public Information', adopted on 8 June 2010. Available at <https://www.oas.org/dil/AG-RES_2607-2010_eng.pdf> (accessed 23 April 2015).

⁹³ 'Model Inter-American Law on Access to Information' Available at <http://www.oas.org/en/sla/dil/access_to_information_model_law.asp> (Accessed 23 April 2015).

⁹⁴ Particularly with regard to the principles developed by the Court in its landmark decision in *Marcel Claude Reyes v Chile*, Case No. 12.108, Report No. 60/03. Available at <http://www.oas.org/en/sla/dil/docs/iahr_court_jurisprudence_Claude_Reyes_vs_Chile.pdf> (accessed 23 April 2015).

⁹⁵ See for example, the 'Joint Document Recommendations on Access to Information'. Available at <http://www.oas.org/en/sla/dil/docs/CP-CAJP_2599-08_eng.pdf> (accessed 23 April 2015).

a. Definitions

The definition of ‘public authority’ is largely the same as prior standards, particularly the IAJC. However, in respect of the applicability to private organisations some qualifications have been introduced. An ATI law is to be applicable to public organisations which utilise ‘substantial’ public funds or perform public functions, only ‘in so far as it applies to those funds or to the public services or functions they undertake’.⁹⁶ With respect to the definition of ‘information’, it appears more comprehensively formulated as ‘any type of data in custody or control of a public authority’.⁹⁷

b. Primacy and interpretation

Where an inconsistency exists, an ATI law must prevail over all other Statutes.⁹⁸ Furthermore, in interpreting an ATI law, or any other relevant law affecting the rights contained in the ATI law, a reasonable interpretation which gives effect to the right of access to information must be adopted.⁹⁹

c. Publication schemes/proactive disclosure

To encourage proactive disclosure of information, each public authority is required to adopt and disseminate publication schemes.¹⁰⁰ These publication schemes in essence, set out the types of information the public authority will publish proactively and the manner in which such records will be published.¹⁰¹ At a minimum, public authorities must disclose certain key classes of information.¹⁰²

d. Records management

The national body responsible for archives in each respective Member State must in coordination with the oversight mechanism (Information Commissioner) develop a binding records management system.¹⁰³

⁹⁶ See articles 1(e) and 3.

⁹⁷ See article 1(a).

⁹⁸ Article 4.

⁹⁹ See article 8.

¹⁰⁰ Article 9(1).

¹⁰¹ Article 9(2).

¹⁰² See article 12(1)(a)-(p).

¹⁰³ Article 33.

e. Process of requesting information

Requests for information can be made in writing or orally, or by any other means,¹⁰⁴ and such requests are not subject to the payment of fees.¹⁰⁵ Rather, only the cost of reproduction and delivery of the information, where applicable is payable. These costs may however be waived for low-income earners.¹⁰⁶ Response to request must be within 20 days,¹⁰⁷ and where necessary this may be extended by another 20 days.¹⁰⁸

f. Exceptions

Generally speaking, access to requested information may be denied if it is 'legitimate and strictly necessary in a democratic society' to protect the following private interests: right to privacy, including life, health or safety; legitimate commercial and economic interests; and patents, copyrights and trade secrets. Information is also exempt, where disclosure could create a 'clear, probable and specific risk of substantial harm to the following public interests: public safety; national security; future provision of free and open advice among public authorities; formulation or development of policy; international or intergovernmental relations; law enforcement and the prevention, investigation and prosecution of crime; State management of the Economy; legitimate financial interests; and tests and audits.'¹⁰⁹

g. Public interest override

In spite of the listed exceptions, requested information must be disclosed, 'unless the harm to the interest protected under the relevant exception, outweighs the general public interest in the disclosure'.

¹⁰⁴ Article 20. Requests made in writing can be electronically and those made orally can be in person or telephonically.

¹⁰⁵ Article 22.

¹⁰⁶ Article 28.

¹⁰⁷ Articles 35(1) and (2).

¹⁰⁸ Article 36(1). The specific instances in which an extension can be allowed are where the request requires review of voluminous records, offices are physically far away or the request requires further consultation with other public authorities.

¹⁰⁹ See article 41. Note however that by article 45, these exceptions do not apply in cases of serious violations of human rights or war crimes.

h. Appeal

Three categories of appeal are provided. First, is an optional internal appeal to the head of the public authority,¹¹⁰ followed by an external appeal to the Information Commission.¹¹¹ Thereafter, a petition may be filed to court against the decision of the Information Commission or to enforce compliance with its decision.¹¹²

i. Information Commission

The establishment of an independent body to oversee the implementation of the ATI law is provided.¹¹³ Such body must be empowered to conduct investigations, issue recommendations and mediate disputes,¹¹⁴ while at the same time promoting the law and monitoring compliance by public authorities with its provisions.¹¹⁵

j. Whistle blower protection

The OAS Model law provides that a person, who acts reasonably and in good faith, must not suffer civil or criminal liability, nor employment detriment in the exercise of any power or duty conferred by the ATI law.¹¹⁶

2.4.3 The African human rights system

Within the African human rights system, as with other regional systems, the development of normative standards on access to information is based on freedom of expression provisions in article 9 of the African Charter. The scope and content of the right of access to information and the elaboration of the core principles integral thereto, has occurred mainly through the adoption of the Declaration of Principles on Freedom of Expression and the work of the Special Rapporteur on Freedom of Expression and Access to Information.

¹¹⁰ Article 46.

¹¹¹ Article 47.

¹¹² Article 50(4), 51 and 52.

¹¹³ See articles 54-63.

¹¹⁴ See generally sections 61 and 62.

¹¹⁵ See generally article 63 and 69.

¹¹⁶ Article 64.

2.4.3.1 The Declaration of Principles on Freedom of Expression in Africa

The African Commission on Human and Peoples' Rights (African Commission) in May 2001, adopted a resolution authorising the development of a Declaration of Principles on Freedom of Expression, based on 'a comprehensive range of international standards and jurisprudence, to elaborate and expound the nature, content and extent of the right to freedom of expression provided for under Article 9 of the African Charter'.¹¹⁷ In addition, the resolution *inter alia*, sanctioned the establishment of 'an appropriate mechanism' to monitor adherence by Member States to freedom of expression standards generally and the pending Declaration in particular.¹¹⁸

Subsequently, a Working Group comprising three members of the African Commission and independent experts was formed to develop the Declaration as recommended by the Resolution.¹¹⁹ A year later in October 2002, the Declaration of Principles on Freedom of Expression in Africa (the Declaration), was adopted by a resolution of the African Commission.¹²⁰ Principle IV of the Declaration titled 'Freedom of Information', declares that:

[P]ublic bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.

Specifically, six key principles which must be contained in an access to information law are outlined as follows:

- i. Everyone has the right to access information held by public bodies.

¹¹⁷ See Resolution 54: Resolution on Freedom of Expression, adopted during the 29th Ordinary Session of the African Commission, which took place from 23 April to 7 May in Tripoli, Libya.

¹¹⁸ As above.

¹¹⁹ The Working Group was established during the 30th Ordinary Session of the African Commission which took place from 13 to 27 October 2001 in Banjul, The Gambia, and comprised of Commissioners Andrew Chigovera, Jainaba Johm and Barney Pityana as well as NGO partners from Article 19. See the Activity Report of the Special Rapporteur on Freedom of Expression in Africa, presented to the 41st Ordinary Session of the African Commission on Human and Peoples' Rights 16 - 30 June 2007, Accra, Ghana. Available at <<http://www.achpr.org/sessions/41st/inter-session-activity-reports/freedom-of-expression/>> (accessed 24 April 2015).

¹²⁰ See Resolution on the adoption of the Declaration of Principles on Freedom of Expression in Africa. This Resolution was adopted during the 32nd Ordinary Session of the African Commission which took place from 17 to 23 October 2002, in Banjul, The Gambia, ACHPR/Res.62 (XXXII) 02. Available at <<http://www.achpr.org/sessions/32nd/resolutions/62/>> (accessed 24 April 2015).

- ii. Everyone has the right to access information held by private bodies where this is necessary for the exercise or protection of any right.
- iii. The refusal to disclose information must be subject to appeal to an independent body and/or court.
- iv. Public bodies must proactively to publish information of significant public interest.
- v. The release of information on wrongdoing or disclosing serious threat to health safety or environment, must not be subject to sanctions if done in good faith, unless such sanction serves a legitimate interest and is necessary in a democratic society.
- vi. Existing secrecy laws must be amended to conform with access to information principles.

Despite its limited scope and non-binding nature, the adoption of the Declaration was a landmark event in the promotion and protection of access to information in Africa. For the first time, Africa had established key principles on access to information, which for the next 10 years remained the singular set of regional standards that could be relied upon in holding Member States accountable in the promotion and protection of the right to access to information in Africa.

2.4.3.2 The Special Rapporteur on Freedom of Expression and Access to Information in Africa

Following the adoption of the Declaration, the second half of the Resolution of the African Commission which gave rise to the development of the Declaration, required the setting-up of an appropriate mechanism to oversee the implementation of the Declaration and by extension the implementation of Article 9 of the African Charter. A 'focal person' within the African Commission was designated for this purpose.¹²¹ Despite advocacy by various stakeholders for the establishment of a monitoring mechanism on freedom of expression which was independent of the African Commission,¹²² the African Commission decided

¹²¹ Commissioner Andrew Chigovera, who had served as one of the members of the Working Group, was appointed the Focal Point, during the 33rd Ordinary Session of the African Commission, which took place from 15 to 29 May 2003 in Niamey, Niger. See the Activity Report of the Special Rapporteur on Freedom of Expression in Africa (n 119 above).

¹²² A consultative meeting held from 13 to 14 August 2003 in South Africa between the Focal Person and stakeholders on freedom of expression, has as a key recommendation, the appointment of an 'external' Special Rapporteur while maintaining an 'internal' focal person. Activity Report of the Special Rapporteur on Freedom of Expression in Africa (n 119 above).

to maintain its practice of appointing serving members as mandate holders of its special mechanisms, and in 2004, the office of the Special Rapporteur on Freedom of Expression in Africa was established.¹²³

Subsequently, the mandate and title of the Special Rapporteur was expanded to include access to information,¹²⁴ making Africa the only regional human rights system with an explicit reference to access to information in the mandate and title of the relevant special mechanisms dealing with access to information.¹²⁵

The mandate of the Special Rapporteur can be broadly categorised as promotional and protective. In terms of the promotional mandate, the Special Rapporteur is empowered to: analyse national media legislation, policies and practice within Member States; undertake promotional country Missions and any other activities for the full enjoyment of the right to freedom of expression and of access to information; and submit reports at each Ordinary Session of the African Commission on the status of the enjoyment of the right to freedom of expression and access to information in Africa. The protective mandate of the Special Rapporteur included the following: undertaking fact-finding missions to Member States where there are reports of systemic violations of the right to freedom of expression and denial of access to information; making public interventions where violations of the right to freedom of expression and access to information have been brought to her attention, by issuing public statements, press releases, and sending appeals to Member States asking for clarifications; and keeping a proper record of

¹²³ During the 36th Ordinary Session of the African Commission from 26 November to 7 December 2004, the office of the Special Rapporteur on Freedom of Expression was established, and the Focal Person, Commissioner Andrew Chigovera was appointed the first Special Rapporteur on Freedom of Expression. See ACHPR/Res.71 (XXXXVI) 04: Resolution on the Mandate and Appointment of a Special Rapporteur on Freedom of Expression in Africa. Available at <http://old.achpr.org/english/resolutions/resolution76_en.html> (accessed 25 April 2015).

¹²⁴ See ACHPR/Res. 122 (XXXII) 07: Resolution on the Expansion of the Mandate and Re-Appointment of the Special Rapporteur on Freedom of Expression and Access to Information in Africa, which was adopted during the 42nd Ordinary Session of the African Commission from 15 to 28 November 2007 in Brazzaville, Republic of Congo. Available at <http://old.achpr.org/english/resolutions/resolution122_en.htm> (accessed 25 April 2015).

¹²⁵ The 3 other relevant mandate holders are described as follows: UN- Special Rapporteur on the Promotion and Protection of the right to Freedom of Opinion and Expression; OAS-Special Rapporteur on Freedom of Expression; and OSCE- Representative on Freedom of the Media.

violations of the right to freedom of expression and denial of access to information and publish this in her reports submitted to the African Commission.

In executing this expanded mandate, the Special Rapporteur has utilised the Declaration in encouraging Member States to adopt access to information laws, and as a benchmark for assessing the efficacy of existing or draft access to information laws of Member States.¹²⁶ However, it soon became clear that beyond the constant emphasis on the deficiencies in the normative framework of most Member States, what was needed was more proactive guidance to Member States in developing or amending access to information laws in conformity with regional and international standards.¹²⁷

2.4.3.3 The Model Law on Access to Information for Africa

To encourage increased adoption of access to information laws on the continent and also remedy the poor level of compliance of adopted laws with regional and international standards,¹²⁸ the African Commission adopted a Resolution in October 2010. This resolution authorised the Special Rapporteur to begin a process of ‘developing a Model Access to Information legislation for Africa’.¹²⁹ Over the next two and a half years, the Special Rapporteur with the assistance of the Centre for Human Rights, University of Pretoria, developed the Model Law.¹³⁰ Following an initial experts meeting in October

¹²⁶ Regularly, the Special Rapporteur’s Activity Reports discusses issues related to the effectiveness of access to information laws.

¹²⁷ See Activity Report of the Special Rapporteur on Freedom of Expression and Access to Information in Africa, presented to the 44th Ordinary Session of the African Commission from 10-24 November 2008 in Abuja, Nigeria. Available at <<http://www.achpr.org/sessions/44th/inter-session-activity-reports/freedom-of-expression/>> (accessed 25 April 2015). In paragraph 41, the Special Rapporteur after providing an overview of the status of access to information on the continent stated,

“... that there is an urgent need for the formulation of a model law or guidelines on Access to Information on the continent, to assist countries to draft laws which comply with international and regional standards and at the same time, are simple, affordable and easy to implement.”

¹²⁸ At this time there only 5 countries in Africa (Angola, Liberia, South Africa, Uganda, Zimbabwe) had adopted ATI laws and some of these laws had been severely criticised for doing more to restrict access to information than to promote the right.

¹²⁹ See ACHPR/Res. 167 (XLVII) 2010: Resolution on Securing the Effective Realisation of Access to Information in Africa, which was adopted by the African Commission during the Ordinary Session which took place from November 2010 in Banjul, The Gambia. Available at <http://old.achpr.org/english/resolutions/Resolution167_en.htm> (accessed 25 April 2015).

¹³⁰ The Centre for Human Rights acted as ‘the Secretariat’ and in particular, this author coordinated the process of the development of the Model Law. See further, statement at the Launching of the Model Law on Access to Information for Africa at the 53rd Session of the African Commission on Human and Peoples’ Rights, Available at <<http://www.chr.up.ac.za/index.php/ati-news.html>> (accessed 26 April 2015). Following the adoption of the Model Law, the Centre for Human Rights has continued to coordinate advocacy efforts

2010 which agreed on the desirability of the development of a Model Law and key principles to be contained therein, a 10 member Working Group with representatives from all sub-regions of Africa was established.¹³¹ This Working Group for the next two years worked together to develop the draft text of the Model Law.¹³²

As part of this process, four sub-regional consultations were held in Mozambique (June 2011), Kenya (August 2011), Senegal (October 2011) and Tunisia (Jun 2012) at which the draft text was rigorously discussed, and comments as well as suggestions made.¹³³ In addition, numerous comments were received electronically, in response to a call for comments by the secretariat of the African Commission. The feedback received at these consultations, together with those received electronically, guided the Working Group in the finalisation of the final draft, which was presented to the African Commission in October 2012.¹³⁴ Following further amendments, the final text of the 'Model Law on Access to Information for Africa (Model Law)' was adopted by the African Commission in February 2013.¹³⁵

Key features of the Model Law

i. Scope of application

The right to access information is guaranteed to every person and not only citizens.¹³⁶ The requirement to disclose information is applicable to 3 classes of 'information holders': public bodies, private bodies, and 'relevant private bodies'-which are bodies which would

at the regional, sub-regional and national level to encourage the utilisation of the Model Law in the development and revision of access to information laws on the continent.

¹³¹ Within this Working Group, a 3-member drafting committee was also established which produced the initial draft and thereafter amended the text based on feedback received at each stage of the process.

¹³² As part of this process, four sub-regional consultations were held in Mozambique (June 2011), Kenya (August 2011), Senegal (October 2011) and Tunisia (June 2012).

¹³³ These consultations had the participation of a broad group of stakeholders including: Ministers/Ministries of Justice and Information, Parliamentarians, National Human Rights Commissions, National Electoral Commissions, academics and members of civil society.

¹³⁴ This final draft was presented by Members of the Working Group to the Members of the African Commission during the 52nd Ordinary Session from 9 to 22 October 2012 in Yamoussoukro, Côte d'Ivoire.

¹³⁵ The Model Law was adopted on 23 Feb 2013 during the 13th Extra-Ordinary Session of the African Commission and formally launched on 11 April 2013, during the 53rd Ordinary Session of the African Commission from 9 to 22 April 2013 in Banjul, The Gambia.

¹³⁶ Section 2(a) and (b).

otherwise be a private body but which is owned, controlled or financed through public funds or which is performing a public function or service.¹³⁷

ii. Process for making requests for information

Requests for information can be made not only in writing but also orally, in which case the requester must be assisted to reduce the request into writing.¹³⁸ No fees are payable for accessing information, only the cost of reproduction of the requested information. Where the information is requested by an indigent person, the reproduction fee is to be waived.¹³⁹ Where information requested is for the purpose of safeguarding the life or liberty of a person, such information must be provided within 48 hours.¹⁴⁰

iii. Duty to create, keep and organize information

Information holders are obligated to create, keep, organise and maintain information.¹⁴¹

iv. Proactive disclosure

Detailed categories of information to be published proactively by information holders both upon the coming into force of the law and annually are listed.¹⁴²

v. Exemptions

There are nine narrowly and clearly defined categories of information exempted from disclosure. Significantly, information is not exempted merely on the basis of its classification status.¹⁴³

vi. Public interest override

There is a strong public interest override provision. Thus, access to requested information can only be refused, where the harm to the interest protected under the relevant exemption that would result from the release of the information *demonstrably outweighs* the public interest in the release of the information.¹⁴⁴

¹³⁷ See definition section an section 2 (a)-(c).

¹³⁸ Section 13(1).

¹³⁹ Section 23.

¹⁴⁰ Section 15(9).

¹⁴¹ Section 6.

¹⁴² Section 7.

¹⁴³ Sections 26-35.

¹⁴⁴ Section 25.

vii. Oversight mechanism

The Model Law provides for the establishment of an oversight body for monitoring, promoting and protecting the right of access to information. The independence of this body is guaranteed through numerous provisions on the process of appointment, removal from office, remuneration e.t.c.¹⁴⁵

2.5 Other binding and non-binding principles on access to information

Apart from all the above enumerated standards which have been developed by the UN and various regional human rights systems, over the years, several other non-binding standards have been developed by inter-governmental bodies, civil society organisation and other stakeholders which have broadened the content of the right of access to information. These include general principles on the right, principles developed in the context of national security and on environmental issues, as well as Model Laws designed to address the content of the right at both the international and regional levels.

2.5.1 The Johannesburg Principles

The Johannesburg Principles on National Security, Freedom of Expression and Freedom of Information is a document which in reflecting the general thinking of access to information as a corollary of the right to freedom of expression at the time, sought to set out key standards for the promotion and protection of both rights, while balancing the enforcement of both rights, with legitimate national security concerns of States.¹⁴⁶

Generally, the principles as they relate to issues of national security appear to merely reiterate to States, the fact that generally accepted principles of access to information are applicable and must be applied in relation to information touching on national security. Thus, in applying the internal limitations to the right of freedom of expression, from which the right of access to information derives, the Johannesburg Principles declares that restriction of information on national security grounds is justifiable only when Governments demonstrate that such restriction is 'prescribed by law and is necessary in

¹⁴⁵ Sections 45-82.

¹⁴⁶ Available at <<http://www.article19.org/data/files/pdfs/standards/joburgprinciples.pdf>> (accessed 1 May 2015). These principles were adopted in Johannesburg on 1 October 1995 by a group of experts brought together by ARTICLE 19, the Centre for Applied Legal Studies and University of Witwatersrand.

a democratic society to protect a legitimate national security interest'.¹⁴⁷ Furthermore, the public interest in the disclosure of information is expressed as the paramount consideration in all circumstances.¹⁴⁸ As a result, individuals should not be punished for the disclosure of information which does not harm or is unlikely to harm legitimate national security interests; or the public interest in the disclosure of the information outweighs the harm from disclosure.¹⁴⁹

These Johannesburg Principles were endorsed by the first UN Special Rapporteur, Abid Hussain, and the above highlighted principles were amongst others referred to in his annual reports to the then Human Rights Commission (now Human Rights Council).¹⁵⁰

2.5.2 The Tshwane Principles

Almost two decades after the adoption of the Johannesburg Principles in 1995, the Global Standards on National Security and the Right to Information (Tshwane Principles) was adopted.¹⁵¹ Unlike the Johannesburg Principles, the Tshwane Principles focuses squarely only on the right of access to information (with no reference to freedom of expression),¹⁵² particularly in the light of contemporary challenges such as terrorism, which increasingly has had States justifying limitations to the right of access to information on the 'weighty ground' of national security.¹⁵³ Acknowledging the established fact that States can and do have legitimate national security interests warranting secrecy, the Tshwane Principles attempts to guide States on the limitations to the non-disclosure of

¹⁴⁷ Principle 12.

¹⁴⁸ Principles 13.

¹⁴⁹ Principle 14.

¹⁵⁰ These reports were tabled in 1996, 1998, 1999 and 2001 respectively. In addition, the Human Rights Commission made reference to the Johannesburg Principles in its annual resolutions on freedom of expression from 1996.

¹⁵¹ The Tshwane Principles was launched on 12 June 2013. The drafting of these principles was facilitated by the Open Society Justice Initiative, through 14 meetings held over two years and with the participation of 22 groups (civil society organisations and academic institutions) worldwide. The finalisation meeting in Tshwane, was organised by the Centre for Human Rights, University of Pretoria in April 2013, giving rise to the name 'Tshwane Principles'. See generally 'The Global Principles on National Security and Right to Information (Tshwane Principles) available at <<http://www.opensocietyfoundations.org/publications/global-principles-national-security-and-freedom-information-tshwane-principles>> (accessed 2 May 2005).

¹⁵² This is a clear example of the now widespread acceptance of access to information as a right on itself.

¹⁵³ See generally the Tshwane Principles. In particular, principle 2(b) refers to national security as 'one of the weightiest public grounds for restricting access to information'.

information on national security grounds, based on evolving international jurisprudence on the right of access to information and international human rights law in general.

Thus, while it is accepted that withholding of information in respect of narrowly defined national security issues such as ‘defence plans, operations and capabilities’ or on ‘the operations, sources and methods of intelligence services’ is justifiable,¹⁵⁴ refusal to disclose information on surveillance, violations of international human rights and humanitarian law or the decision to utilise military force and weapons of mass destruction ought to be disclosed.¹⁵⁵ The Tshwane principles also deals with related issues such as: protection of journalists or other non-government employees who receive or disclose classified information from criminal sanction or from revealing their sources,¹⁵⁶ protection of whistle blowers in the public sector who attempt accessing official complaint mechanisms,¹⁵⁷ duration of classification and procedures for declassification of information.¹⁵⁸

2.5.3 The Aarhus Convention

The Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters was adopted by the European Commission in 1999.¹⁵⁹ The Convention obliges Member States to adopt national legislation guaranteeing the right of everyone to request environmental information held by public authorities,¹⁶⁰ subject to specified limitations.¹⁶¹ Such requested information must be

¹⁵⁴ See principle 9 which lists 5 classes of information which may be legitimately withheld.

¹⁵⁵ Principle 10.

¹⁵⁶ Principles 47 and 48.

¹⁵⁷ Principles 40, 41 and 43.

¹⁵⁸ Principles 16 and 17.

¹⁵⁹ The full text of the Convention is available at < <https://www.unece.org/fileadmin/DAM/env/pp/document/s/cep43e.pdf>> The Convention was adopted by the fourth Ministerial Conference of the European Commission which took place in Aarhus, Denmark giving rise to its name. The Convention came into force in October 2001, 90 days after the sixteenth ratification. See <www.ec.europa.eu/environment.aarh.us/> (accessed 5 June 2015).

¹⁶⁰ Such information includes information on the state of elements of the environment, policies, programmes or legislation affecting or likely to affect the environment, the state of human health and safety that are or may be affected by the environment. See generally article 3 of the Convention.

¹⁶¹ These limitations are provided in article 4(4) and include information that would adversely affect the confidentiality of proceedings of public authorities; international relations, national defence or public security; administration of justice; intellectual property rights; confidentiality of personal data; personal information of a third party or the environment to which the information relates.

provided within one month of the request, without the need to give reasons and in the form requested.¹⁶² More importantly, the Convention contains several provisions requiring the gathering, storing and proactive disclosure of environmental information.¹⁶³ Member States are however given the discretion to determine the appropriate means of redress against failure by public authorities to disclose requested information within the stipulated time- whether the courts or any other independent or impartial body.¹⁶⁴

2.5.4 The Rio Declaration, Bali Guidelines and Rio + 20 Declaration

In 1992, the UN organised a Conference on Environment and Development in Rio de Janeiro, Brazil.¹⁶⁵ The meeting ended with a set of 27 non-binding principles (the Rio Declaration on Environment and Development), which have somewhat come to be regarded as an 'environmental bill of rights', urging states and civil society to work together to protect the environment while simultaneously promoting sustainable development.¹⁶⁶ Principle 10 of the Declaration states that 'environmental issues are best handled with the participation of all concerned citizens' and in particular, 'at the national level, each individual shall have access to information concerning the environment that is held by public authorities' and that States should facilitate and encourage public participation and effective access to justice in this regard.¹⁶⁷ Twenty years later, the outcome document of the Rio+20 conference reiterated the 'broad participation and access to information' is essential to sustainable development.¹⁶⁸

To provide further guidance to States in implementing principle 10, the United Nations Environment Programme (UNEP) developed a set of 26 guidelines, which are in essence

¹⁶² Article 1.

¹⁶³ Article 5.

¹⁶⁴ Article 6.

¹⁶⁵ The Conference is also known as the 'Earth Summit' was a follow-up to the United Nations Conference on the Human Environment which took place in Sweden in 1972. See generally, Kubiszewski, I. and Cleveland, C. 'The United Nations Conference on Environment and Development (UNCERD), Rio De Janeiro, Brazil (2012)'. Available at <www.eoearth.org/view/article/156773/> (access ed 5 June 2015).

¹⁶⁶ The text of the Rio Declaration is available at <www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163> (accessed 5 June 2015).

¹⁶⁷ As above.

¹⁶⁸ Paragraph 43, 'The future we want', UN General Assembly Resolution of 27 July 2012. A/RES/66/288.

key principles to be contained in any national legislation adopted to give effect to principle 10 of the Rio Declaration.¹⁶⁹

2.5.5 The Commonwealth Model Law on Access to Information

The Commonwealth as early as 1980 recognised the importance of access to information, when a meeting of the Council of Law Ministers issued a statement that ‘public participation in the democratic and government process was at its most significant when citizens had adequate access to information’.¹⁷⁰ In March 1999, following the meeting of a group of experts organised by the Commonwealth Secretariat, a set of principles were adopted stating that access to information should be guaranteed as an enforceable right permitting every individual to obtain records held by the three arms of government, any government owned corporation and any other body carrying out public functions.¹⁷¹ This document was adopted by the Council of Law Ministers Meeting in May 1999 and finally by the Commonwealth Heads of Government Meeting in November 1999.¹⁷² In September 2002, the Commonwealth Secretariat prepared a draft model law, to assist member States yet to adopt access to information legislation, which was endorsed by the Law Ministers.¹⁷³ Notably, this Model Law did not establish an oversight mechanism, on the basis that access to information laws can be implemented in small countries without such mechanism, with the commitment of the relevant government departments.¹⁷⁴

¹⁶⁹ The Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters’ was adopted by the Governing Council of UNEP in decision SS.XI/5, part A of 26 February 2010 during its 11th Special Session in Bali, Indonesia.

¹⁷⁰ Communiqué issued by the Commonwealth Law Ministers Meeting in Barbados, 1980. Available at <http://www.humanrightsinitiative.org/index.php?option=com_content&view=article&catid=34%3Aright-to-information&id=650%3Acwstandardscommuniqué&Itemid=81> (accessed 4 June 2015).

¹⁷¹ Available at <http://www.humanrightsinitiative.org/index.php?option=com_content&view=article&id=60&Itemid=81> (accessed 4 June 2015).

¹⁷² Commonwealth Functional Cooperation, para 20 in Commonwealth Heads of Government Meeting Functional Communiqué, Doc. 99/68, 15 November 1999. See Mendel, T. ‘Freedom of Information as an internationally recognised Human Rights’. Available at <<http://www.article19.org/data/files/pdfs/publications/foi-as-an-international-right.pdf>> (accessed 4 June 2015).

¹⁷³ Document No LMM (02) 6. The text of the Model Law is available at <http://www.humanrightsinitiative.org/programs/ai/rti/international/cw_standards/Cth%20model%20law%20-%20FOI%20Act.pdf> (accessed 4 June 2015).

¹⁷⁴ See para 4, explanatory note to the Model Law (n 173 above).

2.5.6 Other civil society soft law standards

Apart from the commonwealth, the international NGO Article 19 also developed in 2001, a Model Law on access to information which is similar in form as content to the principles contained in the international and regional human rights treaties discussed above.¹⁷⁵ Several Declarations on access to information have also been adopted by civil society organisations internationally and in Africa. Those with specific focus on Africa include: The African Regional Findings and Plan of Action for the Advancement of Access to Information (Accra Declaration),¹⁷⁶ The African Platform on Access to Information (APAI) Declaration.¹⁷⁷

2.5.6.1 Article 19 Model Freedom of Information Law

Article 19, an international Non-Governmental Organisation working on issues related to freedom of expression, developed a Model Law in 2001 to guide States in the adoption of access to information laws.¹⁷⁸ Consistent with the best practice at the time, this Model Law envisages the right of access to information as applying to public bodies generally and to private bodies only where ‘it is necessary for the exercise or protection of any right’.¹⁷⁹ In addition fees payable include the cost of ‘searching for, preparing and communicating the information’. It however contains numerous progressive provisions such as those relating to oral requests for information for illiterate and disabled persons,¹⁸⁰ the requirement that information necessary to safeguard the life or liberty of a person be provided within 48 hours,¹⁸¹ the appointment of an independent Information

¹⁷⁵ Available at <<http://www.article19.org/data/files/medialibrary/1796/model-freedom-of-information-law.pdf>> (accessed 4 June 2015).

¹⁷⁶ In February 2010, the Carter Centre in collaboration with the Special Rapporteur on Freedom of Expression and Access to Information in Africa, the Open Democracy Advice Centre and the Media Foundation for West Africa organised a meeting of over 130 ATI advocates in Accra, Ghana. At the end of the three day meeting, findings were issued by participants and accompanied by a Plan of Action on urging specific steps to be taken by International and African bodies, Member States and non-State Actors. The full text of the document is available at <<http://www.cartercenter.org/resources/pdfs/peace/americas/conference2010/ATI-AfricaPlan-text-en.pdf>> (accessed 5 June 2015).

¹⁷⁷ The full text of the document is available at <http://www.africanplatform.org/fileadmin/user_upload/pdf/APAI-Declaration/APAI-Declaration-English.pdf> (accessed 5 June 2015).

¹⁷⁸ ‘A Model Freedom of Information Law’ Available at <<https://www.article19.org/data/files/pdfs/standards/modelfoiaw.pdf>> (accessed 5 June 2015).

¹⁷⁹ Section 2.

¹⁸⁰ Section 8(3).

¹⁸¹ Section 9(1).

Commissioner to monitor compliance and oversee the enforcement of the Act,¹⁸² and whistleblower protection.¹⁸³

2.5.6.2 The African Platform on Access to Information (APAI) Declaration

The APAI Declaration was adopted during the Pan African Congress on Access to Information held in September 2013, in Cape Town, South Africa.¹⁸⁴ The document sets out 14 key principles on access to information, the practical application of these principles in various spheres and recommendations to international and African institutions, Member States, civil society, media, companies and co-operations, as well as public and private donors on actions to be taken for the promotion and protection of access to information on the continent.

2.5.6.3 Summary of international standards on access to information

From all of the above discussions on the access to information standards which have been elaborated at the level of the UN, regional human rights systems, inter-governmental organisations and by civil society organisations, some key principles can be deduced to have progressively emerged as follows:

i. Scope of application

Access to information is a right for ‘everyone’ and no person or group of persons should be excluded from this right. In addition, The obligations of access to information apply to public bodies as well as private bodies owned or controlled by government, or perform public functions, or utilise public funds.

ii. Proactive disclosure

The presumption is that all information held by public bodies is subject to full disclosure. Furthermore, public and private bodies must be obliged to proactively publish key information of public interest about their structure, functions, powers, decisions, revenue and expenditure.

¹⁸² Sections 34 – 46.

¹⁸³ Section 47.

¹⁸⁴ The Conference was held from 17 to 19 September 2009, to exchange knowledge and experience on access to information in Africa, initiate the process for the adoption of an instrument on access to information for Africa and advocate for the recognition of 28 September as the ‘Right to Information Day’ in Africa. See <<http://www.pacaia.org/about-pacai/>> (accessed 5 June 2015).

iii. Procedure for accessing information

The process of accessing information should be simple, quick and affordable and in exercising the right, no fees, other than the actual cost of reproduction must be charged. Refusal of information must be well reasoned and subject to an administrative and/or judicial appeal process which must be expeditious and inexpensive.

iv. Exemptions

The right of access to information must only be limited by narrowly defined exemptions, provided by law and which are only applicable where the public interest in withholding the information, clearly outweighs the public interest in disclosure.

v. Oversight mechanism

An independent mechanism must be established or designated to monitor compliance and oversee enforcement of access to information laws.

vi. Whistleblowing protection

Persons who in good faith, disclose information about wrongdoing must be protected from legal, administrative, and employment-related sanctions.

2.7 Conclusion

This chapter set out to determine whether access to information can be properly regarded as a right within international human rights law and if so, to identify any existing universally accepted normative standards embodying the right of access to information.

The overview of the evolution of access to information under international human rights law shows that the gradual recognition of access to information as a right in itself, independent of, though related to, the right of freedom of expression, has gone hand-in-hand with the expansion and solidification of its normative content. Today, not only is access to information recognised as a right internationally and within all regional human rights systems, but it has also been accorded unprecedented significance as a right, with the adoption of a binding treaty in Europe.

For Africa, despite the restrictive nature of article 9 of the African Charter from which the right derives, the African Commission has taken steps to strengthen the promotion and protection of the right of access to information in three main ways. First is with the 2002

adoption of the Declaration of Principles on Freedom of Expression, which provided a much needed elaboration of the normative content of the right. Thereafter, the expansion of the mandate of the then Special Rapporteur on Freedom of Expression, to also encompass access to information in 2007, provided a platform for the African Commission through the Special Rapporteur to 'legitimately' engage with Member States on issues of access to information.¹⁸⁵ The adoption of the Model Law in February 2013 was the third and most recent landmark contribution of the African Commission to the enjoyment of access to information on the continent.

This chapter has shown that certain key principles on the right of access to information can be gleaned to have developed over the last decade and a half from the normative standards on the right of access to information at the level of the United Nations and regional human rights regimes. Generally, it is recognised that a simple, affordable and speedy process for requesting and receiving access to information must be established by means of legislation which: is applicable to public organs as well as to private organs in specified circumstances; proactive disclosure of information; provides a clearly formulated and narrow scope of exempted classes of information which is made subject to a public interest override; requires the refusal of information to be accompanied by reasons; establishes a system of appeal against refusal of information; protects whistleblowers; and imposes sanctions for the wrongful withholding of information. In Africa, these key principles are embodied in Principle IV of the Declaration and have been further supplemented by the provisions of the Model Law, which go further by addressing peculiar continental issues such as illiteracy, poor record keeping and a pervasive culture of secrecy through a variety of provisions.

As discussions in this chapter have also shown, with the passage of time and accumulation of experiences on the implementation of access to information laws around the world, best practices are constantly emerging, leading to increasingly more progressive normative standards on access to information. Thus, for example, while it

¹⁸⁵ The effect of this is that it is only the Special Mechanism of the African Union, that expressly refers to 'access to information' in the title of its Special Rapporteur, which is accompanied by an express mandate to 'handle' access to information. For all other Special Mechanisms their original focus on freedom of expression remains embedded in the title of their respective mandates.

was previously accepted that information requests be subject to fees for the search, processing and release of information, today, there is widespread recognition that no fees should be paid, but only the market costs of reproducing requested information should be borne by requesters.

Having established the recognition of access to information as a right in and of itself, the extent to which this right has found practical application within the domestic legal framework on the continent will now be examined, starting with the constitutional protection of access to information within Africa.

CHAPTER THREE: CONSTITUTIONS, CONSTITUTIONALISM AND THE CONSTITUTIONAL PROTECTION OF ACCESS TO INFORMATION IN AFRICA

3.1 Introduction

At their inception, newly independent African states acquired constitutions modelled closely along the lines of those of their former colonial powers.¹ The legitimacy of these constitutions have been questioned, not only for the lack of popular participation that characterised their development,² but also for the failure of colonial powers and the African nationalists who 'negotiated' these documents to address glaring problems, which were bound to result in difficulties for the soon to be independent States.³ No wonder, therefore, that soon after independence, most independence constitutions were amended to produce supposedly autochthonous constitutions that addressed some of these peculiarities of the African State which were not contemplated by the independence constitutions.⁴ However, rather than these constitutional amendments resulting in political stability, Africa gradually descended into a continent rife with dictatorial and authoritarian

¹ In the former British colonies, for example, the independence constitutions typically included the introduction of the Westminster or Parliamentary system of government, which was and continues to be the system of governance in the United Kingdom, while the French Colonies generally inherited through their Constitutions, the 'semi-presidential' system. See generally Hamburger, E. 'Constitutional Thoughts and Aims in Former French Africa' (1961) 28 *Social Research* 415.

² While in some cases (e.g. in Kenya, Malawi and Zambia), there were extensive consultations between colonial officials and local nationalist leaders which in fact resulted in concessions on a number of issues by the colonial officials, it has been argued that the focus of British officials was to oversee a smooth transfer of power and not the establishment of real democracies. See Hatchard J. et al, (2004) *Comparative Constitutionalism and Good Governance in the Commonwealth: An Eastern and Southern African Perspective* Cambridge University Press: Cambridge 15-19.

³ See generally Munslow, B. 'Why has the Westminster Model Failed in Africa?' (1983) 36 *Parliamentary Affairs* 218. Fatton, J. 'Liberal Democracy in Africa' (1990) 105 *Political Science Quarterly* 455. Howard for example questions the decision of the British to establish in their former colonies, 'extraordinarily weak central governments especially giving the need for nation-building and political stability'. Citing the examples of Ghana, Nigeria and Uganda, she argues that this subsequently resulted in the first major changes to constitutions after independence being concerned with changes to provisions on 'regional or federal power'. See Howard, R. 'Legitimacy and Class Rule in Commonwealth Africa: Constitutionalism and the Rule of Law' (1985) 7 *Third World Quarterly* 323.

⁴ The amendments to the independence constitutions which in some cases involved the doing away with the liberal principles they contained were made 'under the pretext of nation-building and development' neither of which was achieved. See Fombad, C. 'Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Roles of Political Parties: Lessons and Perspectives from Southern Africa' (2007) 55 *American Journal of Comparative Law* 1.

regimes,⁵ symbolised by successive military coups⁶ and one-party states.⁷ While military coups inevitably suspended the operation of constitutions in the respective States, in other instances, such as with respect to one-party States, constitutions were amended to legitimise one-party rule⁸ or to solidify the concentration of power in the hands of the executive.⁹

The 'third wave of democracy'¹⁰ which began in South America in the 1970's and was later expedited by the fall of the Berlin wall and the end of the cold war; the increasing emphasis on good governance at the regional level¹¹ and its use as a condition for

⁵ Many have argued that the emergence of dictatorial and autocratic regimes in Africa was because by its very nature, colonialism was a system based on oppression and exploitation which had become ingrained in the politics of former colonies, thus making it impossible for constitutionalism to thrive. After independence repressive colonial laws were further strengthened and applied by the new post-colonial governments. See generally, Howard (n 3 above); Okoth-Ogendo, H.W. 'Constitutions without Constitutionalism: Reflections on an African Paradox', in Shivji, I. (ed) *State and constitutionalism: an African debate on democracy* (Harare: SAPES Books 1991); Keith, L.C. and Ogundele, A. 'Legal Systems and Constitutionalism in Sub-Saharan Africa: An Empirical Examination of Colonial Influences on Human Rights (2007) 29 *Human Rights Quarterly* 1065, 1068.

⁶ The first military coup in Africa took place in Togo on 13 January 1963 and by 1992, almost 90 percent of sub-Saharan Africa had either experienced a coup, a coup attempt or a coup plot. See generally Jenkins, J.C and Kposowa, A. 'The Political Origins of African Military Coups: Ethnic Competition, Military Centrality and the Struggle over the Postcolonial State' (1992) 36 *International Studies Quarterly* 271.

⁷ By the time Zimbabwe announced it would become a one party state in 1987, it was the 35th African State to follow this path. The main justifications adduced for the introduction of one-party rule which according to its proponents was actually in line with what obtained in traditional African societies, as opposed to multi-party politics, was the need for national unity and development. For proponents of one-party rule, multi-party politics inevitably accentuated tribal/ethnic divisions. See generally Slinn, P. 'A Fresh Start for Africa? New African Constitutional Perspectives for the 1990s' (1991) 35 *Journal of African Law* 1. Nyong'o, P. 'Africa: The Failure of One-Party Rule' (1992) 3 *Journal of Democracy*, 90. See alsoimba, L. 'The Origins and Spread of One-Party States in Commonwealth Africa, Their Impact on Personal Liberties: A Case Study of the Zambian Model', in Ndulo, M. (ed) (1984) *Law in Zambia* East African Publishing House: Nairobi 113.

⁸ The Independence Constitutions of several African States were amended to introduce one-party rule, for example Ghana (in 1964), Tanzania (in 1965), Malawi (in 1966), Zambia (in 1972), and Sierra Leone (in 1978).

⁹ In Kenya for example, the 1963 Independence Constitution was amended over 30 times, mostly to expand presidential power, while whittling down the checks and balances by the legislature and the judiciary. See Hatchard (n 2 above) 19-21.

¹⁰ Huntington, S. (1991) *The Third Wave: Democratisation in the Twentieth Century* Oklahoma University Press: Oklahoma. According to him, the first wave occurred between 1826 and 1926, while the second wave began in 1943 after the end of the Second World War and lasted till 1962. For a critique of Huntington's use of the wave analogy to describe transitions to democracy, see Doorenspleet, R. 'Reassessing the Three Waves of Democratisation' (2000) 52 *World Politics* 384.

¹¹ At the time of the establishment of the Organisation of African Unity (OAU) in 1963, most African States were still under colonial rule, hence the preoccupation of the continental body was with eradicating colonialism and defending the territorial integrity of the newly independent States. However, by 2000 when

eligibility for receipt of financial aid from western donors;¹² and the 'radical change of heart' by former colonial powers towards former colonies,¹³ brought with it a flurry of constitution-making in many African States.¹⁴ Between 1990 and 2004, all independence constitutions were either entirely replaced by new ones or had undergone some form of modification to give greater focus to issues such as human rights and the creation of democratic institutions,¹⁵ in a period that saw the liberalisation of the political systems in most African states and has been termed the 'second independence',¹⁶ 'second liberation'¹⁷ or 'new wind of change'.¹⁸

A common feature of these newly adopted constitutions was the introduction of constitutional protection of human rights for the first time in some States, and in others, the expansion of categories of human rights guaranteed under previous constitutions.¹⁹

the Constitutive Act of the African Union (AU) was adopted transforming the OAU into the AU, more focus was given to issues of democracy, human rights and good governance.

¹² Sinjela, M. 'Constitutionalism in Africa: Emerging trends' in *'The Evolving African Constitutionalism'* (1998) 60 *The Review* (Special Issue) 25, where then British Foreign Secretary, Douglas Hard, was quoted to have said "Governments which persist with repressive policies, corrupt management, wasteful discredited economic systems, should not expect us to support their folly with scarce aid resources which could be used better elsewhere. See also Shivji, I. *The Struggle for Democracy in Africa*'. Available at <<http://www.marxists.org/subject/africa/shivji/struggle-democracy.htm>> (accessed 9 October 2014).

¹³ It has been argued for example, that a change in the attitude of former colonial powers such as France, by demanding democratic reforms in their former colonies as a condition for continuation of cordial relations was a major influencing factor in the 'democratisation of French Africa'. See generally Reytsjens, F. 'The Winds of Change. Political and Constitutional Evolution in Francophone Africa' (1991) 35 *Journal of African law* 44.

¹⁴ See generally Wiseman, J. 'Democracy and the New Political Pluralism in Africa: Causes, Consequence and Significance' (1993) 14 *Third World Quarterly* 439. Joseph, R. 'Democratisation in Africa after 1989: Comparative and Theoretical Perspectives' (1997) 29 *Comparative Politics*, 363.

¹⁵ Keith and Ogundele (n 5 above) 1066. See also Dressel, B. 'Strengthening Governance through Constitutional Reform'. Available at <http://www.adb.org/sites/default/files/publication/28636/governance_brief13.pdf> (accessed 3 February 2015).

¹⁶ Legum, C. 'The Coming of Africa's Second Independence' (1990) 13 *Washington Quarterly* 129.

¹⁷ Diamond, L. and Plattner, M. (eds) (1999) *Democratisation in Africa: Progress and Retreat* Johns Hopkins University Press: Baltimore, ix.

¹⁸ See Ihonvbere, J. and Turner, T. 'Africa's Second Revolution in the 1990s' (1993) *Security Dialogue* 349. Riley, S. 'Africa's 'New Wind of Change'' (1992) 48 *The World Today* 116. Note however that in reality, this 'wind of change' though widespread was uneven. Thus, in some States there was no change at all either because 'democracy' was fairly well established or the incumbent rulers had a firm grip on power; for some states had just witnessed the overthrow of government following an armed rebellion which promised democratic change; and in some others there was state collapse as a result of civil war or communal violence. See Southall, R. 'Democracy in Africa, Moving Beyond a Difficult Legacy' Occasional Paper 2, Human Sciences and Research Council of South Africa, Democracy and Governance Research Programme.

¹⁹ Generally, the independence constitutions of former French colonies did not contain specific human rights provisions, though their preambles often made reference to human rights in the context of the Universal

One such right, which began to find its way into the constitutions of African states during this period, is the right of access to information. In Africa, like in other parts of the world, there is growing recognition of the importance of access to information as a right necessary for creating and sustaining the culture of democratic governance which these new constitutions sought to establish, and of the need to guarantee it as a constitutional right in itself and not merely as a corollary of the right to freedom of expression.²⁰

Having experienced the political repression which characterised governance in Africa after independence and the deepening economic crises at the time, the realisation of the importance of access to information for political rights such as popular participation, and for socio-economic rights by ensuring accountability, transparency and preventing corruption, has contributed to the inclusion of the right in newly adopted constitutions by African States.

Since 2010, most newly adopted constitutions in Africa have seen the inclusion of access to information as a human right.²¹ Examples are Angola (2010),²² Kenya (2010),²³ Morocco (2011),²⁴ Zimbabwe (2013),²⁵ and Egypt (2014).²⁶ This Chapter thus investigates the historical and contemporary complexities surrounding the constitutional

Declaration of Human Rights. Today, it is only the Constitution of Cameroon that does not contain a catalogue of enforceable of human rights or 'Bill of Rights' but merely affirms commitment to the principles of the Universal Declaration of Human Rights, the United Nations Charter and the African Charter on Human and Peoples' Rights.

²⁰ See generally 'Report of the Special Rapporteur on the Promotion and Protection of Freedom of Expression and Opinion' E/CN.4/2000/63, 18 January 2000, para 42-44. Available at <http://www.un.org/ga/search/view_doc.asp?symbol=E/CN.4/2000/63> (accessed 4 October 2014). See also 'Activity Report of the Special Rapporteur on Freedom of Expression and Access to Information in Africa' presented to the 44th Ordinary Session of the African Commission on Human and Peoples' Rights'. Available at <http://www.achpr.org/files/sessions/44th/inter-act-reps/104/freedom_of_expression.pdf> (accessed 4 October 2014).

²¹ See annexure 2 for provisions of the thirteen stand-alone access to information provisions in Africa. Here, a distinction is made between mere constitutional amendments and the adoption of an entirely new constitutional text or more specifically the review of the human rights provisions of Constitutions. In the case of the former, constitutional amendments, for example in Angola and Guinea (2010), Democratic Republic of Congo and Guinea (2011) have been in line with the cold war trend of consolidating the power of the incumbent. Whereas, in countries where the entire constitution, or at least its Bill of Rights have been extensively overhauled, access to information has been introduced as a standalone right.

²² Article 200(4).

²³ Section 35.

²⁴ Article 27.

²⁵ Section 62.

²⁶ Article 68.

protection of human rights in Africa, the actual and potential avenues for the recognition of access to information as a constitutional right, and what this growing constitutional recognition of access to information means in practical terms for the overall promotion and protection of the right of access to information on the continent. All this is with the aim of identifying the actual and potential contribution of the constitutional right of access to information to socio-economic progress in Africa, as opposed to ATI laws and alternative access to information frameworks.

The Chapter begins with a general discussion on the idea of constitutionalism and the role of a constitution in fostering constitutionalism. Thereafter, the interconnectedness between constitutionalism and human rights is discussed, highlighting the role of international human rights law in the enforcement of constitutionally protected human rights in Africa. To provide a context for detailed discussion of the constitutional protection of access to information in Africa, the emergence of access to information as a constitutional right is examined. This is followed by an overview of the varying forms of constitutional provisions on access to information in Africa, with a view to assessing the extent to which constitutional provisions on access to information in Africa conform with internationally recognised standards on access to information.

3.2 Constitutions, constitutionalism and human rights in Africa: a threefold chord

The end of the Cold War brought with it a progressive end to the blatant disregard for the normative and actual application of international principles of democracy, constitutionalism and human rights within many States in Africa, even if superficial.²⁷ As the 'wind of change' blew across Africa, African leaders, including formerly unapologetic dictators who had metamorphosed into 'born again' democrats,²⁸ embraced constitutionalism and human rights as an imperative for democracy and good governance.²⁹ The constitution, being the *grundnorm*, the supreme law of the land from

²⁷ Fombad, C. 'Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa' (2007) 55 *American Journal of Comparative Law*, 6. Fombad concludes that the optimism for real democratic change present during the wave has given way to gloom and desperation.

²⁸ Fombad, C. 'Constitutional Reforms and Constitutionalism in Africa: Some Reflections on Current Challenges and Future Prospects' (2011) 59 *Buffalo Law Review* 1021.

²⁹ This was both individual and collective. Individually, this was mostly reflected in constitutional reforms. Collectively, this was evident in the transformation of the OAU into the AU and the new continental focus

which all other laws derive their validity,³⁰ alignment of constitutional provisions with democratic principles such as multi-party politics and free and fair elections, naturally became the most important way to affirm commitment to constitutionalism and respect for human rights. As a result, reform predicated on establishing constitutionalism with human rights protection as a central component became widespread as a token sign of constitutional legitimacy.³¹

Today, every state in Africa has a written constitution with human rights provisions.³² However, there is a general consensus that constitutionalism is yet to firmly take root in Africa.³³ What then is the benefit of constitutional protection of human rights? Or, to put it differently, what is the purpose of a constitution and how do constitutionalism and the protection of human rights influence the achievement of this purpose? Answering these questions requires an examination of the theoretical concepts underpinning the terms constitution and constitutionalism, and their relationship with human rights.

3.2.1 Defining constitutions and constitutionalism

There is no single accepted definition of a constitution. It can be said that the appropriateness of the definition of a constitution is dependent on the context in which the term is used. Thus, while some authors have distinguished between written/codified and unwritten/uncodified constitutions,³⁴ and others between minimalist/material, formal

on democracy, human rights and good governance as evident by the Constitutive Act of the AU and subsequent treaties it adopted. See generally Fombad, C 'The Constitution as a Source of Accountability' (2010) 2 *Speculum Juris* 41.

³⁰ The 'grundnorm' or the 'basic norm' was developed by positivist philosopher, Hans Kelsen, to describe the basic rules that underlie any legal system. For him, in law, there exists a hierarchy of norms, with each norm deriving its validity from the other. The *grundnorm* from which all norms derive their validity however, is not justified by reference to other norms, but from a 'fundamental assumption made by people in society about what would be treated as law'. See Kelsen, H. *General Theory of Law and State* (New York: Russell 1961)

³¹ Backer, L. 'From Constitution to Constitutionalism: A Global Framework for Legitimate Public Power Systems' (2009) 113 *Pennsylvania State Law Review* 671.

³² It should however be pointed out that though Eritrea adopted a Constitution in 1997 which was ratified by Parliament, this constitution is yet to come into force. See generally Selassie, B. 'Constitution Making in Eritrea: a process driven approach' in Miller, L and Aucoin, L. (eds) *Framing the State in Times of Transition: Case Studies in Constitution Making* Available at <http://www.usip.org/onlinen-chapters-framing-the-state#Part_2> (accessed 20 October 2014).

³³ See generally Prempeh, K. 'Africa's 'Constitutionalism Revival: False start or new dawn?'' (2007) 5 *international Journal of Comparative Law* 469.

³⁴ The common example of what constitutes a written/codified constitution is that of the United States of America, whilst that of the United Kingdom is symbolic of unwritten constitutions. The main distinction

and modern, and functionalist constitutions,³⁵ more recently, the distinction between constitutions has been narrowed down to one between form and function,³⁶ with the former connoting the formal written text and the latter, the role of constitutions.³⁷

To acquire the status of a constitution, the 'form' of a constitution must be such that the legal text either: explicitly refers to itself as a constitution; or explicitly declare itself as the highest law either by way of entrenchment or limiting other future laws; or delimit the pattern of authority by creating or suspending the legislative or executive arm of government.³⁸ From this perspective, constitutions are defined as 'codes of rules which aspire to regulate the allocation of functions, powers and duties among the various agencies and offices of government, and define the relationship between these and the public'.³⁹

In terms of function, there are three 'functional definitions' of a constitution.⁴⁰ First, is the definition which focuses on the role of the constitution in limiting government power. From this perspective, a constitution is seen as an instrument which at the barest minimum consists of a set of rules that create, structure and defines the limits of government power or authority.⁴¹ Second, is defining a constitution in terms of the extent to which it

between the two is that while a codified or written constitution exists in a single document, an uncoded or unwritten constitution can be found in a variety of sources. However, there is general agreement that this distinction is not absolute as a written constitution depends on other unwritten doctrines to supplement its provisions and ensure its proper implementation. Thus, for example, the United States is said to also have an unwritten constitution. See generally, Amar A. *America's Unwritten Constitution: The Precedents and Principles We Live By* (New York: Basic Books 2012). See also Withington K.E 'The Status of Unwritten Constitutional Conventions in the United States (2013) 5 *University of Illinois Law Review* 101. See also Sachs S.E, 'The "Unwritten Constitution" and Unwritten Law' (2013) 5 *University of Illinois Law Review* 1797.

³⁵ See Dyvre, A. 'The Constitutionalisation of the European Union: Discourse, Present, Future and Facts' (2005) 30 *European Law Review* 165, 169.

³⁶ See generally, Elkins, Z. et al (eds) (2009) *The Endurance of National Constitutions* (Cambridge University Press: Cambridge 37.

³⁷ As above, 39. A distinction has been made between a 'small-c' constitution which refers to the 'broader constitutional order' and a 'big-c' constitution which refers to the text.

³⁸ As above. Note however that Elster earlier identified a slightly different set of criteria for distinguishing a constitution from other legal texts namely: that the document is called a constitution; the document deals with fundamental matters or that the process for altering the document is stringent. See Elster, J. 'Forces and Mechanisms in the Constitution-Making Process' (1995) 45 *Duke Law Journal* 364.

³⁹ Finer, S. et al (1995) *Comparing Constitutions* Oxford University Press: Oxford 1.

⁴⁰ Elkins (n 36 above).

⁴¹ Kumado, C. 'Constitutionalism, Civil Liberties and Development: A Case Study of Ghana since Independence' (Accra: Ghana University Press, 1980) 6. Stanford Encyclopedia of Philosophy. Available at <<http://plato.stanford.edu/entries/constitutionalism/>> (accessed 18 April 2014).

establishes a 'constitutional identity' through sets of practices that embody the collective political goals of the State. In this regard, a constitution which seeks to 'establish the basic rules and procedures of democratic politics and government' as well as 'articulate collective goals and establish the institutional architecture of democracy'⁴² will fall into this category.

A third function of constitutions is setting out 'patterns of authority' and creating the requisite governmental institutions to implement this authority.⁴³ A functional constitution comprises both formal written constitutions and unwritten constitutions. In other words, the definition of a constitution often combines both the functional and formal aspects of a constitution.

Somewhat uniting the first and third functional definition into one, Fombad describes a constitution in its broadest sense as a 'power map' which derives its whole authority from the governed and regulates the allocation of powers, functions and duties among the various agencies and officers of government as well as defines their relationship with the governed.⁴⁴ It forms the main source and basis of governmental rule making and is primarily designed to check against arbitrary rule-making.⁴⁵ For Fombad, the fundamental essence of a constitution is thus to prevent tyranny and anarchy, and to achieve this, a constitution must sufficiently empower the government to be strong enough to operate effectively, while imposing such reasonable restraints that do not make it so weak, that it leads to a state of anarchy.⁴⁶

This thesis, and in particular this Chapter, engages with the term 'constitution' in both the formal and the functional sense. Thus, to the extent that all African States have a written constitution, it deals with the human rights protection in African constitutions, and in

⁴² Alberts, S, 'How Constitutions Constrain' (2009) 41 *Comparative Politics*, 127, 131.

⁴³ Elkins (n 36 above).

⁴⁴ Fombad, C. 'Internationalisation of Constitutions and Constitutional Law in Africa' (2012) 60 *American Journal of Comparative Law* 439, 441. See also Fombad (n 29 above) 43. Oyewo however opines that constitutions, especially in the African context are no longer just power maps but also an instrument for addressing pressing social and economic challenges. See Oyewo, O. 'Political Parties and Constitutionalism in Democratising States in West Africa; A Comparative Study of Nigeria, Benin, Ghana and Senegal'. Available at <<https://www.jus.uio.no/english/research/news-and-events/events/conferences/2014/wccl-cmdc/wccl/papers/ws13/w13-oyewo.pdf>> (accessed 10 October 2014)

⁴⁵ Fombad (n 27 above) 6.

⁴⁶ As above.

particular the right of access to information in the formal sense. More importantly, however, this thesis looks at all three functional roles of a constitution: the constitutional protection of access to information within the broader context of the limiting the power of States to refuse to disclose information, the development of a culture of openness as a collective transformational constitutional goal to which States ought to aspire to, and the critical role that State institutions play in achieving this culture of transparency and accountability.

Thus, these three functional roles of a constitution are not and should not to be seen as mutually exclusive, but rather, as mutually reinforcing and in fact closely connected to the related concept of constitutionalism, because what these three functional definitions highlight, is the potential role of a constitution in fostering constitutionalism.

As to be expected, flowing from the difficulty of defining the term ‘constitution’, ‘constitutionalism’ is equally difficult to define. It has thus been termed a controversial,⁴⁷ ambiguous,⁴⁸ contradictory,⁴⁹ and confusing⁵⁰ concept. This difficulty is perhaps as a result of the fact that defining constitutionalism is constrained by the diverse contexts and purposes for which the formulation of the definition is often attempted. For some it is an idea or a principle, for others it is a process.⁵¹

Apart from the common distinction between ancient and modern constitutionalism,⁵² today, there are numerous descriptions and variations: global constitutionalism as opposed to domestic constitutionalism,⁵³ nationalist and internationalist/transnationalist

⁴⁷ Ihonvbere, J. ‘Towards a New Constitutionalism’ Occasional Paper Series, No.4. (London: Centre for Democracy and Development, 2000), 13.

⁴⁸ Butlerichie, D. ‘The Confines of Modern Constitutionalism’ (2004) 3 *Pierce Law Review* 1.

⁴⁹ See Shivji, I. Contradictory Class Perspectives in the Debate on Democracy’ in Shivji, I. (ed) (1991) *State and Constitutionalism: An African Debate on Democracy* SAPEs: Harare 255.

⁵⁰ Grey, T. Constitutionalism: An analytical framework in Pennock, R. and Chapman J. (eds) (1995) *Constitutionalism: NOMOS XX* New York: New York University Press: New York 189.

⁵¹ Mangu, A. ‘Federalism, Constitutionalism and Democracy in Africa’ Paper delivered at the 8th World Congress of the International Association of Constitutional Law, Mexico, 6-10 December 2010. Available at <<http://www.constitution.org/cmt/mcilw/mcilw.htm>> (accessed 13 October 2014.)

⁵² Most modern scholars distinguish between ancient and modern constitutionalism in recognition of the differences between what ancient philosophers or scholars termed constitutionalism is different from what we know it as today. McIlwain C. (1947) *Constitutionalism, Ancient and Modern* Cornell University Press: Ithaca 21. Also available at <<http://www.constitution.org/cmt/mcilw/mcilw.htm>> (accessed 13 October 2014). See also Butlerichie (n 48 above).

⁵³ Global constitutionalism refers to the growing phenomenon of international norms being utilised in the domestic legal order as opposed to the use of the constitution of a particular state. See generally, Law, D.

constitutionalism⁵⁴ and legal versus popular constitutionalism,⁵⁵ to mention a few.⁵⁶ Generally, earlier approaches to constitutionalism focused on protecting citizens from arbitrary rule through the limitation of government power and were thus negative in nature, as they focused on imposing restrictions on what the government ought not to do. In this sense, constitutionalism has been defined as 'the legal limitations placed upon the rightful power of government in its relationship to citizens'⁵⁷ and as an 'institutionalised system of effective regularised restraints on governmental action'.⁵⁸

In more recent times, however, constitutionalism is increasingly seen more as a means of ensuring that a government is effective and accountable to its citizens on the basis of certain core values, thus adopting a more positive approach and focusing on what government ought to do. In this regard, constitutionalism has been defined as the 'widespread adherence to democratic rules and norms contained in the constitution and other basic laws governing political life'⁵⁹ and also as adherence to not only the letter of the constitution which embodies 'the core values and principles upon which a constitution is based' but also the spirit of the constitution, as 'expressed in, amongst others manifest

and Versteeg, M. 'The Evolution and Ideology of Global Constitutionalism' (2011) 99 *California Law Review* 1163. See also Muller, T. 'Global Constitutionalism in Historical Perspective: Towards Refined Tools in International Constitutional Histories' (2014) 3 *Global Constitutionalism* 77.

⁵⁴ See generally Rubinfeld, J. 'Two Concepts of Constitutionalism' 2002) 96 *American Society of International Law* 394. He distinguishes between internationalist constitutionalism (which features more in Europe) in which it is irrelevant that a constitution emanates from national participatory processes so long as it fulfils internationally recognised requirements of a constitution, as opposed to nationalist constitutionalism (which features more in America) which places emphasis on the participation of the populace in the constitution-making process, and on continued evolution of the constitution through its interpretation by domestic courts.

⁵⁵ See generally Kramer L.D. 'Popular Constitutionalism' (2004) 92 *California Law Review* 959, where popular constitutionalism is described as a system whereby the role of citizens goes beyond occasional participation in constitution-making to active involvement in the interpretation and enforcement of the constitution, while legal constitutionalism vests the power to interpret and enforce the constitution entirely in the judiciary.

⁵⁶ According to Butleritchie the term constitutionalism is also sometimes used in a restrictive or expansive way and at other times in a proscriptive or prescriptive manner. Butleritchie (n 48 above) 1.

⁵⁷ Rosenbaum, A. (ed) (1988) *Constitutionalism: The Philosophical Dimension* Greenwood Press: New York 4.

⁵⁸ Friedrich, C. (1963) *Man and His Government: An Empirical Theory of Politics* NMcGraw-Hill: New York 271.

⁵⁹ Alberts (n 42 above).

deeds, policies, laws, regulations and the manner of their implementation or practical realisation'.⁶⁰

For some, however, constitutionalism is seen as a balancing act: limiting State power in order to ensure the protection of citizens' rights from arbitrary interference, while at the same time, empowering the State to function in an efficient, effective and accountable manner. In this context, constitutionalism has been described as the requirement that State power is defined and limited by law to prevent violations of the law or of the human rights of citizens, while at the same time, giving the State enough power to govern.⁶¹ Constitutionalism thus encompasses 'the idea that a government should not only be sufficiently limited in a way that protects its citizens from arbitrary rule but also that such a government should be able to operate efficiently and in a way that it can be effectively compelled to operate within its constitutional limitations'.⁶² It combines the idea of a government which is limited in its actions that can also be held accountable by its citizens for its actions and thus rests on two main pillars: the imposition of limitations on governments based on certain core values and, secondly, the establishment of processes enabling citizens to legally enforce these limitations.⁶³

3.2.2 Elements of constitutionalism

Perhaps a useful approach to demystifying the elusiveness of the term 'constitutionalism' is to acknowledge the futility of adopting an authoritative and all-encompassing definition of constitutionalism, and instead to opt for unpacking what has been termed the 'features' 'characteristics', 'components', or elements' of constitutionalism, in respect of which there appears to be more academic convergence.⁶⁴

⁶⁰ Gutto, S 'Constitutionalism, Elections and Democracy in Africa: Theory and Praxis'. Available at <file:///C:/Users/User/Downloads/Prof%20S%20Gutto%20-%20Constitutionalism%20Elections%20And%20Democracy%20In%20Africa%20Theory%20And%20Praxis.pdf> (accessed 13 October 2014).

⁶¹ Currie, I. and De Waal, J. *The Bill of Rights Handbook* JUTA: Cape Town 2013 8.

⁶² Fombad (n 27 above) 7.

⁶³ As above. See also Fombad (n 44 above).

⁶⁴ Oloka-Onyango, J. 'Constitutionalism in Africa: Yesterday, Today Tomorrow' in Oloka-Onyango, J. (ed) (2001) *Constitutionalism in Africa: Creating Opportunities, Facing Challenges* Fountain Publishers: Kampala 2.

According to Worley, constitutionalism has three 'features'. First is the supremacy principle, which demands that the government is subject to the law; then the limited government principle, which requires the existence of institutions to limit the arbitrary exercise of governmental power as well as promote human rights; and finally, the entrenchment principle which precludes routine changes to constitutional limitations on governmental power.⁶⁵ Similarly, Rosenfeld identifies the three 'essential characteristics' of constitutionalism as: limitation of government power; adherence to the rule of law; and protection of fundamental rights.⁶⁶

Tushnet's three 'components' of constitutionalism include commitment to the rule of law, the independence of the judiciary and regular free and fair elections.⁶⁷ Henkin, on his part, is more elaborate as he details nine 'essential elements' of constitutionalism as follows: government according to the constitution; separation of powers; popular sovereignty and democratic government; constitutional review; independence of the judiciary; control of the police; civilian control of the military; individual/human rights; limitation of suspension and derogation; and strict conditions for constitutional amendments.⁶⁸

For Jackson, however, constitutionalism can be viewed in much broader terms to include: the willingness to resolve differences through law rather than force; limitation of government power and protect human rights through legally defined processes; providing predictability and stability of the law; and a government that is legitimate and effectively maintains order, promotes the public good, and controls private violence and exploitation.⁶⁹

Fombad identifies the 'core elements' of constitutionalism as: the recognition and protection of fundamental rights and freedoms; separation of powers, independence of

⁶⁵ Worley, J. 'Deliberative Constitutionalism' (2009) *Brigham Young University Law Review*, 431,

⁶⁶ See Rosenfeld, M. 'Modern Constitutionalism as Interplay between Identity and Diversity' in Rosenfeld, M. (ed) (1994) *Constitutionalism, Identity, Difference and Legitimacy: Theoretical Perspectives* Duke University Press: Durham.

⁶⁷ Tushnet, M. 'Comparative Constitutional Law' in Reinman, M. and Zimmerman, R. (eds) (2006) *The Oxford Handbook of Comparative Law* Oxford University Press: Oxford.

⁶⁸ Henkin, L. 'Elements of Constitutionalism' in 'The Evolving African Constitutionalism' *The Review* (Special Issue) International Commission of Jurists, No 60, June 1998, 11-22. See also Henkin, L. 'A New Birth of Constitutionalism: Genetic influences and Genetic defects' (1993) 14 *Cardozo Law Review*, 533.

⁶⁹ Jackson, V. 'What's in a name?: Reflections on Timing, Naming and Constitution-Making' (2007-2008) 49 *William and Mary Law Review* 1249.

the judiciary; review of constitutionality of laws; the control of the amendment of constitution and the creation of institutions that support democracy.⁷⁰ He however emphasises that it is the 'cumulative effect of the presence of each of these elements rather than the extent of the presence of one and the absence of the other that determines whether or not a constitution provides any prospects for constitutionalism'.⁷¹

This thesis adopts the understanding that constitutionalism entails adherence to the foundational values of the constitution, an essential component of which is the protection of human rights, through a combination of rules, mechanisms and structures established by the constitution, in such a manner that enables the governed to hold the government accountable in the exercise of its powers and limit arbitrary action. In providing the above 'definition', this research does not seek to attempt to comprehensively define the term; rather, it rests on this definition solely as a means of contextualising the use of the term in this thesis. The ability of a constitution to foster constitutionalism is thus determined by compliance with both intrinsic (core elements) and extrinsic (functional tenets) factors.

From all of the above preliminary discussion on the concepts of constitution and constitutionalism, two things are clear. First is that, a constitution, whether written or unwritten, is a prerequisite for constitutionalism. Second and most importantly, the quality of a constitution is a major determining factor in fostering constitutionalism- a constitution both in terms of what it contains (core elements) and what these provisions seek to achieve (functional related tenets), forms the building block of constitutionalism. Thus, for there to be a meaningful chance of fostering constitutionalism, a constitution must ideally, as a starting point, contain those core elements highlighted above and in addition, the sum of its provisions must, in varying degrees and subject to the peculiarities of each State: seek to limit State power, enshrine collective goals and establish institutions for the implementation of the constitution. As a result, some authors have erroneously equated the mere existence of a constitution with certain core elements and functional tenets as tantamount to the practice of constitutionalism in a State.

⁷⁰ Fombad (n 27 above) 7. See also Fombad, C. 'Some perspectives on durability and change under modern African constitutions' (2013) 11 *International Journal of Constitutional Law* 382.

⁷¹ Fombad (n 27 above) 11.

Adelman, for example, in his understanding of constitutionalism, states:

By constitutionalism I refer not only to constitutions themselves, but to a much broader aggregation of legislation, doctrine, conventions and non-state law which significantly affects the structure, powers, administration and accountability of all important organs of the state and affect relations between the state and the citizen. This reflects the existence of a culture of constitutionalism that is greater than the sum of its parts and is a crucial determinant in how power will be exercised in any particular state.⁷²

However, constitutionalism goes beyond this, to actual State compliance with the provisions of a constitution.⁷³ Thus, the mere existence of a constitution in itself, even where it contains the core elements and its provisions taken together embodies the functions enumerated above, does not necessarily guarantee constitutionalism.⁷⁴ In addition to this, there must be actual compliance with the provisions of the constitution; otherwise, there can be no constitutionalism. All that will exist is a 'façade'⁷⁵ or 'sham'⁷⁶ constitution - a constitution which 'declares aspirational principles and adopts power structures for government', but which is 'ineffective and potentially delegitimised' and not followed in practice,⁷⁷ because the context in which it is to be enforced is 'harsh and hostile' giving rise to a situation of a 'constitution without constitutionalism'.⁷⁸

⁷² Adelman, S. 'Constitutionalism, Pluralism and Democracy in Africa' (1998) 42 *Journal of Legal Pluralism* 76.

⁷³ See Fombad (n 27 above) 6.

⁷⁴ See for example Rosenfeld (n 66 above) 3.

⁷⁵ The term 'façade or fake constitutions' appears to have been coined by Giovanni Sartori. He distinguishes between proper (*garantiste*), nominal and façade constitutions. Façade constitutions, for him take on the appearance of a true constitution but are disregarded' See Sartori, G. 'Constitutionalism: A preliminary discussion' (1962) 56 *American Political Science Review* 861.

⁷⁶ See generally Law, D. and Versteeg, M. 'Sham Constitutions' (2013) 101 *California Law Review* 863. The authors define as a sham constitution, a constitution which 'its provisions are not upheld in practice'. This lack of adherence may according to them be as a result of a variety of factors: the constitution bears no relationship with reality; is descriptively accurate but has no effect on anyone's behaviour; was never intended to be no more than window dressing or fails to include core elements such as rule of law.

⁷⁷ Note on Counterinsurgency and Constitutional Design (2008) 121 *Harvard Law Review* 1622, 1632.

⁷⁸ Oloka-Onyango, J. (ed) (2001) *Constitutionalism in Africa: Creating Opportunities, Facing Challenges* Fountain Publishers: Kampala 2.

3.2.3 Constitution without constitutionalism: the role of constitutions in fostering constitutionalism

How then can a constitution intrinsically ensure that its provisions are adhered to and through that foster constitutionalism? In other words, what role can the provisions of a constitution play to avoid the label of a ‘constitution without constitutionalism’?⁷⁹ Secondly, what are some of the other factors extrinsic to the constitution which can determine the success or failure of constitutionalism?

3.2.3.1 Promoting constitutionalism from within: adopting compliance-inducing constitutions

Building on Weingast’s conclusion that the political elite is more likely to adhere to rules that limit their power where citizens make the cost of non-adherence high and institutional processes and structures exist to protect their interests,⁸⁰ Alberts has sought to show that a constitution can itself create the necessary conditions for compliance with its provisions. She asserts that evaluating constitutions in terms of the type of incentives they provide to ensure they are complied with, provides an understanding of how differences in constitutions can influence the establishment of constitutionalism.⁸¹ According to her, the incentives constitutions provide are two-fold, dispersal of power and constitutional performance.⁸²

Dispersal of power occurs where a constitution spreads the balance of power widely between groups within a political system. This creates a situation whereby there is ‘mutual vigilance’, and makes it possible to have ‘multiple winners’, such that obeying the rules of the constitution benefits the groups in numerous ways.⁸³ Thus, a constitution which spreads power engenders constitutionalism better than one which centralises power in a few hands.

⁷⁹ This term was first used by Okoth-Ogendo to describe the grim status and prospects for constitutionalism in Africa following the 3rd wave of constitutionalism. See (n 5 above).

⁸⁰ Weingast, B. ‘The Political Foundations of Democracy and the Rule of Law’ (1997) 91 *American Political Science Review* 245.

⁸¹ Alberts (n 42 above) 131.

⁸² As above.

⁸³ As above.

With regard to constitutional performance, Alberts asserts that where constitutions create a democratic system which protects rights, and allows for 'effective governance and popular satisfaction with democracy', there are multiple winners and clear benefits of democracy, which serves as an incentive to support compliance with democratic rules. Thus, where this is present, deviation from the constitution is more unlikely and leads to more established constitutionalism.⁸⁴

She concludes that 'depending on the incentives they generate, constitutional rules can create the conditions that lead to their own enforcement. When they facilitate the protection of the fundamental interests of key groups and cooperation in governing, constitutional rules are likely to be upheld'.⁸⁵ Conceding that differences in constitutional provisions cannot in all cases conclusively be the cause of differing levels of constitutionalism and democratic institutionalisation between States, she asserts that they nevertheless play a significant role because:

where constitutional provisions balance the distribution of political power (between the executive and legislature, among the courts and independent oversight bodies, to citizens through referenda, initiative and recall, and in some cases, to regions through federalism), where they provide self-interested reasons to cooperate even in the midst of political rivalry, and where democratic systems do a better job protecting rights, governing well, there is a greater likelihood that political actors comply with democratic rules.⁸⁶

While Albert's conclusion that a constitution can intrinsically create incentives for constitutionalism has merit, the reality is that the constitution-making process is a complex one, often involving a broad spectrum of competing considerations, such that, depending on the context, the need to develop a text which fosters constitutionalism may not necessarily be the foremost consideration of constitution-makers, and even if it were, the constitution which eventually emerges, may not necessarily reflect this laudable objective of promoting constitutionalism. This has certainly played itself out in Africa. The fact is that the constitution-making process in Africa has often been preceded by authoritarian

⁸⁴ As above.

⁸⁵ As above, 140.

⁸⁶ As above, 141.

rule, conflict, and political or electoral violence thereby rendering the drafting of a new constitution part of a peace or transition process. This brings with it its own challenges.

A good example of the challenges associated with constitution making, is the drafting of the Zimbabwe Constitution of 2013 as required by the Global Political Agreement of 2008, brokered by the Southern African Development Community (SADC). The GPA created a 'transitional inclusive government' following the 2008 election violence that saw the Movement for Democratic Change (MDC) leader Morgan Tsvangirai withdraw from the run-off elections, citing intimidation of his supporters by the ruling (Zimbabwe Patriotic Front (ZANU-PF) party, led by incumbent President Robert Mugabe.⁸⁷ The drafting process that took place afterwards was extremely acrimonious and resulted in allegations and counter-allegations by the main political players of attempting to manipulate the process for political gain.⁸⁸ Needless to say, the document which finally emerged was one of compromise, such that it did not sufficiently address some of the fundamental issues necessary for engendering constitutionalism in Zimbabwe.⁸⁹

The reality that the prevailing environment in which constitutions are developed are often not conducive for the inclusion of provisions supporting constitutionalism, is buttressed by Elster⁹⁰ who concluded that, with a few exceptions,⁹¹ the constitution-making process is one often precipitated by 'a crisis or exceptional circumstances of some sort', and greatly influenced by an interplay of competing constraints, interests, passions and reason.⁹²

⁸⁷ See Sokwanele, 'Reflecting on Zimbabwe's constitution-making process'. Available at <http://archive.kubatana.net/docs/demgg/sokw_reflect_constitution_making_120808.pdf> (accessed 16 October 2014).

⁸⁸ See generally Disenza, G Zimbabwe's Constitutional Reform Process: Challenges and Prospects. Available at <<http://www.ijr.org.za/publications/pdfs/IJR%20Zimbabwe%20Constitutional%20Reform%20OP%20WEB.pdf>> (accessed 8 October 2014).

⁸⁹ For example, the Constitution of Zimbabwe is criticised for concentrating power excessively in the hands of the executive, especially the President, with minimum checks and balances. Another criticism is the lack of strict procedures for amending the Constitution save for provisions on human rights and land acquisition which require a referendum. See generally Disenza, G Zimbabwe's Constitutional Reform Process: Challenges and Prospects. Available at <<http://www.ijr.org.za/publications/pdfs/IJR%20Zimbabwe%20Constitutional%20Reform%20OP%20WEB.pdf>> (accessed 8 October 2014).

⁹⁰ Elster (n 38 above) 396.

⁹¹ One such exception is the 1974 constitution of Sweden which took almost 20 years to finalise.

⁹² He listed 7 such waves, beginning with the period between 1780 and 1791, when the United States, France, and Poland, adopted constitutions and ending with the constitution-making by eastern European States following the end of communism in 1989.

However, the overarching importance of a rich normative constitutional framework as a pre-condition for constitutionalism cannot be overemphasised. Thus, viewed from the perspective that a strong constitution with provisions which increase the chances of it being enforced is the ideal but not the only starting point for constitutionalism, then Albert's postulation is instructive. Certainly, it is more daunting to attempt to make a bad law work than the reverse.

3.2.3.2 Promoting constitutionalism from without: constitution-making and contexts of operation

There are other extrinsic factors that may influence State compliance with constitutional provisions.⁹³ Two are particularly relevant to this research. In recent times, the importance of popular participation in the constitution-making process and of the existence of the necessary conditions for the proper functioning of institutions established by the constitution to ensure compliance with its provisions, has received copious attention as being crucial for constitutionalism.

3.2.3.3 Popular participation in the constitution-making process

Whereas, earlier discourse on constitution-making generally focused more on the content of constitutions, more attention is now being paid to the process of constitution-making as a yardstick for determining legitimacy and its potential to engender constitutionalism. While some see it as absolutely necessary, for others, it is merely one of the numerous tools to increase legitimacy, and at the other extreme are those who believe that participation does not in any way influence the constitution which is inevitably a product of compromise between those in power.⁹⁴ By far however, are those who believe that public participation increases public acceptance and ownership of the document that

⁹³ The difficulty of identifying reasons for State non-compliance with constitutional provisions through empirical research has been acknowledged by writers. See Law, D. (2010) *Constitutions*, in *Oxford Handbook on Empirical Legal Research* Oxford University Press: Oxford 387, citing problems of inadequate data and causal complexity as hindering 'empirical research on constitutions in general' and 'reliable causal inference in particular'.

⁹⁴ Bannon, A. 'Designing a Constitution Drafting Process: Lessons from Kenya' (2007) 116 *Yale Law Journal* 1824.

emerges,⁹⁵ and in post-conflict or transitional situations, fosters national unity which can be important for nation-building and achieving national reconciliation.⁹⁶ Some argue that constitutional provisions on human rights which emerge from a participatory process involving deliberation 'have more of an indigenous character and are more fervently defended and respected', while those imposed by colonialists, the political elite or military juntas tend not to be understood or appreciated and are easily derogated from.⁹⁷ Thus, irrespective of the extent to which participation actually influences the content of the final constitution, it can create ownership and commitment to its implementation from society.⁹⁸

Ihonbvere for example, supports the new emphasis on the need to democratise the environment in which a constitution is 'developed, adopted and proclaimed', and believes that for a constitution to have legitimacy, the enabling environment for constitutionalism must first be created. He argues that constitutionalism should go beyond what he calls a 'legalistic interpretation' to include the:

process for developing, presenting, adopting and utilising a political compact that defines not only the power relations between political communities and constituencies, but also the rights, duties and obligations of citizens in any society. Essentially, the focus of what we mean by constitutionalism is on two issues: first, the process of constitution making and the extent to which it is popular, inclusive, participatory or process-led, and democratic; and second, the available openings, institutions and processes of making the constitution a

⁹⁵ Samuels, K. 'Constitution Building Processes and Democratisation: A Discussion of Twelve Case Studies' Available at <[http://www.idea.int/cbp/upload/IDEA%20CBP%20Comparative%20paper%20by%20Kirsti%20Sa muels-2.pdf](http://www.idea.int/cbp/upload/IDEA%20CBP%20Comparative%20paper%20by%20Kirsti%20Samuels-2.pdf)> (accessed 18 October 2014).

⁹⁶ Sarkin, J. 'The Drafting of South Africa's Final Constitution from a Human Rights Perspective' (1999) 47 *American Journal of Comparative Law* 86.

⁹⁷ Ghai Y. Human Rights and Social Development: Toward Democratization and Social Justice (Geneva: UNRISD 2001) 29. Hart, V. 'Democratic Constitution Making' United States Institute for Peace Special Report. Available at <[http://www.peacemaker.un.org/sites/peacemaker.un.org/files/DemocraticConstitution Making_USIP2003. pdf](http://www.peacemaker.un.org/sites/peacemaker.un.org/files/DemocraticConstitutionMaking_USIP2003.pdf)>. (accessed 4 April 2014). Ogowewo, T. Why the Judicial Annulment of the 1999 Constitution is Imperative for the Survival of Nigeria's Democracy' (2000) 44 *Journal of African Law* 135.

⁹⁸ Widner, J. 'Constitution Writing in Post Conflict Settings: An Overview' (2008) 49 *William and Mary Review* 1513, 1525. Hyndman, P. 'Constitutions, Constitutionalism and the Effective Implementation of the International Standards on Human Rights' (2000) 21 *Australian Yearbook of International Law* 105 states:

Indeed, community commitment may be inspired even though the text of the proposed constitution itself will not be likely to gain anything approaching a consensus on all, or even on most, points. If the new constitutional document is seen as being, overall, reasonable, fair and workable, if there has been wide participation in its development, then there can arise a feeling of ownership of the project, and a commitment from the society as a whole to endeavour to make it work.

living document by taking it to the people so that they are in a position not just to have access to it, but also to understand it, claim ownership and use it in the defence of the democratic enterprise.⁹⁹

Public participation in constitution making has been affirmed as a human right. In interpreting the right to participate in public life guaranteed under article 25 of the ICCPR,¹⁰⁰ the UN Human Rights Committee,¹⁰¹ has in *Marshall v Canada*¹⁰² and through general comment No 25,¹⁰³ concluded that this right encompasses the right of citizens to participate in the making or amendment of the constitution.¹⁰⁴

However, many of the assumptions about the benefits of popular participation may be over stated and the exact connection between participation and the achievement of the desired outcome unknown.¹⁰⁵ The fact is that ‘participatory constitution making is highly controversial’ and the achievements of participatory constitution making, then, are not to be romanticized.¹⁰⁶ As the Kenyan 2000-2005 constitution making experience showed, popular participation is not a one size fits all. A lot depends on the local political and cultural context.¹⁰⁷ In addition, participation in constitution making is an extremely

⁹⁹ Ihonbvere, J. ‘How to Make an Undemocratic Constitution: The Nigerian Example’ (2000) 21 *Third World Quarterly* 343.

¹⁰⁰ Article 25(a) of the ICCPR states that every citizen has a right without discrimination or unreasonable restrictions, ‘to take part in the conduct of public affairs, directly or through freely chosen representatives’.

¹⁰¹ The body is now known as the Human Rights Committee.

¹⁰² See *Marshall v Canada*, Communication No. 205/1986, U.N. Doc. CCPR/c/43/D/205/1986 at 40 (1991). In this case, the authors of the communication argued that their non-inclusion at a constitutional conference to discuss the amendment of the Canadian Constitution was a violation of their right to participate in public life and a violation of article 25 of the ICCPR. Although the HRC found that the right to participate in the constitution-making process was indeed guaranteed by article 25, it held that in the instant case, there had been no violation of this right.

¹⁰³ UN Human Rights Committee (HRC) *General Comment No. 25: The Right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25 of the Covenant)* 27 August 1996, CCPR/C/Rev.1/Add.727. General Comment No 25 in para 6 states that ‘Citizens also participate directly in the conduct of public life when they choose or change their constitution or decide public issues through a referendum or other electoral process ...’.

¹⁰⁴ The Committee found that:

It is for the legal and constitutional system of the state party to provide for the modalities of such participation,” and “Article 25(a) of the covenant cannot be understood as meaning that any directly affected group, large or small, has the unconditional right to choose the modalities of participation in public affairs. That, in fact, would be an extrapolation of the right to direct participation by the citizens, far beyond the scope of Article 25(a).”

¹⁰⁵ Ginsburg et al ‘Does the Process of Constitution-Making Matter?’ (2009) 5 *Annual Review of Law and Social Science* 201.

¹⁰⁶ Hart (n 97 above) 11.

¹⁰⁷ Bannon (n 94 above) 1842. For Kenya, it gave the process legitimacy and strengthened democratic institutions but it was divisive, increased ethnic tensions and in some cases gave rise to violence. In the

expensive¹⁰⁸ and time consuming exercise.¹⁰⁹ In Uganda, research revealed that though citizens who participated in the making of the 1995 constitution were more likely to support the constitution, this support was based more on the opinion of the political elite and the government than on their own participation, showing that legitimacy is not only the result of participation, but is also a product of other factors.¹¹⁰ Other criticisms have been that participation may make constitutions too detailed and incoherent,¹¹¹ and also increase the difficulty of reaching agreement.¹¹²

A key issue in Africa, has been the composition of the bodies or institutions charged with the overseeing the constitution-making process. Thus, where members of the constitution-making body are selected in such a manner that its members overwhelmingly represent a political power or group, the outcome of the constitution-making process is bound to favour the interests of the political power which appointed them.

In Uganda for example, the 22-member Uganda Constitutional Commission, which was established in 1989 and tasked with drafting a new constitution for Uganda, comprised of 'strong adherents of the movement system' all appointed by President Museveni.¹¹³ As to be expected, the draft constitution which emerged was one which 'favoured' the NRM and further entrenched the 'movement system'.¹¹⁴ Furthermore, elections to the Constituent Assembly, which deliberated on and eventually adopted the Constitution, was similarly flawed and gave undue advantage to supporters of the movement system and

end when parliament/president did not like the document that emerged following the consultative process, it simply changed the rules and put its own draft constitution forward with the provisions it wanted, which was subsequently rejected by the voters in a referendum.

¹⁰⁸ The Ugandan constitution making exercise cost approximately \$20 million, with 42 percent provided by the Ugandan Government and the rest by foreign donors. Tripp, A. 'The Politics of Constitution Making in Uganda' in Miller, L. (ed) (2010) *Framing the State in Times of Transition: Case Studies in Constitution Making* United States Institute of Peace: Washington 163.

¹⁰⁹ For example in South Africa it took 5 years altogether 1991-1996 and in Uganda 8 years 1988-1995.

¹¹⁰ Moehler, C. 'Public Participation and Support for the Constitution in Uganda' (2006) 44 *Journal of Modern African Studies* 275.

¹¹¹ Ginsburg (n 105 above) 215. See also Ginsburg, T. et al 'Citizen as Founder: Public Participation in Constitutional Approval' (2008) 81 *Temple Law Review* 361.

¹¹² Elkins, Z. 'Constitutional Networks' in Kahler (ed) (2009) *Networked Politics: Agency, Power, and Governance* Cornell University Press: Ithaca.

¹¹³ See Oloka-Onyango, J. (1998) *Governance, State Structures and Constitutionalism in Contemporary Uganda* Centre for Basic Research: Kampala 21. See also Bussey, E. 'Constitutional Dialogue in Uganda' (2005) 9 *Journal of African Law* 1.

¹¹⁴ See further, Tripp (n 108 above) 163.

members of the NRM, by curtailing the ability of political parties and other non-NRM members to campaign for election.¹¹⁵ During the sitting of the Constituent Assembly, some members of the NRM who dared to publicly oppose the continuation of the movement system and advocated for introduction of multi-party politics, were forced to recant.¹¹⁶ In the end, the constitution which emerged was similar to the draft submitted by the Constitutional commission and further entrenched the movement system.¹¹⁷ Interestingly, just over a decade later, the movement system was jettisoned, when the government succeeded in getting parliament to adopt 119 constitutional amendments to the 1995 Constitution, which also included a lifting of two-term limit for election as president.

3.2.3.4 Context and conditions of constitutionalism

As Przeworski has observed, the prevailing conditions under which constitutionally established institutions function in a state, go a long way in determining the extent to which the constitutional rules are adhered to.¹¹⁸ For him, constitutional rules are more easily respected in democratic and affluent countries, or countries with progressive economic development and reduction of income inequality.¹¹⁹ Other contributing factors he identifies are the influences from foreign governments and international or intergovernmental institutions; political learning (that is, the acquired political culture of institutions); and the choice of political system of government (for example parliamentary or presidential system).¹²⁰ Thus, in creating and empowering institutions for constitutionalism, the local context ought to determine the type of institutions to be

¹¹⁵ As above.

¹¹⁶ According to Oloka Onyango (n 113 above) 16, Major General Tinyefuza who described as 'almost immoral' the extension of the movement system, was later forced to apologise, stating that "henceforth, before expressing any opinion, on any constitutional or political matter, I shall seek the guidance and authority of the appropriate organs of the army".

¹¹⁷ While much has been made of the extensive consultation engaged in by the Constitutional Commission, critics have argued that the Commission focused on educating people on the content of the draft constitution rather than seeking their opinion on it.

¹¹⁸ See Przeworski, A. 'Do Constitutions Constrain?' paper delivered at the conference on Constitutions, Democracy, and the Rule of Law, Columbia University, New York, October 30, 2003, 5-6. Available at <http://c250.columbia.edu/c250_events/symposia/constitutions/papers/przeworski_paper.pdf> (accessed 8 October 2014).

¹¹⁹ Przeworski, A. et al 'What makes Democracies Endure?' (1996) 7 *Journal of Democracy* 38.

¹²⁰ As above, 39.

created, rather than attempting to transplant institutions that have enhanced constitutionalism in other contexts.¹²¹

Critical of the disproportionate emphasis on the content of constitutions without corresponding consideration of the conditions in which such documents operate in the African context, Adelman has cautioned against what he terms 'constitutional fetishism'. This he describes as the idea that a good constitution can guarantee development. Rather, using Africa in general and Nigeria as example, he cautions that the 'right constitutional framework' is only a 'necessary but insufficient means of securing democratic development'.¹²²

Thus, the context in which institutions created to enforce the constitution operate, together with the strength of constitutional provisions themselves, have a direct and major impact on the extent of compliance with constitutions.

3.3 Constitutionalism and the protection of human rights in Africa

The promotion and protection of human rights is generally accepted as a core element of 'modern constitutionalism'. Beyond that however, the centrality of human rights to constitutionalism is reflected in the fact that many constitutionalists have come to regard the protection of human rights as the overarching aim of constitutionalism, thus describing human rights protection as 'central to genuine constitutionalism',¹²³ 'the overall purpose of constitutionalism',¹²⁴ and 'the very essence of constitutional government'.¹²⁵ Such is the level of importance placed on human rights protection within the constitutional order. In the words of Louis Henkin, foremost American constitutional scholar,

Ours is the age of rights. Human rights is the idea of our time, the only political-moral idea that has received universal acceptance. The Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1948,

¹²¹ See Przeworski (n 118 above).

¹²² Adelman, S. Constitutionalism, Pluralism and Democracy in Africa (1998) 42 *Journal of Legal Pluralism* 78.

¹²³ Quoting Carl Friedrich in Chandler, R. et al (1987) *The Constitutional Law Dictionary: Individual Rights* Santa Barbara: ABC –Clio Information Services 35.

¹²⁴ Sigmund, P. Carl Friedrich's Contribution to the Theory of Constitutionalism-Comparative Government in Pennock, J. and Chapman, J. (eds) (1979) in *Constitutionalism: Nomos XX* New York University Press: New York 39.

¹²⁵ Nwabueze, B. (1973) *Constitutionalism in the Emergent States* C. Hurt and Co 10: London.

has been approved by virtually all governments representing all societies. Human rights are enshrined in the constitutions of virtually every one of today's 170 states-old states and new; religious, secular and atheist; Western and Eastern; democratic, authoritarian and totalitarian; market economy, socialist and mixed; rich and poor developed, developing, and less developed.¹²⁶

In view of this, most African States have embedded in their constitutions today, a 'Bill of Rights',¹²⁷ or incorporated human rights norms in one way or another.¹²⁸ For most African States, however, this is a relatively new phenomenon, as the majority of independence constitutions where for various reasons, relatively thin on human rights protection.

The inclusion of human rights in the independence constitutions of Africa was not intended by colonialists to be a comprehensive exercise. With a few exceptions, the French made only scant reference to human rights as contained in the 1789 Declaration on the Rights of Man and of Citizens and the 1958 French Constitution, mostly in the preamble to the constitutions of their soon-to-be independent colonies.¹²⁹ The British, having no equivalent written constitution, could not do the same.¹³⁰ Moreover, Britain was vehemently opposed to the inclusion of human rights in the independence constitutions of its colonies.¹³¹ Thus, Ghana, the first African colony to gain independence from Britain, had only a cursory reference to human rights in its independence constitution.¹³²

When however the process of independence in Nigeria reached a stalemate, due to the fears raised by minority groups of possible exploitation by the majority, Britain acquiesced to the introduction of a Bill of Rights in the Nigerian independence Constitution of 1960.¹³³

¹²⁶ Henkins, L. (1993) *The Age of Rights* Columbia University Press: New York, ix.

¹²⁷ Bill of Rights here refers to the catalogue of rights contained in any constitution irrespective of what they be called e.g. 'fundamental rights' as in Nigeria or 'fundamental rights and freedoms' as in Ethiopia or 'freedoms and rights' in Côte d'Ivoire.

¹²⁸ Killander, M. The Role of International Law in Human Rights Litigation in Africa in Quansah, E. and Binchy, W. (eds) (2009) *The Judicial Protection of Human Rights in Botswana* Clarus Press: Dublin.

¹²⁹ Fombad, C. 'African Bills of Rights in Comparative Perspective' (2011) 17 *Fundamina* 38.

¹³⁰ See generally, Parkinson, C. (2007) *Bills of Rights and Decolonisation: The Emergence of Domestic Human Rights Instruments in Britain's Overseas Territories* Oxford University Press: Oxford 103.

¹³¹ Heyns, C. 'African Human Rights Law and the European Convention' (1995) 11 *South African Journal of Human Rights* 256.

¹³² The 1957 Constitution of Ghana had 3 human rights related provisions on protection of minorities, protection of religious freedom and compensation for property compulsorily acquired by the State. See Parkinson (n 130 above) 131.

¹³³ Heyns (n 131 above) 256.

The Bill of Rights included, which was largely a verbatim reproduction of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention),¹³⁴ was then subsequently replicated in the constitutions of various other African colonies that gained independence thereafter.¹³⁵

Today, international human rights law continues to be influential in shaping the constitutional protection of human rights in domestic legal systems in Africa. For African States, as with all other States the world over, respect for and adherence to international human rights principles has become a 'condition for admission into the global village'.¹³⁶

The influence of international human rights law on the constitutional protection of human rights within the domestic system is most visible in two main instances. First, is through the provisions of national constitutions themselves which set out the status and applicability of international law generally or international human rights law in particular, within the domestic legal order. The second instance, is through the utilisation of general principles of customary international law and provisions of international human rights treaties themselves in the interpretation and application of constitutional guarantees on human rights. In both instances, it is the existence of human rights provisions within constitutions, no matter how strong they may be, which creates the avenue for international human rights law to influence the constitutional promotion and protection of rights at the domestic level in Africa.

3.4 Access to information as a constitutional right

With the growing recognition of access to information as a human right at the international level, States are increasingly introducing specific provisions guaranteeing the right of access to information in their constitutions. For those who have not done so, expanding the existing constitutional provisions on freedom of expression, or other constitutional

¹³⁴ The European Convention was the obvious international human rights treaty from which the British fashioned a Bill of Rights because following the adoption of the European Convention in 1950, the British Government had in 1953 made a declaration extending the application of the ECHR to its African colonies. However, the application of the European Convention was specifically declared to cease upon attainment of independence. See Heyns (n 131 above) 254.

¹³⁵ As above. These were Sierra Leone, Uganda, Kenya, Malawi, Zambia, Botswana, Lesotho and Swaziland. Of these 8, only Botswana still retains the same Bill of Rights.

¹³⁶ Heyns, C. and Viljoen, F. 'Current Developments: An Overview of International Human Rights Protection in Africa' (1999) 15 *South African Journal of Human Rights* 421.

rights, to find a constitutionally protected right to access information held by the State, becomes a real possibility for grounding the right of access to information as a constitutional right.

For example, in Europe, 19 countries explicitly guarantee a stand-alone right of access to information held by the State,¹³⁷ while five others guarantee the broader right to information or freedom of information.¹³⁸ For the remaining 23 countries that have no explicit provision on access to information,¹³⁹ the right can be read in to their constitutional provisions on freedom of expression or other relevant right.¹⁴⁰ This includes the United Kingdom, which although has no written Constitution, protects freedom of expression through its adoption of Human Rights Act of 1988,¹⁴¹ which effectively codifies the provisions of the European Convention on Human Rights.

Naturally, most access to information advocates argue strongly for the inclusion of a stand-alone provision recognising access to information in the constitution, due to the central role constitutionally protected rights play in engendering constitutionalism.

Bovens for example argues that in addition to the traditionally recognised civil, political, and social rights in constitutions, a fourth category of 'information rights' should be added.¹⁴² For him, the constitutional protection of access to information makes more tangible the obligation for States to respect, fulfil, promote and protect the right concerned, imposed by international human rights law.¹⁴³ Furthermore, he contends that

¹³⁷ These are: Albania, Austria, Belgium, Bulgaria, Croatia, Estonia, Finland, Hungary, Moldova, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Serbia and Slovakia, Slovenia, and Sweden.

¹³⁸ These are: Azerbaijan, Czech Republic, Latvia, Macedonia, and Ukraine.

¹³⁹ Andorra, Armenia, Bosnia and Herzegovina, Cyprus, Denmark, France, Georgia, Germany, Greece, Iceland, Ireland, Italy, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, Russia, San Marino, Spain, Switzerland, Turkey.

¹⁴⁰ This assumption is based on the recent decisions of the European Court, discussed above, expanding article 10 on freedom of expression to include the right of access to information. Whether this will happen in every single State is in reality of course dependent on a variety of factors, paramount of which is the extent to which domestic courts rely on decisions of the European Court in cases before it. See generally, Murray, J. 'The Influence of the European Convention on Fundamental Rights on Community Law' (2011) 33 *Fordham International Law Journal* 1388.

¹⁴¹ Article 10 of the Act is a verbatim reproduction of article 10 of the European Convention. The Act came into force in October 2000.

¹⁴² Bovens, M. 'Information Rights: Citizenship in the information society' (2002) 10 *Journal of Political Philosophy* 317.

¹⁴³ As above.

constitutional protection allows much broader protection of access to information than access to information legislation, which generally mainly focuses on open government.¹⁴⁴

Long before the first standalone provision on access to information in Africa was enacted by South Africa, Shivji had also canvassed for access to information, a right 'of very broad purport but includes the right to demand and receive information from state organs' to be 'constitutionally entrenched'.¹⁴⁵

This insistence on the explicit constitutional protection of a right to access information held by the State is understandable and should be seen in the context of the indispensable role that access to information plays in a society, not only for the realisation of other human rights but also in the context of democracy, good governance and accountability. As these concepts are agreed to be 'essential elements of constitutionalism', states, all of which theoretically aspire towards constitutionalism, are thus obliged to include provisions facilitating the realisation of these objectives in the text of national constitutions.¹⁴⁶ This reality, combined with the centrality of human rights to the fostering of constitutionalism as a whole, makes it fitting for access to information to be constitutionally protected as a right in itself.

Bovens for example bases his justification for insisting on the constitutional recognition of access to information on the important role information plays in the life of citizens, which he demonstrates through what he terms the '3 elements of citizenship': citizens as subjects, citizens as *citoyen* and citizens as members of society.¹⁴⁷ He explains that as subjects, citizens need to act with legality which requires 'legal certainty, lawfulness and cognisance' and that it is only if subjects are certain of being informed timeously and adequately about their rights and duties, that they can act lawfully. As *citoyen*, citizenship requires democratic accountability and control of the executive and legislature through participation in the making of laws and policies, which is impossible without information from the State. Finally, as members of society, individuals need information to make

¹⁴⁴ As above.

¹⁴⁵ Shivji, I. State and Constitutionalism: A new Democratic Perspective" in Shivji I. (ed) (1991) *State and Constitutionalism: An African Debate on Democracy* Saper Books: Harare 43.

¹⁴⁶ Currie, I. and De Waal (2005) n.61 above 692.

¹⁴⁷ Bovens (n 142 above) 9.

decisions rationally and plan their lives accordingly. He also sees a social justice element to this in that, the constitutional guarantee of access to information could, to some extent, address the inequalities in accessing information between the wealthy who have the means to do so, and the poor, who do not.¹⁴⁸

Peled and Rabin also concur that access to information should be a constitutional right. Their theoretical justification for this is four-fold: political-democratic, instrumental, proprietary, and oversight/transparency.¹⁴⁹ The political-democratic justification is that access to information, especially in terms of its centrality to public participation contributes to and is a condition for constitutional democracy as well as for the exercise of procedural political rights such as freedom of expression. For them, the instrumental justification of access to information lies in the fact that rights which create the conditions that are necessary for the exercise of other rights are in themselves constitutional rights. In other words, its instrumentality to the realisation of other rights makes access to information constitution-worthy. The thrust of the proprietary justification is that information held by the State is the property of citizens and residents, as it is gathered by a public service funded by tax payers for that purpose. As 'owners' of the information therefore, citizens and residents are entitled to this information, subject only to the need to protect the interests of other 'owners', that is, members of the public.¹⁵⁰ Finally, the oversight justification which is not 'rights' connected as such, focuses on the role of constitutions in ensuring good governance through the oversight of government to ensure transparency and help fight corruption.

More generally, however, the importance of access to information has been emphasised on the basis of various theories and rationale. Invariably, the fundamental role of access to information in strengthening democracy, accountability, governance and the realisation of other rights preoccupy this theorisation. Calland, agreeing that access to information

¹⁴⁸ As above.

¹⁴⁹ Peled, R. and Rabin, Y. 'The Constitutional Right to Information' (2011) 42 *Columbia Human Rights Law Review* 357.

¹⁵⁰ This view is also shared by Snell, R. and Sebina, P. 'Information Flows: The Real Art of Information Management and Freedom of Information' (2007) 35 *Archives and Manuscripts* 54, 65.

has 'theoretical and conceptual intricacies',¹⁵¹ sought to illustrate this by identifying three 'characters' of the right: the multi-dimensional character in which the right has both positive and negative elements, in that it can be used as a 'sword and a 'shield, as well as a collectively or by individuals; a multi-functional character which enables it play different roles in a democracy such as participation and accountability; and a multi-rational character through which it can be utilised by various sectors of society for the realisation of whichever goal or right may be desired, such as socio-economic rights.

For former American president, Jimmy Carter, the importance of access to information lies in its facilitation of participation in decision making, accountability and also the realisation of socio-economic rights. In his words:

Public access to government-held information allows individuals to better understand the role of government and the decisions being made on their behalf. With an informed citizenry, governments can be held accountable for their policies, and citizens can more effectively choose their representatives. Equally important, access to information laws can be used to improve the lives of people as they request information relating to health care, education, and other public services.¹⁵²

While similarly accepting the importance of access to information for political participation and for the realisation of other rights, Roberts insists that access to information is most importantly a tool for oversight of the State and is thus 'more accurately justified as an instrument for discouraging arbitrary state action and protecting the basic right to due process and equal protection of the law'.¹⁵³

¹⁵¹ Calland, R. The Right of Access to Information: The State of the Art and the Emerging Theory of Change in Diallo, F. and Calland, R. (2013) *Access to Information in Africa: Law, Culture and Practice* Koninklijke Brill: Leiden 21.

¹⁵² See foreword by President Jimmy Carter in Newman, L. (ed) *Access to Information: A Key Democracy*, Carter Centre, November 2002. Available at <<http://www.cartercenter.org/documents/1272.pdf>> (accessed 24 October 2014).

¹⁵³ Roberts, A. 'Access to Government Information: An Overview of Issues' in Newman, L. (ed), (n 196 above).

Access to information is also seen as central to transparency and the democratic process, and has been described as a necessary feature of ‘any society which lays claim to adherence to democratic ideals’.¹⁵⁴ Echoing this position, Florini notes that in addition to the ‘pragmatic argument’ that access to information is necessary for transparency, is also the ‘fundamental moral claim’ of its centrality to democracy. According to her, the fundamental role of access to information for the functioning of democracy is made obvious by the fact that:

the essence of representative democracy is informed consent, which requires that information about government practices and policies be disclosed. And in democracies, by definition, information about government belongs to the people, not the government.¹⁵⁵

Thus, it can be argued that, the multi-functional, multi-dimensional and multi-rationale nature of access to information combined with the centrality of human rights to the constitutional order and the aspirational role constitutions play in the society makes the express constitutional protection of access to information an ideal.

3.4.1 Reading-in of access to information as a constitutional right

Moving beyond the insistence of the specific constitutional guarantee of access to information, there is the alternative of reading-in a constitutional right of access to information from already existing constitutional rights such as freedom of expression, in line with the practice of regional human rights bodies highlighted above. The fact is that domestic courts have been doing so since 1969, when the Supreme Court of Japan found that a ‘right to know’ was an integral part of freedom of expression as guaranteed by article 21 of the Japanese Constitution.¹⁵⁶ The Court held as follows:¹⁵⁷

¹⁵⁴ See the Activity Report of the Special Rapporteur on Freedom of Expression and Access to Information in Africa presented to the 44th Session of the African Commission on Human and Peoples’ Rights, November 2008, paragraph 49. Available at <<http://www.achpr.org/english/Commissioner%27s%20Activity/44th%20OS/Special%20Rapporteurs/Freedom%20of%20expression.pdf>> (accessed 24 November 2014).

¹⁵⁵ Florini, A The Battle Over Transparency in *The Right to Know: Transparency for an Open World* Florini, A. (ed) (2007) Columbia University Press: Columbia 2.

¹⁵⁶ In *Kaneko v Japan*, Supreme Court 1969, 11.26 Keishu 23-11-1490.

¹⁵⁷ As above.

In a democratic society, the reports of the mass media provide the people with important materials on which to base their judgement in the nations politics and they serve the peoples 'right to know.'

This position was further strengthened in *S.P Gupta v Union of India*,¹⁵⁸ where the Supreme Court of India read in access to information into the right to freedom of expression guaranteed by the constitution. The Court held that the right to know was implicit in the right to freedom of speech and expression guaranteed by article 19 of the Constitution and that the disclosure of information on the functioning of government is the rule and secrecy an exception, justified only by public interest.¹⁵⁹ In this case, the Court found against the decision of the State not to disclose communication between the Minister of Justice and the President of the Supreme Court on the appointment of Supreme Court judges.

In South Korea, access to information became a constitutionally protected right following the decision of the Constitutional Court in the *Forests Survey Inspection Request* case.¹⁶⁰ In that case, the plaintiff unsuccessfully sought information from local officials to prove the ownership of his land, which had been expropriated without his knowledge. Finding that the right to free formation of ideas was an integral part of freedom of speech and the press as guaranteed by article 21 of the Constitution, the Court held that this right could not be fulfilled without the right of 'access, collection and processing of information'. Refusal to disclose the requested information thus constituted a violation of the right to know with respect to the information held by the government.

Israel's Supreme Court has also found that for the realisation of freedom of expression, several other rights such as 'the right to receive information' must be recognised and that in turn imposes an obligation on the State to provide that information.¹⁶¹ More recently,

¹⁵⁸ 1982 A.I.R S.C. 149, 234.

¹⁵⁹ As above, para 66.

¹⁶⁰ (1989) 1 KCCR 176, 88Hun-Ma22, delivered on 4 April 1989. Available at <http://www.right2info.org/resources/publications/case-pdfs/south-korea_forests-survey-inspection-request-case-petitioner-v.-supervisor-of-county-of-ichon> (accessed 22 October 2014).

¹⁶¹ HCJ 1601/90, 8 May 1990, 48(3) PD 353 [1990] (Isr.).

the Canadian Supreme Court, in *Ontario (Public Safety and Security) v Criminal Lawyers Association*,¹⁶² held that the access to information can be derived from freedom of expression provisions of the constitution, albeit within a limited scope, where it can be shown 'that access is necessary for the meaningful exercise of free expression on matters of public or political interest'.¹⁶³

Apart from the recognition of access to information by expanding the scope of already existing constitutional provisions on freedom of expression, domestic courts have also found a constitutional protection of access to information using other existing constitutional provisions. In *Reliance Petrochemicals Ltd. v Proprietors of Indian Express Newspapers, Bombay Pvt. Ltd. and Others* for example, the Indian Supreme Court found that access to information was a right guaranteed as part of the right to life under article 21 of the constitution.¹⁶⁴ And in Argentina, the Supreme Court has held that article 1 of the Constitution which declares Argentina a republic, imposes an obligation of transparency which requires that information held by the State must be disclosed to the public.¹⁶⁵ This constitutional principle has been upheld in subsequent judicial decisions.¹⁶⁶

3.4.2 Challenges to the constitutional protection of access to information

With all of the above, it is apparent that there are three main avenues for the constitutional protection of access to information at the domestic level: the express incorporation of a provision on access to information into the constitution; the expansion of existing constitutional rights such as freedom of expression to include access to information; and the direct reliance on normative standards of international human rights law¹⁶⁷ or judicial decisions of international human rights bodies.

¹⁶² 2010 SCC 23, [2010] 1 S.C.R. 815

¹⁶³ Para 37.

¹⁶⁴ 1988 (004) SCC 0592 SC, para. 234.

¹⁶⁵ 9 Acordada de la Corte Suprema de Justicia de la Nación No. 1/2004 Exp. 315/2004 Adm. Gral. See Yagel, L (ed) , *Disclosing Justice: A Study on Access to Information in Latin America*, Due Process of Law Foundation: USA 2007, 7. Available at <<http://www.dplf.org/uploads/1196288246.pdf>> (accessed 25 October 2014).

¹⁶⁶ As above.

¹⁶⁷ This will be apt in countries like Benin for example, where by virtue of article 7 of the Constitution, the African Charter forms 'an integral part' of the Benin Constitution and the bill of rights only guarantee the right to a free press. This will not be a new phenomenon as the Constitutional Court of Benin in *Okpeitcha*

However, a few factors that affect the utility of these avenues specifically within the African context, should be highlighted. First is that the possibility of express constitutional guarantee of access to information is a narrow one, considering that for most States, constitution-making is not a frequent occurrence. Furthermore, the alternative path of reviews or amendment of constitutions is often a complex process, and rightly so, being that one of the features of constitutionalism is the existence of a rigorous process for the amendment of the constitution.¹⁶⁸ As a result, all African States that have incorporated specific constitutional provisions of access to information from the State have done so not as amendments, but as part of the enactment of an entirely new constitution.

Furthermore, the expansion of existing constitutionally protected rights and the direct application of normative standards of international human rights law and of judicial decisions of the relevant judicial bodies is wholly dependent on the inclination of domestic courts towards this. This in turn, is dependent on several other factors such as the extent of international human rights law awareness within the judiciary; the status of the foreign and international law within the domestic legal system, and judicial independence. Consequently, while this possibility exists in theory, in reality, it may be difficult to achieve.

A general criticism which may be presented against the constitutional recognition of access to information is the minimalist position that the continuous expansion of human rights contributes to 'rights inflation' which weakens the overall implementation of human rights and dilutes their significance.¹⁶⁹ To prevent this, scholars such as Ignatieff suggest that only 'negative liberties' such as life, liberty, property and security should be protected.¹⁷⁰ Likewise, Cranston believes that only those rights which are capable of being translated into real positive rights; have a universal character and amount to

v Okpeitcha has relied on the African Charter in finding a violation of the duty to 'preserve the harmonious development of the family' in article 29(1). See *Okpeitcha v Okpeitcha*, (2002) AHRLR 33 (BnCC 2001).

¹⁶⁸ See generally Fombad, C. 'Some Perspectives on Durability and Change under Modern African Constitutions'; (2013) 11 *International Journal of Constitutional Law* 382.

¹⁶⁹ See Ignatieff, M. (2001) *Human Rights as Politics and Idolatry* Princeton University Press: Princeton, 90. There, he says 'rights inflation- the tendency to define anything desirable as a right – ends up eroding the legitimacy of a defensible core of rights. That defensible core ought to be those that are strictly necessary to the enjoyment of any life whatever'.

¹⁷⁰ As above, 67.

‘fundamental freedoms’ or ‘primary social goods’¹⁷¹ should be recognised as human rights.¹⁷² These minimalist views have been criticised for failing to appreciate the interdependence and interrelatedness of human rights, which makes it practically impossible to strictly separate rights.¹⁷³

In any case, the multi-dimensional, multi-functional and multi-rationale nature of human rights, makes access to information perfectly capable of falling within the strict confines that minimalists like Ignatieff and Cranston have set out as what amounts to rights. Such is the versatility of access to information. Unfortunately, however, the history of constitutionalism in Africa is proof that the singular act of including human rights provisions in a constitution is no foreteller of the extent to which it will take root in society. The impact of a constitution is also to a large extent dependent on the institutions that implement it.¹⁷⁴

3.5 Constitutional protection of access to information in Africa

The Republic of Seychelles became the first African country to explicitly accord constitutional status to the right to access information as a stand-alone right, with the coming into force of the 1993 Constitution of Seychelles, following its approval in the June 1993 Constitutional referendum.¹⁷⁵ This pioneering constitutional recognition of access to information as a positive right was replicated in quick succession by Malawi, Uganda and South Africa.¹⁷⁶ Following South Africa’s 1996 constitutional provision on access to

¹⁷¹ This concept was developed by John Rawls and described it as those ‘that any rational person prefers more than less off, whatever her final aims. See Rawls, J. (1971) *Theory of Justice* Harvard University: Cambridge

¹⁷² Cranston, M. Human Rights, Real and Supposed in Raphahe, D.I (ed) (1967) *Political Theory and the Rights of Man* Macmillan: London 43. See also Cranston, M. Are there any human rights? (1983) 112 *Daedalus*.

¹⁷³ See generally Beitz, C. Human Rights as a Common Concern’ (2001) 95 *American Political Science Review*, 269; Dinsmore, G. ‘Debate: When Less Really is Less- What’s Wrong with Minimalist Approaches to Human Rights?’ (2007) 15 *Journal of Political Philosophy* 473; Deveaux, M. ‘Normative Liberal Theory and the Bifurcation of Human Rights’ (2009) 2 *Ethics and Global Politics* 171.

¹⁷⁴ Ihonvbere, J. ‘Politics of Constitutional Reforms and Democratization in Africa’ in Lumumba-Kasongo, T. (ed) (2000) *Dynamics and Policy Implications of the Global Reforms at the End of the Second Millennium* Brill: Netherlands

¹⁷⁵ Twomey, M. C. Seychelles Country Report, Oxford Constitutions of the World. Available at <<http://www.lcla.up.ac.za/oxford-constitutions/country-reports>> (accessed 28 October 2014). For full details of all 13 constitutional provisions on access to information, see annexure 2.

¹⁷⁶ Access to information was introduced into the newly drafted Constitutions of Malawi in 1994, Constitution of Uganda in 1995 and Constitution of South Africa in 1996. Note however, that section 23 of the Interim

information, which is arguably the most progressive on the continent,¹⁷⁷ it took almost another decade and a half for access to information to once again be constitutionally entrenched in another African constitution.¹⁷⁸ Between 2010 and 2014, another 9 newly adopted African constitutions guaranteed access to information as a human right.¹⁷⁹ In total, therefore, access to information has been constitutionally entrenched as a human right in thirteen countries across the continent.

3.6 The normative framework of constitutional protection of access to information in Africa

There are three broad categories of constitutional provisions on access to information in Africa. In the first category are those constitutions that expressly provide for access to information held by the State as part of its Bill of Rights. Another category is those provisions that recognise a 'right to' or 'freedom of' information under the right of freedom of expression. However, the majority of African constitutions fall within the third category of constitutional provisions that contain no reference whatsoever in their protection of freedom of expression.

3.6.1 Express constitutional protection of access to information in Africa

A brief overview is undertaken of the 13 express constitutional provisions on access to information in Africa to provide some insight into the variations in their normative content and the possible impact on the practical enforcement of the right.

Constitution of South Africa 1993, which was assented to and came into force in 1994, did guarantee access to information. However, it did so on a much narrower basis than the subsequent Constitution of 1996.

¹⁷⁷ Although the Interim Constitution adopted in 1993 also included an access to information provision, that provision was substantially modified in the 1996 Constitution.

¹⁷⁸ Note that although the 1997 Constitution of Eritrea which was adopted during this period does contain the right of access to information, it has never come into force. As a result, none of its provisions are of any effect and are not considered by this thesis as it is the epitome of a 'sham' or 'façade' constitution.

¹⁷⁹ These are Constitution of Angola in 2010, Constitution of Guinea in 2010, Constitution of Kenya in 2010, Constitution of Niger in 2010, Constitution of Morocco in 2011, Constitution of South Sudan in 2011, Constitution of Somalia in 2012, Constitution of Zimbabwe in 2013 and Constitution of Egypt in 2014.

3.6.1.1 Categories of persons who can access

Ideally, the right to access information should be granted to every person, citizens and non-citizens alike. Of the 13 constitutional provisions guaranteeing the right of access to information, six grant the right to ‘everyone’, ‘every person’, ‘individuals’ or the ‘public’ in general.¹⁸⁰ Six others restrict this right only to its citizens. Section 62 of Zimbabwe’s Constitution is however unique, in that it expressly guarantees the right of access to information to citizens, permanent residents and ‘every person’, as opposed to all others which grant the right either only to citizens or to everyone. However, there are differences in the circumstances giving rise to the application of the right by these three different categories in Zimbabwe. On one hand, all citizens and permanent residents have the right to access any information held by ‘the State or by any institution or agency of government’ on the other hand, ‘every person’ can access information held by any person ‘including the State’, only when the information is ‘required for the exercise or protection of a right’. Thus, persons who are neither citizens nor permanent residents only have a right to access information, where they can prove that such information is needed to protect or exercise another right.

This novel formulation in the Constitution of Zimbabwe attempts to strike a balance between the reluctance of many States to grant an unrestricted right to access information, and the practical reality that failure to extend the right to ordinary residents or any other person on Zimbabwean territory, could leave room for the violation of various other human rights. However, as it will be shown below, the restriction of the categories of persons entitled to the right could in many cases defeat some of the very objectives the provision seeks to achieve, that is, transparency and accountability of 3 public institutions.

The negative impact of restricting the application of this right only to citizens is illustrated by two recent decisions by Kenyan courts. In *Famy Care Ltd v Public Procurement*

¹⁸⁰ These are Angola, Malawi, Niger, Seychelles (the public), Somalia and South Africa.

Administrative Board,¹⁸¹ the High Court of Kenya held that the proper interpretation of section 35 of the Constitution of Kenya is that the right to access to information is available only to citizens and could neither be exercised by juristic persons nor natural persons who were are not citizens of Kenya, as defined by the citizenship provisions in the Kenyan Constitution.¹⁸² Thus, the plaintiff being a company registered in India did not qualify as a citizen. It was irrelevant that the plaintiff, sought access to documents to prove irregularities in a procurement award by a public body, which was thus a matter of public interest.¹⁸³

In Nairobi Law Monthly Co Ltd v Kenya Electricity Generating Company,¹⁸⁴ where the plaintiff in a defamation case sought access to documents to prove the truth of the statement in question, the High Court following the earlier decision in the *Famy* case held that a company incorporated in Kenya was a juristic person with 'Kenyan nationality' and was thus incapable of relying on section 35(1) of the Constitution which was applicable only to natural persons with Kenyan citizenship.¹⁸⁵

The requirement that a person seeking to access information must be a citizen was taken to a somewhat illogical conclusion in both cases, particularly in the *Nairobi Monthly* case. This is particularly so given that the High Court of Uganda faced with the same issue has interpreted 'citizen' to include corporate bodies, stating that 'corporate bodies can enforce rights under the Bill of Rights, for they are taken as persons in law, though not natural persons'.¹⁸⁶ It is submitted that the courts in both Kenyan cases ought to have adopted a

¹⁸¹ Petition No. 43 of 2012, 2012 Kenya Law Reports. Available at <http://kenyalaw.org/Downloads_Free_Cases/432012.pdf> (accessed 26 October 2014).

¹⁸² Para 25.

¹⁸³ Para 29-30.

¹⁸⁴ Petition No 278 of 2011. Available at <http://kenyalaw.org/CaseSearch/view_preview1.php?link=32814989894189150344229> (accessed 26 October 2014).

¹⁸⁵ Paras 75-82.

¹⁸⁶ See *Greenwatch Ltd v Attorney General and Another*, Case No HCT-00-CV-MC-0139 of 2001, (2002) UGHC, 28. Part of the reasoning of the Judge in this case was that section 237 of the Constitution states that land belongs to the citizens of Uganda and shall vest in them in accordance with the land tenure system provided in the Constitution. Since a limited liability company such as the plaintiff was allowed to own land, it could be regarded as a citizen, albeit, a corporate citizen.

purposive and generous interpretation of the constitution, instead of a strict literal interpretation.

3.6.1.2 Scope of application

A distinction is often made between the types of institutions from which information is to be made available. Generally, constitutional application of access to information tends only to be vertical, that is, against the state and not horizontal-against individuals or private entities. Thus, at the barest minimum, information held by all public institutions ought to be subject to access. In this regard, the constitutions of all 13 countries guarantee a right of access to information held by the State¹⁸⁷ or public authorities or administration.¹⁸⁸ Some ensure the scope of applicability is clear by expressly stating that the right applies to any information held by the State and any of its 'institutions', 'organs' 'agencies' and at 'every level'.¹⁸⁹ Though Angola and Guinea do not expressly indicate the institutions from which information is to be obtained, it can be deduced from the types of information that can be accessed, such as archives and administrative records in Angola and public information in Guinea, that such information will be held by the State and possibly other non-State institutions.

Some constitutional provisions go further to include in their definition of the State an entity which performs a public function or public service. Thus, in Morocco, the right of access to information is extended to 'elected authorities and organs performing 'public services' and in Seychelles, to authorities performing government functions. This is in recognition of the growing trend in Africa and elsewhere, of ordinarily private bodies performing public services or functions on behalf of the State, either as a result of privatisation of former State entities or the conclusion of Service Level Agreements (SLAs) between States and private entities.

¹⁸⁷ These are Egypt, Kenya, South Africa, Somalia, South Sudan, Malawi, Uganda, and Zimbabwe.

¹⁸⁸ These are Seychelles, Morocco, and Niger.

¹⁸⁹ These are South Sudan, Malawi, Uganda and Zimbabwe.

A final category of constitutional provisions are those which allow the right to access not only the information held by the State, but also that of private entities. However, this extension of the right to private bodies is restricted only to cases where the information 'is necessary for the exercise or protection of a right'. This progressive provision can be found in the constitutions of Kenya, Somalia, South Africa, and Zimbabwe and with the exception of Kenya, this right is guaranteed to all persons in these countries and not just to citizens.

3.6.1.3 Exemptions

It is generally accepted that access to information is not an absolute right. There exist a variety of instances in which access to information can be justifiably restricted such as for purposes of national security and defence or the protection of the privacy of others. While the constitutional provisions on access to information in Egypt, Kenya, Guinea, Niger, South Africa and Somalia are silent on the matter, all others specify categories of information to be exempted from disclosure. The scope of such exempted information vary considerably between narrow and broad exemptions and between those which subject exemption to further tests and those that do not.

Thus, the constitutional provisions of South Sudan and Uganda are narrow as they exempt information only when its disclosure is likely to prejudice the right to privacy of others and 'public security' or 'the security or sovereignty of the State' respectively. Much broader exemptions include 'interests of defence, public security, or professional confidentiality';¹⁹⁰ 'security and defence matters, state secrecy, criminal investigation and personal privacy';¹⁹¹ national security, prevention and detection of crime, compliance with an order of a court, legal privilege, and protection of the privacy of others;¹⁹² national defence, the internal and external security of the State, private life of persons, protection of constitutionally guaranteed rights, and protection of sources and domains specificity by law.¹⁹³

¹⁹⁰ Zimbabwe.

¹⁹¹ Angola.

¹⁹² Seychelles.

¹⁹³ Morocco.

In the case of Seychelles and Zimbabwe the wide exemptions are mitigated by the subjection of their application to objective tests which would ideally, on a case by case basis, determine whether these exemptions should be applied or not. In the Seychelles, the application of exemptions is subject to two conditions. It must be prescribed by law and must also be such that is necessary in a democratic society. In Zimbabwe, the test is even more stringent. Exemptions must be provided by law and must be 'fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom'. This progressive test is however significantly constrained by the curious general restriction placed on the right to access information from the State only where 'the information is required in the interests of public accountability'.¹⁹⁴ A restrictive interpretation of the term 'public accountability', could lead to the application of the test becoming redundant in most cases.

Malawi's constitutional provision appears to be the widest, though at first glance, the absence of an express limitation of the categories of information that can be accessed, appears positive. However, on closer inspection, it becomes apparent that this provision subjects the right to a blanket exemption of 'any act of Parliament'. In other words, any law which permits the non-disclosure of information automatically trumps the constitutionally protected right of access to information. Had this broad exemption been subjected, at the very minimum, to a further test of necessity, the negative effect could have been cushioned by an objective consideration of the necessity for limiting the right to access information in each specific case. It remains to be seen what impact this will have, in the event that an access to information law is enacted to give effect to this constitutional provision. But as it currently stands, the legal enforcement of the right to access information based on this constitutional provision may prove a difficult task.

It should however be noted that though the majority of the constitutional provisions on access to information do not provide tests to be applied in determining the application of exemptions, most constitutions tend to have general limitation clauses which may contain

¹⁹⁴ Section 62(1).

a test to be applied to justify any or some of the rights guaranteed by the Constitution. Relevant examples here are the Constitutions of Uganda¹⁹⁵ and South Africa.¹⁹⁶

3.6.1.4 Requirement to adopt implementing legislation

A common feature of constitutional provisions on access to information in Africa, is the imposition of an obligation on the legislature to adopt a law to give effect to the right. This is the case with regard to the constitutions of Egypt, Somalia, South Africa, Uganda, and Zimbabwe. Only two of these countries have so far fulfilled this obligation. In South Africa and Uganda, access to information laws were adopted in 2000 and 2005 respectively.¹⁹⁷ For Somalia, non-compliance with the obligation to adopt an access to information is in all likelihood due to the fact that it is severally regarded a failed State.¹⁹⁸ Considering that the constitutional provisions in Egypt and Zimbabwe have only recently been enacted in 2014 and 2013 respectively, the promulgation of laws on access to information in both States can be reasonably expected to follow in due course. The majority of the constitutional provisions on access to information are however silent on the issue of adoption of laws to give effect to the right.¹⁹⁹ Of these, Angola, Guinea and Niger, and South Sudan, have in fact adopted access to information laws, while Ghana,²⁰⁰ Malawi,²⁰¹ and Morocco,²⁰² are at advanced stages of adopting laws. In Seychelles, preliminary efforts towards the adoption of a law began in January 2015.²⁰³

¹⁹⁵ Article 43.

¹⁹⁶ Section 36.

¹⁹⁷ These are the Protection of Access to Information Act and the Access to Information Act respectively.

¹⁹⁸ From 2008 to 2012, the Foreign Policy and Global Policy for Peace Failed States Index featured Somalia at the top. In 2014, it moved to second place below South Sudan. Note that the index has since 2014 been renamed the 'Fragile States Index'. Available at <<http://ffp.statesindex.org/rankings-2014>> (accessed 27 October 2014).

¹⁹⁹ These are Angola, Guinea, Kenya, Malawi, Morocco, Niger, Seychelles, and South Sudan.

²⁰⁰ A Private Members Access to Information Bill was to be tabled in parliament which underwent its first reading in August 2015 and has since been adopted by both houses of Parliament.

²⁰¹ A Right to Information Bill has been approved by cabinet and tabled in Parliament. See <<http://www.ghana.gov.gh/index.php/media-center/news/2565-parliament-begins-consideration-of-rti-bill/>> (accessed 27 July 2016).

²⁰² A draft Law on the Right to Access Information was adopted by the lower house of Parliament in July 2016. See <<http://www.freedominfo.org/2016/07/moroccan-lower-house-oks-access-to-information-bill/>> (accessed 27 July 2016).

²⁰³ From 19 to 21 January 2015, the Special Rapporteur on Freedom of Expression and Access to Information in Africa, Commissioner Pansy Tlakula, conducted an advocacy visit to the Republic of Seychelles to meet with high-level government officials on the importance of adoption of an access to information law. Subsequently, a national symposium was held on 25 and 26 May to generate an understanding of the right of access to information and begin preliminary discussions on the content of an

While one may be quick to assume that the imposition of the enactment of legislation to give effect to the constitutional right of access to information is necessary, if only to hasten or guarantee the enactment of the law, the above shows that this may not always be the case. Four countries, as indicated above, in which no such obligation was imposed have gone ahead to enact the necessary legislation and three others are at advanced stages of doing so. And if the experience of Uganda, which took ten years after the constitutional entrenchment of access to information to enact legislation is anything to go by, the inclusion of the requirement for the adoption of a law does not guarantee that government will do so speedily. One thing is clear, however. The existence of a constitutional right of access to information provides the much needed impetus for the adoption of an access to information law.

3.6.1.5 Proactive disclosure

The overarching aim of legal frameworks on access to information is to make proactive disclosure of information the norm and secrecy the exception. Yet, all but one of the existing constitutional guarantees on access to information makes no reference to this. The Constitution of Kenya is the exception, when it provides in section 35(3) that ‘the State shall publish and publicise any important information affecting the nation’. Thus, the High Court in the *Famy* Case in interpreting article 35(3) has held that the State has a duty not only to proactively publish information of public interest, but also provide open access to such specific information as people may require from the State.²⁰⁴

The utility of including the principle of proactive disclosure of information in constitutional provisions on access to information cannot be overemphasised as it sends a clear message to the State and all those required to provide access to information to create systems for doing so and to the public that the need to request access to documents should be the exception and not the rule.

ATI law for Seychelles. This author was a member of the Special Rapporteur’s delegation on both occasions.

²⁰⁴ N 181 above, para 34.

From all the above, it is clear that it is important that constitutional provisions on access to information are as progressive as possible irrespective of what its future role will eventually be, that is, whether to form the singular basis for the enforcement of the right of access to information or as the basis or the enactment of a future access to information law. As the supreme law of the land a progressive constitutional guarantee on access to information ensures that the effect of the adoption of a restrictive access to information law can be mitigated by the constitution.

3.6.2 Alternative constitutional protection of access to information in Africa

Apart from the 13 countries that expressly guarantee access to information as a stand-alone right, there are three categories of alternative constitutional provisions through which access to information can be anchored in the framework of African constitutions. These are through the 'general information rights' guaranteed by the constitution; 'information rights guaranteed as part of constitutional provisions on freedom of expression' and finally through constitutional provisions on freedom of expression.

3.6.2.1 General information rights guaranteed by the constitution

The constitutions of twelve African countries guarantee the 'right to information' or 'freedom of information' either as a component of freedom of expression as in the case of Burkina Faso,²⁰⁵ Central African Republic,²⁰⁶ Congo,²⁰⁷ Democratic Republic of Congo (DRC),²⁰⁸ Mozambique,²⁰⁹ and Rwanda,²¹⁰ or with no direct reference to freedom of

²⁰⁵ Article 8 of the Constitution of Burkina Faso guarantees the right to information.

²⁰⁶ Article 13 of the Constitution of Central African Republic guarantees 'freedom of information'.

²⁰⁷ Article 19 of the Constitution of Congo guaranteed the 'right to information'.

²⁰⁸ Article 24 of the Constitution of DRC guarantees the 'right to information'.

²⁰⁹ Article 48 of the Constitution of Mozambique guarantees the 'right to information'. The Right to Information Law of Mozambique in its preamble however refers to this provision as the basis for its enactment.

²¹⁰ Article 19 of the Constitution of Rwanda guarantees 'freedom of information'.

expression as with Côte d'Ivoire,²¹¹ Ghana,²¹² Guinea Bissau,²¹³ Madagascar,²¹⁴ Senegal,²¹⁵ and Tunisia.²¹⁶

3.6.2.2 Information rights guaranteed as part of freedom of expression

Thirteen African countries possess constitutional provisions on freedom of expression in similar words as the UDHR, ICCPR, IACHR and the ECHR, 'the right to seek, receive and impart information', all of which have been expanded and interpreted, to guarantee the right of access to information. Thus, it can be reasonably expected that in line with the corresponding provisions of the ICCPR, to which all African States are party, the constitutional provisions on freedom of expression in Botswana,²¹⁷ Cape Verde,²¹⁸ Ethiopia,²¹⁹ Lesotho,²²⁰ Liberia²²¹ Mauritius,²²² Nigeria,²²³ Sierra Leone,²²⁴ Sudan,²²⁵ Swaziland,²²⁶ Tanzania²²⁷ Togo,²²⁸ and Zambia,²²⁹ will be interpreted within the domestic legal interpreted as establishing a right of access to information. The constitution of

²¹¹ Article 24 of the Constitution of Côte d'Ivoire guarantees the 'right to information'.

²¹² Article 21(1)(f) of the Constitution of Ghana guarantees the 'right to information'. In April 2015. In a recent case (*Lolan Kow Sagoe-Moses v Minister for Transport and Attorney General*, Suit No. HR 0027/2015), the Human Rights Division of the High Court of Ghana held that section 21(1)(f) confers a the right to access information held by government, thus reading-in the right.

²¹³ Article 34 of the Constitution of Guinea Bissau guarantees the 'right to information'.

²¹⁴ Article 11 of the Constitution of Madagascar guarantees the 'right to information'.

²¹⁵ Article 8 of the Constitution of Senegal guarantees the 'right to a variety of information'.

²¹⁶ Article 18 of the Constitution of Tunisia guarantees the 'right to information'.

²¹⁷ Section 12 of the Constitution of Botswana guarantees the 'freedom to receive ideas and information'

²¹⁸ Article 45(2) of the Constitution of Cape Verde guarantees the 'freedom to inform and be informed, to search for, receive and disseminate information and ideas'.

²¹⁹ Article 29(2) of the Constitution of Ethiopia guarantees the 'freedom to seek, receive and impart information'.

²²⁰ Section 14(1) of the Constitution of Lesotho guarantees the 'freedom to receive ideas and information'

²²¹ Article 15 of the Constitution of Liberia guarantees the 'freedom to receive and impart knowledge and information'

²²² Article 12(1) of the Constitution of Mauritius guarantees the 'freedom to receive and impart ideas and information'

²²³ Section 39(1) of the Constitution of Nigeria guarantees the 'freedom to receive and impart ideas and information'. Note that Nigeria has domesticated the African Charter by incorporation. Hence, article 9 of the Charter is directly applicable.

²²⁴ Section 25(1) of the Constitution of Sierra Leone guarantees the 'freedom to receive and impart ideas and information'

²²⁵ Section 39 of the Constitution of Sudan guarantees the 'right to reception and dissemination of information'.

²²⁶ Section 24 of the Constitution of Swaziland guarantees the 'freedom to receive ideas and information'

²²⁷ Article 18 of the Constitution of Tanzania guarantees the 'freedom to seek, receive and impart or disseminate information'.

²²⁸ Article 26 of the Constitution of Togo guarantees the 'freedom to express and disseminate information'

²²⁹ Section 20 of the Constitution of Zambia guarantees the 'freedom to receive ideas and information'.

Liberia however has a peculiar provision that makes it easier to interpret article 15 on freedom of expression as guaranteeing a right of access to information. Article 15(c) provides that with regard to the right, ‘there shall be no limitation on the public right to be informed about the government and its functionaries’.

3.6.3 Constitutional provisions on freedom of expression

Another 16 constitutions guarantee the right to freedom of expression but make no specific reference to the word ‘information’ in guaranteeing this right. However, giving the broad interpretation that domestic courts in other parts of the world have given to freedom of expression as a foundation of the right of access to information,²³⁰ these constitutional provisions can be interpreted as conferring the right of access to information. The relevant countries are Algeria,²³¹ Benin,²³² Burundi,²³³ Chad,²³⁴ Djibouti,²³⁵ Equatorial Guinea,²³⁶ Gabon,²³⁷ Gambia,²³⁸ Libya,²³⁹ Mali,²⁴⁰ Mauritania,²⁴¹ Namibia,²⁴² São Tomé and Príncipe,²⁴³ and Western Sahara.²⁴⁴

The Constitutions of Cameroon and Comoros are unique in that the substantive parts of the constitution contain no provisions on freedom of expression. However, the preamble to the Constitution of Cameroon ‘affirms attachment’ to the rights contained in the UDHR and the African Charter, and other ratified treaties based on certain principles, which

²³⁰ See pages 96-98 above.

²³¹ Section 41.

²³² Article 24. Note that article 7 of the Constitution of Benin makes the African Charter an integral part of the Constitution of Benin. Hence article 9 of the African Charter, which has been interpreted by the African Commission as guaranteeing the right of access to information, is directly applicable.

²³³ Article 31. Note that by article 19 of the Constitution of Burundi, the UDHR and the African Charter are an integral part of the Constitution of Burundi. Thus like Benin, article 9 of the African Charter, which has been interpreted by the African Commission as guaranteeing the right of access to information, is directly applicable.

²³⁴ Article 27.

²³⁵ Article 15.

²³⁶ Article 13.

²³⁷ Article 1(2).

²³⁸ Section 25(1).

²³⁹ Article 14.

²⁴⁰ Article 4

²⁴¹ Article 10.

²⁴² Article 21.

²⁴³ Article 28(1).

²⁴⁴ Article 29.

includes freedom of expression. In addition, both the UDHR and the African Charter are attached as annexures to the Constitution. Presumably, both these treaties can be directly relied upon to find a constitutional guarantee of the right of access to information. Likewise, the Constitution of Comoros, in its preamble ‘emphasises commitment’ to principles and rights contained in the UDHR and African Charter including freedom of expression. Unlike Cameroon, however, the constitution of Comoros explicitly declares that the preamble ‘is an integral part of the constitution’.²⁴⁵

3.6.4 The implications of current constitutional protection of access to information in Africa

The fact that of the 54 constitutions on the continent, 42 do not contain access to information in their Bill of Rights, requires that this right be read-in to other guaranteed rights, notably, freedom of expression, to be recognised as a human right. In the absence of such judicial recognition, the advantage of the implementation of the right at the domestic level, as a human right grounded in international human rights law, becomes illusory.

Yet, the willingness of domestic courts to read-in access to information as a human right, as with any other right, is dependent on numerous factors already highlighted, such as the status of international law within the domestic system, the strength of the existing Bill of Rights as a whole, awareness of international human rights within the judiciary and the bar, and judicial independence. In essence, the inclusion of a right of access to information in the constitution obviates the need to leave the realisation of the right at the mercy of the interplay of these factors.

This point is further demonstrated by the case studies in the next chapter which examines how South Africa and Uganda, both with stand-alone Constitutional provisions on access to information, have fared with utilising these provisions in achieving socio-economic progress on the one hand, and what the experience of Nigeria, with only the right ‘to seek

²⁴⁵ See the final sentence of the preamble to the Constitution of Comoros.

receive and impart information’ as a component of freedom of expression has been on the other hand.

3.7 Case study country one: South Africa

3.7.1 Brief constitutional history of South Africa

Prior to the coming into force of the interim Constitution in February 1994, South Africa had operated under three previous constitutions adopted in 1910, 1961 and 1983 respectively, all of which progressively entrenched the exclusion of the black majority and other Indian and coloured minorities in the process of constitutional development.²⁴⁶ The unification of the two British colonies and the two ‘Boer’ Republics as the Union of South Africa in 1910,²⁴⁷ was preceded by the adoption of the South Africa Act of 1909 (the Constitution) by the British Parliament, creating a unitary State made up of four provinces and came into force in 1910.²⁴⁸ The 1910 Constitution was modelled along the lines of the British Westminster style government based on parliamentary supremacy, which meant that apart from a few constitutional provisions requiring special process for amendment, a simple majority of parliament passing a law was sufficient for such law to acquire the status of the supreme law of the land.²⁴⁹

In 1948, apartheid as a ‘system of government’ was introduced such that by the time South Africa became a Republic in 1961, ‘Afrikaner republicanism’ had taken root. The result was that the 1961 Constitution reflected the policy of ‘separate development’ otherwise known as ‘apartheid’ the purpose of which was to create ten sovereign black nation-states’ on the one hand and a white, ‘coloured’ and Indian nation-state on the other.²⁵⁰ The 1983 Constitution, despite retaining the concept of parliamentary

²⁴⁶ Sarkin (n 96 above) 67.

²⁴⁷ These were the British colonies of Cape of Good Hope and Natal, and the Boer Republics of Orange Free State and Transvaal.

²⁴⁸ Venter, F. South Africa Country Report, Oxford Constitutions of the World, 1-2. Available at <<http://www.icla.up.ac.za/oxford-constitutions/country-reports>> (accessed 28 October 2014).

²⁴⁹ De Vos, P. ‘A Bill of Rights in a Post-Apartheid South African Constitution: A Contextual International Human Rights Analysis’ (1993) 24 *Columbia International Human Rights Law Review* 277, 280.

²⁵⁰ Venter (n 248 above) 2. See also Klug, H. ‘Historical Background’ in Chaskalson et al (eds) (1996) *Constitutional Law of South Africa* JUTA: Cape Town.

sovereignty, created as part of the government's reform programme, a strong executive president, three legislative chambers-one each for the Indian, coloured and whites-and a President's Council to resolve any parliamentary differences between the three chambers.²⁵¹ This was the existing constitutional structure that later gave way to the two-part constitution making process which brought an end to apartheid and ushered in a democratic State founded on the principle of constitutional supremacy.

3.7.2 The 1993 Interim Constitution

Described as 'a process of constitutional compromise' starting with the 'crossing the Rubicon speech' during which a 'package of measures' was announced by then President, De Klerk,²⁵² several other events such as: the ANC's suspension of its armed struggle against the government; the government's commitment to repeal the infamous security legislation; the establishment of the Convention for Democratic South Africa (CODESA);²⁵³ and the Record of Understanding;²⁵⁴ culminated in the Multi-Party Negotiating Process (MPNP)²⁵⁵ in March 1993.²⁵⁶ Despite the initial strong objections by

²⁵¹ De Vos (n 249 above) 281.

²⁵² Corder, H. 'Towards a South African Constitution' (1994) 57 *Modern Law Review* 491. In President F.W. De Klerk's speech at the opening of Parliament on 2 February 1990, he announced: the unbanning of the African National Congress (ANC), Pan Africanist Congress (PAC) and the South African Communist Party (SACP); release of some prisoners and detainees; a moratorium on the death penalty; unbanning of individuals and easing of emergency restrictions; and promised unconditional release of Nelson Mandela.

²⁵³ See generally Friedman, S. (1993) *The Long Journey: South Africa's Quest for a Negotiated Settlement* Ravan Press: Johannesburg. CODESA brought together 19 groups including the National Party government, at which a 'declaration of intent' setting out foundational principles on which the transitional process will be based was agreed upon and established five working groups to work on key aspects of the transition process.²⁵³ The Declaration of Intent is available at <<http://www.nelsonmandela.org/omalley/index.php/site/q/03lv02039/04lv02046/05lv02047/06lv02049/07lv02052.htm>> (accessed 6 November 2014.)

²⁵⁴ As above, 160. Following the collapse of CODESA and the ANC-led campaign of 'rolling mass action' the ANC and the National Party government signed a 'Record of Understanding' part of which included the so called 'sunset clause' by which the first 5 years of the transitional government was to be headed by a power-sharing executive. This agreement paved the way for the resumption of negotiations on the transitional process. See also Klug, H. 'Participating in the Design: Constitution Making in South Africa' (1996) 3 *Review of Constitutional Studies* 18.

²⁵⁵ 26 political groups participated in the MPNP, which comprised of 5 Structures: the plenary body; the negotiating forum; the negotiating council; and the planning committee.

²⁵⁶ For a detailed consideration of the making of the Interim constitution, see Corder (n 252 above), Ebrahim, H. (1988) *The Soul of a Nation: Constitution-making in South Africa* Oxford University Press: London; Klug, H. South Africa's Experience in Constitution-Building, Legal Studies Research Paper Series No. 1157, University of Wisconsin Law School. Available at <[file:///C:/Users/User/Downloads/SSRN-id1808168%20\(1\).pdf](file:///C:/Users/User/Downloads/SSRN-id1808168%20(1).pdf)> (accessed 4 November 2014).

some to the idea of the constitution being drafted by an elected body,²⁵⁷ the MPNP finally resolved that an interim constitution be adopted to provide for the election of a transitional parliament which would in turn serve as a constituent assembly for the drafting of a new constitution.²⁵⁸ Notably, the constituent assembly was to be constrained by certain 'constitutional principles' upon which the final constitution was to be founded.²⁵⁹

On 22 December 1993, the Interim Constitution was promulgated and when it came into force after the April 1994 elections, South Africa for the first time had a Constitution which contained a Bill of Rights, allowed for judicial review and embraced the principle of constitutional supremacy over that of parliamentary sovereignty.²⁶⁰ The 490-strong elected parliament was now tasked with adopting a final constitution, within two years of election into office, which complied with 34 constitutional principles²⁶¹ adopted by the MPNP and then had to be certified by the newly formed Constitutional Court as compliant.²⁶²

3.7.3 The 1996 Constitution

Whereas the making of the Interim Constitution involved minimal public participation,²⁶³ the Constituent Assembly was eager to produce a constitution which was legitimate and exuded public ownership through an inclusive, accessible and transparent process.²⁶⁴ To

²⁵⁷ Both the incumbent National Party and the Inkatha Freedom Party initially rejected the idea of a democratically elected constituent assembly to adopt the constitution. For detailed reasons behind their objections, see Klug, H. 'South Africa's New Constitution: the Challenges of Diversity and Identity' (1995) 28 *Verfassung und Recht in Übersee* 421.

²⁵⁸ The process was as follows: a transitional constitution is drafted by the MPNP to determine the constitutional framework after the 1994 elections, the transitional constitution is adopted by the tri-cameral legislature, the transitional constitution will be in force until the constituent assembly drafted a new constitution, the constituent assembly is to be bound by constitutional principles which the final constitution must adhere to; the transitional government is to be bound by fundamental rights and the transitional constitution is to establish regional governments to be agreed upon by the MPNP.

²⁵⁹ Corder (n 252 above) 502.

²⁶⁰ Steenkamp, A. 'The South African Constitution and the Bill of Rights: An Evaluation in the Light of International Human Rights Norms' (1997) 17 *Human Rights Quarterly* 101.

²⁶¹ See schedule 4, Constitution of the Republic of South Africa Act 200 of 1993. Available at <<http://www.constitutionalcourt.org.za/site/constitution/english-web/interim/schedules.html#sched4>> (accessed 9 November 2014).

²⁶² Spitz, R. and Chaskalson M. (2000) *The Politics of Transition: A Hidden History of South Africa's Negotiated Settlement* Hart Publishing: Oxford.

²⁶³ Klug (n 256 above) 28.

²⁶⁴ Ebrahim (n 256 above) 177; Murray, C. 'Negotiating Beyond Deadlock: From the Constitutional Assembly to the Court' in Andrews, P. and Ellmann, S (eds) *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law* (Johannesburg: Witwatersrand University Press 2001) 112. Sripathi, V.

achieve this, a well-coordinated public participation programme with the slogan ‘You’ve made your mark now have your say’ was launched to encourage public participation in the two-stage constitution-making process.²⁶⁵

In the first stage, over 1.7 million submissions were received from the public in response to requests for submissions on the content of the final Constitution.²⁶⁶ Based on this, six theme committees of the Constituent Assembly²⁶⁷ formulated comprehensive reports for its consideration in the formulation of the first working draft.²⁶⁸ The working draft of the constitution which emerged from the Constituent Assembly was again widely disseminated and received extensive public comment in the second phase of the process.²⁶⁹ During this second phase, two revised drafts of the Constitution were produced after a series of ‘bi- and multilateral meetings’ of the Constituent Assembly whittled down the 32 contentious issues.²⁷⁰

The final text of the Constitution was agreed upon on 8 May after further negotiations and referred to the Constitutional Court for certification in accordance with the interim constitution. At the Constitutional Court, following further public submissions and public hearings, the court declared it was unable to certify the Constitution due to non-compliance in ten instances.²⁷¹ Finally, after another round of negotiations by the constituent assembly, the agreed amendments were forwarded to the Constitutional

‘Constitutionalism in India and South Africa: A Comparative Study from a Human Rights Perspective’ (2007) 16 *Tulane Journal of International and Comparative Law* 84.

²⁶⁵ As above. As part of the programme, 486 constitutional education programmes, as well as numerous television and radio constitutional awareness programmes were held nationwide. An easy to read monthly newsletter ‘Constitutional Talk’ was also produced and distributed by the Constituent assembly to keep the population abreast of the constitution-making process.

²⁶⁶ Ebrahim (n 256 above) 244.

²⁶⁷ These focused on: character of the State; structure of the State; relations between levels of government; fundamental rights; judiciary and legal systems; and specialised structures. Sarkin (n 96 above) 70.

²⁶⁸ Ebrahim (n 256 above)

²⁶⁹ Sarkin (n 96 above) 70. Following the distribution of over 5 million copies of the working draft of the Constitution in November 1995, over 1,500 individual submissions and 248,500 signatures on petitions were received by the February 1996 deadline for public comment.

²⁷⁰ As above, 71.

²⁷¹ Ex parte Chairperson of the Constitutional Assembly; in re Certification of the Constitution of the Republic of South Africa 1996 (10) *BCLR* 1253 (CC). For detailed enumeration of the 10 non-compliant provisions, See Sarkin (n 96 above) 73.

Court, which this time unanimously certified the text on 4 December 1996.²⁷² The 1996 Constitution was signed into law by President Nelson Mandela on international human rights day, 10 December 1996 in Sharpeville, and came into force on 4 February 1997. Despite the lengthy process it entailed, the open and participatory nature of the constitution drafting process, is central to its popular legitimacy.²⁷³

3.7.4 The South African Bill of Rights

Despite the different motives that underpinned the acceptance of the idea of a bill of rights during the constitution-making process,²⁷⁴ the inclusion of 'fundamental rights' in the Interim Constitution and a 'Bill of Rights' in the final constitution forms a major part of the 'constitutional revolution' wrought by these two constitutions on constitutionalism in South Africa.²⁷⁵ The Bill of Rights in Chapter 2 of the Constitution was to a large extent influenced by the Canadian Charter of Rights and Freedoms of 1982 and the *Grundrechte* in the German *Grundgesetz*.²⁷⁶

The Bill of Rights is unique in that it recognises as justiciable all three 'so-called' generation of rights.²⁷⁷ Some unique civil and political rights such as the right to freedom and security of the person;²⁷⁸ citizenship;²⁷⁹ freedom of trade, occupation and

²⁷² Ebrahim (n 256 above) 248. Spitz and Chaskalson (n 262 above) 427.

²⁷³ Steytler, N. 'Republic of South Africa' in Kincaid, J. and Tarr, G. (eds) (2005) *A Global Dialogue on Federalism: Constitutional Origins, Structure and Change in Federal Countries* McGill University Press: Quebec 311.

²⁷⁴ De Vos (n 249 above) 278. See also Sachs, A. (1993) *A. Advancing Human Rights in South Africa: Contemporary South African Debates* Oxford University Press: Cape Town 101. Sachs, A. (1990) *Protecting Human Rights in a New South Africa: Contemporary South African Debates* (Oxford University Press: Cape Town. While the NP government believed the incorporation of a Bill of Rights would limit the power of future governments and secure the economic and cultural privileges of the white minority, anti-apartheid groups sought to redress decades of cultural, social, economic and political imbalance that had resulted from years of apartheid.

²⁷⁵ Ackerman, L. 'The Legal Nature of the South African Constitutional Revolution' (2004) 4 *New Zealand Law Review* 633.

²⁷⁶ Venter, F. (n 248 above) 12.

²⁷⁷ The Bill of Rights is an improvement on the interim Constitution with respect to the inclusion of socio-economic rights comprising the right to environment, housing; healthcare, food, water and social security and education.

²⁷⁸ Section 12.

²⁷⁹ Section 20.

profession;²⁸⁰ fair labour practices;²⁸¹ access to information;²⁸² just administrative action and access to courts;²⁸³ and the rights of children;²⁸⁴ are recognised alongside a broad range of justiciable socio-economic rights, comprising the right to property;²⁸⁵ housing;²⁸⁶ healthcare, food, water and social security;²⁸⁷ education.²⁸⁸ Finally, group rights such as the right to a healthy environment and to the protection of the environment;²⁸⁹ language and culture;²⁹⁰ and the rights of cultural and linguistic communities;²⁹¹ are also recognised.

There are three progressive features of Chapter two of the Constitution. First, although the State bears the primary responsibility to ‘respect, protect, promote and fulfil’ all of the rights contained in the bill of rights’, a unique feature of the South African Bill of Rights is that in addition to applying vertically, as it ‘binds all legislative, executive and judicial organs of state at all levels of government’, it also applies horizontally by binding natural or juristic persons, if and to the extent that it is applicable.²⁹² Another progressive inclusion is that the often strict application of the *locus standi* principle, by which only a person having direct interest in a matter can institute an action, is rendered immaterial in relation to the application of the Bill of Rights, due to the express provision that a person acting in their own interest; on behalf of another who cannot act in their name; as a member of a group or class of persons; acting in the public interest; or an association acting in the interest of its members, can approach a competent court for redress where a right is threatened or has been infringed.²⁹³ Furthermore, in interpreting the Bill of Rights, courts

²⁸⁰ Section 22.

²⁸¹ Section 23.

²⁸² Section 32.

²⁸³ Section 34.

²⁸⁴ Section 28.

²⁸⁵ Section 25.

²⁸⁶ Section 26.

²⁸⁷ Section 27.

²⁸⁸ Section 29.

²⁸⁹ Section 24.

²⁹⁰ Section 30.

²⁹¹ Section 31.

²⁹² Section 8(1) and (2). The express extension of the application of the bill of rights to natural and juristic persons and to the judiciary, was a direct reaction to the gap identified by the Constitutional Court Judgement under the interim Constitution wherein the bill of rights was only binding on the executive and legislature. See in *Du Plessis v De Klerk* 1996 (3) SA 850 CC.

²⁹³ Section 38.

are required to: promote the values of an 'open and democratic society based on human dignity, equality and freedom'; consider international law; and may consider foreign law, and when interpreting legislation, courts are required to 'promote the spirit, purport and objects of the Bills of Rights'.²⁹⁴

The enjoyment of the right contained in the bill of rights is limited by general limitation clause and the derogation provisions. Generally, the bill of rights may be limited only by a law of general application which must be 'reasonable and justifiable in an open and democratic society, based on human dignity, equality and freedom', and upon consideration of 'relevant factors such as: the nature of the right, the purpose of the limitation, nature and extent of the limitation, the relationship between the limitation and its purpose and whether there are less restrictive means to achieve the purpose'.²⁹⁵ Furthermore, laws enacted during a state of emergency from derogate from the rights contained in the bill of rights. However, the right to life; human dignity; and freedom from slavery and servitude are completely non-derogable, while the right to equality; freedom and security of the person; rights of children; and of arrested, detained and accused persons can be derogated from in varying degrees.²⁹⁶

3.7.5 Access to information under the South African Constitution

The inclusion of a right of access to information in the interim constitution was an attempt to break-away from the apartheid legacy of pervasive State secrecy, a characteristic which was clearly incompatible with the open and democratic society sought to be created by the negotiating parties.²⁹⁷ Section 23 of the Interim Constitution thus provided:

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

²⁹⁴ Section 39(1) and (2). *Phumelela Gaming and Leisure Limited v Gründlingh and Others* 2006 ZACC 6; 2007 (6) SA 350 (CC); 2006 (8) BCLR 883 (CC).

²⁹⁵ Section 36(1).

²⁹⁶ Section 37(4).

²⁹⁷ Currie, I. and De Waal, J. (n 61 above) 692.

Such was the importance attached to the right of access to information in shaping the new South Africa, that one of the 34 Constitutional Principles which the Final Constitution was mandated to contain, was a right of access to information. Constitutional Principle IX required that:

Provision shall be made for freedom of information so that there can be an open and accountable administration at all levels of government.²⁹⁸

Thus, in compliance with Constitutional Principle IX, section 32 was enacted guaranteeing the right of access to information. However, this new access to information provision was considerably wider than that of the interim constitution in 3 respects. First, access to information held by the State was broadened by dispensing with the requirement that the information be 'necessary for the exercise or protection' of a right.²⁹⁹ Second, the scope of application of the right previously limited only to the State was broadened to include 'any other person' where the information is 'necessary for the exercise or protection of any rights'.³⁰⁰ Finally, Parliament was required to enact a law to give effect to the constitutional right.³⁰¹

Section 32 did not however come into force immediately the 1996 Constitution was promulgated. By virtue of schedule 6 to the 1996 Constitution, section 32 was only to come into force upon the enactment of the legislation required under to give effect to the right of access to information as required by section 32(2), which enactment had to take place within 3 years of the Constitution taking effect.³⁰² Failure to so enact the legislation within the specified three year time frame meant that the provisions of section 32 (2)

²⁹⁸ See schedule 4, Constitution of the Republic of South Africa Act 200 of 1993. Available at <<http://www.constitutionalcourt.org.za/site/constitution/english-web/interim/schedules.html#sched4>> (accessed 7 November 2014).

²⁹⁹ Section 32(1)(a).

³⁰⁰ Section 32(1)(b).

³⁰¹ Section 32(2).

³⁰² Item 23, Schedule 6 (Transitional Provisions) Constitution of the Republic of South Africa 1996. Available at <<http://www.justice.gov.za/legislation/constitution/SACConstitution-web-eng-s06.pdf>> (accessed 9 November 2014).

would lapse.³⁰³ Consequently, the Promotion of Access to Information Act (PAIA) was passed by Parliament in January 2000, signed into law on 2 February 2000 and came into force in March 2001.

3.7.6 The judicial interpretation of section 32

With the adoption of PAIA to give effect to article 32, the provisions of article 32 cannot be directly relied upon in enforcing the right of access to information. This is so because although by virtue section 8, the Bill of Rights can be applied directly as it binds all organs of the State as well as natural and juristic persons, however, based on the principle of constitutional avoidance, a court must first avoid deciding a case as a constitutional issue if the relevant legislation can be interpreted in a manner consistent with the Bill of Rights. This principle which was first applied under the interim Constitution continues to be applied under the 1996 Constitution.³⁰⁴ This position is further entrenched by the principle of subsidiarity requiring that redress must first be sought within the confines of legislation before recourse to direct constitutional remedies.³⁰⁵

Thus the effect of this is that it is PAIA, and not section 32 of the Constitution, which is directly applicable in any proceedings on access to information before the court, except where the application alleges that PAIA itself is inconsistent with the Constitution.³⁰⁶ Thus in *Stefan Brummer v Minister of Social Development*,³⁰⁷ the Constitutional Court in finding that the 30 day period within which PAIA required an appeal to courts for refusal of access to information was inconsistent with the Constitution and therefore invalid, made reference to section 32.

³⁰³ As above, item 23(3). Since the 1996 Constitution came into force on 4 February 1997, this meant that an access to information Act needed to be adopted by 3 February 2000.

³⁰⁴ See *S v Mahlangu*, 1995 (3) SA 876 (CC) 59; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*, 2000 (2) SA 1 (CC) 21.

³⁰⁵ In *City of Cape Town v SANRAL and Others* (2014) ZAWCHC 74, the Court reiterated that the application of the principle of subsidiarity meant that PAIA and not section 32 is applied.

³⁰⁶ *PFE International Inc (BVI) and Others v Industrial Development Corporation of South Africa* 2013 (1) SA 1 (CC); *Mazibuko and Others v City of Johannesburg and Others*, 2010 (4) SA 1 (CC) at para 73.

³⁰⁷ See also *Sumbana and Others v Head of Department: Public Works Limpopo Province* 2009 (3) SA 64.

Another instance in which section 32 can be relied upon, is where a legislation or conduct ‘that is beyond the reach of PAIA’ has infringed on section 32.³⁰⁸ Thus, in *La Lucia Sands Share Block Ltd v Barkhan*,³⁰⁹ where PAIA was inapplicable because the wordings of PAIA exclusively exempted the requested information from disclosure, the Constitutional Court relied on section 32 in interpreting section 113 of the Companies Act which allowed for access to the register of members of companies, in such a manner as to give effect to the right of access to information.³¹⁰

Consequently, since the coming into force of PAIA, section 32 mostly applies indirectly in interpreting PAIA and other legislation and as there are very limited chances of instances in which PAIA has and can be found to be inconsistent with the constitution or to be inadequate in giving effect to section 32, PAIA has effectively relegated section 32 to the background in the enforcement of the right of access to information in South Africa.

3.8 Case study country two: Uganda

3.8.1 Brief constitutional history of Uganda

On 9 October 1962, Uganda attained independence, bringing into force its first ever written constitution which had been negotiated at a constitutional conference held in Lancaster House, UK.³¹¹ Because Uganda was in effect ‘an artificially amalgamated nation’ made up of numerous and diverse chiefdoms and kingdoms, the Constitution established a ‘federal and semi-federal approach’.³¹² Federal status and special privileges were granted to the Buganda and only quasi-federal status to the three other kingdoms.³¹³ The 1962 Constitution established a Westminster model of government characterised by the prime minister, the leader of the largest party in the National Assembly, who executed

³⁰⁸ Currie and De Waal (n 61 above) 695. See *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services* (2008) ZACC 6, para 23.

³⁰⁹ 2010 (6) SA 421 (SCA).

³¹⁰ Note that in this case, PAIA did not apply directly because the request for access to information held by a private body was not required for the protection or exercise of a right, as required by PAIA.

³¹¹ Mbazira, C. Uganda Country Report, Oxford Constitutions of the World. Available at <<http://www.icla.up.ac.za/oxford-constitutions/country-reports>> (accessed 28 October 2014).

³¹² As above, 1.

³¹³ These were the kingdoms of Toro, Ankole and Bunyoro.

executive power together with a cabinet of ministers drawn from members of parliament.³¹⁴ As the leader of the Uganda People's Congress (UPC) which was the largest party in parliament, Milton Obote became prime minister, and the king of Buganda, Sir Edward Mutesa, held the largely ceremonial position of President.³¹⁵

Barely three years after independence, a constitutional crisis over the 1965 referendum resulted in disagreement between the president and the prime minister, and led to Milton Obote deposing the Kabaka as president 'in the interest of national unity, public security and tranquillity'.³¹⁶ The independence Constitution was suspended and an interim constitution introduced in its place.³¹⁷ Dubbed the 'pigeon hole constitution' because parliamentarians received the draft in their pigeon holes for discussion and adoption on the same day without and debate,³¹⁸ the 1966 Interim Constitution abolished the twin-position of president and prime minister in favour of a president who assumed all executive power.³¹⁹ A constitutional challenge to the Interim Constitution failed, when the Constitutional Court held that the replacement of the independence constitution by the Interim Constitution of 1966 was a 'victorious revolution' creating a legitimate legal order.³²⁰ Another challenge to the wide powers vested in the president under the interim constitution was also unsuccessful.³²¹

In 1967, a constitution which was essentially an 'amended version' of the interim constitution was adopted by parliament acting as a constituent assembly.³²² Uganda became a unitary republic, kingdoms and constitutional head of districts were abolished

³¹⁴ Mbazira (n 311 above) 2.

³¹⁵ Tripp (n 108 above) 159.

³¹⁶ Mutibwa, P. (1992) *Uganda Since Independence: A Story of Unfulfilled Hopes* Fountain Publishers: Kampala 11.

³¹⁷ Mukholi, D. (1995) *A Complete Guide to Uganda's Fourth Constitution: History, Politics and the Law* Fountain Publishers: Kampala 16.

³¹⁸ As above. President Obote is quoted as having said to parliamentarians, 'This is now the provisional Uganda constitution till another enactment... If you go down to your pigeon holes you will find your copies of the new constitution'.

³¹⁹ Mbazira (n 311 above) 3.

³²⁰ *Uganda v Commissioner of Prisons, ex parte Matovu* (1966) EALR 514

³²¹ *Shabane Opoloto v Attorney-General of Uganda* (1969) EALR, 631.

³²² See generally, Bradley, A. 'Constitution Making in Uganda' Transition 1967, 25-31. Mubangizi, J. 'The Protection of Human Rights in Uganda: Public Awareness and Perceptions' (2005) 3 *African Journal of Legal Studies* 166, 171.

and all executive power became centralised in the President.³²³ Significantly, the Bill of Rights riddled with claw back clauses, was now narrower than that of the independence constitution,³²⁴ and the new constitution exerted tighter executive control of the judiciary.³²⁵ Together, these numerous changes gave room for the imposition of a state of emergency by president Obote in 1969 and the banning of all opposition political activities.³²⁶ Uganda became a *de facto* one-party state.

This state of affairs combined with ethnic tensions between northern Ugandans, ultimately led to the 25 January 1971 *coup d'état* in which General Idi Amin Dada took over power. Typical with military governments, he dissolved parliament, suspended the Constitution and ruled by decrees.³²⁷ Idi Amin's 'reign of terror' lasted until 1979 when he was overthrown by Ugandan exiled liberation groups backed by the Tanzanian government. Two short-lived military governments followed, during which multi-party elections, widely believed to have been rigged in favour of the UPC, returned Milton Obote to power in 1980.³²⁸ Following five years of civilian rule, Obote was again removed in a bloodless coup.³²⁹ Shortly thereafter, on 26 January 1976, Yuweri Museveni's National Resistance Army (NRA) overthrew the military government and established in its place the National Resistance Movement (NRM).

While not directly suspending the 1967 Constitution, legislative and executive powers were exercised by the High Command and the National Resistance Council (NRC).³³⁰ A significant occurrence was the introduction of the Movement or No Party System in place of multi-party politics, which was justified on the basis of the 'need to promote national

³²³ Mukholi (n 317 above) 18.

³²⁴ Mubangizi (n 322 above) 171.

³²⁵ Bradley (n 322 above) 30.

³²⁶ As above.

³²⁷ Oloka-Onyango, J 'From Whence Have We Come and Where Exactly are We Going?: The Politics of Electoral Struggle and Constitutional (Non) Transition in Uganda' (2005) *Rights and Democratic Governance Working Paper Series No 1* HURIPPEC, Makerere University, Kampala, Uganda, 1.

³²⁸ President Godfrey Binasia was overthrown by President Paulo Munanga who then conducted elections. See Oloka-Onyango, J. (n 327 above) 1.

³²⁹ Mutibwa (n 316 above) 154.

³³⁰ Mudola, D. 'Institution Building: The case of the NRM and the Military in Uganda 1986-9' in Hansen, H. and Twadde, M. (eds) (1991) *Changing Uganda: The Dilemma of Structural Adjustment and Revolutionary Change* James Curry: London 231.

unity, reconciliation, stability and reconstruction.³³¹ A period of transition was announced which in the end lasted for 10 years.

3.8.2 The 1995 Constitution

The making of a new constitution for Uganda was a priority for the NRM long before it came into power.³³² Thus, upon coming into power in 1986, the NRM issued Legal Notice 1 of 1986 as the constitutional basis of the NRM Movement and provided that a new constitution was to be made for Uganda which would be debated and finalised by the National Resistance Council and the NRA.³³³ In addition to setting up a Ministry of Constitutional Affairs to oversee the process of constitutional reform,³³⁴ as part of the transition, a 22 member constitutional commission, led by a judge of the Supreme Court of Uganda, Benjamin Odoki, was established.³³⁵ The task of the Ugandan Constitutional Commission (UCC) was to 'consult the people and make proposals for a popular and lasting constitution based on national consensus'.³³⁶

3.8.2.1 The drafting process

After a lengthy process which spanned almost four years,³³⁷ and included conducting over 800 seminars, intensive publicity and information campaigns, and analysis of the over 25,000 submissions received, the UCC submitted a report and a draft constitution to government on 31 December 1992.³³⁸ A key recommendation was that rather than the draft Constitution submitted by the UCC being finalised by the NRC as was provided for

³³¹ Opiyo, N. et al 'Breaking the Conflict Trap in Uganda: A Proposal for Constitutional and Legal Reforms', ACODE Policy Research Series No. 58 of 2013. Available at http://www.acode-u.org/documents/PRS_58.pdf (accessed 27 October 2014).

³³² Mutibwa (n 316 above) 185.

³³³ Wapakhabulo, J. 'Uganda's experience in Constitution Making' Available at <http://www.commonlii.org/ke/other/KECKRC/2001/33.html#Heading1> (accessed 27 October 2014).

³³⁴ Mutibwa (n 316 above) 185.

³³⁵ Statute on the Ugandan Constitutional Commission, Law No 5 of 1998, enacted by the National Resistance Council on 21 December 1988.

³³⁶ 1995 Uganda Constitutional Commission Report, 1. Available at http://www.constitutionnet.org/files/merged_ccreport_missingchaps7-14_and24.pdf (accessed 28 October 2014).

³³⁷ The members of the UCC were sworn-in on 4 March 1989 and its first meeting of the commission took place on 7 March 1989. Odoki, B. (2014) *The Search for a National Consensus: The Making of the 1995 Constitution* Kampala: Fountain Publishers: Kampala 26.

³³⁸ As above.

in the Statute of the UCC, a constituent assembly elected directly by the people should be tasked with debating and adopting the draft Constitution.³³⁹

A Constituent Assembly Statute was thus adopted in 1993, establishing a 288 member Constituent Assembly,³⁴⁰ which was elected in March 1994. In the end, more than two-thirds of the seats in the Constituent Assembly were occupied by NRM members.³⁴¹ Incorporating more than 80 percent of the recommendations of the UCC, on 22 September 1995, the Constitutional Assembly adopted the 1995 constitution of Uganda.³⁴² Some notable provisions of the Constitution³⁴³ include a unicameral legislature, independence of the judiciary,³⁴⁴ widening of the Bill of Rights³⁴⁵ and the establishment of a Human Rights Commission with quasi-judicial powers.³⁴⁶ The 1995 constitution also retained the movement system³⁴⁷ and banned political activities,³⁴⁸ but required that a referendum be conducted four years after the first elections under the constitution, for the people to decide on the political system to be adopted.³⁴⁹ Parliament was also empowered to enact laws regulating political party activities.³⁵⁰

3.8.3 The Ugandan Bill of Rights

The Bill of Rights is contained in chapter four of the Ugandan Constitution under the caption 'Protection and Promotion of Fundamental and Other Human Rights and Freedoms'. This Bill of Rights is a marked improvement on the 1962 Independence and

³³⁹ Para 54, Interim Report of the Uganda Constitutional Commission, submitted to the Minister of Constitutional Affairs, quoted in Odoki (n 326 above) 265.

³⁴⁰ Of these, 214 were elected directly by the people and 74 representatives of interest groups which included 39 women, 10 military officers, 10 delegates appointed by the President, 8 members of political parties, 4 youths, 2 trade unionists and 1 disabled person. Odoki (n 337 above) 274.

³⁴¹ Odoki (n 337 above) 276.

³⁴² As above, 279.

³⁴³ See generally Cullimore, C. 'Uganda: The Making of a Constitution' (1994) 32 *Journal of Modern African Studies* 707.

³⁴⁴ See Chapter 8 of the Constitution.

³⁴⁵ See Chapter 4 of the Constitution.

³⁴⁶ See sections 51-58 of the Constitution.

³⁴⁷ See section 272.

³⁴⁸ See section 270.

³⁴⁹ See sections 272 and 274 of the 1995 Constitution.

³⁵⁰ Section 73 of the Constitution.

the 1967 Republican Constitution, as it recognises wider variety of rights and creates novel mechanisms for their implementation.³⁵¹

Broadly speaking, the Ugandan Bill of Rights caters for all three so-called 'generation of rights'. Apart from the usual civil and political rights, some unique provisions include the right to influence government policies through civic organisations,³⁵² the right of access to information³⁵³ and the right to just and fair treatment in administrative decisions.³⁵⁴ In addition, the rights of marginalised groups such as women, children and persons living with disabilities are also catered for.³⁵⁵ Furthermore, affirmative action in favour of these groups is constitutionally enshrined³⁵⁶ and an Equal Opportunities Commission established to give effect to this right.³⁵⁷ A few socio-economic rights such as the right to property,³⁵⁸ right to education,³⁵⁹ right to work and participate in trade union activities³⁶⁰ are enshrined along with group rights such as the rights of minorities;³⁶¹ right to a clean and healthy environment;³⁶² and the right to culture.³⁶³

The enjoyment of the rights contained in the Bill of Rights, are limited by two sets of provisions under the constitution. First, the Bill of Rights may be limited to avoid prejudice to the rights of others and the public interest. However, neither political persecution nor detention without trial can be grounds for limiting rights in the public interest and the limitation must be 'acceptable and demonstrably justifiable in a democratic society' or contained in the constitution.³⁶⁴ Second, the Bill of Rights can be limited by an Act of Parliament authorising reasonably justifiable measures for dealing with a state of

³⁵¹ Mubangizi (n 322 above) 173.

³⁵² Section 38 (2).

³⁵³ Section 41.

³⁵⁴ Section 42

³⁵⁵ Sections 33-35.

³⁵⁶ See generally section 32.

³⁵⁷ The Equal Opportunities Commission Act was promulgated in 2007.

³⁵⁸ Section 26.

³⁵⁹ Section 30

³⁶⁰ Section 40.

³⁶¹ Section 36

³⁶² Section 39

³⁶³ Section 37

³⁶⁴ Section 43.

emergency.³⁶⁵ Despite these two limitations on the enjoyment of rights under the constitution however, freedom from torture and cruel, inhuman and degrading treatment or punishment; freedom from slavery or servitude; right to fair hearing and right of habeas corpus are categorically entrenched as non-derogable rights.³⁶⁶

There are two progressive provisions in the constitution in terms of the application of the Bill of Rights. By section 20(2), the Bill of Rights is expressly applicable to individuals as it is to be 'respected, upheld and promoted by all organs and agencies of Government and by all persons'. Secondly, an action in respect of the Bill of Rights is not restricted by the principle of *locus standi*, as not only a person whose rights are threatened or have been infringed can bring an action but also, 'any person or organisation may bring an action against the violation of another person's or group's human rights'.³⁶⁷

3.8.4 Access to information under the Ugandan Constitution

Article 41 of the Constitution of Uganda, guaranteeing the right of access to information, has its roots in the Report of the UCC presented to the President on 31 December 1992. Section 27(b) of its 'summary of recommendations' suggested that:

the freedom of information for the public and the media should include having access to any government document which has not been classified. Classified documents should be automatically declassified and made accessible after a maximum of 20 or 30 years as Parliament may decide.³⁶⁸

The UCC also recommended that:

the safeguard of national security or other interests in any publication and information should always be balanced with the requirements of public interests.³⁶⁹

³⁶⁵ Section 46.

³⁶⁶ Section 44.

³⁶⁷ Section 50.

³⁶⁸ 1995 Uganda Constitutional Commission Report (n 336 above) 759.

³⁶⁹ As above.

These two recommendations thus formed the basis of the current protection of access to information in the 1995 Constitution of Uganda. The Chair of the UCC, Benjamin Odoki, conscious of the ground breaking effect of this recommendation, singles out the inclusion of ‘the right of access to information in possession of the State’ as one of the innovations in the Bill of Rights of the 1995 Constitution.³⁷⁰

Section 41 is by and large a progressive provision in that it applies broadly to information held by the State or any other organ or agency of the State’. It provides a limited category of exempted information and also specifically requires that Parliament adopt a law to give effect to the right.³⁷¹ However, the fact that it restricts the enjoyment of the right only to citizens and does not expressly provide for access to information held by private entities performing public functions or services somewhat limits its efficacy. Despite these shortcomings, section 41 has been relied upon successfully in a number of cases for the enforcement of the right of access to information in Uganda, including those related to socio-economic issues. In 2005, the Access to Information Act was adopted by Parliament in line with article 41(2) of the Constitution in order to give effect to the right of access to information in Uganda.³⁷²

3.8.5 Judicial interpretation of article 41

Since the adoption of the Constitution, there have been a number of cases in which several aspects of the right to access information has come up for consideration before courts, thereby requiring the interpretation of article 41. Generally, the courts have adopted a progressive interpretation of article 41 and jealously guarded the right of access to information against attempts by the State to restrict its application through the limitation clauses contained in articles 43 and 46 of the Bill of Rights, other provisions of the Constitution, other legislation and an indirect amendment of article 41.

³⁷⁰ Odoki (n 381 above) 315. He also identified the establishment of the human rights commission as the other innovation.

³⁷¹ Note however that the Access to Information Act 2005 which was enacted by Parliament to give effect to article 41, subsequently introduced a wider category of exemptions than contained in article 41. The significance of this is discussed in more detail in chapter three.

³⁷² The Access to Information Act was assented to in July 2005 and came into force on 20 April 2006.

3.8.5.1 Scope of application: Who can access information?

In *Greenwatch v Attorney General and Another*,³⁷³ the High Court of Uganda adopted a broad interpretation of the word ‘citizen’, to include ‘corporate citizenship’, thereby extending the scope of application of article 41, beyond natural persons. In this case, the State had argued that the applicant was not a citizen based on the categories of citizenship recognised by articles 10 and 12 of the Constitution being limited to natural persons, and was thus not entitled to access the requested document. However, the High Court relying on article 237 of the constitution which provides that land in Uganda belongs to the citizens of Uganda, by virtue of which the applicant as a limited liability company incorporated in Uganda by citizens of Uganda is able to own land, found that the applicant was a citizen of Uganda, albeit a ‘corporate citizen’.³⁷⁴

3.8.5.2 Scope of application: the State, its organs and institutions

In *Greenwatch v Attorney General and Another*,³⁷⁵ the plaintiffs argued that because the second respondent was incorporated as a limited liability company, it was not an ‘agency’ or ‘organ’ of the State as contemplated by article 41 due to its ‘separate legal existence’. The court held that it was ‘the totality of circumstances surrounding the company that must be taken into account’ and not its status as a limited liability company, in determining whether the respondent was an agency of the government. In this regard, the fact that the Uganda Electricity Board (UEB) which was the predecessor of the second respondent was before its dissolution, a government parastatal established by law and owned entirely by government for the singular purpose of developing and supplying power to the entire country, on the basis of which the it signed the document in question, combined with fact that which the second respondent was a company owned entirely by government had succeeded the UEB and was performing the task previously performed by UEB made it an ‘agent’ of the government. It was irrelevant that it was a limited liability company.³⁷⁶

³⁷³ HCT-00-CV-MC-0139 of 2001 per Egonda-Ntende J.

³⁷⁴ Para 30-31.

³⁷⁵ As above.

³⁷⁶ Paragraphs 26-28.

3.8.5.3 Primacy of article 41 over statutes restricting access

In *Major General Tinyefuza v Attorney General*,³⁷⁷ the court rejected a bid by the State to prevent the admission of a document into evidence on grounds that it would 'prejudice the security of the State'. In doing so, the State relied on section 121 of the Evidence Act which renders documents relating to 'affairs of the state' inadmissible without the consent of the relevant head of department, on account of state privilege. The Constitutional Court in accordance with section 273(1) of the Constitution which requires all existing laws at the time of the coming into force of the Constitution to be 'construed with such modifications, adaptations, qualifications, and exceptions as may be necessary to bring it in conformity with the Constitution', held that section 121 was inconsistent with article 41 and thus not applicable.³⁷⁸ The courts finding of inconsistency with article 41 was confirmed by the Supreme Court on appeal.³⁷⁹

In reaching its decision, the Constitutional Court emphasised that section 121 must be read in a manner to bring it in conformity with the Constitution, because by article 2 of the Constitution, the Constitution is the supreme law of the land and is binding on all persons and authorities in Uganda and prevails over all other laws inconsistent with it. Furthermore, article 20(2) of the Constitution requires that the Bill of Rights is to be 'respected, upheld and promoted by all organs and agencies of Government and by all persons'.³⁸⁰

The effect of another Act of Parliament curtailing the right of access to information was also considered in *Zachary Olum v Attorney General*,³⁸¹ In this case, the Constitutional Court following its decision in *Major General Tinyefuza v Attorney General*, held that section 15 of the National Assembly (Powers and Privileges) Act which prohibited employees and Members of Parliament from giving minutes of evidence on and content of documents considered in parliament without prior permission of the speaker or clerk of

³⁷⁷ Ruling (Constitutional Case No 1 of 1996), (1997) UGCC, 3.

³⁷⁸ Page 11-14.

³⁷⁹ *Attorney General v Tinyefuza*, Supreme Court Constitutional Petition No 1 of 1997.

³⁸⁰ Page 11-14.

³⁸¹ (Ruling) Constitutional Petition No. 6 of 1999 (2000) UGCC, 3.

the assembly, was inconsistent with article 41 of the Constitution guaranteeing the right of access to information and thus not applicable. Furthermore, the court rejected that section 15 was a permissible limitation of the right of access to information, as it did not fall within derogation of rights permitted by article 44.³⁸²

The Supreme Court, in *SSemogerere and Olum v Attorney General*,³⁸³ resisted an attempt by the government to sneak in a constitutional amendment that would have had the effect of indirectly amending article 41, by creating an extrinsic category of exceptions in article 97. This would have whittled down the effectiveness of article 41 and its primacy over Statutes. In this case, the applicants challenged the constitutionality of the Constitution (Amendment) Act No 13 of August 2000, which had amongst other things sought to amend section 97 of the Constitution, by introducing the exact wordings of section 15 of the National Assembly (Powers and Privileges) Act that the Constitutional Court had in *zachary Olum v Attorney General*³⁸⁴ found to be inconsistent with article 41 of the Constitution. The court held that section 5 of the Amendment Act of 2000 ‘in so far as it purports to restrict the right of access to information unconstitutionally’ conflicts with the constitution and is therefore null and void.³⁸⁵

3.8.5.3 Exemptions

In *Major General Tinyefuza v Attorney General*, it was held that the mere pleading that the exercise of the right of access to information will jeopardise state security is insufficient, to override giving effect to the right. The onus is on the State to prove this by adducing evidence to show the prejudice that is likely to be suffered.³⁸⁶ In that case, the court went ahead to examine the document and found that it did contain issues of national security and so proceeded to hold proceedings in camera for that aspect.

³⁸² Per Okello, JA.

³⁸³ Constitutional Appeal No 1 of 2002, per Kanyeihamba JSC.

³⁸⁴ (N 381 above).

³⁸⁵ Page 21-22.

³⁸⁶ Page 12.

In *Uganda Reporters Association v Attorney General*,³⁸⁷ the plaintiff was charged with leaking of information contrary to the Official Secrets Act. The Chief Magistrate upon application by the State issued a ruling that the case be conducted in camera *inter alia* on grounds of national security. On application for review of the ruling to the High Court, the Court found that in reaching her decision, the trial magistrate was duty bound to assess the evidence in support of the claim of likely prejudice to national security, in accordance with the imitations in article 44 of the Constitution, and then go on to determine if the limitation of the rights concerned, which included access to information, were justifiable and necessary in a free and democratic society, and whether the purpose of the limitation could be achieved with less restrictive means.³⁸⁸ For failure to do so, the ruling of the magistrate was quashed and sent back for re-consideration.

3.9 Case study country three: Nigeria

3.9.1 Brief constitutional history

From the time of the amalgamation of the Protectorate of Southern Nigeria and the Protectorate of Northern Nigeria into one in 1914, until the attainment of independence in 1960, Nigeria had five constitutions adopted in 1914, 1922, 1946, 1951 and 1954 respectively.³⁸⁹ While the 1914 Constitution vested all executive and legislative power in the Governor General, the Cliffords Constitution of 1922 for the first time introduced a Legislative Council, with token Nigerian representation, which had limited powers to introduce legislative measures.³⁹⁰ In 1946, the Richards Constitution provided for a more representative Legislative Council and created an additional structure, the regional Houses of Assembly for the Northern, Western and Southern Provinces, as advisory bodies. It was however the Macpherson Constitution of 1951, that introduced the first makings of federalism, with powers devolved to the supposedly more representative regional Houses of Assembly and the newly created Federal House of

³⁸⁷ Miscellaneous Cause No 87 of 2014.

³⁸⁸ Paragraph 41-46.

³⁸⁹ See generally, Odumosu, O. (1963) *The Nigerian Constitution: History and development* Sweet and Maxwell: London 10.

³⁹⁰ Aihé, D. *Selected Essays on Nigeria Constitutional Law* Idodo Umeh Publishers:Benin, 4.

Representatives.³⁹¹ Following a constitutional conference, in 1954, a more ‘participatory’ but equally unrepresentative process led to the adoption of the Lyttleton Constitution with the express adoption of federalism and increased regional autonomy.³⁹²

Following two more constitutional conferences, at which the independence constitution was agreed upon, on 1 October 1960, Nigeria attained independence. Like other British colonies, the 1960 constitution adopted the Westminster parliamentary system of government with a bicameral legislature. The Prime Minister wielded executive power together with a Council of Ministers drawn from representatives of the regions in the federal legislature, while each of the three autonomous regional governments were governed by premiers all drawn from regional parliaments and each with a separate constitution attached as schedules to the independence constitution. Notably, the 1960 Constitution contained a Bill of Rights,³⁹³ which was the compromise solution from the colonial government to assuage the fear of minority ethnic groups of possible exploitation by the majority after independence.³⁹⁴ In 1963, following yet another constitutional conference, the Independence Constitution was amended, transforming Nigeria into a republic and the Supreme Court replaced the Judicial Committee of the Privy Council (JCPC) as the highest court in the land.³⁹⁵

The attempt at federalism during the first republic, rather than unify the political polity, resulted in bitter intra-ethnic political rivalry and power struggles between the federal and regional governments,³⁹⁶ ultimately setting the scene for the first of numerous *coup d’états* that would dominate governance for the next three decades.³⁹⁷ In January 1966, a bloody military *coup d’état* brought Nigeria’s foray into democratic rule to an abrupt stop.

³⁹¹ As above.

³⁹² Udoma, E. (1994) *History and the Law of the constitution of Nigeria* Malthouse: Lagos 150.

³⁹³ Only a limited number of civil and political rights were guaranteed. See sections 17-27 and 30, The Constitution of the Federation of Nigeria 1979.

³⁹⁴ Nwafor, A. ‘Enforcing Fundamental Rights in Nigerian Courts- Processes and Challenges’ (2009) 4 *African Journal of Legal Studies* 3.

³⁹⁵ Okpanachi, E. & Garba, A ‘Federalism and Constitutional Change in Nigeria’ (2010) 7 *Federal Governance* 5.

³⁹⁶ See generally, Aguda, A. (ed) (1985) *The Challenge of the Nigerian Nation: An Examination of its Legal Development, 1960-1985* Heineman: Ibadan 9.

³⁹⁷ For a detailed account of the reasons for the 1966 coup, told from the perspective of one of the coup plotters, see Ademoyega, A. (1981) *Why We Struck: The Story of the First Nigerian Coup* Evans: Ibadan.

For the next 13 years, Nigeria was ruled by three successive military regimes, the last of which handed over power to a civilian government in 1979. During this period, the 1966 Constitution was suspended and the country was ruled by military decree with no distinction between executive and legislative power, and the effectiveness of the judiciary severely hampered by decrees ousting the jurisdiction of courts.

The adoption of the 1979 Constitution heralded the return to civilian rule which this time was based on the presidential system of government. Although drafted by a Constitution Drafting Committee (CDC), the eventual alteration of the draft before its promulgation substantially altered its content and made a mockery of the 'participatory' process.³⁹⁸ The return to civilian rule was however short-lived by another *coup d'état* in January 1984. From then till the eventual return to civilian rule in May 1999, another four military regimes ruled the country, interrupted only by a three month civilian-led Interim National Government.³⁹⁹ In the same period, two constitutions were drafted in 1989 and 1995 respectively, both of which were never fully implemented.⁴⁰⁰

3.9.2 The 1999 Constitution

In 1998, following the death of General Sanni Abacha, a fresh constitution making process was embarked upon, with the establishment of a 15 member Constitution Debate Committee (CDC) to coordinate debate on a new constitution. Unfortunately, the draft submitted to the military government for adoption, suffered the same fate as the 1979 Constitution, as once again, amendments were made by the ruling military government, prior to its promulgation on 5 May 1999. The absence of meaningful public debate and participation in the adoption of the 1999 Constitution, has led to copious criticism of the

³⁹⁸ Nwabueze, B. (1982) *A Constitutional History of Nigeria* Longman: Lagos 253.

³⁹⁹ The ill-fated transition process to civilian rule inaugurated by the military regime of General Ibrahim Babangida, despite producing a democratically elected president was stalled by the annulment of those elections by Babangida.

⁴⁰⁰ While the 1989 constitution was partially promulgated and partially implemented, that of 1995 was never promulgated.

1999 constitution as devoid of legitimacy and local ownership, much like its previous counterparts.⁴⁰¹

The Constitution is binding on all authorities and persons in Nigeria and any law inconsistent with it is void to the extent of its inconsistency.⁴⁰² The 1999, with minor differences, is a replication of its 1979 predecessor. It maintains the presidential system of government, with the division of executive and legislative power between the federal and state governments.⁴⁰³ The constitution has since been amended in 2010 to 'deal with ambiguous provisions on power vacuum, weak electoral provisions, lack of autonomy of key democratic institutions, and procedure for amending the Constitution'.⁴⁰⁴

3.9.3 The Nigerian 'Bill of Rights'

The Nigerian Constitution contains a Bill of Rights phrased as 'Fundamental Human Rights' in chapter four. The Nigerian Bill of Rights guarantees civil and political rights such as the right to life; dignity, fair hearing, private and family life, freedom of thought, conscience and religion, freedom of expression, freedom of association, freedom of movement, and freedom from discrimination.⁴⁰⁵ Apart from the right to property guaranteed in sections 43 and 44, all other socio-economic rights are found under 'fundamental objectives and directive principles of State policy' in chapter two of the constitution.⁴⁰⁶ Although, by section 13, 'all organs of government and all authorities and persons exercising legislative, executive and judicial powers are to conform to, observe

⁴⁰¹ Oyewo, O. 'The Challenges of Constitutionalism, Good Governance and Corruption in Nigeria: Lessons for Other Democratizing States'. Available at <https://www.academia.edu/6526852/THE_CHALLENGES_OF_CONSTITUTIONALISM> (accessed 10 October 2014). See also Ihonvbere (n 99 above) and Ogowewo (n 97 above).

⁴⁰² Section 1(1) and (3) Constitution of the Federal Republic of Nigeria 1999. *Attorney General Ondo State v Attorney General of the Federation*, (2002) 9 NWLR (Pt 772) 222.

⁴⁰³ Section 2(2).

⁴⁰⁴ Diala, A. The Dawn of Constitutionalism in Nigeria in Mbondeyi, M. and Ojienda, T. (eds) (2013) *Constitutionalism and Democratic Governance in Africa: Contemporary Perspectives from Sub-Saharan Africa* PULP: Pretoria 135.

⁴⁰⁵ See sections 33 to 42 of the Constitution.

⁴⁰⁶ Section 16(2)(d) requires the State to direct its policy towards ensuring 'suitable and adequate shelter, suitable and adequate food, reasonable national minimum living wage, old age care and pensions, and unemployment, sick benefits and welfare of the disabled are provided for all citizens'. Section 20 also requires the State to 'The State shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria'.

and apply' chapter two of the Constitution, section 6(6)(c),⁴⁰⁷ explicitly dictates that the provisions of chapter two cannot by themselves be enforced in a court of law.⁴⁰⁸ However, used in tandem with other provisions of the constitution itself,⁴⁰⁹ or the African Charter,⁴¹⁰ chapter two becomes justiciable under the Nigerian legal system.⁴¹¹

The Bill of Rights is subject to two sets of limitations under the Constitution. Generally, any law that is reasonably justifiable in a democratic society can limit the Bill of Rights on grounds of public defence, public safety, public order, public morality, public health or to protect the rights and freedoms of others can.⁴¹² Secondly, during periods of emergency, the right to life and to dignity can be derogated from by virtue of legislation, to the extent that it is reasonably justifiable for dealing with the emergency. However, the right to life (other than death resulting from acts of war) and the prohibition of conviction for an offence which was not a crime when it was committed, are non derogable rights.⁴¹³

Unlike the Bill of Rights of South Africa and Uganda, which expressly provide for their application to individuals and for their provisions to be relied upon in the enforcement of rights in the public interest, the Nigerian Bill of Rights contains no such provisions.

⁴⁰⁷ Section 6(6)(c) of the Constitution provides that the judiciary cannot inquire into 'any issue or question as to whether any act of omission by any authority or person or as to whether any law or any judicial decision is in conformity with' under chapter two.

⁴⁰⁸ In *Archbishop Anthony Okogie and Others v The Attorney-General of Lagos State*, (1981) 2 NCLR 350 and *Uzoukwu v Ezeonu* (1991) 6 NWLR Part 200, the courts have held that the role of the judiciary is to interpret the constitution and other laws in a manner that gives effect to the provisions of Chapter 2.

⁴⁰⁹ This exception is contained in 6(6)(c). Thus, in *Attorney General Ondo State v Attorney General Federation*, (n.446 above) the provision of section 15(4) of chapter two, requiring the State to 'abolish all corrupt practices and abuse of power' was read with Item 60(a) of the second schedule to the constitution empowering the National Assembly to make laws that 'promote and enforce the observance of the Fundamental Objectives and Directive Principles contained in this Constitution' as allowing the national assembly to enact laws giving effect to section 15(4). See also *Attorney General Lagos State v Attorney General Federation*, (2003) 15 NWLR (Pt 842) 113, 175.

⁴¹⁰ With the incorporation of the African Charter into the domestic legal system, all human rights recognised by the African Charter are directly enforceable and have been so enforced by Nigerian courts. Thus, in *Gbenre v Shell Petroleum Development Company*, (Unreported, FHC/B/CS/53/05, 14 November 2005) the court relied on a combination of the right to life and to dignity under the Bill of Rights and article 24 of the African Charter as imposing a right to poison and pollution-free environment. The ECOWAS Court of Justice has also applied article 17 of the African Charter as creating a right to education in Nigeria. See *Registered Trustee of the Socio-Economic Rights Accountability Project v Nigeria*, Suit No ECW/CCJ/APP/0808.

⁴¹¹ Ibe, S. 'Implementing Economic, Social and Cultural Rights in Nigeria: Challenges and Opportunities' (2010) 10 *African Human Rights Law Journal* 198.

⁴¹² Section 45(1).

⁴¹³ Section 45(2).

However, in practice, chapter 4 has been so interpreted and applied to individuals.⁴¹⁴ Similarly, the application of the *locus standi* principle has been dispensed with in relation to enforcement of human rights protected under the Constitution.⁴¹⁵

3.9.4 Access to information under the 1999 Constitution

The Constitution of Nigeria has no stand-alone provision on access to information. Instead, what exists is section 39 which safeguards the right to 'receive and impart ideas and information without interference' within the context of the right of freedom of expression. Given that identical provisions under international and regional human rights treaties such as the UDHR, ICCPR, ECHR, Inter-American Convention have been interpreted as recognising the right to access information, Nigeria can be regarded as having a constitutional guarantee of access to information, albeit an untested one, as there is yet to be any authoritative judicial pronouncement or interpretation of section 39 in terms of the right of access to information. Moreover, since by the domestication of the African Charter, its provisions are directly enforceable within the domestic legal system,⁴¹⁶ the interpretation of article 9 by the African Commission as guaranteeing a right of access to information makes it unthinkable that any Nigerian court will decide otherwise. There is equally the possibility of reading in the right of access to information into other rights such as the right to life and the right to human dignity as has been done by courts in India.⁴¹⁷

3.10 Conclusion

This Chapter set out to investigate the extent to which the right of access to information has become a constitutionally recognised right in Africa and the extent to which such recognition provides avenues for the broader enjoyment of the right on the continent. In an effort to locate the discourse beyond the narrow confines of a simplistic analysis of constitutional provisions on access to information in Africa devoid of the context in which these provisions operate. The Chapter discusses the concept of constitutionalism as an

⁴¹⁴ *Anigboro v Sea Trucks Ltd* (1995) 6 NWLR (pt 399) 35; *Aniekwe v Okereke* (1996) 6 NWLR (pt 452) 61.

⁴¹⁵ See the Fundamental Rights (Enforcement Procedure) Rules 2009, made pursuant to section 46(3) of the Constitution.

⁴¹⁶ *Abacha v Fawehinmi*, (2000) 6 NWLR (pt. 660) 228.

⁴¹⁷ *Reliance Petrochemicals Ltd v Proprietors of Indian Express Newspapers* (n 164 above).

ideal to which all modern States aspire, and the centrality of the constitutional protection of human rights to the realisation of this ideal. In doing so, it showed that the existence of human rights protection of constitutional status, is a precondition for the practice of constitutionalism. In response, African States have increasingly incorporated human rights protection into their constitutions.

However, because constitutionalism goes beyond the mere existence of the ‘elements of constitutionalism’ to actual compliance with these provisions, and because in many instances, the motivation for the incorporation of these constitutional protection of human rights has been to create a semblance of, and not actual democratic reform, there is generally a disconnect between the idyllic functional aspirations of these constitutions and the actual practice of constitutionalism on the continent. This situation is further compounded by the complexity of circumstances surrounding the constitution-making process in Africa, which often contribute to a real lack of local ownership of constitutional texts, the absence of intrinsic constitutional incentives and of strong democratic institutions to compel constitutionalism. Many of these constitutions have thus become labelled ‘sham’ or ‘façade’ constitutions, leaving Africa a continent of ‘constitutions without constitutionalism’.

This disconnect notwithstanding, this chapter finds that constitutional protection of human rights is an essential first step towards the actual realisation of human rights at the domestic level. This is particularly so, as international human rights law continues to expand not only the nature and scope of constitutionally protected human rights but also its interpretation and application within domestic legal systems in Africa. And it is precisely this ever expanding nature of international human rights law which has influenced the emergence of access to information as a right, and its growing constitutional recognition both as a right in itself and as a derivative of other traditionally recognised rights in Africa. A consideration of the unique and multi-faceted nature of this right reveals the potential role of access to information in engendering constitutionalism, and with that, the express recognition of access to information as a constitutional right is theoretically ideal.

However, the minimal existence of such express recognition in Africa makes the reality of alternative constitutional recognition through existing constitutional rights and international human rights law imperative. For such alternative recognition to succeed, however, a variety of factors such as favourable (constitutional) provisions on the status of foreign law in the domestic legal order, a high level of judicial awareness of human rights standards, and judicial independence are necessary.

An overview of the normative content of existing constitutional provisions on access to information in Africa shows a progressive strengthening of these provisions, and the uncertainty which faces the realisation of the right in the majority of African countries without the express recognition in its Bill of Rights. In light of this, a robust express constitutional provision on access to information becomes necessary to guarantee the realisation of the right by itself or as a foundation for grounding the future implementation of an access to information law in the Bill of Rights and in international human rights law.

As a prelude to the consideration of case studies on the contribution of constitutional guarantees on the right of access to information to socio-economic progress, this chapter also examines the constitutional history and constitution-making process leading up to the enactment of the constitutions currently in force in the case study countries of South Africa, Uganda and Nigeria. This revealed that the level of popular participation in the processes in South Africa and Uganda contributed to legitimacy of these constitutions as opposed to the lack of ownership which diminishes the legitimacy of the Nigerian Constitution. The experience of these case study countries also show that the ability of courts in South Africa and Uganda to give effect to the right of access to information, is made possible by the holistic application of the strong provisions in the Bill of Rights and in the constitution as a whole, thus lending credence to the theory that a constitution can intrinsically create the necessary incentive to stimulate compliance with its provisions.

The case studies of Nigeria and South Africa also bring to light an added advantage of express constitutional protection of access to information over reliance on judicial recognition of the existence of the right in enforcement of access to information. On the

one hand, the origins of the right in South Africa as a constitutional principle which was seen as vital to ending the apartheid legacy of extreme secrecy, in favour of an open and accountable democratic society, continues to underpin the enforcement of access to information as a constitutional right given effect to by law. In Nigeria on the other hand, the absence of an express constitutional right or judicial recognition, has led to mechanical application of the law without reference to its nature as a human right of constitutional status. In essence, constitutional protection of access to information as a human right enables its enforcement to be more easily rooted in an understanding of the mischief it was intended to cure, backed up by the inalienable status that human rights enjoy. This is so especially within a constitution which is the supreme law of the land, thus providing better chances for access to information in the realisation of rights, including socio-economic rights, as will be shown in the next Chapter.

CHAPTER FOUR: CONSTITUTIONAL PROTECTION OF ACCESS TO INFORMATION AND SOCIO-ECONOMIC PROGRESS IN AFRICA: CASE STUDIES FROM SOUTH AFRICA, UGANDA AND NIGERIA

4.1 Introduction

As the last chapter has also shown, the importance attached to constitutions within the domestic legal order, together with the centrality of human rights protection as a core element of constitutionalism renders the constitutional protection of the right of access to information ideal. Furthermore, the recognition in international law of access to information as a self-standing right has over the last two decades resulted in the inclusion of constitutional provisions on access to information in the Bill of Rights of most newly adopted constitutions by African States.

However, given the historical context of constitution-making and constitutionalism in Africa and the continuing low levels of socio-economic development in Africa, the question then arises about to what extent, if any, this ‘new’ constitutional entrenchment of access to information has contributed to socio-economic progress in Africa.

This chapter thus seeks to examine the effect of the constitutional guarantee of the right of access to information on socio-economic progress in Africa. Specifically, it considers the extent to which the right has contributed to socio-economic progress in Nigeria, South Africa and Uganda, the factors that enhance or restrict this contribution and the ‘added advantage’ in advancing socio-economic progress by including access to information as a constitutional guarantee.

4.2 Case study country one: South Africa

The fact that PAIA was enacted in 2000 in compliance with section 32(2) of the Constitution and item 23 of schedule 6 to the interim Constitution, meant that until 2000, section 23 of the Interim Constitution was the constitutional basis for protection of access to information. Subsequently, section 32 applied directly for the brief ‘hiatus period’

between the adoption of PAIA in February 2000 and its into force in March 2001.¹ Thereafter, however, through the application of the principle of subsidiarity, the right of access to information has been considered by courts in the context of PAIA, with section 32 of the Constitution only referred to indirectly, where necessary.

Furthermore, the substantial widening of the scope of the right of access to information under section 32 of the current Constitution in comparison with section 23 of the interim constitution, has rendered case law emanating from the application of section 23 mostly immaterial to the current discussion. As a result, there is a dearth of cases in which section 32 has been relied upon in enforcing the right of access to information and more particularly in advancing socio-economic progress.²

In one relevant case in which the facts giving rise to the case took place after the enactment of the 1996 Constitution but before PAIA came into force, section 32 was relied upon by the Court in enforcing the right to access information which had an impact on socio-economic progress. The case of *Trustees of Biowatch Trust v The Registrar: Genetic Resources* 'Biowatch case' is discussed.

4.2.1 The Biowatch Case

In 1992, on the verge of transition to a democratic government, the apartheid government approved field trials for Genetically Modified (GM) cotton in South Africa. Subsequently, the National Department of Agriculture (NDA) in 1997 without the prior existence of a policy and any real public participation in the process,³ tabled the Genetically Modified Organisms (GMO) Bill in Parliament, which was passed into law.⁴ Under the Act, an

¹ *Investigating Director of the Investigating Directorate: Serious Economic Offences and Another v Gutman*, No 002(4) SA 230 (SCA), para 13 to 15; *Ingledeu v Financial Services Board*, 2003(4) SA 584 (CC), para 36.

² The use of PAIA for enforcing the right of access to information and in particular socio-economic progress is one of the main area of focus in Chapter 5.

³ Wynberg, R and Fig, D. 'A Landmark Victory for Justice: Biowatch's Battle with the South African State and Monsanto' Biowatch South Africa, March 2013. Available at <<http://www.biowatch.org.za/docs/misc/2013/A%20Landmark%20Victory%20for%20Justice.pdf>> (accessed 11 November 2014).

⁴ Genetically Modified Organisms Act No 15 of 1997, assented to on 20 May 1997.

Executive Council was established to oversee its implementation,⁵ while the day to day administration of the Act was the responsibility of the Registrar, who performed this task under the supervision of the Executive Council.⁶

Concerned that, in granting permits to grow GM crops, the Registrar and Executive Council was failing to properly assess the health, environmental and socio-economic impact of GM crops in line with the constitutional right to a safe and healthy environment, Biowatch, a local NGO working on issues of genetic modification and the promotion of biological diversity and sustainable livelihoods, sought clarity on the permitting process.⁷ Between July 2000 and February 2001, Biowatch sent four separate sets of requests for information on the risk assessments conducted as part of the permitting system, but received unsatisfactory, partial answers from the Registrar.⁸ Thus, in August 2002, Biowatch launched an application challenging the refusal of the Registrar to provide access to the requested documents as a violation of its right of access to information guaranteed by section 32 of the Constitution and seeking an order directing the release of this information.⁹ In doing so, Biowatch decided to strategically institute the application based on the Constitution rather than PAIA (which had already by then come into force), on the advice of its lawyers. In making that decision, the following account is instructive:

Biowatch was advised by its legal representatives that PAIA presented problems to a requesting party by creating time delays in responding to requests and providing a range of grounds for refusing access to records. As a result, Biowatch was advised to base its application for access to information solely on

⁵ Section 3-5. This Council consisted of 8 members mainly from relevant government departments and was tasked with the overall implementation of the Act, including granting permits for the development and use of GMOs.

⁶ Sections 8 and 9.

⁷ Eastwood, J. 'The Biowatch Case: A victory for access to information and a landmark decision on costs awards in public litigation'. Biowatch Research Papers No 1 of 2012, 5. Available at <<http://www.biowatch.org.za/docs/papers/2014/RP1%20The%20Biowatch%20Case.pdf>> (accessed 10 November 2014).

⁸ As above.

⁹ *Trustees of Biowatch Trust v The Registrar: Genetic Resources*, 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC). Available at <http://www.right2info.org/resources/publications/case-pdfs/south-africa_trustees-for-the-time-being_high-ct> (accessed 10 November 2014).

section 32 of the Constitution, which provides a broad entitlement to information held by the state and is qualified only by a general limitations clause.¹⁰

The respondents challenged the reliance on section 32, arguing that instead, it was PAIA which was the applicable law, thus the failure of the applicant to follow the request procedure and internal appeal mechanisms under PAIA, rendered the application premature.¹¹ The respondents further argued that in any case, section 32 of the Constitution was limited by section 18(1) of the GMO Act which prohibited the disclosure of information and also by section 19 of the GMO Act, the applicants were compelled to exhaust internal appeal processes under the GMA before resort to court action.

Rejecting both arguments, the High Court found both that PAIA could not be applied retrospectively to the four requests for information by Biowatch and that the procedures and the internal appeal mechanism of PAIA were not applicable in this particular case. Accordingly, section 32 was the applicable law.¹² The Court also rejected the argument of the respondents that section 18(1) validly prohibited the release of the information requested by Biowatch on grounds that section 18(1) contained two exceptions which applied in the instant case. Moreover, the court found that section 39(2) of the Constitution requires South African courts to interpret laws in a manner which gives effect to the Bill of Rights. Furthermore, the failure to follow the appeal process in section 19 of the GMO Act did not affect the relief sought by the applicant.¹³

In conclusion, the Court found that the failure of the Registrar to disclose such information was a violation of its right of access to information as guaranteed by section 32(1)(a) of the Constitution and ordered that the respondent provide access to eight of the eleven categories of information requested.¹⁴

¹⁰ Eastwood (n 7 above) 6.

¹¹ *Trustees of Biowatch Trust v The Registrar: Genetic Resources* (n 9 above) para 12.

¹² As above, para 29 to 32.

¹³ Para 38.

¹⁴ No order for disclosure was made for three categories of information found to be 'vague and overbroad'.

Nine months after the High Court decision, Biowatch eventually gained access to most of the requested documents.¹⁵ An assessment of the information revealed that, as suspected, the process for granting permits was substantially and procedurally flawed and was based on 'weak decision making, using flawed information and flouting public administration principles'.¹⁶ Generally, the permits were vague and imposed uniform standards without any consideration of the GMO in question or the relevant social and environmental context for each application. Furthermore, the risk assessments submitted as part of the permit applications were all undertaken by the applicants themselves raising obvious issues of objectivity and bias. These risk assessments turned out to be mechanical replications of previous applications made in other countries, as they made reference to species which do not exist in South Africa. Furthermore, the risk assessments were grossly inadequate in that they were predominantly based on desk research rather than empirical surveys. Finally, the examination of the requested documents revealed that neither EIAs nor socio-economic impact assessments were required as part of the permit application process.¹⁷

This case has had a lasting impact on access to information on environmental and health rights in South Africa. While the six year delay in receiving the requested documents meant that nothing could realistically be done with regard to the permits issued before the litigation, the case has led to better understanding of the decision making process with regard to GM crops and there are also reports that after Biowatch instituted proceedings in the High Court, NGOs have found it easier to access information on GMOs crops due to greater awareness by civil servants on the right of access to information and increased proactive disclosure of information for example, through the website of the Department of Agriculture.¹⁸

More specifically, the information acquired by Biowatch in the case empowered civil society to assist government in redressing some of the weaknesses in the GMO permit

¹⁵ With the exception of some minutes of meetings of the Executive Council and some old documents which had been destroyed already. Wynberg and Fig (n 3 above) 43.

¹⁶ As above, 46.

¹⁷ As above.

¹⁸ As above.

system and lead the legislative reform process on GMOs.¹⁹ This increased civil society involvement has resulted in the inclusion of the requirement of undertaking EIAs on GMOs under the National Environmental Management Biodiversity Act of 2004.²⁰ Furthermore, the procedural and substantive inadequacies in the permitting process under the GMO Act which Biowatch discovered through the review of the documents it requested, has been utilised in influencing amendments to the GMO Act in 2006.²¹ The overall process of the Executive Council in issuing permits for growing GMOs has been tightened, and on a case by case basis, it must determine whether there is a need for applicants to submit scientifically based risk assessments, EIA, socio-economic impact assessments and proposed risk management measures in addition to application.²² In deciding whether to grant a permit, the Executive Council must also consider public input, the EIA and socio-economic impact of the proposed activities.²³

These outlined successes emanating from the *Biowatch* case has no doubt played a part in protecting the South African society at large by reducing the environmental and health risks associated with GM crops through a stricter permit application process which takes into consideration scientific assessments of the activities on the environment, its socio-economic impact as well as risk management plans to address these assessments. However, with the coming into force of PAIA, the possibility of section 32 playing such a role in advancing socio-economic process has become extremely unlikely.

4.3 Factors influencing contribution to socio-economic progress

Due to the limited use of section 32 in enforcing the right of access to information in general and consequently also in advancing socio-economic progress, in particular, it is difficult to identify with certainty the factors that have contributed to the successful use of this constitutional provision solely on the basis of the *Biowatch* case. However, a few issues which can be objectively considered to have had a positive impact on the advancing the right to a healthy environment will be discussed.

¹⁹ As above.

²⁰ See section 78(1) National Environmental Management Biodiversity Act 2004.

²¹ The GMO Amendment Act 23 of 2006.

²² Section 4(1) GMO Amendment Act.

²³ Section 4(2) GMO Amendment Act.

4.3.1 Origin of the constitutional protection of access to information

There is no doubt that the importance attached to the role of access to information in creating an open and transparent government, and the subsequent entrenchment of this as a constitutional principle which must of necessity be reflected in the final Bill of Rights has meant that courts have in applying this provision recognised it as essential to upholding the founding values of the Constitution.²⁴ Furthermore, the fact that other provisions of the Constitution emphasise the centrality of open, transparent and accountable governance as essential to the democratic society the Constitution seeks to achieve²⁵ and that courts are required to respect, promote, protect and fulfil the Bill of Rights, as well as to interpret legislation in a manner that gives effect to the Bill of Rights made the reliance on the constitutional protection of access to information before courts successful both under the interim and the current constitution.²⁶

4.3.2 Constitutional protection of the right to a healthy environment

The recognition of environmental rights in section 24 of the South African Constitution made the use of the information accessed meaningful, despite the fact that by the time it was received, it was no longer relevant to Biowatch in terms of the original intention for the request for access. Thus, the fact that section 24 guarantees the right of everyone 'to an environment that is not harmful to their health or well-being' and to have the environment protected through legislative and other means to 'prevent pollution and ecological degradation; promote conservation and secure ecological sustainable development and use of natural resources while promoting justifiable economic and social development' meant that the information could be used to influence future developments

²⁴ In the *Biowatch* case for example, it was stated in para 37 that:

... the right of access to information is intended to serve a wider purpose, namely to ensure that there is open and accountable administration at all levels of government - a vital ingredient in our new constitutional culture and in an open and democratic society.

²⁵ See section 4(1)(c) of the Constitution.

²⁶ Again in the *Biowatch* case it was further stated that:

Our constitutional dispensation after all enjoins the State - acting through its appointed officials - to positively respect, protect, promote and fulfil the rights in the Bill of Rights in Chapter 2 of the Constitution. To interpret section 18(1)(a) of the GMO Act in the aforementioned fashion, which in my view it should be, would also be in keeping with the constitutional imperative of interpreting legislation in a manner that promotes the spirit, purpose and objects of the Bill of Rights.

on GMOs in a manner that was consistent with the constitution. To do otherwise would have left the government open to further possible constitutional litigation and public backlash for failure to uphold the constitution. In essence, the overall concern that Biowatch had with the normative framework and implementation of the GMO Act was in line with constitution, thus making it more difficult for the government not to act positively and in a way that better protected the right to a healthy environment and sustainable development.

4.6.3 Political will to engage and broad-based civil society support

Closely related to the above was the willingness of the government to engage with Biowatch in the subsequent amendment of laws related to GMOs in line with its assessment of deficiencies of the existing laws. Though this willingness can partly be attributed to the constitutional protection of the right to a healthy environment discussed above, it will not be unreasonable to suggest that the massive advocacy and public awareness campaign mounted by Biowatch on the negative environmental impact of failure to properly regulate GM crops prior to and throughout the period of litigation, made it difficult for the government in its subsequent amendment of these two laws not to take cognisance of Biowatch's position. For example, Biowatch indicates that following the hearing of the case in 2004, it:

forged a stronger relationship with the Parliamentary Portfolio Committee on the Environment, consulted and briefed wider NGO networks and developed a broader strategy around public awareness raising, media and education.²⁷

It is also reported that unlike the National Department of Agriculture and the Executive Council of the GMO Act, 'other national and provincial government departments and several parliamentary committees were supportive of Biowatch's position.'²⁸ Strategic alliances were also forged within environmental groups, faith groups, farmer groups, consumer groups, conservation organisations, and other civil society groups.²⁹ In

²⁷ Wynberg and Dig (n 3 above) 32.

²⁸ As above, 33.

²⁹ As above.

addition, several local civil society organisations lent their support to the cause by applying to be joined as *amicus curiae*.³⁰ Thus, the broad based support for Biowatch's position was formidable and contributed to the willingness of the government to work with Biowatch in making the necessary changes to the legal framework regulating GMOs in South Africa.

4.4 Potential contribution to socio-economic progress

The indirect applicability of section 32 notwithstanding, the strong rooted aspirations of constitutionalism as a tool for transforming the South African society from one of pervasive government secrecy to open and accountable governance at all levels, allows the constitutional protection of access to information to play an important role in promoting and protecting the right of access to information through PAIA. This is particularly so considering that in interpreting any legislation (including PAIA), courts are required to interpret laws in a manner which gives effect to the Bill of Rights. Thus, in the extremely limited circumstances in which section 32 remains applicable, the judicial enforcement of the right of access to information, can, depending on the level to which the information received is utilised, advance socio-economic progress as in the Biowatch case. This potential is further strengthened by the fact that the Bill of Rights recognises as justiciable, a broad range of socio-economic rights.

4.5 Case study country two: Uganda

The Ugandan judiciary has generally been progressive in its interpretation and application of the constitutional provisions on access to information, even resisting an attempt to curtail the right of access to information through a constitutional amendment. Two specific cases illustrating the actual contribution of the constitutional protection of access to information to socio-economic progress are considered.

³⁰ The Open Democracy Advice Centre (ODAC) successfully joined the case at the High Court. Thereafter, in pursuing the appeal against the cost order, the Legal Resources Centre (LRC) represented Biowatch, while Lawyers for Human Rights (LHR) and the Centre for Applied Legal Studies (CALS) also joined as *amici curiae*.

4.5.1 The Bujagali Hydropower Project Case

In October 1994, the government of Uganda signed a Memorandum of Understanding (MOU) with AES Nile Power (AESNP) for the provision of 'adequate, reliable and affordable power' through the construction and operation of a 200 MW power plant in Bujagali Falls, in the Jinja province of Uganda.³¹ The project involved the construction of approximately 100 kilometres of 220 kV and 132kV transmission lines and substations. Without any form of public consultation or a competitive bidding process, a Power Purchase Agreement (PPA) between AESNP and the Uganda Electricity Board (UEB) was signed in December 1999 following its approval by the Ugandan parliament.³² This was followed by the signing of an Implementation Agreement between AESNP and the Minister of Energy and Mineral Department, on behalf of the government of Uganda.³³ Subsequently, the UEB was privatised leading to the transfer of responsibility for the PPA to the Uganda Electricity Transmission Company Limited (UETCL) as the successor of the UEB.³⁴

By these agreements, the construction of the hydropower dam was to begin in 2002 and end in 2005. However, the project stalled when local non-governmental organisations raised concerns about the lack of information surrounding the project. Apparently, unofficial information had revealed that the government would be required to pay to AESNP \$100 million dollars each year, over a period of 30 years, regardless of how much power was actually generated and then sold by UETCL to Ugandans.³⁵ There was thus the well-founded fear that with only three percent of the Ugandan population having access to the power grid at the time, the Ugandan government would be unable to meet the financial obligations and the burden would be shifted to Ugandans in the form of high electricity tariffs. This was compounded by the fact that the project was to be financed

³¹ Makumbi, I. 'Public Access to Government-Private Sector Contracts: The Case of the Bujagali Power Purchase Agreement' (2003) Uganda Wildlife Society, Access to Information Series No 1.

³² As above.

³³ *Greenwatch v Attorney General and Another*, HCT-00-CV-MC-0139 of 2001, para 15.

³⁴ Public Enterprises Reform and Diverstiture (Vesting of Undertaking of UEB)(No.2), S.I No, 77/2001.

³⁵ Brand, R. 'Uganda High Court to Consider Releasing Key Document on Dam Project'. Available at <<http://www.freedominfo.org/2002/07/the-ugandan-high-court-to-consider-releasing-dam-project-document> /> (accessed 2 November 2014).

through loans and guarantees by the World Bank, which would be subject to interests. Other concerns included the lack of proper Environmental Impact Assessment (EIA) to objectively assess potential environmental damage to the Nile River; the lack of an open competitive bidding process; alleged bribery of Ugandan officials by AESNP; likely increase in electricity tariffs; and the negative impact on fishery, tourism and culture.³⁶ Following complaints to the World Bank by local NGOs,³⁷ the World Bank's Inspection Panel³⁸ undertook an investigation into the Bujagali project. Its report vindicated the concerns of local NGOs and recommended the release of the PPA to 'place the public in a position to analyse, understand, and participate in informed discussion about viability of the project and its impact on the economy and well-being of Ugandans'.³⁹ The report also found that the management of the World Bank had violated five operational policies in its planning process of the Bujagali project.⁴⁰ Despite this report, the World Bank insisted that it could not release the PPA because both the Ugandan government and AESNP were against this and that under the Bank's Disclosure Policy,

some documents and information are provided to the Bank on the explicit or implied understanding that they will not be disclosed outside the Bank. The Bank must treat such information accordingly.⁴¹

³⁶ Pottinger, L. 'Uganda's Bujagali Dam: A Case Study in Corporate Welfare' International Rivers Network, September 2000. Available at <[http://www.internationalrivers.org/files/attached-files/case_study .pdf](http://www.internationalrivers.org/files/attached-files/case_study.pdf)> (accessed 2 November 2014).

³⁷ Letter of complaint by two local organisations- National Association of Professional Environmentalist (NAPE) and Save Bujagali Crusade (SBC) in June 2001 to the Compliance Advisor Ombudsman of the World Bank, citing several concerns about the project. Available at <[http://www.eprf.probeinternational .org/node/4519](http://www.eprf.probeinternational.org/node/4519)> (accessed 2 November 2014). See also Request for Inspection to the Inspection Panel of the World Bank Group. Available at <http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2004/03/25/000265513_20040325181116/Rendered/PDF/23998.pdf> (accessed 2 November 2011).

³⁸ The World Bank Inspection Panel was created by the Board of Directors of the World Bank to ensure accountability in the implementation of the Bank's policies and procedures.

³⁹ Inspection Panel Investigation Report, May 2002, 16. Available at <<http://documents.worldbank.org/curated/en/748801468781489557/pdf/23998.pdf>> (accessed 2 November 2014).

⁴⁰ As above. The policies violated were: involuntary resettlement, environmental assessment, natural habitats, disclosure of information, and the economic evaluation of investment operations.

⁴¹ Management Report and Recommendation in Response to the Inspection Panel Investigation Report, 7 June 2002. Available at <http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2004/06/17/000265513_20040617105441/Rendered/PDF/24272sec.pdf> (accessed 2 November 2014).

It was this state of affairs that led Greenwatch, a local Ugandan organisation, in September 2001 to institute an action in the High Court against the Attorney General, requesting an Order that the failure to make public the PPA was a violation of the constitutional right to information under article 41 and for the PPA to be made available to Greenwatch.⁴² In response, the government initially justified its decision not to grant access to the PPA on grounds that to do so would: prejudice the national security of Uganda; expose the vulnerability of the Uganda power sector; negatively impact the credibility of Uganda to attract foreign investment; amount to a breach of the confidentiality clause in the PPA; and violate the privacy rights of other parties to the PPA.⁴³ It was also contended that the PPA was not a public document and did not fall within article 41 because UETCL was a limited liability company and not a government agency.

When subsequently ordered by the Court in July 2002 to produce the PPA, the government then claimed that there was in reality no PPA.⁴⁴ However, Greenwatch was able to present to the Court a copy of the PPA which it had received from a Member of Parliament.⁴⁵ Upon a review of the PPA it was discovered that it was an agreement between AESNL and UETCL. UETCL was thus joined as second respondent in the case.⁴⁶

Contrary to the contentions of the respondent, the Court in its decision of 12 November 2002 found that the PPA was a public document, that the respondent was an 'agency' of the government, and that the plaintiff was indeed a citizen, a 'corporate citizen' entitled under article 41 to have access to the PPA. However, the Court ordered that the PPA be release to the public and not just to Greenwatch. The government initially filed an appeal to the judgement, but later withdrew it.⁴⁷

⁴² *Greenwatch v Attorney General and Another* (n 33 above).

⁴³ As above.

⁴⁴ As above, para 6.

⁴⁵ As above.

⁴⁶ As above para 7.

⁴⁷ Kakuru, K. and Ssekyana, I. 'Case Book on Environmental Law' February 2009, Volume 1, 37.

Following the judgement, an independent assessment of the PPA revealed that the Bujugali dam project was excessively expensive,⁴⁸ and that the PPA did not conform to 'international standards, and entailed massive extra costs for Uganda'.⁴⁹ It concluded that the World Bank gave poor advice to the Ugandan government, and misled the public about the cost of the project.⁵⁰ Specifically, the report found that Uganda would be required to make annual payments of \$132 million (and not \$111 million as previously thought) to AESNP over 30 years. This was contrary to international standards, which if applied, would have reduced the payments by about \$40 million initially and then by an average of \$20 million over the lifetime of the project.⁵¹ In addition, the report highlighted five key areas in which a better negotiated agreement and a competitive bidding process would have resulted in a total savings of \$600 million over the life time of the PPA and a considerable decrease in the projected power tariffs for Ugandans, without affecting the basic framework of the project.⁵²

Subsequently, the previous Ugandan Minister of Energy who had since become Alternate Executive Director at the World Bank, was forced to resign over allegations he received bribes for the award of the project to AESNP while still Minister.⁵³ The World Bank also temporarily suspended its funding of the project while the allegations of corruption were addressed.⁵⁴ In June 2002, the Government of Uganda, which had only six months earlier agreed to an increase of the cost of the project from \$480 million to \$520 million by AESNP, sought to renegotiate a lower project cost with AESNP. Veidekke and Skanska, two foreign companies that were to partner with AESNP in the construction of the dam,

⁴⁸ 'The Bujugali Power Purchase Agreement- an Independent Review' International Rivers Network. Available at <http://allafrica.com/download/resource/main/main/00010069:07d7863ca2ba623_63e7c05a762486629.pdf> (accessed 2 November 2014).

⁴⁹ As above, 2.

⁵⁰ As above.

⁵¹ As above.

⁵² As above, 23-25.

⁵³ Tangri, R and Mwenda, A. *The Politics of Elite Corruption in Africa: Uganda in Comparative African Perspective* (Routledge: New York 2013) 99.

⁵⁴ As above.

pulled out of the project in June 2003,⁵⁵ and AESNP followed suit in August 2003.⁵⁶ The project effectively collapsed at this point.

The impact of the public revelation of the terms of the PPA can be deduced from the fact that the procurement process subsequently followed by the Government was a marked improvement on the earlier one as it 'followed a transparent, international, competitive bidding process' and, in turn, the successful bid consortium of Bujagali Energy Limited (BEL) 'selected the Equipment, Procurement, Construction (EPC) contractor on a competitive bidding basis and required the contractor to sign up to a code of conduct'.⁵⁷ Furthermore, the government of Uganda developed a new design and updated the Environmental Impact Statement to address public concerns, which it shared with stakeholders at a workshop organised for that purpose in February 2005.⁵⁸

Although not all the concerns raised about the project were addressed to the satisfaction of critics and legitimate concerns continue to be raised about its viability,⁵⁹ the implementation of the project by BEL cannot be faulted for its efforts at ensuring that the proactive disclosure of information related to the implementation of the project was mainstreamed into its activities⁶⁰ and ensuring that the local community and Ugandans at large were continuously consulted through the implementation of a 'Public Consultation

⁵⁵ Hennig, R. Scandinavians pull out of Bujagali Dam Project. Available at <<http://www.afrol.com/articles/12892>> (accessed 4 November 2014).

⁵⁶ By this time, the share price of AESNP had plummeted, Enron (its parent company) had collapsed and the CEO of AESNP had changed. Esty, C. and Sesia, A. 'An Overview of Project Finance-2004 update' Harvard Business School Case Note 9-205-605, Harvard Business School.

⁵⁷ Financial Solutions: Partial Risk Guarantee, World Bank Publication, December 2007, 2. Available at <<http://siteresources.worldbank.org/INTGUARANTEES/Resources/UgandaBujagaliNew.pdf>> (accessed 4 November 2014).

⁵⁸ Oweyegha-Afunaduula, F. and Muramuzi, F. 'Outstanding and New Issues in the Bujagali Dam Process: An Environmental Viewpoint' Available at <<http://afdef.org/index.php/79-articles/147-outstanding-and-new-issues-in-the-bujagali-dam-process-an-environmental-viewpoint>> accessed 4 November 2014).

⁵⁹ Kapika, J. and Eberhard, A. (eds) 'Uganda Brave Reforms and New Growth in Power Sector Reform and Regulation in Africa, Lessons From Kenya, Tanzania, Uganda, Zambia, Namibia, Ghana' (Cape Town: Human Sciences and Research Council 2013). See for example, Summary of Key Findings from the Inspection Panel Investigation Report on Bujagali Hydropower Project, Uganda, November 2008, Available at <<http://www.Internationalrivers.org/resources/summary-of-inspection-panel-report-on-bujagali-dam-2008-3586>> (accessed 4 November 2014).

⁶⁰ The project website contains information such as external project reviews, monthly newsletters and the Social and Environmental Assessment Report. See <http://www.bujagali-energy.com/bujagali_hydroDocuments.htm> (accessed 4 November 2014).

and Disclosure Program'.⁶¹ BEL also claims to have resettled or compensated about 8700 people affected by the project; rescued animals endangered by the project activities, and built schools, clinics and a micro-credit fund in affected communities.⁶² In total, BEL invested \$13 million on community development initiatives in Bujagali.⁶³

It can be deduced that the considerable social responsibility efforts of BEL was brought about by the public outrage at the lack of transparency that permeated the entire negotiation process of the earlier PPA with AESNP, and the fact that the increased electricity tariffs and the debt burden the project would impose on Uganda, far outweighed its overall benefit to Ugandans. The public release of the PPA, based on the Order of the Court, thus availed Ugandans the opportunity to discover for themselves that the PPA was flawed in favour of AESNP to the detriment of the socio-economic development of Uganda as a whole.⁶⁴ The wide dissemination and public knowledge of the unfavourable terms of the PPA, subsequently led to a more open process and a better negotiated PPA which has resulted in improved power supply for the country as a whole.⁶⁵

4.5.2 The Mulago National Referral Hospital Case

In March 2013, Jennifer Musimeta delivered twin girls at the Mulago National Referral Hospital, the largest state-owned hospital in Uganda.⁶⁶ She was later informed of the death of one of the babies but was denied access to the baby's body, together with her hospital records.⁶⁷ After persistent requests by herself and her husband, three days later

⁶¹ As part of this programme, sub-county consultation committees were formed and periodic engagements with local and national stakeholders as well as government agencies are undertaken. Information available on the Bujagali Hydropower project website <http://www.bujagali-energy.com/bujagali_publicConsultation1.htm> (accessed 2 November 2014).

⁶² As above.

⁶³ Bujagali: Powering Uganda from the Nile' <<http://www.alstom.com/Global/Power/Resources/Documents/Brochures/bujagali-uganda-kaplan-hydro-plant-advertorial.pdf>> (accessed 2 November 2014).

⁶⁴ This thesis in no way reaches the conclusion that the Bujagali project as implemented was the best solution for Uganda's energy needs. The argument here is that access to information about the earlier PPA between the Ugandan government and AESNP averted the implementation of a non-transparent and unfavourable PPA which would have been detrimental to the socio-economic interests of Ugandans.

⁶⁵ The completion of the Bujagali project is said to have improved power supply in Uganda. See Mawejje, J. et al 'Powering Ahead: The Reform of the Electricity Sector in Uganda' (2013) 3 *Energy and Environment Research* 126, 131.

⁶⁶ Fallon, A. 'Ugandans Fight for the Right to Access Their Own Medical Records'. Available at <<http://www.Globallissues.org/news/2014/03/27/18434>> (accessed 2 November 2014)

⁶⁷ As above.

they were given the body of a dead baby.⁶⁸ DNA tests carried out by the police, to whom the matter had been reported by the couple, revealed the body they were given was not that of their baby.⁶⁹ After further repeated attempts at accessing information about their daughter proved unfruitful, the couple with the help of the Centre for Health, Human Rights and Development (CEHURD), on July 18 2013, filed a case in the High Court of Uganda.⁷⁰ The couple challenged an unwritten policy in health facilities in Uganda denying access by patients to their medical records, arguing that failure of the hospital to provide Ms Musimeta access to her medical records and of the circumstances surrounding the birth of the baby, is a violation of the couples right of access to information as guaranteed by article 41 of the Constitution.⁷¹

The High Court in January 2014 ordered the hospital to release all requested documents, which included the patient's file, as well as relevant information with regard to the date of delivery such as the mortuary record, list of health workers on duty, the registry of infants delivered, antenatal and delivery records, and a copy of the DNA results carried out on the body produced by the hospital. When, on continuation of the case in March 2014, the hospital had failed to comply with the order, the Court adjourned the case for a few hours and ordered that all requested documents be produced in line with her earlier order. The hospital then complied and the hearing of the case resumed. In July 2014, the Court gave both parties to the case until 29 September 2014 to settle the matter out of court.⁷² The opportunity for an amicable settlement was again extended by the court to February 2015.⁷³

⁶⁸ Namusobya, S. 'Navigating the Access to Information Challenge in Health Rights Litigation in Uganda'. Available at <<https://www.hhrjournal.org/2014/09/navigating-the-access-to-information-challenge-in-health-rights-litigation-in-uganda/>> (accessed 2 November 2014).

⁶⁹ As above.

⁷⁰ *CEHURD & Others v Mulago National Referral Hospital & Attorney General*, Civil Suit No. 212 of 2013.

⁷¹ The applicants also alleged violations of their right to health, rights of the family and rights of the child. Email by Ms Nakibuuka Noor Musisi, Manager, Strategic Litigation, CEHURD. Available at <<https://groups.google.com/forum/#!topic/legal-expert-advisory-group/1s-h95KLQGM>> (accessed 2 November 2014).

⁷² 'Judge Gives Mulago Last Chance in Child Case' The Daily Monitor, 12 July 2014. Available at <<http://www.monitor.co.ug/News/National/Judge-gives-Mulago-last-chance-in-child-case/-/688334/2381882/-/82lmxl/-/index.html>> (accessed 2 November 2014).

⁷³ 'Hearing of Civil Suit No. 212 of 2013 extended to February 2015'. Available at <<http://www.cehurd.org/2014/12/hearing-of-civil-suit-no-212-of-2013-adjourned-to-feb-2015/>> (accessed 10 April 2016).

While the long-term impact of this case on the right to health in Uganda remains to be seen, it is clear that the constitutional provision on access to information has in this instant case, been successfully relied upon to compel the hospital to release information contained in Ms Musimeta's medical records as well as other information pertaining to the circumstances surrounding the birth and alleged death of Ms Musimeta and Mr Mubangizi's child. This case thus illustrates the utility of access to information in the context of the right to health.

Article 14(1)(d) of the Protocol to the African Charter on the Rights of Women in Africa (Womens' Protocol) guarantees 'the right to be informed on one's health status'. The African Commission in its general comment on article 14(1)(d) has stated that this right 'includes the right of women to access adequate, reliable, non-discriminatory and comprehensive information about their health'.⁷⁴ More generally, the Committee on Economic Social and Cultural Rights (CESCR) has stated that the right to health is interrelated with information accessibility, the right to seek, receive and impart information, because of the 'special importance' of access to information in relation to health. The CESCR has also interpreted the obligation of States to respect the right to health as requiring States to 'refrain from censoring, withholding or intentionally misrepresenting health related information'.⁷⁵

The World Health Organisation (WHO) Declaration on Patients' Rights also states that:

Patients have the right of access to their medical records and technical records and to any other files and records pertaining to their diagnosis, treatment and care and to receive a copy of their own files and records or parts thereof.⁷⁶

⁷⁴ General Comment on Article 14(1)(d) and (e) on the Protocol to the African Charter on the Rights of Women in Africa, adopted by the African Commission on Human and Peoples' Rights. Available at <<http://www.achpr.org/instruments/general-comments-rights-women/>> (accessed 2 November 2014)

⁷⁵ General Comment No.14 (2000) of the Committee on Economic, Social and Cultural Rights, E/C.12/2000/4 11 August 2000, para 34.

⁷⁶ WHO Declaration on the Promotion of Patients' Rights in Europe, European Consultation on the Rights of Patients, 28-30 March 1994, Amsterdam, para 4.4. Available at <http://www.who.int/genomics/public/eu_declaration1994.pdf?ua=1> (accessed 3 November 2014).

From all of the above, it is clear that the disclosure of the medical information is an integral part of the right to health. Consequently, the reliance by the applicants in this case on article 41 of the Constitution for the release of this record as well as other relevant information clearly illustrates the utility of constitutional provision on access to information in advancing the right to health in Uganda.

4.6 Factors influencing contribution of access to information to socio-economic progress

While there have been a number of cases in which article 41 has sought to be utilised in accessing information, most of these have been with respect to disclosure of information for the purpose of enforcing individual civil and political rights. It is only the *Bujagali* case and the *Mulago Hospital* case that can be directly relied upon in an attempt to evaluate factors that have influenced the utility of access to information in advancing socio-economic progress.

4.6.1 Holistic interpretation of the Constitution

The Constitution of Uganda is a progressive document, not only in terms of its Bill of Rights which recognises the three categories of rights and promotes public interest litigation, but also with regard to other provisions such as article 273(1) requiring all existing laws to be ‘construed with such modifications, adaptations, qualifications, and exceptions as may be necessary to bring it in conformity with the Constitution’. These provisions have allowed Ugandan courts to give effect to the constitutional right of access to information not by rigid and mechanical interpretation of article 41, but taking the Constitution as a whole and interpreting it in such a manner as to give effect to the right. For example, an attempt to indirectly amend article 41 was prevented by looking beyond the legality of the constitutional amendment process to the actual impact of the proposed amendment, and in the *Greenwatch* case, the Court relied on article 237 of the Constitution recognising corporate ownership of land in finding that Greenwatch’s status as a ‘corporate citizen’ allowed it to invoke the enforcement of article 41.

4.6.2 Civil society strategic collaboration and persistence

In the *Bujagali* case, the persistent and coordinated pressure exerted by international and local civil society organisations in Uganda for access to the PPA, the lack of an open and competitive bidding process and in highlighting the environmental and economic concerns of local communities, eventually led to the court victory compelling the disclosure of the PPA. Furthermore, this persistence by civil society translated into a more transparent bidding, as well as attempts by the government and BEL to address the environmental and socio-economic concerns surrounding the development of the project. The coordinated local and international advocacy also drew international attention and support for the concerns surrounding the Bujagali project. At home, local organisations such as the National Association of Professional Environmentalists (NAPE), Save Bujugali Crusade (SBC), Greenwatch, and Advocates Coalition for Development and Environment (ACODE) worked very closely together through a coordinated advocacy effort which was not ‘predetermined’ but ‘devised and applied as the process went on’ developed a multi-pronged response to problems arising from the project, through a combination of advocacy, research, and litigation.⁷⁷

International environmental organisations, such as the International Rivers Network (IRN) and the Environmental Law Alliance Worldwide (ELAW),⁷⁸ also worked very closely with these local organisation and assisted by lobbying the World Bank Inspection Panel to undertake an Inspection of the Bujagali project and by funding trips to various fora by members of these local organisations to sustain international publicity on the issue.⁷⁹

Similarly, in the *Mulago Hospital* case, the pivotal role of civil society, in particular CEHURD, first in attempting to assist in the securing the release of the requested

⁷⁷ See generally, Kakuru, K. ‘Uganda: Ensuring Public Involvement in the Bujagali Hydroelectric Power Project’. Available at <<http://www.eli.org/sites/default/files/docs/advocacytoolscasestudies/casestudy.uganda.final.Pdf?q=pdf/advocacytoolscasestudies/casestudy.uganda.final.pdf>> (accessed 3 November 2014).

⁷⁸ As above, 5.

⁷⁹ As above.

information from the hospital, and when that failed, by instituting proceedings against the hospital, was crucial to the successful utilisation of article 41.

4.6.3 Influence of external actors

In the *Bujagali* case, although the World Bank resisted requests from civil society to disclose the content of the PPA, the subsequent report by its Inspection Panel validated the concerns of local groups and provided credible evidence of the defects in the Bank's processes of assessing the project and advising the government of Uganda. This report further strengthened the activism of civil society for access to the PPA. Subsequently, the World Bank's temporary suspension of funding, insistence on an open and competitive bidding process as well as on a code of conduct by the winner of the bid, contributed to exerting pressure on the government of Uganda for transparency in the entire process and also on BEL to address concerns of local communities and civil society.

4.7 Potential contribution to socio-economic progress

In June 2006, Uganda's Lake Albert Region was discovered to have oil deposits with estimated total reserves of two million barrels.⁸⁰ Since then, several companies have entered into oil exploration licenses also known PSAs with the government worth billions of dollars. Accessing information in such PSAs would ordinarily provide an opportunity for Ugandans to interrogate the terms of such agreements to ensure that they adequately safeguard their interests and that informed suggestions on how those proceeds can be channeled towards improving the socio-economic development of the country. Information on the PSAs also better allows Ugandans to hold government accountable for the use of oil revenue and ensure this is done in a transparent, fair and equitable manner. This is especially important given the pervasive nature of corruption within public service in Uganda and past occurrences of corrupt activities in the petroleum and electricity sectors.⁸¹

⁸⁰ Kiiza, J. et al, 'Righting Resource-Course Wrongs in Uganda: The Case of Oil Discovery and the Management of Popular Expectations' Economic Policy Research Centre , Research Series No. 78, July 2001. Available at <<http://ageconsearch.umn.edu/bitstream/150481/2/series78.pdf>> (accessed 5 November 2014).

⁸¹ See generally Tangri and Mwenda (n 53 above).

The establishment of the Extractive Industries Transparency Initiative (EITI), a coalition of governments, companies and civil society for the purpose of improving openness and accountability in the management of natural resource revenues, is recognition of the role access to information plays in fostering socio-economic development.⁸² Founded on 12 key principles, such as the importance of the prudent use of natural resource revenues for sustainable development and poverty reduction; of public debate in informing choices and options for sustainable development; and of transparency by governments and extractive industries in enhancing public financial management and accountability, the EITI requires that States comply with specific minimum requirements prior to application as an 'EITI candidate', followed by a rigorous process of validation as an 'EITI compliant' State.⁸³ One such relevant requirement is the 'production of comprehensive EITI reports that include full government disclosure of extractive industry revenues, and disclosure of all material payments to government by oil, gas and mining companies'.⁸⁴ Presently, there are over 20 EITI candidate and compliant states in Africa.⁸⁵ Uganda does not belong to either category although it has stated its commitment to transparency and accountability in the oil and gas sector and to apply as a candidate to participate in the EITI process in the near future.⁸⁶

At home, however, the government of Uganda has adamantly refused to allow access to information on PSAs citing reasons such as prejudice to national security and commercial interests.⁸⁷ This continued refusal is despite the fact that all three countries that have signed PSAs with the government of Uganda have indicated their willingness to disclose

⁸² The EITI was established on 17 June 2013 when a conference convened at Lancaster House, London and attended by governments, extractive industries and civil society agreed to a 'Statement of Principles and Agreed Actions'. See <<http://collections.europarchive.org/tna/20070701080507/http://www.dfid.gov.uk/news/files/eitireportconference17june03.asp>> (accessed 6 November 2014).

⁸³ See The EITI Standard, 11 July 2013. Available at <https://eiti.org/files/English_EITI%20STANDARD_11July_0.pdf> (Accessed 6 November 2014).

⁸⁴ EITI requirement 4, as above, 25.

⁸⁵ List of EITI candidate and compliant States is available at <<https://eiti.org/countries>> (accessed 6 November 2014).

⁸⁶ Remarks by Honourable Irene Muloni, Minister of Energy and Mineral Development, at the 6th EITI Global Conference in Sydney, Australia, 23 May 2013. Available at <https://eiti.org/files/Hon%20Muloni_Remarks_6th%20EITI%20conference%5B4%5D.pdf> (accessed 5 November 2014).

⁸⁷ *Charles Mpagi and Izama Angelo v. Attorney General*, Miscellaneous Cause No. 751 of 2009.

their content to the public, if the other companies and the government agree to this.⁸⁸ This persistent refusal by the government has left concerned Ugandans with no other option than to approach the courts. Unfortunately, the success highlighted above with utilising access to information to compel the disclosure of information on the PPA for the Bujagali hydropower project by the State has not been replicated, at least not in terms of courts ordering that government disclose information on the PSAs. In the only case in which the right to access the information contained in the PSAs has sought to be exercised,⁸⁹ the application was denied by a Chief Magistrate, on the basis that the applicants did not prove satisfactorily that the public interest in the release of the information outweighs the harm sought to be protected by the disclosure-confidentiality clauses.⁹⁰

However, the fact that the application was primarily brought under the Access to Information Act of 2005, and not in terms of article 41 of the Constitution (even though the Constitution was mentioned in passing), raises questions as to whether a better outcome may have been achieved, if, as had been the case in the *Bujagali* case, the application was brought on the basis of the violation of the Bill of Rights, and in particular the right of access to information as protected by article 41 of the Constitution. In this regard, this thesis asserts that relying on the constitutional right of access to information as a means for compelling the government of Uganda to disclose PSAs, has the potential of advancing socio-economic development in Uganda. It is with this in mind that, in December 2009, Greenwatch lodged an application for the disclosure of the content of two sets of PSAs before the High Court.⁹¹ The case is however yet to be concluded.

It should be noted however that the details of some of these PSAs have since emerged. In 2010, the content of PSAs allegedly signed by the government in 2004 and 2007 with

⁸⁸ It has been reported that both Total and Tullow Oil have publicly indicated their willingness to publish the PSAs entered into with the Ugandan Government and has done so privately. See 'Why Should Uganda Publish Oil Contracts' Global Witness Briefing Paper August 2014. Available at <http://www.globalwitness.org/ugandaoilcontracts/files/briefing_why_should_uganda_publish_extractive_contracts.pdf> (accessed 4 November 2014).

⁸⁹ See *Charles Mpagi and Izama Angelo v. Attorney General* (n 87 above).

⁹⁰ This case will be discussed in more detail in Chapter 5.

⁹¹ See 'Ugandans Sue Government Over Oil Deals' by Rachel Cooper, The Telegraph, 5 January 2010. Available at <<http://www.telegraph.co.uk/finance/newsbysector/energy/oilandgas/6937546/Ugandans-sue-government-over-oil-deals.html>> (accessed 6 November 2014).

respectively were released by Platform, a United Kingdom based organisation.⁹² Based on Platform's analysis, these PSAs 'do not represent the good deal publically claimed by the government'.⁹³ Subsequently, a coalition of local Ugandan organisations also produced a negative assessment of the PSAs.⁹⁴ In August 2014, another foreign based organisation, Global Witness, released two PSAs signed by the government in February 2012,⁹⁵ as well as an analysis of these documents, which this time concludes that the government 'successfully negotiated more favourable financial terms'.⁹⁶ Be that as it may, it is only where the public has access to the official copies of the PSAs that accurate analysis of its content can serve as the starting point of public participation on all matters related to the oil prospecting process and the effective utilisation of the revenue generated for the socio-economic development of Uganda. This becomes even more compelling considering that Uganda's estimated oil reserves have now doubled.⁹⁷

4.8 Case study country three: Nigeria

In the absence of express judicial recognition of a constitutionally protected right of access to information, any attempt to explore the potential contribution of this right to socio-economic progress, which by itself is speculative, becomes an exercise bordering on academic futility. Nevertheless, it may be useful to indicate at this point,⁹⁸ that the absence of an express or (judicial recognition of an implied) constitutional guarantee of access to information has contributed largely to the mechanical application of the Nigerian Freedom of Information (FOI) Act as any other legislation. Thus, despite the centrality of

⁹² The documents are available on the Platform website <<http://www.carbonweb.org/showitem.asp?Article=375&parent=39>> (accessed 5 November 2014).

⁹³ 'Uganda's Contracts- a Bad Deal Made Worse'. Available at <http://www.platformlondon.org/carbonweb/documents/Ugandas_oil_contracts_A_Bad_Deal_Made_Worse_Tullow_Heritage.pdf> (accessed 5 November 2014).

⁹⁴ 'Contracts Curse: Uganda's Oil Agreements Places Profit Before People' Civil Society Coalition on Oil in Uganda', February 2010. Available at <<http://platformlondon.org/wp-content/uploads/2012/01/Contracts-Curse-Uganda-Platform-CSCO.pdf>> (accessed 5 November 2014).

⁹⁵ These PSAs are available at <http://www.globalwitness.org/ugandaoilcontracts/files/PSA_EA1A.pdf> and <http://www.globalwitness.org/ugandaoilcontracts/files/PSA_Kanywataba.pdf> (accessed 5 November 2014).

⁹⁶ 'A Good Deal Better? Uganda's Secret Oil Contracts Explained' Global Witness, September 2014. Available at <http://www.globalwitness.org/ugandaoilcontracts/files/Report_A_good_deal_better_low_res.pdf> (accessed 5 November 2014).

⁹⁷ 'Uganda Oil Bonanza Now Growing' News 24, 29 August 2014. Available at <<http://www.news24.com/Africa/News/Uganda-oil-bonanza-growing-20140829>> (accessed 5 November 2014).

⁹⁸ Chapter 4 focuses on the access to information laws of Nigeria, South Africa and Uganda as case studies.

access to information as a right which is necessary for the enforcement of other rights, its application in Nigeria, is devoid of its status as a human right.⁹⁹ As a result, the entire process of instituting actions for the enforcement of access to information and its adjudication by courts is executed as an ordinary court process as opposed to a human rights matter of constitutional status. Such recognition would in effect elevate access to information from its current status as a statutory right to that of a constitutional right and allow courts to take into consideration international human rights law, including the African Charter, in the interpretation and application of the FOI Act.

4.9 Conclusion

To demonstrate the utility of the constitutional right of access to information in advancing socio-economic progress, three case studies were undertaken. These case studies reveal that in granting the right of access to information in South Africa and Uganda, the preoccupation of courts was squarely on implementing the constitutional right of access to information and not whether the intended purpose of the application was the enforcement of any of the three so-called 'generations of rights'. What this shows is that the actual contribution of constitutional protection of access to information to socio-economic progress is equally dependent on the strategic use of the information once acquired and not merely the nature of the right sought to be enforced by the disclosure of the information. The success of such use is however influenced by other factors such as the constitutional recognition of the right sought to be enforced and the ability to galvanise broad-based awareness and support locally, and in some cases internationally, on the need for the State to act with regard to the information disclosed, and in so doing improve the relevant socio-economic condition.

These above-mentioned factors however reveal certain shortcomings of reliance on the constitutional protection on access to information for socio-economic progress.¹⁰⁰ By their

⁹⁹ There has been one case in which reference to section 39 was made in the enforcement of the FOI Act- *Yomi Ogunlola v Speaker Oyo State House of Assembly* (Unreported, Suit No. M332/12). However, this reference was *obiter dictum*, and in no way reflected in the order of the court. Moreover, the decision has since been overruled by the Federal High Court in a strict interpretation of the FOI Act and the legislative powers of federal and State governments under the Constitution.

¹⁰⁰ Rosenberg, G. (1991) *The Hollow Hope: Can Courts bring about Social Change?* Chicago University Press: Chicago; Maris, M and MacMahon, K. 'The Politics of Rights Revisited: Rosenberg, McCann and

very nature, constitutionally protected human rights require litigation for their enforcement where they have been or are likely to be violated by acts or omissions of the State or individuals.

Considering the reality in Africa that the vast majority of the population are poor, illiterate, generally lack awareness on constitutional rights and face substantial practical difficulties in accessing legal representation and accessing courts, navigating the complex world of constitutional litigation is thus left to civil society organisations with the necessary specialist knowledge and financial resources to do so on their behalf. If successful, these organisations must then map out and implement the needed advocacy to translate judicial decisions upholding the right of access to information into improved socio-economic conditions. Herein lies the need for simple and inexpensive systems for exercising the right of access to information that is accessible to ordinary people and is established by law.

Furthermore, Constitutions by their nature, at least with regard to human rights provisions, contain general 'declaratory principles' that States undertake to abide by, which must then ideally be translated into specific laws that address in detail the human right in question. Thus, while a constitutional provision on the right of access to information is essential to establishing a culture of openness through the free flow of information, it is insufficient to singlehandedly bring about the structural and systemic transformation from secrecy to openness within the public service and where applicable, private bodies. This, which is what every ATI law seeks to achieve, is the preoccupation of the following Chapter.

the New Institutionalism' in Schultz, D. (ed) (1998) *Leveraging the Law: Using the Court to Achieve Social Change*; An-Na'im, A. 'The Legal Protection of Human Rights in Africa: How to do More with Less' in Sarat, A and Kearns, T. (eds) (2001) *Human Rights: Concepts, Contests and Contingencies* University of Michigan Press: Ann Arbor 89.

CHAPTER FIVE: LEGISLATIVE PROTECTION OF ACCESS TO INFORMATION IN AFRICA

5.1 Introduction

In the last three decades, the world-wide push for transparency and accountability in governance has reached heightened levels.¹ This focus has been attributed to numerous factors such as the growth of the international media, the ‘technology boom’, issues of national security, and the ‘third wave of democratisation’.² In particular, the ‘third wave of democratisation’, which spurred on widespread constitutional and legislative reform across the world, brought about by a combination of external and internal factors,³ has had as one of its lasting effects, wider acceptance of the interconnection and interdependence between democratic governance and economic development.⁴

In pursuit of this ‘new discovery’ of the mutually reinforcing trilogy of democracy, good governance and human rights, on one hand, and economic development, on the other, the adoption of access to information (ATI) laws has increased rapidly in the last two decades. Between 1987 and 2007, the number of countries with ATI laws, rose from 13 to 75.⁵ Today, there are over 100 ATI laws across the world.⁶ In many countries, the

¹ See generally, Blanton, J. ‘The World’s Right to Know’ (2002) 131 *Foreign Policy* 50.

² Relly, J. and Sabharwal, M. ‘Perceptions of Transparency of Government Policy Making: A Cross-National Study’ (2009) 26 *Government Information Quarterly* 148.

³ See generally, Huntington, S. (1993) *The Third Wave: Democratization in the Late Twentieth Century* University of Oklahoma Press: Oklahoma. See also Schraeder, P. ‘Understanding the “Third Wave” of Democratisation in Africa’ (1995) 57 *Journal of Politics* 1160.

⁴ See generally, Papaioannou, E. and Siourounis, G. ‘Democratisation and Growth’ (2008) 118 *The Economic Journal*, 1520. See also Knack, S. (ed) (2003) *Democracy, Governance and Growth* University of Michigan Press: Ann Arbor; Sundaram, J.K. and Chowdhury, A. (eds) (2012) *Is Good Governance Good for Development?* Bloomsbury Academic: New York.

⁵ See, Callamard, A. ‘Towards a Third Generation of Activism for the Right to Freedom of Information’. Available at <<http://www.article19.org/pdfs/publications/mozambique-unesco-world-press-freedom-day.pdf>>

⁶ Note that there is no universal acceptance on the exact number of countries with access to information laws, due to the multiplicity of persons/organisations who have sought to produce this data, and their varied understanding of the requisite characteristics of an access to information law, properly so called. For a 2012 look at the multiple existing lists on access to information laws, see ‘93 countries have FOI regimes, most tallies agree’, available at <<http://www.freedominfo.org/2012/10/93-countries-have-foi-regimes-most-tallies-agree/>>. Between 2012 and 2015, an additional 10 countries, in respect of which there is no dispute as to their status as access to information laws have been adopted. As a result, it is generally accepted that there are now over 100 access to information laws globally.

adoption of ATI laws formed part of the transition to democracy or of the constitutional reform process, and in others, it was introduced as a tool to fight corruption, or to address health and environmental concerns, or in response to pressure from financial institutions and intergovernmental organisations' demands for accountability of national financial systems.⁷

In Africa, acceptance of the mutually reinforcing nature of democracy, governance and human rights, on the one hand,⁸ and socio-economic development, on the other,⁹ came with greater emphasis being placed by intergovernmental organisations, Western governments and international donor organisations on the importance of governmental transparency and accountability as a tool for fighting the corruption and underdevelopment which continued to cripple Africa.¹⁰

In analysing the root cause of the poor socio-economic development in sub-Saharan Africa despite its sustained intervention,¹¹ the World Bank in a 1989 report concluded that

⁷ Rellya, J. and Sabharwal, M. 'Perceptions of transparency of Government Policymaking: A cross-national study' (2009) 26 *Government Information Quarterly* 431.

⁸ Good governance is a much broader concept than democracy and in fact certain aspects of both concepts may not be mutually reinforcing as is commonly assumed or pronounced. As Rakner et al, have illustrated, while in building democracy, the dispersal of power among key governmental institutions is necessary, good governance often relies on the strengthening and consolidation of power by institutions as evidence of good governance. See Rakner, L et al, 'Democratisation's Third Wave and the Challenge of Democratic Deepening: Assessing International Democratic Assistance and Lessons Learned'. Working Paper 1, Research Advisory Project (RP-05-GG) of the advisory board of the Irish Aid, Working paper 1, August 2007. Available at <<http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opini-on-files/241.pdf>> (accessed 5 February 2015).

⁹ At the first annual Africa Governance Forum in 1997, for example, Mr Kingsley Amuako, then Executive Secretary of the United Nations Economic Commission (UNECA), stated, "In Africa, as elsewhere in the world, good governance fosters social and economic progress, which in turn helps sustain good governance". Available at <<http://www.un.org/en/africarenewal/114spgov.htm>> (accessed 24 February 2015).

¹⁰ For example, Article 9(3) of the Cotonou Agreement signed between the European Community and its Members States with the African, Caribbean and Pacific group of States in June 2000, stipulates that good governance 'shall underpin the domestic and international policies of the Parties and constitute a fundamental element' of the agreement. Furthermore, by the combined reading of Articles 9(2) and 96, the failure to observe human rights, democratic principles and rule of law could ultimately led to the imposition of sanctions against an erring partner State. Available at <<http://www.acp.int/sites/acpsec.waw.be/files/Cotonou2000.pdf>> (accessed 2 February 2015).

¹¹ In the mid-1980s, the World Bank introduced a series of initiatives to improve economic performance in sub-Saharan Africa. These initiatives included: external financing; structural adjustment and enhanced structural adjustment programmes; debt relief, dealing with social aspects of adjustment programmes and development; and dealing with long-term development problems. See generally 'The progress of Initiatives to benefit sub-Saharan Africa, Development Committee, Number 21, 1 January 2004, Available at

‘underlying the litany of Africa’s development problems is a crisis of governance’.¹² The report recognised that the achievement of sustainable economic development in sub-Saharan Africa was dependent not only on solid economic strategies but on the quality of governance,¹³ and called on African governments to go beyond ‘public finance, monetary policies, prices and markets’ to address other ‘fundamental questions’ such as governance.¹⁴

It was in this context that the concept of ‘good governance’ initially defined as ‘a public service that is efficient, a judicial system that is reliable and an administration that is accountable to the public’, was introduced as a solution to Africa’s developmental problems.¹⁵ Thereafter, the cultivation of good governance practices also described as ‘political conditionalities’, became a precondition for the World Bank and other international financial institutions to provide aid to Africa.¹⁶

<http://www-wds.worldbank.org/external/default/WDSPContentServer/IW3P/IB/2000/02/03/000178830_9810190158265/Rendered/PDF/multi_page.pdf> (accessed 2 February 2015).

¹² The 1989 World Bank Report on Sub-Saharan Africa ‘From Crisis to Sustainable Growth’. Available at <http://www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/1999/12/02/000178830_98101901364149/Rendered/PDF/multi0page.pdf> (accessed 2 February 2015).

¹³ See Eide, A ‘Human Rights Requirements to Good Governance’, Annex 1 in ‘Stocktaking on the Notion of Good Governance and Good Administration’ European Commission for Democracy through Law (Venice Commission) study no 470/2008, 8 April 2011.

This recognition came with a dilemma, as Article IV Section 10 of its Articles of Agreement, allows a consideration of strictly economic factors. It was necessary for the World Bank to attempt to influence political leadership indirectly, as Article IV Section 10 of its Articles of Agreement, prohibits a consideration of anything other than economic factors.

¹⁴ See Stein, H. ‘The World Bank and the Making of the Governance Agenda’. Available at <http://www.institutions-africa.org/trackingdevelopment_archived/resources/docs/PaperASSR-Amsterdam-October-09--Stein-Final2.pdf> (accessed 25 January 2015).

¹⁵ It should be noted however that the content of the report and subsequent ones initially referred only to ‘governance’ thereby omitting ‘good’. See World Bank 1989 Report (n 12 above) xii.

¹⁶ For example, at the inception of NEPAD, the commitment from the European Union and other developed nations to provide aid, increase foreign investment and the lift trade barriers was conditional on governance reform, including human rights in member States. See Smith B. (2007) *Good Governance and Development* Palgrave Macmillan: Hampshire 8. Similarly, the International Monetary Fund has relied on Article IV of its Statute regarding ‘negotiations for orderly exchange arrangements’ to require member States, including those in Africa, to implement good governance policies. See generally Article VIII, IMF Article of Agreement. Available at <<http://www.imf.org/external/pubs/ft/aa/index.htm>> (accessed 5 January 2015).

Perhaps in response to this changing emphasis, the initial preoccupation of the Organisation of African Unity (OAU)¹⁷ mainly with the fight for decolonisation and against neo-colonialism, and with the sovereignty of Member States to manage their political affairs and natural resources,¹⁸ subsequently gave way to 'respect for democratic principles, human rights,¹⁹ the rule of law and good governance'²⁰ by its successor, the African Union.²¹ Starting with the establishment of the New Partnership for Africa's Development (NEPAD),²² and the African Peer Review Mechanism (APRM),²³ the AU has sought to establish continent-wide standards on democracy and good governance as part of a holistic effort towards addressing human rights and development. These efforts have included the adoption of numerous treaties,²⁴ specifically requiring Member States to adopt ATI laws to combat corruption,²⁵ as a prerequisite for democracy and governance²⁶ and as an integral part of public service delivery.²⁷ Likewise, sub-regional

¹⁷ The Organisation of African Unity preceded the African Union as the regional inter-governmental body for Africa. The Charter of the Organisation of African Unity was adopted in Addis Ababa, Ethiopia on 25 May 1963 and came into force on 13 September 1963.

¹⁸ Paragraph 6 of the preamble to the OAU Charter speaks of the determination to 'safeguard and consolidate the hard-won independence as well as the sovereign and territorial integrity of our States, and to fight against neo-colonialism in all its forms'. Furthermore, article 2(d) of the OAU Charter lists as one of the purposes of the organisation, the eradication of all forms of colonialism.

¹⁹ For a detailed discussion of the impact of the transformation from the OAU to AU in Africa, see Murray, R. (2004) *Human Rights in Africa: From the OAU to the African Union* Cambridge University Press: Cambridge. See also Udombana, N. 'Can the Leopard Change its Spots? The African Union Treaty and Human Rights' (2002) 17 *American University International Law Review* 1177.

²⁰ Principle (m), Constitutive Act of the African Union.

²¹ The Constitutive Act of the African Union was adopted in Lome, Togo on 11 July 2000 and came into force on 26 May 2001. The inaugural meeting of the African Union was held in Durban South Africa in July 2002.

²² NEPAD was initially established as the New Africa Initiative (NAI) in July 2001. Subsequently, it was renamed NEPAD at the first meeting of the Implementation Committee in October 2001, in Abuja, Nigeria.

²³ As a follow-up to the establishment of NEPAD, the African Union established the African Peer Review Mechanism, as a voluntary mechanism to assess the implementation of NEPAD. The NEPAD Implementation Committee in June 2002 adopted the APRM Memorandum of Understanding The APRM Base Document, setting out the structure and process of the APRM, followed by a 'Memorandum of Understanding on the African Peer Review Mechanism, in March 2003, which States are required to sign to become part of the APRM review process. See generally, Bing-Pappoe, A. 'Reviewing Africa's Peer Review Mechanism: A Seven Country Survey', March 2010. Available at <http://www.pacweb.org/Documents/APRM/APRM_Seven_countries_March2010-E.pdf> (accessed 28 October 2015).

²⁴ These include the African Union Convention on Preventing and Combatting Corruption, the African Charter on Democracy, Elections and Governance, and the African Charter on Values and Principles of Public Service and Administration.

²⁵ See article 9 of the Africa Union Convention on Preventing and Combatting Corruption.

²⁶ See article 2(10) African Charter on Democracy, Elections and Governance.

²⁷ See article 6 of the African Charter on the Values and Principles of Public Service and Administration.

bodies, also known as Regional Economic Communities (RECs), such as the EAC,²⁸ ECOWAS²⁹ and SADC³⁰ have infused good governance and human rights standards into their originally purely 'economic' mandates,³¹ with ECOWAS still in the process of developing a Supplementary Act incorporating issues of access to information.³² Similarly, inter-governmental financial institutions such as the African Development Bank (ADB) have also developed policies regulating public access to information in their possession.³³

Despite this increased focus on access to information as a tool for democratic participation, good governance and accountability, ATI laws initially struggled to gain ground in Africa. Following the adoption of South Africa's Protection of Access to Information Act (PAIA) in 2000, the adoption of ATI laws initially struggled to gain ground.³⁴ However, the adoption of ATI laws has gradually gained momentum, with 18 countries in Africa having now adopted ATI laws.³⁵

²⁸ The East African Community was established in 2000 and comprises.

²⁹ The Economic Community of West African States was established in 1975 as initially as a sub-regional initiative for economic development, but has since expanded to set human rights and governance standards for its 15 Member States.

³⁰ The Southern Africa Development Community, previously referred to as the Southern Africa Development Coordinating Conference, was established in 1980 as a forum for the advancement of economic development in the region and comprises 15 Member States.

³¹ See for example article 3(b) EAC Treaty; Protocol ECOWAS Protocol on Democracy and Good Governance, A/SP1/12/01 adopted in December 2001; SADC Principle and Guidelines Governing Democratic Elections adopted in 1992, Protocol against Corruption adopted in 2001, Protocol on Gender and Development adopted in 2008.

³² The draft 'Supplementary Act for a Uniform Legal Framework on Freedom of Expression and Right to Information, was adopted by the Ministers of Information and Communication of ECOWAS in January 2011 but has failed to be adopted by the Assembly of Head of States and Government, which is required for it to have binding effect on its 15 Member States. See 'Free Expression Framework Adopted by ECOWAS Information Ministers'. Available at <http://www.ifex.org/west_africa/2012/03/14/regional_framework/> (accessed 21 March 2015). The draft Supplementary Act (2010) which largely deals with the right to freedom of expression, dedicates 4 articles to the right of access to information. The Draft Supplementary Protocol is available at <<http://www.freedominfo.org/2012/03/work-on-african-model-laws-still-under-way/>> (accessed 21 March 2015).

³³ See the ADB's Disclosure and Access to Information Policy of May 2012, which came into force in February 2013. Available at <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/Bank_Group_Policy_on_Disclosure_and_Access_to_Information.pdf> (accessed 21 March 2015).

³⁴ From January 2000 when PAIA was adopted to January 2010 only a total of five ATI laws had been passed by Angola, Ethiopia, South Africa, Uganda and Zimbabwe. However the laws of Angola and Zimbabwe have been severely criticised for falling short of regional and international ATI standards and in some respects, doing more to prevent access to information than to promote access.

³⁵ These are Angola (2002), Côte d'Ivoire (2013), Ethiopia (2008), Guinea (2012), Kenya (2016), Liberia (2010), Mozambique (2014), Niger (2011), Nigeria (2012), Rwanda (2013), Sierra Leone (2014), South

Against this background, this Chapter investigates the existing continental landscape on access to information, with a view to determining the extent to which such legislation conform with the internationally recognised principles on access to information and in that their potential to contribute to socio-economic progress. Specifically, the normative content and implementation of ATI laws in Nigeria, South Africa and Uganda are examined. This is so as to highlight the actual and potential contribution of ATI laws to socio-economic progress, as with constitutional guarantees of access to information and alternative generic frameworks on access to information.

5.2 Overview of access to information legislation in Africa³⁶

The newly democratic South Africa was the first African State to adopt an access to information law in February 2000, in order to give effect to the right of access to information as guaranteed by article 32(1) of the 1996 Constitution of South Africa.³⁷ By 2010, only 5 more countries-Angola,³⁸ Ethiopia,³⁹ Liberia,⁴⁰ Uganda,⁴¹ and Zimbabwe⁴² had adopted ATI laws, most of which fell short of the existing regional and international standards on access to information.⁴³ Since 2010 however, ten additional laws were adopted in quick succession in Côte d'Ivoire,⁴⁴ Guinea,⁴⁵ Mozambique,⁴⁶ Niger,⁴⁷

Africa (2000), South Sudan (2014), Sudan (2015), Togo (2016), Tunisia (2012), Uganda (2005) and Zimbabwe (2002). See annexure 4 for an overview of the key provisions of these laws.

³⁶ Note that the term 'access to information law' is used loosely to describe normative legislative frameworks providing a process to access information held by government and in some cases, private bodies. Thus, while it is appreciated that what exists in countries like Angola, Guinea, Niger and Tunisia may not be access to information laws properly so called, either because they rank lower than Acts of Parliament in the hierarchy of laws in the relevant State or are purely administrative frameworks or regulations, they are nevertheless treated as ATI laws because they essentially give effect to a general right of access to information, irrespective of their normative hierarchy in the relevant States.

³⁷ The Promotion of Access to Information Act was signed into law by President Mandela in February 2000 but only came into force on 9 March 2001, while 4 other sections (section 10, 14, 16 and 51) came into force on 15 February 2012.

³⁸ The Law on Access to Documents held by Public Authorities (2002).

³⁹ The Mass Media and Access to Information Proclamation (2008).

⁴⁰ The Freedom of Information Act (2010).

⁴¹ The Access to Information Act (2005).

⁴² The Access to Information and Protection of Privacy Act (2002).

⁴³ The law of Zimbabwe has received the most severe criticism not only for combining media and freedom of expression related issues with an ATI law, but mostly for doing more to restrict rather than promote and protect the right of access.

⁴⁴ Law on Access to Information of Public Interest (Law 2013-867 of 23 December 2013).

⁴⁵ Law on Access to Public Information, 2010 (Law 2010/004/CNT of 24 November 2010).

⁴⁶ The Law on Right to Information (2014).

⁴⁷ The Law on Access to Public and Administrative Documents (Law No 2011-22).

Nigeria,⁴⁸ Rwanda,⁴⁹ Sierra Leone,⁵⁰ South Sudan,⁵¹ Sudan⁵² and Tunisia,⁵³ in the next five years.⁵⁴ Togo and Kenya are the latest countries to adopt ATI laws.⁵⁵

In addition to the increased pace of the adoption of ATI laws, Africa has also witnessed a progressive strengthening of the normative content of these laws. While PAIA at the time of its adoption was recognised internationally as a progressive law, today, there are several other recently adopted laws on the continent which establish superior normative legal frameworks on access to information. This positive normative solidification is attributable largely to the development and adoption of the Model Law on Access to Information for Africa (Model Law) in February 2013. Though non-binding, the Model Law has influenced the normative content of subsequently adopted ATI laws and current ATI Bills on the continent.⁵⁶

A brief overview is now undertaken of the 18 access to information laws in Africa, with a view to providing an understanding of the variations in their normative content and the possible impact this has on their implementation.

⁴⁸ The Freedom of Information Act (2011).

⁴⁹ Law No 04/2013 Relating to Access to Information (2013).

⁵⁰ The Right of Access to Information Act (2013).

⁵¹ Protection of Access to Information Act (2013).

⁵² On 28 January 2015, the National Assembly of Sudan announced the adoption of an ATI law. See <<http://www.parliament.gov.sd/ar/index.php/site/getNewsbyId/66666820>>. However, the content and quality of this law remains unknown, due to its absence from the public domain and the secrecy surrounding the adoption process. See 'Sudan Passes Freedom of Information Law but Journalists Remain Weary'. Available at <<https://cpj.org/blog/2015/02/sudan-passes-freedom-of-information-law-but-journa.php>> (accessed 25 July 2015).

⁵³ Decree No 2011-41 on access to Administrative Documents of Public Authorities (2011).

⁵⁴ On 30 August 2015, the National Transitional Council of Burkina Faso adopted a law on 'The Right of Access to Information and Public Documents', which is yet to be signed into law by the country's interim President.

⁵⁵ On 10 March 2016, the Parliament of Togo adopted an ATI law, which has since been signed into law. See French text of 'Law Establishing Freedom of Information and Public Documentation'. Available at <<http://africafoicentre.org/index.php/foi-laws/190-togo-loi-acces-a-l-information>> (accessed 10 July 2016). President Uhuru Kenyatta signed into law the Kenyan ATI law on 4 September 2016. Available at <http://www.the-star.co.ke/news/2016/09/01/uhuru-signs-nine-bills-into-law-public-to-now-have-easy-access-to_c1412609> (accessed 8 September 2016).

⁵⁶ The author has first-hand knowledge of how the Model Law has influenced the ATI laws of Nigeria, Malawi and Mozambique and the drafting of ATI Bills in Ghana and Seychelles for example. This is as a result of her managing a project involving advocacy by the Special Rapporteur to these countries. The influence of the Model Law on the ATI laws of Rwanda and Sierra Leone are equally self-evident.

5.2.1 Categories of persons who can access

International and regional standards are clear that the right of access to information is to be enjoyed by every person in a State. Thus the Model Law allows for ‘every person’ to request for information.⁵⁷ While the laws of Angola,⁵⁸ Kenya,⁵⁹ Mozambique,⁶⁰ South Sudan⁶¹ and Uganda,⁶² do not conform to this principle as they apply to only citizens, all others do by granting the right of access to ‘any person’⁶³ ‘every person’⁶⁴ ‘all persons’⁶⁵ or ‘everyone’.⁶⁶

Zimbabwe’s ATI law is however peculiar, in that though applicable to ‘every person’, the words ‘every person’ is qualified to mean citizens, permanent residents, and holders of temporary employment, residency or study permits and expressly excludes any ‘mass media service’ or ‘broadcaster’ that is not registered under the Act or the Broadcasting Act respectively, and any foreign State.⁶⁷ It appears that this qualification of the term ‘everyone’ to expressly exclude States and the media, was to prevent the unintended consequences of critics of the ‘fast-track land redistribution programme’ which began in 2005 amid international condemnation, from to accessing information under the law.

5.2.2 Scope of application

At the time of the adoption of PAIA in 2000, access to information laws were typically concerned only with elaborating the procedure for the accessing of information held by public bodies.⁶⁸ PAIA however set a high standard for the continent from the onset, by expressly extending the application of the obligation to provide access to information to private bodies, albeit with less restrictive obligations in comparison with public bodies.⁶⁹

⁵⁷ Section 2(a) and (b).

⁵⁸ Article 2(2).

⁵⁹ Section 4.

⁶⁰ Article 14.

⁶¹ Section 6.

⁶² Section 5(1).

⁶³ Guinea (article 1); Niger (section 4); Nigeria (section 1(1)); South Africa (section 1)

⁶⁴ Rwanda (article 3); Sierra Leone (section 3); Zimbabwe section 5(3) (c) and (d).

⁶⁵ Côte d’Ivoire (article 3), Ethiopia (article 12(1)).

⁶⁶ Liberia (section 1.4(b)).

⁶⁷ Section 5(3)(c) and (b).

⁶⁸ For example, the Access to Information Act of Canada applies only to ‘government institutions’; the Freedom of Information Act of United Kingdom 2000, applies only to ‘public authorities’.

⁶⁹ See definition of public body in section 1, PAIA.

In addition, PAIA extended the meaning of public bodies beyond the traditional three branches of government and parastatals, to include any other institution exercising a power or performing a duty by virtue of the Constitution or exercising a public power or performing a public function by virtue of any legislation.⁷⁰ PAIA was also unique in recognising that an ordinarily private body could in some instances be treated as a public body and *vice versa* depending on the circumstances of each case.⁷¹

It seems however that African States were not inclined to following in the footsteps of South Africa, at least not initially, as the next few laws adopted chose to stick to a rigid application only to public bodies. Thus, the laws of Angola,⁷² Ethiopia,⁷³ Uganda⁷⁴ and Zimbabwe⁷⁵ apply only to 'Public bodies', and even more recent ones such as those of Côte d'Ivoire,⁷⁶ and Tunisia,⁷⁷ have adopted a similar, approach. However, with the growing reality of public services and functions being outsourced and the privatisation of State entities providing public services, ATI laws across the continent have increasingly been made applicable to ordinarily private bodies which perform public functions, provide public services or utilise public funds. Thus the laws of Guinea,⁷⁸ Liberia,⁷⁹ Mozambique,⁸⁰ Niger,⁸¹ Nigeria,⁸² Rwanda,⁸³ Sierra Leone,⁸⁴ and South Sudan all apply to private bodies in these three circumstances to varying degrees. More recently, however, countries like Sierra Leone and South Sudan have like South Africa, extended the application of their laws to private bodies *simpliciter*, though more narrowly in

⁷⁰ See definition of public body in section 1, PAIA.

⁷¹ See section 8(1) PAIA.

⁷² Article 3.

⁷³ Article 2(5).

⁷⁴ Sections 4 and 5(1).

⁷⁵ Section 5 and second schedule to the Act.

⁷⁶ Article 1.

⁷⁷ Article 2.

⁷⁸ Article 1.

⁷⁹ Sections 1(6)(b) and (c).

⁸⁰ Article 3.

⁸¹ By article 3, the law applies to private bodies performing public functions.

⁸² Section 30(3).

⁸³ By articles 3 and 2(4), the law applies to private bodies which 'carries any business in relation to public interest or to rights and freedoms of people'.

⁸⁴ Section 1.

comparison to public bodies.⁸⁵ This is perhaps yet another sign of the influence of the Model Law on more recently adopted ATI laws on the continent.

5.2.3 Primacy

International best practice is that an ATI law must supersede all other laws in terms of regulating access to information, subject only to the Constitution. Thus, the Model Law reflects this position.⁸⁶ Though PAIA set the pace by expressly incorporating strong a primacy provision to the effect that PAIA ‘applies to the exclusion of any provision of any other legislation’ that prohibits or restricts disclosure or is ‘materially inconsistent’ with its objectives or any of its provisions,⁸⁷ successive laws on the continent have not necessarily done the same. Other laws like those of Liberia⁸⁸ and Nigeria,⁸⁹ contain equally strong express primacy provisions, which in effect guarantee that provisions in other laws restricting access to information, cannot be relied upon as justification for non-compliance with the right of access as guaranteed by the relevant ATI laws. Most laws however contain no primacy provisions, thus leaving the ultimate application of provisions in other laws restricting access, to the determination of courts.⁹⁰ South Sudan however uniquely expressly established the ‘non-primacy’ of its law by providing that the Act

⁸⁵ To be applicable to private bodies in South Africa (section 50(1)(a)) and South Sudan (section 5), the information must be ‘required for the exercise or protection of any right’ while for Sierra Leone (section 2(2)), it must be ‘necessary for the protection or enforcement of any right’.

⁸⁶ See section 4 of the Model Law.

⁸⁷ Section 5 PAIA.

⁸⁸ Section 1(7) states:

Save for the Constitution, this Act is and shall be the primary law governing the right of access to information, including all matters related to request for and provision of information in Liberia. No administrative action, order or regulation contrary to, inconsistent with, or in derogation of this Act shall issue or be effective in Liberia, and this Act shall prevail over any and all subsequent inconsistent statutes, except a subsequent statute that specifically amends or repeals it.

⁸⁹ Section 1(1) provides:

Notwithstanding anything contained in any other Act, law or regulation, the right of any person to access or request information, whether or not contained in any written form, which is in the custody or possession of any public official, agency or institution howsoever described, is established

⁹⁰ The following laws are silent on primacy: Angola, Côte d'Ivoire, Ethiopia, Guinea, Mozambique, Niger, Sierra Leone, Rwanda, Tunisia, Uganda, and Zimbabwe.

applies 'without prejudice to the provisions of any other legislation that prohibits or restricts the disclosure of information.'⁹¹

5.2.4 Proactive disclosure

As required by regional and international standards, ATI laws provide systems for the proactive disclosure of information, albeit with varying degrees in terms of frequency and the categories of information which are required to be published. The Model Law for example provides quite an extensive list of categories of information which must be published upon the enactment of an ATI law and those which must be published annually.⁹²

While most laws on the continent require this information to be updated annually,⁹³ others are silent about frequency,⁹⁴ thus leaving this entirely up to each individual institution covered by these laws.⁹⁵ The categories of information to be proactively disclosed in the law of Sierra Leone are the widest by far,⁹⁶ while those of Ethiopia,⁹⁷ Guinea,⁹⁸ Rwanda,⁹⁹ South Africa,¹⁰⁰ South Sudan,¹⁰¹ Uganda¹⁰² also contain wide categories and are similar in content, perhaps pointing to the fact that the South Africa's PAIA which was the earliest of all five, was used as a guide by all others. Equally broad are the laws of Liberia¹⁰³ and Nigeria,¹⁰⁴ with that of Mozambique¹⁰⁵ considerably narrower. On the other end of the

⁹¹ Section 8(1).

⁹² See sections 7 and 8 of the Model Law.

⁹³ Ethiopia, Guinea, Nigeria, South Africa, South Sudan

⁹⁴ Côte d'Ivoire, Liberia, Mozambique, Niger, Rwanda, Sierra Leone. Note that Tunisia required such information to be published 'regularly'.

⁹⁵ Angola and Uganda, are unique in that their laws require proactive disclosure biannually and biennially respectively.

⁹⁶ Section 8-11.

⁹⁷ Article 13.

⁹⁸ Article 15.

⁹⁹ See article 3, Ministerial Order No. 006/07.01/13 of 19/12/2013, 'Determining in Details the Information to be Disclosed'.

¹⁰⁰ Section 14 and 15. Slightly less cumbersome proactive disclosure obligations are imposed on private bodies in sections 51 and 52.

¹⁰¹ Section 17

¹⁰² Section 7.

¹⁰³ Section 2.6. Note however that the provision is not exhaustive as it ends with 'other relevant information for dealing with the authority or monitoring its performance'.

¹⁰⁴ Section 2(1)-(3).

¹⁰⁵ Section 6(2).

scale are the laws of Angola¹⁰⁶ and Tunisia¹⁰⁷ which contain very narrow categories of information requiring proactive disclosure and the laws of Niger¹⁰⁸ and Rwanda¹⁰⁹ which contain very vaguely formulated and general proactive disclosure provisions. Zimbabwe's AIPPA is again unique, in that it is the only law on the continent which fails to provide for the proactive disclosure of information, thus lending credence to the general perception that the law does more to restrict than to allow access to information.

5.2.5 Procedure for request

The growing trend is for quick and simple procedures for accessing information which take into consideration the needs of the most vulnerable in the society. This position is reflected in the Model Law which not only allows for requests to be made orally or in writing, but also requires that illiterate persons and persons living with disabilities must be assisted in making their requests in a manner which meets their needs.¹¹⁰

Thus, increasingly, laws have moved away from the requirement that requests for access must of necessity be made in writing,¹¹¹ to allowing for oral requests for persons who are illiterate or living with disabilities.¹¹² Today, most laws not only allow for oral requests generally,¹¹³ but also allow for requests to be communicated telephonically or through

¹⁰⁶ By article 11, the information to be proactively disclosed are: all documents, decisions, circulars and guidelines related to its activities; lists of documents explaining legislation and describing administrative procedures.

¹⁰⁷ By article 5 only financial related information s to be proactively disclosed: statistical economic and social data including national accounts and statistical surveys; all information relating to public finances, the economy, debts and interests on debts, medium-term debt forecasts, management of public finances and all data related to the budgets at the national, regional and local level; and data on social programmes and services.

¹⁰⁸ Article 15 states: 'Departments producing or holding government information are required to provide registers indicating the information in their possession'.

¹⁰⁹ By article 7, public organs and private bodies are required to 'proactively disclose vital information to the public'. A Ministerial Order is to lay out the procedure for determining the costs such information, however the Ministerial Order is yet to be issued.

¹¹⁰ Section 13(1) and 14(2) of the Model Law.

¹¹¹ The laws of Angola (article 13), Côte d'ivoire (article 11), Niger (article 3(4) and (5), Tunisia (article 7); Zimbabwe (section 6) require requests to be made in writing.

¹¹² Ethiopia (article 14(1); South Africa (section 18(3); South Sudan (section 9(4); Uganda (section 11(3).

¹¹³ Guinea (article 10); Liberia (section 3(4)); Mozambique (article 15(4); Nigeria (section 3); Rwanda (article 2(1); Sierra Leone (section 3(4).

other means of communication,¹¹⁴ and with some making specific provisions to ensure that needs of illiterate persons and persons living with disabilities are catered for.¹¹⁵

The maximum time within which information requests are to be responded to varies widely on the content. Generally however, these time limits have also decreased over time, thus providing more possibilities for prompt responses. While majority of earlier laws required responses to be received between 20 and 30 days after requests,¹¹⁶ more recently enacted laws require information to be provided within 15 days.¹¹⁷ Even less time is given to respond to requests in certain cases such as where the life or liberty of an individual is in jeopardy¹¹⁸ or where the information is required by a journalist or a researcher.¹¹⁹

In terms of fees, it used to be that administrative fees could be charged for information requests over and above the actual cost of reproduction of the information if granted.¹²⁰ Increasingly however, most laws on the continent now allow for fees to be paid only in respect of the cost of reproducing or transcribing the relevant information.¹²¹ Some laws

¹¹⁴ Article 3(1) of the Rwanda law allows for requests to be made verbally, in writing, by telephone, internet or any other means of communication'; Section 3(3) of the Sierra Leonean Law allows for requests to be made by 'email, fax, post, telephone or by any other medium'; section 3.4 of the Liberia Law allows for requests to be made by email and 'by any alternative means'.

¹¹⁵ For example, section 3(3) of the Nigerian FOI Act allows illiterate persons or persons living with disabilities who cannot request for information orally or in writing to do so through a third party. Article 18 of Mozambique's RTI law allows for persons living with disability to exercise their right of access to information through gestures.

¹¹⁶ These include Côte d'Ivoire (30 days); Ethiopia (30 days); Guinea (20 working days); Liberia (30 days); Mozambique (21 days); South Africa (30 days); Uganda (21 days); Zimbabwe (20 days);

¹¹⁷ These include Angola (10 days); Niger (15 days); Nigeria (7 days); Rwanda (3 days); Sierra Leone (15 working days); South Sudan (7 days); Tunisia (15 days)

¹¹⁸ Ethiopia (10 days); Guinea (2 days); Rwanda (1 day); Sierra Leone (1 day); Tunisia (1 day).

¹¹⁹ Niger (5 days) and Rwanda (2 days).

¹²⁰ Article 5(2) of Angola's ATI law provides that fees must strictly correspond to 'the cost of the materials used and the service rendered'. By article 14(2) of Ethiopia's law fees include 'the actual cost of searching, collecting and duplicating'. By article 10 of the Rwandese law, 'the cost of making copies or sending the information may be charged'. In Sierra Leone section 6 provides that, 'only reasonable, cost-based amount for reproducing and sending information must be charged', while in South Africa, articles 22(6) and 54(6) require payment of an 'access fee' for the reproduction, postal fee and for search and preparation of the information'. In Uganda section 47(2) the fee payable is the actual cost of retrieval and reproduction of the information. In Zimbabwe, by section 7, fees are payable for 'obtaining access and 'any service rendered in connection with the provision of access

¹²¹ Guinea (article 14); Liberia (section 3(11)); Mozambique (article 17); Nigeria (section 8), Tunisia (article 15).

allow for fees to be waived where the request is for personal information or the requester is indigent.¹²²

5.2.6 Appeals

Principle IV(2) of the Declaration of Principles on Freedom of Expression in Africa (the Declaration) requires that a refusal to disclose information must be subject to appeal to an independent body and/or courts. The Model Law takes this further by establishing an internal appeal mechanism, with further appeal to an independent body and then a final appeal to courts as a last resort. However, very few laws in Africa provide these multi layered levels of appeal.¹²³ While most existing laws make courts the ultimate arbiter in cases of refusal of information,¹²⁴ many do not allow for internal appeal mechanisms within the public (or private) body,¹²⁵ or to independent quasi-judicial or administrative mechanisms.¹²⁶ Nigeria and Uganda are particularly unique, in that no appeal mechanism exist other than the institution of proceedings in a court of law, against refusal of information requests by public institutions.¹²⁷ This absence of a simple, quick and cost effective intermediary appeal mechanism which acts as a sort of buffer between public institutions and courts has negative implications for the implementation of ATI laws. As will be discussed in the case studies, litigation is an extremely complex, time consuming

¹²² Section 14(12) of Ethiopian law. See also section 12(4) South Sudanese law, which also waives fees where the public or private body to whom the request is made does not respond timeously or communicate with the requester.

¹²³ The few who do are: Côte d'Ivoire; Ethiopia; Liberia; Niger; Mozambique; Sierra Leone, and South Sudan.

¹²⁴ The Rwandese law is silent on appeals generally, though reference is made to the fact that the Ombudsman can 'provide for the information to be disclosed by a public and private organ', but nothing is said of appeals to courts. See article 4, Ministerial Order No. 006/07.01/13 of 19/12/2013. Zimbabwe's law also does not provide for appeals to courts.

¹²⁵ The following countries have no internal appeal mechanisms: Angola; Guinea; Niger; Nigeria; Rwanda, Uganda, Zimbabwe

¹²⁶ Although the Declaration and the Model Law envisage 'independence' in this context to mean a body which is separate and distinct from government, the identification of 'independent mechanisms' here merely enumerates countries which have a separate body other than the public institution to which the request was made to hear appeals against refusals to disclose. Countries without an independent appeal mechanism in this sense include: Nigeria, Tunisia, South Africa and Uganda.

¹²⁷ See section 20 of the FOI Act 2011. The 2012 Guidelines issued by the Attorney General (as amended in 2013), however recommends that public institutions establish an internal review process. See also sections 37 and 38 of Ugandan ATI.

and costly exercise, putting this method of enforcing rights far beyond the reach of the average citizen.

5.2.7 Exemptions

Providing categories of information exempted from disclosure is a must for every ATI law, not least because the right of access to information by its very nature requires the balancing of the right to privacy and personal information of individuals with the right of access, but also because States often hold information which must be kept secret to avoid jeopardising numerous legitimate interests. The problem however is that the legacy of secrecy which exists in most public institutions in Africa, often sees States seeking to exempt the widest possible categories of information, by crafting exemptions which are vaguely defined and broadly formulated, as opposed to international and regional standards requiring exemptions to be as narrowly and precisely defined as reasonably possible. Thus, the Model Law, for example, contains nine categories of narrowly defined exemptions.¹²⁸

Without exception, all ATI laws in Africa exempt information on grounds of national/ State security and privacy and/or personal information. An extreme case of a national security exemption is that of Ethiopia, which empowers the head of a public body to issue a certificate stating that the requested information relates to national security, national defence or international relations and disclosure of which would cause serious harm.¹²⁹ Such decision to issue a certificate is final and cannot be reviewed even by a court of law.¹³⁰

Other commonly listed exemptions are those relating to: professionally/legally privileged information; information relating to law enforcement or prevention or prosecution of crimes; trade secrets, or information relating to the commercial or economic interests of the State or third parties and information endangering the life, safety and security of individuals.

¹²⁸ See Part III (sections 27 -35).

¹²⁹ Article 35(1).

¹³⁰ Article 35(2).

In terms of narrowing the applicability of exemptions, the best practice which has emerged is ascribing varying thresholds to specific exemptions, in accordance with the potential level of harm which would be occasioned by the release of the information. Thus for example, the Model Law establishes lower thresholds such as 'is likely to endanger', 'would cause prejudice' for exempted categories of information such as those relating to law enforcement or the protection of life, health and safety of individuals. However, higher thresholds such as 'would cause substantial harm to' 'would cause substantial prejudice to' are reserved for more contentious exemptions relating to national security and defence, international relations and economic interest of the State.¹³¹

Of particular relevance in the application of exemption provisions of ATI laws, is the provision of a public interest override. Generally, this provision seeks to ensure that irrespective of exemption provisions, the paramount consideration in adjudicating requests for information is the public interest in the release in the information. While the ATI laws of Angola, Côte d'Ivoire, Guinea, Mozambique, Niger, Rwanda, Tunisia and Zimbabwe have no public interest override provisions, those of Ethiopia,¹³² Liberia,¹³³ Nigeria,¹³⁴ Sierra Leone,¹³⁵ South Africa,¹³⁶ South Sudan¹³⁷ and Uganda¹³⁸ do. In South Africa however, the framing of the provision makes it particularly difficult to apply, as the information in question must also contain evidence of substantial contravention or failure to comply with the law or an imminent and serious public safety or environmental risk.¹³⁹

Typically, public interest override provisions are worded in terms that information must be released 'when the public interest in the disclosure of the information outweighs the harm in question'.¹⁴⁰ The exception to this, are the laws of Ethiopia¹⁴¹ and Liberia¹⁴² which

¹³¹ See sections 31-32 of the Model Law.

¹³² Article 28.

¹³³ Section 4(8)(c).

¹³⁴ Nigeria's law is unique, in that public interest override provisions are integrated into all but two exemption provisions.

¹³⁵ Section 12(2).

¹³⁶ Sections 46 and 70.

¹³⁷ Section 22.

¹³⁸ Section 43.

¹³⁹ See sections

¹⁴⁰ Section 46 of the Promotion of Access to Information Act of South Africa.

¹⁴¹ Article 28.

¹⁴² Section 4(8)(c).

frames its public interest provision in the reverse. The Model Law also follows this trend by providing ‘the harm that would result from the release of the information demonstrably outweighs the public interest in the release of the information’.¹⁴³ In so doing, these ‘reverse public interest override provisions’ seek to emphasise that in all cases the presumption ought to be that the release of the information is in the public interest, thereby shifting the burden of proving that the overriding weight of the harm necessitates the non-disclosure of information. This framing is however yet to be emulated by States.

5.2.8 Oversight mechanism

To ensure effective implementation of its provisions, any legislative framework on ATI, requires the establishment or designation of an appropriate body or institution to oversee this role. Such institution must be independent and provided with the necessary powers to enable it play its role ensuring effective implementation.¹⁴⁴

Generally, these powers fall under three broad categories of protection, monitoring, and promotion.¹⁴⁵ Protection powers relates to the powers, which ideally should be akin to that of a quasi-judicial body, to investigate and make binding decisions relating to requests for information.¹⁴⁶ Monitoring powers allows the oversight mechanism to ensure compliance on issues such as proactive disclosure of information, submission of annual reports to the oversight mechanism, publication of information manuals and general powers to audit compliance with all obligations under the law.¹⁴⁷ Promotion powers relate to the powers of the oversight mechanism in terms of generating awareness and educating the public about the law, as well as ensuring continued training of institution to which the law applies.¹⁴⁸

On the continent, the establishment of independent with the necessary powers and resources to effectively implement ATI laws remains a challenge. Beginning with South Africa which vested an already existing mechanism- the South African Human Rights

¹⁴³ see section 25 of the Model Law.

¹⁴⁴ See sections 53-57 of the Model Law.

¹⁴⁵ See Model Law, Part V, Divisions 3,4 and 5.

¹⁴⁶ Sections 75-82 of the Model Law.

¹⁴⁷ Sections 64-69 of the Model Law.

¹⁴⁸ Section 62 of the Model Law.

Commission (SAHRC) with the oversight responsibilities under PAIA, many States such as Ethiopia,¹⁴⁹ Guinea,¹⁵⁰ Mozambique,¹⁵¹ Niger,¹⁵² Nigeria,¹⁵³ Rwanda,¹⁵⁴ Tunisia,¹⁵⁵ and Uganda¹⁵⁶ have followed suit. However, in countries like Angola,¹⁵⁷ Côte d'Ivoire,¹⁵⁸ Liberia,¹⁵⁹ and Sierra Leone,¹⁶⁰ the trend has been to establish an entity comprising either a single individual or group of individuals, supported by a staff compliment, for the sole purpose of overseeing the implementation of ATI laws. Zimbabwe's case is however slightly different in that the Zimbabwe Media Commission is established both as a media regulatory body and with solely promotional powers in relation to the ATI aspects of AIPPA.¹⁶¹

While the adoption of the Model Law has brought with it a substantial improvement in the quantity and quality of access to information laws on the continent, as discussed in relation to constitutional guarantees on access to information, a law is only as good as its effective implementation. Case studies from South Africa, Nigeria and Uganda illustrate in practical terms the experiences with the implementation of ATI laws in general.

¹⁴⁹ The Ombudsman is designated by articles 31-33.

¹⁵⁰ While the Ombudsman by article 18 is empowered to deal with administrative appeals relating to refusals to disclose information, the National Human Rights Commission is also by article 20 empowered to ensure the exercise and enjoyment of the right of access to information.

¹⁵¹ The State Archives National Information System and the Ombudsman appear to share the oversight role in Mozambique, although the exact functioning is unclear. The only reference to oversight functions is in article 42 of the Law, which provides that that the Governing Body of the State Archives National Information System submits an annual report on the implementation of the Act to the Ombudsman, for inclusion in the annual report of the Ombudsman to Parliament.

¹⁵² The Ombudsman is by article 28, the designated institution to oversee the implementation of the law.

¹⁵³ By section 29(6) the Attorney-General is empowered to ensure compliance by all public institutions with the Act.

¹⁵⁴ Article 18 requires the Ombudsman to 'particularly monitor the enforcement of the law'.

¹⁵⁵ Tunisia does not expressly vest implementation of its 'Decree Loi' in an existing mechanism. Rather, it provides no special mechanism for redressing refusal of access to information, other than an internal appeal to the head of the public body, followed by an appeal to the administrative court by virtue of article 19.

¹⁵⁶ The Minister of Information is by section 43 tasked with making regulation for the implementation of the Law. However, no specific protection or promotion powers are provided.

¹⁵⁷ Article 19 establishes a 7 member Monitoring Commission only with promotional but with no protection or compliance powers.

¹⁵⁸ A Commission for Access to Public Interest Information and Documents Public (AIHRC) is established by article 19, with strong protection powers.

¹⁵⁹ By sections 5(1) and 5(2), an Independent Information Commissioner with strong protection, promotion and monitoring powers is established.

¹⁶⁰ By section 32(2), a Commission comprising 5 members is established with strong protection, promotion and monitoring powers.

¹⁶¹ See section 42(1) of AIPPA.

5.3 Case study country one: Nigeria

5.3.1 Background to the development of the Freedom of Information Act 2011

The eighteen-year campaign for the adoption of the Nigerian Freedom of Information law, which began during the regime of former military ruler, General Sani Abacha, is a remarkable lesson in perseverance. The first attempt at developing an access to information law for Nigeria began as far back as 1993, when two Civil Society Organisations, Media Rights Agenda (MRA), Civil Liberties Organisation (CLO), and the national journalist association, the Nigerian Union of Journalists (NUJ), agreed on the need for the development of a law guaranteeing 'the right to be informed about administrative documents' as a corollary of the right to freedom of expression.¹⁶²

In 1994, a draft Access to Official Documents was produced by taking into account discussions between these three organisations and international best practice under the leadership of CLO.¹⁶³ This draft was subjected to extensive discussions at a two-day stakeholder workshop in March 1995, after which a second draft was developed and subsequently forwarded to the Minister of Information as well as the Minister of Justice and Attorney General. At a March 1999 meeting on Media Law Reform in Nigeria organised by MRA and Article 19, the second draft was further discussed and substantially revised.

With the return of Nigeria to civilian rule in May 1999, the campaign for the adoption of an ATI law regained momentum when the newly democratically elected President, Olusegun Obasanjo, signified his intent to present an anti-corruption Bill to the National Assembly (Parliament) for consideration.¹⁶⁴ Sighting an opening, MRA wrote to the President in June 1999, stating that the transparency and accountability which government sought to achieve through the adoption of an anti-corruption law, was best complemented by the

¹⁶² 'Campaigning for Access to Information in Nigeria: A Report of the Legislative Advocacy Programme for the Enactment of a Freedom of Information Act, 6. Available at <<http://www.foicoalition.org/PDF%20Files/Campaign%20for%20Access%20to%20Information.pdf>> (accessed 25 August 2015).

¹⁶³ The collation of international best practice and the original framework for the Bill was developed by Chidi Odinkalu, while the actual drafting was undertaken by Tunde Fagbohunlu, both of CLO. This draft was subsequently vetted by late Bankole Aluko. See Odinkalu, C. 'Nigeria's Freedom of Information Law: How Friends Launched a Movement'. Available at <<https://www.opensocietyfoundations.org/voices/nigeria-free-dom-information-law-how-friends-launched-movement>> (accessed 25 August 2015).

¹⁶⁴ Campaigning for Access to Information in Nigeria (n 161 above) 11.

adoption of an access to information law. MRA thus urged the simultaneous tabling of the access to information Bill in the National Assembly by the President. However President Obasanjo declined to engage with legislators on the matter, instead advising MRA to forward its draft ATI Bill to the National Assembly directly.¹⁶⁵

Led by MRA, the coordinating organisations began an intensified advocacy campaign, aimed at generating broad based support for the Bill within civil society and more importantly within the National Assembly. As part of this campaign, letters were written to all members of the National Assembly and several formal and informal meetings were held with high-ranking members of both legislative chambers seeking support for the adoption of the Bill.¹⁶⁶ There was a media campaign involving articles in newspapers and appearances on several television shows to discuss the Bill.¹⁶⁷

Ultimately, these advocacy efforts paid off. In August 1999, the Bill was sponsored into the lower house by three members of the House of Representatives,¹⁶⁸ and published in the government gazette on 8 December 1999.¹⁶⁹ However, the Bill failed to make progress beyond the 'committee stage', during the term of that Parliament (from 1999 to 2003).¹⁷⁰

In the next term of Parliament (2003 to 2007) considerable progress was made. The Bill was passed by both houses of the National Assembly.¹⁷¹ However, when the adopted law was forwarded to President Obasanjo, he stalled. First he denied having received the text, and when he eventually acknowledged its receipt, he exercised his veto power by refusing to sign it into law.¹⁷²

¹⁶⁵ As above.

¹⁶⁶ Campaigning for Access to Information in Nigeria (n 161 above) 30-37.

¹⁶⁷ Campaigning for Access to Information in Nigeria (n 161 above) 37.

¹⁶⁸ They are Honourable Tony Anyanwu, Honourable Nduka Irabor and Honourable Sonny Ugokwe.

¹⁶⁹ Federal Republic of Nigeria Official Gazette, No. 91, Vol. 86 of 3 December 1999. Available at <<http://www.foicoalition.org/PDF%20Files/FOI%20Official%20Gazette.pdf>> (accessed 25 August 2015).

¹⁷⁰ Freedom of Information Act Signals Consolidation of Nigeria's Democracy' Open Society Justice Initiative Press Release, 31 May 2011. Available at <<https://www.opensocietyfoundations.org/press-releases/freedom-information-act-signals-consolidation-nigeria-s-democracy>> (accessed 27 August 2015).

¹⁷¹ See Odinkalu, C. 'Nigeria's Freedom of Information Law: How Friends Launched a Movement' (n 162 above)

¹⁷² As above.

With the departure of President Obasanjo, and the coming into office of the sixth Parliament in 2007, the campaign for the adoption of an FOI law garnered new momentum. The Bill was re-introduced in the House of Representatives by Abike Dabiri in November 2007.¹⁷³ However, after three years of persistent refusal to allow consideration of the Bill,¹⁷⁴ many openly expressed pessimism at the prospects of the adoption of a Freedom of Information Law in Nigeria.¹⁷⁵ This pessimism was fuelled by public statements by numerous law makers linking the successful passage of the Bill to stronger restrictions on media,¹⁷⁶ thereby perpetuating the incorrect notion that access to information is a right solely for the media as opposed to ordinary citizens.

With parliamentary elections and the end of the parliamentary session looming, and increasingly vocal support by the Minister of Information, Labaran Maku, for the passage of the Bill,¹⁷⁷ the House of Representatives unanimously passed the FOI Bill on 24 February 2011.¹⁷⁸ On 16 March 2011, the Senate passed a different version of the Bill into law, thus requiring the establishment of a joint committee comprising six parliamentarian each from both houses to harmonise the two versions of the Bill.¹⁷⁹

While the version of the House of Assembly was widely accepted, that of the Senate which was significantly watered down and potentially problematic, became the subject of severe criticism from civil society campaigners, the media and observers. Notably, the

¹⁷³ See Nyam, P. 'Reps Throw Out FOI Bill' Leadership Newspaper, 4 June 2008. Available at <<http://nsrkt.blogspot.co.za/2008/06/rep-throw-out-foi-bill-nigeria.html>> (accessed 4 September 2015).

¹⁷⁴ As above.

¹⁷⁵ See for example 'FOIA Prospects in Nigeria Called Grim'. Available at <<http://www.freedominfo.org/2010/08/foia-prospects-in-nigeria-called-grim%E2%80%99/>> (accessed 27 August 2015).

¹⁷⁶ See for example 'Nigeria Legislator Blames Media for Holding up FOI Bill'. Available at <<http://www.freedominfo.org/2010/09/nigerian-legislator-blames-media-for-holding-up-foi-bill/>> (accessed 27 August 2015). See also 'Nigeria Senate President Says No 2010 Action on FOI' Available at <<http://www.freedominfo.org/2010/12/nigerian-senate-president-says-no-2010-action-on-foi/>> (accessed 27 August 2015).

¹⁷⁷ See 'Nigerian House Votes to Pass FOI Legislation'. Available at <<http://www.freedominfo.org/2011/02/nigerian-house-votes-to-advance-foi-legislation/>> (accessed 28 August 2015). See also 'Nigerian House Member Pledges Action on FOI Bill'. Available at <<http://www.freedominfo.org/2011/01/nigerian-house-member-pledges-action-on-foi-bill/>> (accessed 28 August 2015).

¹⁷⁸ See 'Nigerian House Passes FOI Bill Without Opposition'. Available at <<http://www.freedominfo.org/2011/02/nigerian-house-passes-foi-bill/>> (accessed 28 August 2015). See also 'House of Representatives Passes the FOI Bill' Freedom of Information Coalition. Available at <<http://foicoalition.org/news/2011/housepassesfoib2011.htm>> (accessed 28 August 2015).

¹⁷⁹ See 'Senate Passes FOI Bill, Sets up Conference Committee'. Available at <<http://foicoalition.org/news/2011/senateharmonisesfoib2011.htm>> (accessed 27 August 2015).

Senate's version included a provision requiring journalists to disclose their sources.¹⁸⁰ More specifically,¹⁸¹ the Senate's version restricted the application of the Bill only to citizens, expunged the application of the public interest ride proviso on exempted information, substantially weakened the whistle-blower protection, and deleted very important progressive provisions of the Bill.¹⁸²

Fortunately, the final harmonised Bill produced by the Joint Committee on 19 May 2011, addressed all the issues occasioned by the Senate's version of the Bill by largely adopting that of the lower house,¹⁸³ and a few days later, both Houses separately adopted the harmonised Bill on 24 May.¹⁸⁴ One day after the Bill was delivered to him by the Clerk of the National Assembly,¹⁸⁵ and 18 years after the first draft of the FOI Bill was developed, the Freedom of Information Act was signed into Law on 28 May 2011 by President Goodluck Jonathan.¹⁸⁶

5.3.2 Overview of the Freedom of information Act 2011

5.3.2.1 Purpose of Act

The 'introduction' to the Act,¹⁸⁷ summarises the threefold aim of the act as to 'make public records and information more freely available; provide for public access to public records and information, and protect serving public officers from adverse consequences of

¹⁸⁰ See 'Sources Disclosure Clause in FOI Bill Riles Nigerian Press' Available at <<http://www.freedominfo.org/2011/03/source-disclosure-clause-in-foi-bill-riles-nigerian-press/>> (accessed 28 August 2015).

¹⁸¹ See 'Freedom of Information Bill 2011, Recommendations to the Conference Committee'. A summary of recommendations by Right to Know Nigeria. Available at <<http://r2knigeria.org/index.php/foi-campaigns?download=21:recommendations-to-the-conference-committee-on-foi-bill-2011>> (accessed 30 August 2015).

¹⁸² These included the provision obviating the need for a requester to indicate 'specific interest' in information requested, the provision requiring notification to the requester denying access and giving reasons for the denial and the section of the Act under which the denial is made.

¹⁸³ See 'NASS Conference Committee Harmonises FOI Bill', Freedom of Information Coalition. Available at <<http://foicoalition.org/news/2011/nasscommharmonisesfoib.htm>> (accessed 28 August 2015).

¹⁸⁴ See 'Nigerian Parliament Adopts Harmonised FOI Bill', Freedom of Information Coalition. Available at <<http://foicoalition.org/news/2011/nassadoptsfoib.htm>> (accessed 28 August 2015).

¹⁸⁵ See 'Jonathan Signs Freedom of Information Law' Available at <<http://saharareporters.com/2011/05/31/jonathan-signs-freedom-information-law>> (accessed 4 September 2015).

¹⁸⁶ 'At Last, Jonathan Signs FOI Bill into Law' Vanguard Newspaper, June 2011. Available at <<http://www.vanguardngr.com/2011/06/at-last-jonathan-signs-foi-bill-into-law/>> (accessed 4 September 2015).

¹⁸⁷ Though not specifically titled 'objectives' or 'purpose', the opening sentence of the Act summarises its purpose.

disclosing certain kinds of official information without authorisation’ and also to establish procedures for the achievement of these purposes.

5.3.2.2 Primacy over other legislation

A unique feature of the Nigerian FOI Act is the emphatic declaration of the primacy of the Act in the opening words of its first provision. Section 1(1) of the Act provides that ‘Notwithstanding anything contained in any other Act, law or regulation, the right of any person to access or request information, whether or not contained in any written form, which is in the custody or possession of any public official, agency or institution however described, is established’. In effect, the FOI Act nullifies any provisions of conflicting legislation, to the extent of the inconsistency.

Furthermore, the combined effect of sections 27(2) and 28 is that the FOI Act is the paramount legislative authority on the disclosure of information, such that it allows the disclosure of information which would otherwise have been prohibited under the provisions of the Official Secrets Act, the Criminal Code of the FOI Act or any other similar restricting access to information.

5.3.2.3 Scope of application

The Act guarantees ‘every person’ and not only citizens the right to request information, from public institutions.¹⁸⁸ Public institutions are broadly defined to include¹⁸⁹ ‘any legislative, executive, judicial, administrative or advisory body of the government, including boards, bureau, committees or commissions of the State, and any subsidiary body of those bodies, including but not limited to committees and sub-committees, which are supported in whole or in part by public funds or which expends public funds and private bodies providing public services, performing public functions or utilising public funds.’¹⁹⁰

5.3.2.4 Proactive disclosure

Public institutions are required to proactively publish the following categories of information: description of the organisation and its responsibilities; a list of classes of

¹⁸⁸ Section 1(1).

¹⁸⁹ Section 30(3).

¹⁹⁰ See *Okoi Obono-Obla v CCEC Nigeria Ltd*, Motion No. FCT/HC/M/34/2013.

records in its possession and manuals used by employees in performing their functions; description of documents containing decisions, opinions and orders of the institution; a list of applications for grants or permits, reports by independent contractors and contracts between the institution and other institutions or private entities; and the details of the officer of the institutions to whom applications can be made under the Act.¹⁹¹ Furthermore, public institutions are required to update and review these categories of information periodically and whenever changes occur.¹⁹² Failure of a public institution to comply with proactive disclosure provisions of the Act entitles the institution of proceedings to compel compliance.¹⁹³

In addition to these general proactive disclosure requirements, the FOI Act also imposes proactive disclosure obligations in respect of annual reports on the implementation of the Act. Specifically, each public institution is required to make available to the public, via computer, telecommunications or any other electronic means, their annual reports submitted to the Attorney General.¹⁹⁴ In addition, the Attorney General must also publish the same annual reports of public institutions, 'in hard copies, online and also at a single electronic access point'.¹⁹⁵

5.3.2.5 Procedure for access

Requests can be made in writing or orally,¹⁹⁶ and in the case of persons who are illiterate or leaving with disabilities, through a third party.¹⁹⁷ A request must be responded to in writing by the authorised official within 7 days, granting the request,¹⁹⁸ refusing the request,¹⁹⁹ or transferring the request to the appropriate public or private entity (within 3 but no later than 7 days of receipt),²⁰⁰ or extending the time by an additional 7 days.²⁰¹

¹⁹¹ Section 2 (1)-(3).

¹⁹² Section 2(5).

¹⁹³ Section 2(6).

¹⁹⁴ Section 29(2).

¹⁹⁵ Section 29(3).

¹⁹⁶ Section 4.

¹⁹⁷ Section 3.

¹⁹⁸ Section (4)(a).

¹⁹⁹ Section (4)(b).

²⁰⁰ Section 5.

²⁰¹ Section 6.

No fees are payable other than the 'standard charges for document duplication and transcription fees'.²⁰² Furthermore, requesters need not indicate a 'specific interest in the information being applied for'.²⁰³

5.3.2.6 Exempted information

The following categories of information are exempted from disclosure: information which may be injurious to the conduct of international affairs and defence;²⁰⁴ information collected for administrative or law enforcement purposes, or which may injure the security of penal institutions or facilitate the commission of an offence;²⁰⁵ personal information;²⁰⁶ trade secrets and commercial or financial information of a third party;²⁰⁷ legal, medical, journalistic, and all other professionally privileged documents;²⁰⁸ research papers;²⁰⁹ information utilised in administering academic examinations or determining qualification for a license or employment; building plans yet to be constructed, and information identifying library users.²¹⁰ The burden of proof that an exemption is applicable rests on the public institution.²¹¹

These seven categories of exempted information can be divided broadly into discretionary and mandatory exemptions. In terms of discretionary exemptions, public institutions are allowed to adjudicate applications for exempted information on a case by case basis, based on surrounding circumstances,²¹² while mandatory exemptions gives no flexibility to public institutions in this regard.²¹³ A distinction can also be made between qualified exemptions,²¹⁴ and absolute exemptions.²¹⁵ While qualified exemptions require an assessment of whether the requested information meets the relevant threshold of 'may, 'could reasonably be expected to' or 'would' cause harm to the activity or purposes

²⁰² Section 8.

²⁰³ Section 1(2).

²⁰⁴ Section 11.

²⁰⁵ Section 12.

²⁰⁶ Section 14.

²⁰⁷ Section 15.

²⁰⁸ Section 16.

²⁰⁹ Section 17.

²¹⁰ Section 19.

²¹¹ *PPDC v Minister of FCT and Another*. Unreported case FCT/HC/CV/M/3057/13,

²¹² These include sections 11, 12, 16, 17, 19.

²¹³ These include sections 16 and 17.

²¹⁴ These are contained in sections 11, 12, 14, 15 and 19.

²¹⁵ These are contained in sections 15(2), 17 and 17.

specified in the exemption, and if so, the public interest override is applied to weigh the benefits of disclosure against its potential harm, the absolute exemptions require no such assessment or application of the public interest override.²¹⁶

5.5.2.7 The public interest override

Unlike most other ATI laws which provide for omnibus public interest override provisions, FOIA embeds in each section defining an exemption, similarly worded public interest override provisions to the effect that 'notwithstanding anything contained in this section, an application for information shall not be denied where the public interest in disclosing the information outweighs whatever injury the disclosure would cause.'²¹⁷

This approach is clearly borne out of experiences with the application of public interest override in existing ATI laws, below highlighted in the discussions on South Africa and Uganda.²¹⁸ Generally, the experience has been that public institutions routinely ignore the application of the public interest override. Thus, rather than a two-tiered approach of first determining if an exemption applies and then proceeding to apply the public interest override, once it is believed (rightly or wrongly) by an official that a specific exemption is applicable, the request is denied. By including the text of the public interest override provision in each section dealing with exemptions, however, an official seeking to rely on an exemption is more clearly confronted with the need to apply the override in making a decision. As will be seen, this approach has not necessarily guaranteed the expected consideration of the public interest override by public institutions in applying exemptions.²¹⁹

5.3.2.8 Appeals

Any requester denied access to the requested information can apply to the High Court for a review of such denial within 30 days or such time as the court may allow. Such application is to be heard and determined summarily.²²⁰ In any application before it, the

²¹⁶ See *Boniface Okezie v CBN*, Suit No. FHC/L/CS/494/2012.

²¹⁷ While the exemptions contained in sections 11, 12 and 19 are identical, those contained in sections 14 and 15 are worded slightly differently to accurately define the exemption.

²¹⁸ See pages 46 and 62 respectively.

²¹⁹ The application of the public interest override is discussed below in the overview of the implementation of FOIA.

²²⁰ Sections 20 and 21.

Court is empowered to examine any information which is the subject matter of the proceedings with a view to making a decision on the case before it.²²¹ In doing so, the Court is to take the necessary precautions to prevent the disclosure of the information in dispute.²²²

5.3.2.9 Oversight mechanism

The Attorney-General is conferred the 'oversight responsibility' of ensuring the compliance of all public institutions with the Act.²²³ In particular, the Attorney General is required to develop reporting and performance guidelines for annual reports to be submitted by all public institutions²²⁴ and based on annual reports received from these public institutions,²²⁵ must itself submit annual reports to the National Assembly on the implementation of the law by public institutions.²²⁶ This oversight responsibility of the Attorney General is shared with the National Assembly viz-a-viz the establishment of the Committee on Government Reform Oversight in the House of Representatives and the Committee on Government Affairs and the Judiciary of the Senate.²²⁷

5.3.3 Overview of the implementation of the Freedom of Information Act

An assessment of the implementation of the FOIA over four years after its adoption, reveals a mixed bag of results. While there has been a deluge of litigation of the FOI Act, compliance with the Act remains low, as with the low level of public awareness around the existence and usefulness of the Act. A brief assessment of this is undertaken.

5.3.3.1 'Retroactive' operation of the Act

The FOI Act, like other ATI laws, does not expressly provide for its application to information created prior to the coming into force of the Act. As a result, conflicting decisions have been made by Nigerian courts. The Federal High Court in *LEDAP v Clerk National Assembly*,²²⁸ granted access to salaries and emoluments to members of the

²²¹ Section 22.

²²² Section 23.

²²³ Section 29(6).

²²⁴ Section 29(1) and (5).

²²⁵ Section 29(1).

²²⁶ Section 29(7).

²²⁷ Section 29(4).

²²⁸ Unreported, FHC/ABJ/CS/805/2011.

National Assembly dating back from June 2007, and in *Boniface Ekezie v CBN*,²²⁹ the Federal High Court granted access to information from the Central Bank of Nigeria about the assets forfeited by the former chair of a Bank who pled guilty to fraud in 2010. In both instances, the relevant documents came into being before the adoption of the FOI Act.

However, in *Incorporated Trustees of the Citizen Assistance Centre v Honourable Adeyemi Kuforiji and Lagos State House of Assembly*,²³⁰ the High Court held that the FOI Act is not expressly retroactive, and can thus not be applied to information created before its adoption. Again in *Congress for Progressive Change v Independent National Electoral Commission*,²³¹ the court also dismissed an application for judicial review of the non-disclosure of information related to the 2011 elections, created before the coming into force of the Act.

It is submitted that the application by courts of the principle of non-retroactivity is an unduly rigid and incorrect interpretation and enforcement of the ATI Act. This is particularly so, as the principle of non-retroactivity is ordinarily applicable in criminal law and operates to protect accused persons from culpability for acts committed prior to being established as an offence in any written law.²³² It is certainly in the context of criminal law that the Constitution of Nigeria prohibits retroactivity.²³³

Furthermore, a careful interpretation of the definition of 'information' to include 'all records documents and information' and 'public record or document' to mean 'a record in any form having been prepared or having been or being used', indicates that the date on which the information is created is an irrelevant consideration in refusing disclosure under the Act.²³⁴ This is more so, as the date of the coming into force of the Act does not

²²⁹ FHC/L/CS/494/2012.

²³⁰ *Incorporated Trustees of the Citizen Assistance Centre v Honourable Adeyemi Kuforiji and Lagos State House of Assembly*, Suit No. ID/211/2009, decided in March 2012.

²³¹ Unreported, FHC/ABJ/CS/766/2012.

²³² See generally, Popple, J. 'The Right to Protection From Retroactive Criminal Law: The History of the Principle of Non-Retroactivity' (1989) 13 *Criminal Law Journal* 251-262.

²³³ Section 4(9) of the Constitution in setting out the legislative powers at the federal and state level, prohibits the National Assembly and the House of Assembly of states respectively from making laws with retrospective effect, 'in relation to any criminal offence whatsoever'. Similarly, section 36(12) in the 'Bill of Rights' provides that '... a person shall not be convicted of a criminal offence unless that offence is defined and the penalty thereof prescribed in a written law'.

²³⁴ See section 31 of the FOI Act.

materially affect the availability or otherwise of the information requested and even where it does due to loss or destruction of 'old' information, the Act does not compel the disclosure of information which does not exist. More importantly release of such information is unlikely to in any way prejudice the relevant public institution in relation to FOIA. This issue will only be settled with finality by a decision of the Supreme Court.

What this situation clearly illustrates however, is the importance in an ATI law, of a preamble and/or objective which expressly expounds the purpose of the Act, as is the case with PAIA and ATI of Uganda. It is difficult to conceive how any South African or Uganda Court could possibly conclude that their ATI laws do not apply to information which came into existence before the adoption of these laws.

5.3.3.2 Procedural matters in requesting access

To ensure a simple, expeditious and cost-effective remedy for unjustified refusal by public institutions to disclose information, the FOI Act introduced a flexible process for instituting proceedings in cases of denial of information. Thus, a review of refusal to disclose is to be dealt with summarily,²³⁵ thus requiring Courts to determine applications 'promptly and in a simple manner'.²³⁶ A further implication of the simplified nature of cases brought pursuant to FOIA is that the method by which the application for review is instituted need not conform to the normal process of instituting proceedings in the relevant court, especially as the FOI Act does not specify the required process.²³⁷

This position has even been extended to condone the failure of an applicant to observe the directions of the court on the method of filing the application for judicial review, on the basis that the court in its efforts to dispense justice does not rely on 'strict adherence to technicalities but rather to substance'.²³⁸ Where the Statute establishing a public institution lays down a specific method of instituting proceedings against that institution, the adherence to which runs contrary to the spirit and intent of the FOI Act, the provisions of the FOI Act prevails over any such inconsistent law.²³⁹

²³⁵ See section 20 of the FOI Act.

²³⁶ *LEDAP v Clerk of National Assembly*, Unreported, FHC/ABJ/CS/805/2011.

²³⁷ As above.

²³⁸ *Okoi Obono-Obla v CCEC Nigeria Ltd*, unreported, Motion No. FCT/HC/M/34/2013.

²³⁹ *PPDC v NAFDAC and Another*, Unreported, Suit No FHC/ABJ/CS/760/13.

Section 20 has also been interpreted to mean that an application for review need not necessarily be brought within 30 days, so long as the applicant files for and the court grants leave for extension of time as provided in section 20 any time thereafter.²⁴⁰

More generally, courts have reiterated that refusal to disclose must be accompanied by reasons for such refusal and must be communicated to the requester within the 7 day timeline for responding to requests under the Act.²⁴¹ In cases where access is to be granted, public institutions must inform requesters of reproduction fees before imposing such fees.

5.3.3.3 Application of exemptions and public interest override

The most common exemptions relied upon, and in most cases wrongly, are those that relate to trade secrets, commercial or confidential information, and contractual or other negotiations,²⁴² as well as that containing personal information.²⁴³ Thus courts have held that a simple loan agreement between the government and a foreign bank,²⁴⁴ or details of remittance of funds by companies engaged to collect tolls on behalf of a public institution,²⁴⁵ do not amount to trade secrets of a third party as contemplated by section 15(1)(a) of the Act.

Furthermore, information relating to contracts already awarded for the completion of an existing building and external work on the building is not exempted.²⁴⁶ To be exempted under section 15(1)(b): the transaction must still be at the negotiation stage; a third party must be involved and the information must reasonably be expected to interfere with the contractual negotiations of a third party.²⁴⁷ Similarly, information on salaries of the

²⁴⁰ *Okoi Obono-Obla v CCEC Nigeria Ltd*, unreported, Motion No. FCT/HC/M/34/2013. This interpretation is preferred to the latently erroneous earlier decision in *Incorporated Trustees of the Citizen Assistance Centre v Honourable Adeyemi Kuforiji and Lagos State House of Assembly*, that leave for extension of time must be sought before the expiration of the thirty day timeline.

²⁴¹ *PPDC v Minister of FCT and Another*. Unreported case FCT/HC/CV/M/3057/13. See also *Centre for Social Justice v. Minister of Finance*, Suit No. FHC/ABJ/CS/301/2013.

²⁴² See section 15(1)(a) and (b).

²⁴³ See section 14.

²⁴⁴ *PPDC v Ministry of Finance and Another*, Unreported, Suit No. FHC/ABJ/CS/856/13.

²⁴⁵ *PPDC v Minister of Federal Capital Territory and Another*, Unreported case FCT/HC/CV/M/3057/13, 30 January 2014.

²⁴⁶ *PPDC v NAFDAC and Another*, Unreported, Suit No FHC/ABJ/CS/760/13.

²⁴⁷ *PPDC v PHCN*, Unreported, FHC/ABJ/CS/582/2012.

Governor and senior officials of the Central Bank of Nigeria²⁴⁸ or of members of the National Assembly,²⁴⁹ cannot be exempted as personal information, bearing in mind that the definition of personal information under the Act excludes information ‘information that bears on the public duties of public employees and officials’.²⁵⁰

In a rare case in which the court has found an exemption applicable, even after the application of the public interest override, the court in *Boniface Okezie v CBN*,²⁵¹ in a convoluted decision, found that information on the amount received by a legal firm contracted by the government to prosecute the former Managing Director of a Bank was duly exempted from disclosure by virtue of ‘legal practitioner-client privilege as provided by section 16(a) of the FOI Act.

5.3.3.4 Monitoring and enforcement mechanism

The mechanism for monitoring compliance and enforcement under the FOI Act is inherently defective. While current ATI best practice indicates a shift from the establishment of a single ‘independent Commissioner’ to more diversely constituted ‘Independent Commission’ to oversee the promotion, research, monitoring and enforcement of ATI laws, many States, especially in Africa, are increasingly wary of establishing new institutions as oversight mechanisms for ATI laws, often sighting severe budgetary constraints.²⁵² Notwithstanding such justified budgetary concerns, by failing to entrust the oversight responsibility (promotion, monitoring and enforcement) to a single institution independent from the three arms of government, even if an already existing one, but opting rather to entrust the Executive, which oversees the very public service that the Act seeks to transform from a culture of secrecy to one of openness, with compliance with FOIA does not generate confidence that erring public institutions will held

²⁴⁸ *Uzoegwu v CBN*, Unreported, FHC/ABJ/CS/1016/2011.

²⁴⁹ *LEDAP V Clerk National Assembly*, Unreported, FHC/ABJ/CS/805/2011.

²⁵⁰ See definition of ‘Personal information’ in section 31 of the FOI Act.

²⁵¹ FHC/L/CS/494/2012.

²⁵² A good example is Malawi, which currently has an ATI Bill before Parliament. One of the outstanding issues which had somewhat delayed the consideration of the Bill by Parliament, is the moratorium on the establishment of new institutions by the executive. As a result, efforts needed to be made to identify an appropriate existing institution to take up this oversight responsibility. This information came to the attention of the author as part of the technical team supporting the work of the Special Rapporteur on Freedom of Expression and Access to Information in Africa, who undertook an advocacy visit to Malawi in May 2015.

accountable for failure to comply with obligations under the Act and falls substantially short of international best practice.²⁵³

This is further compounded by the power conferred to the Attorney General which is ‘at best, weak and ambiguous’ making it difficult to effectively exercise its compliance oversight mandate.²⁵⁴ In fact, section 27(8) requiring the Attorney General to provide details of steps taken by the Ministry of Justice (which is headed by the Attorney General and Minister of Justice) to ‘encourage all government or public institutions to comply with the Act’, starkly illustrates this lack of ‘real compliance power’. Furthermore, even the clearly stipulated power to issue Guidelines is watered down by their very characterisation as Guidelines which connote an intention to establish an advisory role rather than one of enforcing compliance.

The additional lack of enforcement powers by the Attorney General means that an aggrieved requester must approach the Courts to give effect to any obligation of a public institution under the FOIA, including the enforcement of prescribed sanctions. The time consuming and financially intensive nature of litigation in Nigeria, coupled with high levels of illiteracy and access to justice difficulties, thus effectively puts the enforcement of the FOIA beyond the reach of the average Nigerian.

Despite the limitations under the FOIA, the Attorney General has taken some positive steps at ‘mainstreaming the implementation of the FOI Act’.²⁵⁵ This includes: the establishment of the Freedom of Information Act Implementation Unit in the Ministry of Justice,²⁵⁶ the identification of the implementation of the FOIA as a strategic objective for

²⁵³ The Model Law for example provides for oversight by an information commission which is an independent in terms of its funding and appointment process and adequately empowered to undertake promotional, research, monitoring and enforcement role, thereby making application to courts a last resort. See sections 45 to 83, Model Law on Access to Information for Africa.

²⁵⁴ Annual Report on the Implementation of the FOI Act 2011, Volume 1: Narrative Report, 30 March 2012. Available at <<http://www.foia.justice.gov.ng/foiaadmin/template/photo/documents/APRIL%20NARRATIVE%20REPORT%20VOL%201.pdf>> (accessed 7 September 2015).

²⁵⁵ Speech presented by the Attorney General to the Ministerial Platform on the Mid-term Achievements of the Federal Ministry of Justice 2011-2013. Available at <<http://www.slideshare.net/TransformNG/ministry-of-justice-23568162>> (accessed 10 September 2015).

²⁵⁶ See ‘Ministerial Platform: Highlights of the Achievements of the Ministry of Justice 2011-2012’ speech delivered by the (former) Attorney General and Minister of Justice, Mr M.B Adoke on 21 May 2012. Available at <<http://h5xg235kszd9nbbd31bt9p65.wpengine.netdna-cdn.com/wp-content/uploads/2012/05/ACHIEVEMENTS-OF-THE-MINISTRY-OF-JUSTICE-2011-2012.pdf>> (accessed 10 September 2015).

the implementation of Justice Sector reforms in Nigeria²⁵⁷ issuing of an Advisory Memorandum, to all Ministries, Departments and Agencies, on the reporting obligations of public institutions to submit annual reports to the Attorney General; ²⁵⁸ publication of 'Guidelines on the Implementation of the Freedom of Information Act 2011' to provide 'clearer implementation of the FOI Act' and to aid its understanding and application by public institutions.²⁵⁹ The Guidelines were subsequently revised and republished on 29 March 2013,²⁶⁰ following consultations with stakeholders.²⁶¹ The revised Guidelines serves the dual purpose of guiding public institutions in the fulfilment of obligations under the Act while at the same time providing materials, in a manner somewhat akin to regulations, which are necessary for the implementation of the Act.²⁶²

5.3.3.5 Awareness and education

Within public institutions, there is limited awareness about the existence of the FOI Act and the supplementary documents developed by the Attorney General pursuant to the Act, such as the Advisory Memorandum and the Guidelines.²⁶³ Among the few who are

²⁵⁷ The implementation of this strategic objective which was launched on 6 August 2011 by the Attorney General prioritised the development of Guidelines for public institutions, training programmes for all government agencies and the facilitation of desk officers for the management of FOI issues. See the welcome address of the Attorney General at the consultation forum for the revised FOIA implementation Guidelines, 27-28 November 2012. Available at <http://www.foia.justice.gov.ng/pages/resources/download/WELCOME_CONSULTATIVE.pdf> (accessed 7 September 2015).

²⁵⁸ The 'Implementation of the Freedom of Information Act 2011 and the Reporting Requirements in Section 29 thereof', HAGF/MDAS/FOIA/2012/1, was issued on 29 January 2012. (On file with author). Note that the stipulations on reporting requirements in the Advisory Memorandum now forms Chapter 13 of the Revised Guidelines. See (n 259 below).

²⁵⁹ Foreword to the Guidelines on the Implementation of the Freedom of Information Act 2011. (On file with author).

²⁶⁰ The revised guidelines are available at <http://www.foia.justice.gov.ng/pages/resources/REVISED_GUIDELINES_ON_THE_IMPLEMENTATION_OF_THE_FOIA_2013.pdf> (accessed 7 September 2015). The revised Guidelines substantially improve on the initial version and contain progressive aspects such as encouraging the establishment of an internal review mechanism though not a requirement of FOIA.

²⁶¹ A stakeholders' dialogue to discuss the Guidelines and elicit feedback was held on 27 and 28 November 2012. 'Narrative Report on the National Consultative Forum on the Draft Revised Guidelines on the Implementation of the Freedom of Information Act'. Available at <http://www.foia.justice.gov.ng/pages/news/FOIA%20CONSULTATION%20OV_27-28_2011_REPORT.pdf> (accessed 7 September 2015). See also 'Ministries, Stakeholders Dialogue on FOIA Implementation Draft Guidelines' The Nation, 4 December 2012, John Austin Unachukwu. Available at <<http://thenationonline.ng.net/ministry-stakeholders-dialogue-on-foia-implementation-draft-guidelines/>> (accessed 7 September 2015).

²⁶² The Guidelines contain numerous templates of documents to be utilised by public officials in processing requests for information, as well as a schedule of fees for the duplication of records under the Act. See pages 17-20 and 50 respectively.

²⁶³ Omonowa, E.O 'Some of the Challenges in Implementing the Current Guidelines on Freedom of Information Act, 2011' Available at <<http://www.foia.justice.gov.ng/pages/resources/download/FEDE>>

aware of the existence of FOIA and supplementary documents, even less are well acquainted with their contents or have received the requisite training from their respective institutions on their interpretation and application.²⁶⁴ The poor level of awareness about the Act and its provisions have been made glaring when public institutions challenge as ‘frivolous, vexatious and an abuse of court processes’ applications for judicial review of express or mute refusals within 30 days of such denial, as duly provided by section 20 of the Act.²⁶⁵

While some ‘sensitisation workshops’ have been conducted by the Ministry of Justice and a handful of public institutions,²⁶⁶ the depth and effectiveness of such trainings and their overall reach is minimal, considering that the FOIA applies to over 500 public institutions at the federal level. Moreover, these trainings have been uneven and have been mainly targeted senior officers, thereby leaving junior level staff and other staff not directly involved in the implementation of the FOIA ignorant on the details of the law.²⁶⁷ There is therefore need for a continuous and coordinated training approach led by the Attorney General,²⁶⁸ which can only be possible with the provision of much needed funding.²⁶⁹

The need for sensitisation, equally extends to lack of awareness about the Act also has potentially far-reaching consequences with regard to the judiciary. Although courts have for the most part been progressive, in a few instances, the decisions by courts have generated disbelief as to their poor understanding of the content and purpose of FOIA.

There is widespread ignorance amongst ordinary Nigerians on the existence and the potential of FOIA.²⁷⁰ For example, a research study conducted fourteen months after the

RAL_MINISTRY_OF_JUSTICE_AND_UNITED_NATIONS_DEVELOPMENT_PROGRAMME.pdf> (accessed 7 September 2015).

²⁶⁴ As above, 2.

²⁶⁵ See for example, *India Garba v Accountant General of Benue State*, Unreported, MHC/2564m/12.

²⁶⁶ In the 2014 Fiscal year for example, the Ministry of Justice in its oversight role organised 4 sensitisation workshops for Heads of FOI units and Implementation Committees of public institutions, as well as for middle to senior levels staff only of the Ministry of Justice. See 2014 Annual Report on the Implementation of the Freedom of Information Act 2011’. Available at <<http://www.foia.justice.gov.ng/foia-admin/template/photo/documents/FOI%20REPORT%202014.pdf>> (accessed 9 September 2015).

²⁶⁷ As above.

²⁶⁸ Omonowa (n 262 above) 10.

²⁶⁹ 2014 Annual Report on the Implementation of the Freedom of Information Act 2011, 4.

²⁷⁰ ‘Implementing Nigeria’s Freedom of Information Act 2011: The Journey so Far’ Available at <<http://r2knigeria.org/index.php/publications/foi-assessments-reports?download=82:implementing-nigeria-s-foi-act-2011-the-journey-so-far>> (accessed 7 September 2015).

adoption of the FOIA showed that only 18 percent of journalists had a good understanding of the law and only three percent had utilised FOIA to access information from public institutions.²⁷¹

A contributing factor to this is that although the Act imposes an obligation on public institutions to provide training to employees on the FOIA,²⁷² there is no corresponding obligation provision for the Attorney General or public institutions to undertake promotional activities to raise public awareness about the Act. The existing case law on the FOI Act however reveals that currently, the use of the FOI Act is mostly by specialist CSOs and a few learned individuals seeking transparency and accountability of public institutions across the various fields of expertise, rather than by ordinary people.²⁷³ This gap has thus been filled by CSOs which has developed several user friendly materials on the FOI Act and translated this into six major local languages,²⁷⁴ facilitated the training of senior judges,²⁷⁵ and work with local communities to create an understanding of FOIA and assist with making requests under FOIA.²⁷⁶

As part of efforts to increase awareness by the Office of the Attorney General however, a website has also been developed to provide information general information on FOIA and on the oversight activities of the Attorney General's office,²⁷⁷ and dedicated phone

²⁷¹ Ezinwa, C. et al, 'Spitting on a Blood Document: An Analysis of Nigerian Journalists Perception and Implementation of the Freedom of Information Act' (2014) 29 *Journal of Law Policy and Globalisation* 72.

²⁷² Section 13 requires public institutions to train for its officials on the public's right to access information and for the effective implementation of the Act.

²⁷³ For example, the Public and Private Development Centre has instituted proceedings in at least 10 cases, all public procurement and open contracting related.

²⁷⁴ The freedom of Information Act, a simplified version of the Act, as well as a practical usefulness has been developed by the Right to Know Initiative (R2K) and is available in English, Pidgin, Yoruba, Hausa, Igbo, Tiv and Ijaw languages.

²⁷⁵ The Open Society Justice Initiative and United Kingdom's Department of International Development (DFID) in collaboration with the National Judicial Institute held a training for over 350 senior judges from 77 superior courts of record in May 2014. See Odinkalu, C. and Kadiri, M. 'Making Progress on Freedom of Information in Africa'. Available at <<https://www.opensocietyfoundations.org/voices/making-progress-freedom-information-africa>> (accessed 9 September 2015).

²⁷⁶ The Network of University Legal Aid Clinics for example is running an FOI project in which Legal Aid Clinics from 9 Universities across Nigeria create awareness on the FOI Act and assist with making requests under the Act. Available at <<http://www.nulai.org/index.php/projects/foi>> (accessed 9 September 2015).

²⁷⁷ See <<http://www.foia.justice.gov.ng/>> (accessed 9 September 2015).

lines assigned to facilitate the public engagement with the Attorney General's office on any issue related to the FOI Act.²⁷⁸

5.3.3.6 Compliance by public institutions

By section 29(1) of the Act, on or before 1 February each year, all public institutions are required to submit to the Attorney General, a report of the implementation of the FOI Act in the preceding fiscal year. And in turn, the Attorney General is required to submit before 1 April annually, a report to the National Assembly detailing the implementation of the Act by public institutions and the efforts of the Ministry of Justice to facilitate compliance with the Act by public institutions.²⁷⁹

An accurate assessment of the status of implementation of FOIA is however made difficult by the dismal rate of compliance with the reporting mechanism under FOIA. In the first year of its enactment, only 16 public institutions submitted annual reports to the Attorney General.²⁸⁰ While the number of public institutions submitting reports has steadily increased to 32 in 2012, 52 in 2013 and 60 in 2014, these numbers still fall below expectations.²⁸¹

Generally, requests for information have meet with mute refusals and where responses are given, this is often done beyond the statutory time limit of 7 days.²⁸² The court in *Boniface Okezie v CBN*,²⁸³ has since held that public institutions have an obligation to respond to requests for information within 7 days by either granting a request or providing reasons in case of a denial. In reality however, mute refusals are certain to be a continuing feature of FOIA implementation in Nigeria because although the Act sanctions the wrongful denial of access to information with a fine of N50,000 (approximately \$250) against the relevant public institution upon conviction,²⁸⁴ there has been no effort by the

²⁷⁸ Speech presented by the Attorney General to the Ministerial Platform on the Mid-term Achievements of the Federal Ministry of Justice 2011-2013 (n 254 above).

²⁷⁹ Section 29(7) and (8).

²⁸⁰ See 2014 Annual Report on the Implementation of the Freedom of Information Act 2011'. Available at <<http://www.foia.justice.gov.ng/foiaadmin/template/photo/documents/FOI%20REPORT%202014.pdf>> (accessed 9 September 2015).

²⁸¹ As above, 6.

²⁸² 'Implementing Nigeria's Freedom of Information Act 2011 (n 269 above).

²⁸⁴ Section 7(5).

Attorney General to take action by utilising this provision to serve as a deterrence for public officials, and attempts by CSOs to directly approach the courts to make such convictions have failed on several occasions without any clear 'reasons for declining to grant this relief'.²⁸⁵

5.3.3.7 Application of FOI Act to States

Nigeria is a federation comprising of the Federal, State and Local governments respectively and with a National Assembly that is empowered 'to make laws for the peace, order and good government of the Federation with respect to any matter included in the Exclusive Legislative List,²⁸⁶ the Concurrent Legislative List²⁸⁷ and any other matter as provided by the Constitution.'²⁸⁸

While FOIA in its definition of 'public institutions' does not expressly declare its application to all levels of government,²⁸⁹ a proper reading of its provisions clearly shows an intention that the Act apply to '**any** public official, agency or institution, howsoever described.'²⁹⁰ Despite this apparent clarity of the application of FOIA throughout the federation, the application of FOIA to all 36 States of the federation remains a bone of contention amongst legal scholars and practitioners, with some of the opinion that the Act applies only to federal level (institutions) of government and thus must be 'domesticated' by States to be applicable.²⁹¹ This anomalous view on the need to domesticate an Act of Parliament has been further fuelled by conflicting judgements emanating from the judiciary on the matter.²⁹² This is despite the fact that one of the first decisions ordering

²⁸⁵ See 'Freedom of Information: Matters Arising'. Available at <<http://csj-ng.org/blog/freedom-of-information-matters-arising/>>(accessed 19 September 2015). In *India Garba v Commissioner for Local Government and Chieftaincy*, Suit No, VHC/20/2012. However, the Court found the defendant guilty of wrongful denial of information and ordered the payment of the 500,000 fine.

²⁸⁶ Section 4(2).

²⁸⁷ Section 4(4)(a).

²⁸⁸ Section 4(4)(b).

²⁸⁹ Several laws expressly provide so. See for example section 1 of PAIA which defines public bodies to include bodies in the 'national or provincial sphere' and 'any municipality in the local sphere'.

²⁹⁰ See section 1(1).

²⁹¹ Since the adoption of FOIA, 3 States have adopted FOI Laws. These include Ekiti, Delta and Lagos.

²⁹² See 'Lawyers Disagree Over Freedom of Information Act', 16 February 2014, Leke Baiyewu and Tobi Aworinde. Available at <<http://www.punchng.com/news/lawyers-disagree-over-freedom-of-information-act/>> (accessed 20 September 2015).

the release of information under the Act, was made by a State High Court, and was in respect of information held by a Local Government Council.²⁹³

In the first judicial pronouncement specifically on the issue of domestication,²⁹⁴ the High Court in Oyo State held that FOI Act applies directly to states of the federation without the need for ‘domestication’ given that the National Assembly is empowered to make laws for the peace, order and good government of Nigeria under the Constitution,²⁹⁵ more so, where the law is in respect of a ‘malaise plaguing the country’. In reaching this decision, the court relied on an earlier decision of the Supreme Court,²⁹⁶ where it was held that an anti-corruption law enacted by the federal government is applicable to all States. The Supreme Court held that the power of the National Assembly to so enact the law emanated from a combined interpretation of the Exclusive Legislative list and other relevant sections of the Constitution and went further to find that in the circumstances, adopting a broad interpretation of the Constitution in order to give effect to the Constitution was necessary, taking into consideration, the fact that:

Corruption is not a disease which afflicts public officers alone but society as a whole. If it is therefore to be eradicated effectively, the solution to it must be pervasive to cover every segment of the society.²⁹⁷

Subsequently, the Federal High Court, in March 2014 again held that FOIA is applicable in all states of the federation, including Enugu State as with other laws such as the Economic and Financial Crimes Commission Act.²⁹⁸

However, more recently, a judge also of the Federal High Court, in October 2014,²⁹⁹ found that the FOI Act was not applicable to States and only applied to the federal

²⁹³ *India Garba v Commissioner for Local Government and Chieftaincy*, Suit No. VHC/20/2012).

²⁹⁴ *Yomi Ogunlola v Speaker, Oyo State House of Assembly*, Unreported, Suit No: M/332/12.

²⁹⁵ Section 4(2) of the Constitution of Nigeria, 1999.

²⁹⁶ *Attorney General of Ondo State v Attorney General of the Federation and Others*, (2002) 9 NWLR (pt. 772) 222.

²⁹⁷ Per Uwais CJN (as he then was).

²⁹⁸ Per Agishi J, *Civil Liberties Organisation v Enugu State Commissioner for Health*, Suit No. FHC/EN/M/263/20 11. See ‘Court Declares Freedom of Information Act Applicable in All States’. Available at <<http://icirnigeria.org/court-declares-freedom-of-information-act-applicable-in-all-states/>>(accessed 20 September 2015).

²⁹⁹ See ‘In Conflicting Judgement, Court Says FOI Act Not Binding on States’ This Day Newspaper, 1 October 2014. Available at <<http://www.thisdaylive.com/articles/in-conflicting-judgement-court-says-foi-act-not-binding-on-states/192884>> (accessed 20 September 2015).

government and its agencies,³⁰⁰ arguing that that if it was the intention that the Act be applicable to all States all the House of Assembly of States should have been involved in its adoption.³⁰¹ In another pending case before the Federal High Court in Lagos,³⁰² the government of Lagos State has again challenged the application of the FOI Act to Lagos State.³⁰³

It is submitted that the on-going debate and conflicting judicial decisions on the need for domestication may not have arisen, had FOIA been expressly grounded in international human rights law in general, and the provisions of the Constitution and the African Charter on Human and Peoples' Rights (Ratification and Enforcement Act) in particular. In the absence of this, final clarity on the matter will only be reached with a decision of the Supreme Court.

5.4 Case study country two: South Africa

5.4.1 Background to the development of the Promotion of Access to Information Act

The importance attached to the right of access to information in the newly democratic South Africa was evident not only from its inclusion in the Interim Constitution as one of the 34 Constitutional Principles which must of necessity be contained in the final Constitution,³⁰⁴ but also from the fact that the final Constitution imposed an obligation on government to adopt legislation to give effect to the right within three years of its coming into force.³⁰⁵ Thus, the coming into force of the 1996 Constitution on 3 February 1997

³⁰⁰ Per Abang, J. in *LEDAP v Attorney General and Others*, Unreported. Available at <<http://dailypost.ng/2014/11/01/court-rules-foi-act-binding-states/>> The Commissioners of Finance of 6 States (Abia, Akwa-Ibom, Delta, Imo, Lagos and Rivers) of the federation were joined as defendants.

³⁰¹ This position is an incorrect application of section 12(3) of the Constitution which requires that a law adopted by the National Assembly pursuant to a treaty must be ratified by a majority (19 of 36) Houses of Assembly. The FOIA was however not adopted pursuant to a treaty, even though Nigeria is a State Party to the African Charter, and has domesticated that treaty'.

³⁰² *SERAP v Governor of Lagos State*, Suit No. FHC/L/CS/57/2014, filed in January 2014.

³⁰³ Adesomooju, A. 'Fashola to File Fresh Objection Against FOI Suit' Punch Newspaper, 9 April 2014. Available at <<http://www.punchng.com/news/education-fund-fashola-to-file-fresh-objection-against-foi-suit/>> (accessed 20 September 2015).

³⁰⁴ See Chapter 3 for more extensive discussions on the making of the South African Constitution in general, and the drafting of its access to information provision in particular.

³⁰⁵ By Item 23(1) of Schedule 6 to the 1996 Constitution, implementing legislation had to be enacted 'within three years from the date the Constitution took effect', failing which section 32 would 'lapse'. In other words,

meant that the requisite implementing legislation for the right of access to information as contained in section 32, had to be enacted by 2 February 2000.

In reality, however, initial efforts towards the development of the mandated national legislation had inadvertently begun long before the adoption and coming into force of the 1996 Constitution. In a bid to develop a legislative framework for the open and democratic society, which was a central theme of the Interim Constitution,³⁰⁶ an Open Democracy Task Group was established in June 1994 by then Vice-President Thabo Mbeki.³⁰⁷ The Task Group early on set out clearly in its policy proposal that it considered its task as one of proposing an Act to give effect to the constitutional values and aspirations of a transparent and accountable government.³⁰⁸ And so, building on earlier efforts of one of its members,³⁰⁹ and comparative legislation in other jurisdictions,³¹⁰ the Task Group produced a first draft of an Open Democracy Bill in August 1995. Following further consultation and comments from stakeholders,³¹¹ a final draft was submitted to Cabinet in 1996 for approval.³¹² Notably, the Bill subsumed the four interrelated issues of access

unless and until an access to information law was enacted, the access to information provision in section 23 of the Interim Constitution remained in force.

³⁰⁶ See for example sections 33 and 35 of the Interim Constitution for references to 'open and democratic society'.

³⁰⁷ The Task Force was chaired by Advocate Mojanku Gumbi, then legal adviser to Thabo Mbeki and comprised of 5 other members: Advocate Vincent Maleka, Prof. Etienne Mureinik, Prof Mandla Mchunu, Advocate Empie van Schoor and Mr Adrian Nortje. See 'The Open Democracy Act: Process vs Product' May 1995 update. Available at <<http://fxi.org.za/archive/Linked/update/9505/2.html>> (accessed 8 July 2015).

³⁰⁸ See White, J. 'Open Democracy: Has the Window of Opportunity Closed?' (1998) 14 *South African Journal of Human Rights* 65-75 at 65. See also Allan, K. and Currie, I. 'Enforcing Access to Information and Privacy Rights: Evaluating Proposals for an Information Protection Regulator for South Africa' (2007) 23 *South African Journal of Human Rights* 563.

³⁰⁹ In 1993, Prof Mureinik together with 3 other colleagues under the auspices of the Centre for Applied Legal Studies (CALS), University of Witwatersrand, had undertaken a comparative study of some existing access to information laws, and developed proposals for a South African Freedom of Information Act. See White, J. 'Open Democracy: Has the Window of Opportunity Closed?' (1998) 14 *South African Journal of Human Rights* 65.

³¹⁰ According to its Chair, the Task Group relied on similar legislation from Australia, New Zealand, India, United Kingdom, United States and Canada in developing the Bill. See minutes of the meeting of the Security and Justice Select Committee and the Justice Police Portfolio Committee of 24 July 1998. Available at <<https://pmg.org.za/committee-meeting/6586/>> (accessed 8 July 2015).

³¹¹ For example the Open Democracy Advisory Forum (ODAF) which was established in collaboration with the Task Group and with coordinated by FXI, which convened a series of conferences to discuss and provide recommendations on the Open Democracy Bill. Available at <<http://www.fxi.org.za/old%20webpages/archives/Open%20Democracy%20Bill/odaf3.htm>> (accessed 8 July 2015).

³¹² See Tilton, D. and Calland, R. 'In Pursuit of an Open Democracy: A South African Campaign Case Study', 3. Available at <http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_papers/>

to information, privacy, open meetings, and whistle blower protection into a single legislation.³¹³

In the end, a significantly watered down version of the Bill which left many questioning the new government's commitment to transparency and accountability, was approved by Cabinet,³¹⁴ and published in the Government Gazette in October 1997 for 'information and comment'.³¹⁵ After the Bill was finally tabled in Parliament in July 1998,³¹⁶ the Portfolio Committee on Justice tasked with the Bill only managed to conduct public hearings in March 1999, before the process was interrupted by the June 1999 general elections.³¹⁷ Following the elections, a joint *ad hoc* committee of both the National Assembly and the Council of Provinces was set up in August 1999, to fast track the process of consideration of the Bill.³¹⁸ The joint *ad hoc* committee organised further hearings on the Bill in October and then spent the next three months working furiously on the Bill to meet the constitutionally imposed deadline.³¹⁹

One major amendment to the Bill during the parliamentary process, was the inclusion of a new part giving effect to the right to access information held by private bodies,³²⁰ a

southafrica/Calland%20&%20Tilton%20-%20In%20pursuit%20of%20open%20democracy.pdf> (accessed 6 July 2015).

³¹³ See White (n 308 above) 68. Eventually, the section on open meetings was completely discarded, while a Whistleblower law, the Protected Disclosures Act, was subsequently enacted in 2000 and only more recently, the Protection of Personal Information Act in 2013.

³¹⁴ As above. Some of the key changes to the Bill where: the deletion of the section on open meetings; the substitution of the proposed Information Commissioner with the South African Human Rights Commission and Information Courts with regular courts to monitor implementation and adjudicate disputes respectively; the exclusion of cabinet from the scope of application of the Act; the deletion of the 'necessity of harm provision' as well as that requiring the publication of decision making guidelines of government institutions.

³¹⁵ Government Gazette No 18381 of 18 October 1997, volume 338. Available at <<http://www.gov.za/sites/www.gov.za/files/18381.pdf>> (accessed 6 June 2015). The public was given exactly 3 weeks to submit comments.

³¹⁶ White (n. 308 above). The Bill was introduced to Parliament as Bill 67 of 1998, by the Chair of the Task Group and Adv van Schoor, member of the Task Group and also staff of the Office of the Chief State Law Advisor.

³¹⁷ Tilton and Calland (n 311 above) 5.

³¹⁸ As above.

³¹⁹ As above.

³²⁰ Following the adoption of the final constitution which expressly provided in section 32(1)(b) for the application of the right to 'any other person', many clamoured for the express incorporation of provisions giving effect to this into the Open Democracy Bill, which understandably made no reference to this, as it was developed based on the more restricted access to information provisions of section 23 of the Interim Constitution which only applied to information held by 'the State or any of its organs'. See for example, submissions by the Freedom of Expression Institute (FXI) to the Portfolio Committee on Justice in August 1998 Available at <http://www.fxio.org.za/oldsite_bin/odb_submain.htm> (accessed 8 July 2015). See also

testament to successful advocacy efforts by civil society and other stakeholders for a truly comprehensive law.³²¹ The other significant change to the Bill, was the removal by the Committee of the part which dealt with privacy to avoid 'dealing with the right to privacy in section 14 of the Constitution in an *ad hoc* and undesirable manner'³²² as well as the section on whistle blower protection, because it was not 'apposite to include a chapter on whistle blower protection in legislation dealing with the right of access to information'.³²³ With only the access to information section left, the Open Democracy Bill now appropriately renamed the Promotion of Access to Information Bill, was adopted by Parliament on 25 January 2000. The Bill received Presidential assent on 2 February, just in time to meet the constitutionally imposed deadline.³²⁴

submissions by the South African Council of Churches (SACC) to the Portfolio Committee on Justice in February 1999. Available at <http://www.sacc-ct.org.za/sub_odb.html> (accessed 8 July 2015). See also recommendations of the South African Human Rights Commission Workshop on Open and Accountable Democracy, 15 to 17 July 1999. Available at <<http://www.sahrc.org.za/home/21/files/Reports/workshop%20on%20open%20and%20accountable%20democracy.pdf>> (accessed 8 July 2015)

³²¹ The main drafter of the Bill, Advocate Empie van Schoor, who had also been a member of the Open Democracy Task Group, during the initial consideration of the newly drafted section on private bodies by the Joint *ad hoc* committee on 18 November 1999, indicated that the draft had been 'influenced by the submissions made by COSATU, SACC and other members of the of the Open Democracy Campaign Group'. Available at <<http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/1999/minutes/991118odb.htm>> (accessed 8 July 2015).

³²² South African Law Reform Commission (Project 124) Report on Privacy and Data Protection 2009, available at <http://www.justice.gov.za/salrc/reports/r_prj124_privacy%20and%20data%20protection2009.pdf> (accessed 8 July 2015). See also paragraph 4, 'Report of the Ad-Hoc Joint Committee on Open Democracy Bill on the Open Democracy Bill', 24 January 2000. Available at <<https://pmg.org.za/committee-meeting/6798/>> (accessed 8 July 2015). The Committee requested the Minister of Justice and Constitutional Development to 'introduce Privacy and Data Protection Legislation, after thorough research on the matter, as soon as reasonably possible'. Subsequently, the Law Reform Commission was tasked with the matter, and proposed the introduction of a law. The Protection of Personal Information Act was enacted in November 2013.

³²³ See paragraph 9, 'Report of the Ad-Hoc Joint Committee on Open Democracy Bill on the Open Democracy Bill', 24 January 2000, (n. 321 above). In fact, Parliament had begun a simultaneous process to redraft the chapter into separate whistle blower legislation by February 2000. In the end, the Protected Disclosures Bill was adopted by Parliament on 20 June 2000, signed into law by the President on 1 August and came into force in February 2001. See Camerer, L. 'Protecting Whistle blowers in South Africa: The Protected Disclosures Act, No 26 of 2000' *Institute of Security Studies Occasional Paper No 47 – 2001*. Available at <<https://www.issafrica.org/uploads/paper47.pdf>> (accessed 9 July 2015)

³²⁴ With the Constitution coming into force on 3 February 1997, the three year deadline (in terms of section 23(1) of Schedule 6 of the Constitution) was 2 February 2000, the day PAIA was enacted.

5.4.2 Overview of the Promotion of Access to Information Act

Much has been said about PAIA being a 'golden standard' which was well ahead of its time,³²⁵ especially in respect of its horizontal application to information held by private bodies, albeit with some limitations.³²⁶ However, PAIA set another standard, one which has luckily not been emulated, namely its sheer length and complexity. Fifteen years later, PAIA remains the longest and arguably the most complex access to information law in Africa, consisting of 7 parts, several chapters, 93 clauses and a plethora of complex provisions.³²⁷ Nevertheless, PAIA is in many respects a formidable law which has inspired subsequent ATI laws on the continent and globally.³²⁸ Some of the most significant provisions of PAIA are now highlighted.

5.4.2.1 Preamble

The Preamble aptly contextualises the historical significance of PAIA as a tool to address the apartheid system's legacy of 'secretive and unresponsive culture in public and private bodies', and which backed up by the Constitution, seeks to engender a culture of transparency and accountability and the effective realisation of all other rights.³²⁹

5.4.2.2 Objectives

The objectives of the Act are to: give effect to the constitutional right of access to information subject to justifiable limitations and in a manner which balances the right with other rights in the Bill of rights;³³⁰ give effect to the constitutional obligation of promoting a culture of human rights and social justice;³³¹ create systems and processes allowing for

³²⁵ See for example, Dimba, M. 'The Power of Information: Implementing the Right to Information Laws' available at <<https://www.issafrica.org/uploads/CQ25DIMBA.PDF>> (accessed 9 July 2015)

³²⁶ In line with section 32(2) of the Constitution, the application of PAIA to private bodies is only where the requested information 'is necessary for the exercise or protection of any rights'. See section 50(1)(a) of PAIA.

³²⁷ See for example section 8(1):

For the purposes of this Act, a public body referred to in paragraph (b)(ii) of the definition of 'public body' in section 1 or a private body-

(a) May either be a public body or a private body in relation to a record of that body; and
(b) May in one instance be a public body and in another instance be a private body depending on whether that record relates to the exercise of a power or performance or a function as a public body or as a private body.

³²⁸ The influence of PAIA is apparent in the ATI law of South Sudan for example.

³²⁹ See preamble to PAIA.

³³⁰ Sections 9(a) and (b).

³³¹ Section 9(c).

access to information as ‘swiftly, inexpensively, and effortlessly’ as possible;³³² and to promote transparent, accountable and effective governance through *inter alia* facilitating public awareness on the rights contained in the Act, the operations of public bodies and the need for participation in decision making processes.³³³

These objectives are critical, in view of the provisions of section 2, obliging courts to in interpreting the Act, ‘prefer any reasonable interpretation consistent with the objects’ of the Act,³³⁴ and section 5 which gives PAIA precedence over other legislation contrary to its objects.

5.4.2.3 Primacy over other legislation

Another significant provision, is that which gives PAIA ‘supremacy’ over any other laws which ‘prohibits or restricts’ access to information held by public or private bodies, or is ‘materially inconsistent’ with the objectives or any provisions of the Act.³³⁵ In effect, no existing or future law can by this provision, curtail the right as enshrined in PAIA.³³⁶

5.4.2.4 Scope of application

‘Any person’, and not only citizens, has a right to access ‘records’ held not only by public bodies but also private bodies.³³⁷ Furthermore, records which may be requested encompasses any information regardless of form or medium, in the possession or under the control of the public or private body, irrespective of whether it was created by that public or private body,³³⁸ and regardless of when it was created.³³⁹

³³² Section 9(d).

³³³ Section 9(e).

³³⁴ See section 2(1).

³³⁵ Section 5.

³³⁶ The Protection of State Information Bill (otherwise known as the Secrecy Bill) almost changed this. The *ad hoc committee* of the National Council of Provinces sitting on the Bill on 31 August 2011, just 6 days before passing the Bill inserted a new clause 1(4) effectively making the Bill take precedence over PAIA. See ‘Submission by the PAIA Civil Society Network on the Protection of State Information Bill to the National Council of Provinces’ 17 February 2012. Available at <file:///C:/Users/User/Downloads/ PAIACS NNCOPSubmission20120217.pdf> (accessed 8 July 2015).

However, following a massive public outcry, the clause was removed by the *ad hoc committee* in August 2012. See ‘ANC Backtracks on Key Info Bill Clauses’ Mail and Guardian, 29 August 2012. Available at <<http://mg.co.za/article/2012-08-29-anc-backtracks-on-key-info-bill-clauses>> (accessed 8 July 2015).

³³⁷ By the combined reading of the definition of ‘requester’ in section 1 and the right of access to records of public and private bodies in sections 11 and 50 respectively.

³³⁸ Section 1-definition of ‘record’.

³³⁹ Section 3.

3.4.2.5 Proactive disclosure

Every public body is required to annually disclose to the Minister of Justice, the 'categories of records that are automatically available' for inspection, purchase or copying; or directly from that body free of charge and how to access these records.³⁴⁰ In turn, the Minister is required to annually publish or update this information in the Government Gazette.³⁴¹ Private bodies on the other hand are not obliged to do the same, but may 'on a voluntary and periodic basis' submit a similar description to the Minister, who must 'if appropriate' publish or update such information 'on a periodic basis'.³⁴²

5.4.2.6 Procedure for access

Requests are to be made to the information officer, who is the head of the relevant public body. However, information officers must designate deputy information officers to whom the powers or duties under the Act may be delegated to, in writing.³⁴³ For private bodies, requests are to be directed to the head of the body who has no obligation to designate deputy information officers.³⁴⁴

Requests must be made in writing in the prescribed form,³⁴⁵ or orally in the case of persons who are illiterate or living with disabilities, in which case the information officer must assist with reducing the request into writing in the prescribed form.³⁴⁶ A request must be responded to in writing by the information officer **within 30 days**.³⁴⁷ granting the request,³⁴⁸ refusing the request,³⁴⁹ deferring access,³⁵⁰ or extending the time by an additional **30 days**,³⁵¹ or transferring the request to the appropriate public body **within 14 days**.³⁵²

³⁴⁰ Section 15(1).

³⁴¹ Section 15(2).

³⁴² Section 52(1) and (2).

³⁴³ Section 17.

³⁴⁴ Section 53.

³⁴⁵ Section 18 and 53.

³⁴⁶ Section 18(3).

³⁴⁷ Section 25(1) and 56(1).

³⁴⁸ As above.

³⁴⁹ Section 25(3) and 56(2).

³⁵⁰ Section 24.

³⁵¹ Section 26 and 57.

³⁵² Section 20.

Where the request is made to a public body, any reasons given by the requester or the information officer's belief as to the requester's reasons for making a request is irrelevant.³⁵³ The only relevant considerations are compliance with the procedural requirements under the Act by the requester and that the information is not exempted from disclosure under the Act.³⁵⁴

An 'access fee' for the reproduction, postal costs and for search and preparation of the information is payable.³⁵⁵

5.4.2.7 Grounds for refusal of information/exemptions

Under PAIA, refusal to disclose information can be mandatory or discretionary. Thus, access to information **must** be refused where the requested information: involves the unreasonable disclosure of personal information of a third party;³⁵⁶ was obtained for the purpose of enforcing legislation related to revenue collection;³⁵⁷ involves the disclosure of certain commercial information of a third party;³⁵⁸ involves the disclosure of certain confidential information of a third party;³⁵⁹ endangers the life or physical safety of an individual;³⁶⁰ consists of police docket in bail proceedings;³⁶¹ is privileged from production in legal proceedings,³⁶² or relates to prior or ongoing research.³⁶³

Access to information **may** be refused where the requested information: was supplied in confidence by a third party;³⁶⁴ may prejudice the security of property and persons;³⁶⁵ involves the protection of legal proceedings and law enforcement;³⁶⁶ is prejudicial to the defence and safety or international relations of the republic;³⁶⁷ materially jeopardises the

³⁵³ Section 11(3)

³⁵⁴ See section 11(1).

³⁵⁵ Section 22(6) and 54(6).

³⁵⁶ Section 34 (1) and 63(1).

³⁵⁷ Section 35(1).

³⁵⁸ Section 36(1) and 64(1). This includes trade secrets; financial, commercial, scientific or technical information; or information disadvantageous to contractual or other negotiations or prejudicial to commercial competition

³⁵⁹ Section 37(1)(a) and 65.

³⁶⁰ Section 38(a) and 66.

³⁶¹ Section 39(1)(a). See also section 60(14) Criminal Procedure Act, 1977.

³⁶² Section 40 and 67.

³⁶³ Section 43(1) and 69.

³⁶⁴ Section 37(1)(b).

³⁶⁵ Section 38 (b).

³⁶⁶ Section 39(i)(b).

³⁶⁷ Section 41(l)(a).

economic interests and financial welfare of the republic and commercial activities of public bodies;³⁶⁸ contains commercial information of a private body;³⁶⁹ is prejudicial to policy making and the operation of public bodies;³⁷⁰ is manifestly frivolous or vexatious or would substantially and unreasonably divert resources³⁷¹ or relates to prior or ongoing research.³⁷²

5.4.2.8 Public interest override

Notwithstanding the mandatory and discretionary grounds for refusal, information must however be released where it would reveal the contravention of or failure to comply with the law or an imminent and serious public safety or environmental risk, and when the public interest in the disclosure of the information outweighs the harm in question.³⁷³

5.4.2.9 Appeals

An appeal can be made against a denial of access only by public bodies through, an 'internal appeal' to the 'relevant authority', who must make a decision in writing within **30 days** of receipt of the application.³⁷⁴ Thereafter, a requester may appeal the decision of the internal appeal process to the Court.³⁷⁵ Though PAIA in section 78(2) requires that an application to the court following an internal appeal must be brought within 30 days, the Constitutional Court has in *Stefan Brummer v Minister for Social Development*,³⁷⁶ declared the words '30 days' unconstitutional substituting it for 180 days, on the basis that it unjustifiably limits the right to seek justice and the right of access to information.³⁷⁷

Furthermore, it has been held that an application to a court challenging the refusal to disclose requested information, is *sui generis* and not a 'review'. It is an assessment of

³⁶⁸ Section 42.

³⁶⁹ Section 68.

³⁷⁰ Section 44.

³⁷¹ Section 45.

³⁷² Section 43(3).

³⁷³ Section 46 and 70. Note that this does not apply to section 35 on SARS and 43 on research for public bodies.

³⁷⁴ Sections 74-77.

³⁷⁵ Section 78-82.

³⁷⁶ 2009 (6) SA 323 (CC).

³⁷⁷ The substitution was to be an interim measure, pending the enactment/amendment of PAIA by Parliament within 18 months, failing which it would take effect. Since Parliament failed to amend PAIA within 18 months (by February 2011), the substitution has taken effect permanently.

whether based on the facts before the court, the requested information ought to have been granted.³⁷⁸

Another important decision by courts in terms of ancillary issues in litigation under PAIA has been the judgement of the Constitutional Court in *Trustees of Biowatch v Registrar Genetic Resources*³⁷⁹ where a cost order by the High Court against the applicant was reversed, especially because it 'achieved substantial success' in the matter.³⁸⁰

5.4.2.10 Oversight mechanism

The South African Human Rights Commission is the body responsible for oversight of PAIA and is empowered to: develop programmes and disseminate information to the public about the Act; make recommendations for reform of the Act, other legislation or common law relevant to the Act; monitor the implementation of the Act; assist persons to exercise their right of access to information; make recommendations to public bodies on the implementation of the Act; train information officers of public bodies; consult with public and private bodies on problems associated with the implementation of the Act or on the Commission's functions under the Act;³⁸¹ receive reports from public and private bodies on the implementation of the Act,³⁸² and submit annual reports to Parliament on the implementation of the Act.³⁸³

5.4.3 Overview of the implementation of PAIA

As the oldest ATI law on the continent, PAIA provides a considerable body of knowledge on experiences with implementation of an ATI law, in terms of its normative content, implementation by public and private bodies, and interpretation and application by courts. Some of these issues will be considered.

³⁷⁸ Per Sapire A.J in *Mail and Guardian v President of the Republic of South Africa*, (2010) ZAGPPHC 43.

³⁷⁹ 2009 (6) SA 232.

³⁸⁰ As above, per Sachs HJ, para 43.

³⁸¹ Section 83.

³⁸² Section 32.

³⁸³ Section 84.

5.4.3.1 Private or public body?

The relatively less stringent obligations of access with respect to private bodies³⁸⁴ as opposed to public bodies³⁸⁵ under PAIA,³⁸⁶ has meant that bodies which may ordinarily be regarded as private, but straddle public bodies, resist being categorised as public bodies for the purposes of PAIA. This contestation is possible because PAIA expressly recognises that a private body may in some instances be regarded as a public body and vice-versa.³⁸⁷ Courts have thus in many instances been required to first determine whether the information holder is a private or public body in the specific instance, before proceeding to determine whether the denial of access was wrongful or otherwise, based on the applicable sections of PAIA. Thus in *Institute for Democracy in Africa and Others v African National Congress and Others*,³⁸⁸ the Court found that the respondents as political parties, in the context of receiving private donations could not be said to be public bodies as defined under PAIA.³⁸⁹

To assist in determining whether a body is public or private, the Supreme Court of Appeal in *MittalSteel South Africa Ltd v Hltashwayo*,³⁹⁰ relied on four tests which may be used separately or cumulatively:³⁹¹ of which the control test and functions test were most important,³⁹² and went on to find that Mittalsteel was at the relevant time and in exercising

³⁸⁴ A private body is defined as a natural person or a partnership 'carrying out a trade, business or profession' or a former or existing juristic person.

³⁸⁵ A public body is defined as a national and provincial departments and municipalities; or any other institution 'exercising a power or performing a duty' imposed by the Constitution or provincial Constitution or 'exercising a public power or performing a public function' imposed by any legislation.

³⁸⁶ The most significant difference is that whereas a requester for information held by a public body need not provide reasons for a request as per section 11, requests to private bodies must show that the right is 'required for the exercise or protection of a right. Furthermore, a refusal of a request for access by a private body can only be appealed to the High Court, as opposed to that by a public body which is subject to an internal appeal.

³⁸⁷ Section 8(1)(b) of PAIA provides that a public or private body 'may in one instance be a public body and in another instance be a private body depending on whether the record relates to the exercise of a power or performance of a function as a public body or as a private body'.

³⁸⁸ 2005 5 SA 39 (C).

³⁸⁹ See para 50-53.

³⁹⁰ 2007 (1) SA 1 (SCA).

³⁹¹ The test here is: whether the body has discretion to act, and if so, the degree of control by the Executive over that discretion; whether property vested in the body is held for or on behalf of the Government; whether the body has financial autonomy; or whether the functions of the body are governmental functions. See para 17.

³⁹² In evaluating control, the test applied was: whether without the existence of the body, the Government would have intervened to regulate the activity in question; whether the Government has encouraged activities of the body by supporting its work or integrating it into the sphere of public regulation established

its functions in relation to the requested records, a public body. Subsequently, an additional test of 'whether the body utilises public funds' was developed and relied upon in *Mail and Guardian v 2010 FIFA World Cup Organising Committee*.³⁹³

5.4.3.2 Application of PAIA to private bodies

In terms of accessing information held by private bodies, the stipulation that the requested information must be 'required for the exercise or protection of any right', has been construed narrowly by courts. In particular, the interpretation of the word 'required' has received significant attention and has been construed as meaning 'be of assistance'³⁹⁴ or 'reasonably required'³⁹⁵ which must connote 'a substantial advantage or an element of need',³⁹⁶ and requiring the applicant to 'lay a proper foundation'³⁹⁷ as to why the information is reasonably required, but which can only be determined based on the facts and circumstances of each case.³⁹⁸ In practice however, the threshold of 'reasonably required' has substantially limited the possibility of successful reliance on PAIA in accessing information held by private bodies.³⁹⁹ It however appears that courts are now beginning to adopt a less restrictive interpretation of the word 'required'.⁴⁰⁰

5.4.3.3 Grounds for refusal and the public interest override

The complexity of PAIA already previously alluded to, extends to the interpretation and application of the grounds for refusal of access by public and private bodies. The creation of widely framed mandatory and discretionary grounds for refusal under PAIA combined

it under the authority of government; or whether the body exercised excessive or monopolistic powers, para 21.

³⁹³ 2011 (5) SA 163, paras 239, 258 and 266.

³⁹⁴ Thus the applicant must 'state what the right is that he wishes to exercise or to protect, what the information is which is required and how that information would assist him in exercising or protecting that right'. Per Streicher J.A in *Cape Metropolitan Council v Metro Inspection Services* (Western Cape) CC 2001 (3) SA 1013 (SCA), para 28.

³⁹⁵ *Nortje v Attorney General*, 1995 (2) SA 460 (C).

³⁹⁶ Per Comrie AJA in *Clutchco (Pty) Ltd v Davis* 2005 (3) SA 486 (SCA), para 13. See also

³⁹⁷ Per Cameron J, in *Le Roux v Direkteur-Generaal van Handel en Nywerheid* 1997 (4) SA 174 (T).

³⁹⁸ Per Brand JA in *Unitas Hospital v Van Wyk* 2006 (4) SA 436 SCA.

³⁹⁹ See generally Sipondo, A. 'Compliance with PAIA by the Private Sector in South Africa' Available at <http://opendemocracy.org.za/images/docs/publications/PAIA_Users.pdf> (accessed 9 July 2014).

⁴⁰⁰ In *ArcelorMittal v Vaal Environmental Justice Alliance* delivered in November 2014 for example, the Supreme Court of Appeal in finding that the applicants had met the threshold requirement under section 50 of PAIA, took into consideration the fact that VEJA was acting in the public interest, and the need for it to adopt 'a common sense approach' in determining the necessity for 'public participation and collaboration'. This approach is a markedly different from the more 'mechanical' approach of the courts in earlier cases like *Unitas Hospital v Van Wyk* 2006 (4) SA 436 SCA.

with strict and conditional considerations of the grounds of refusal,⁴⁰¹ without clear guidance to information officers on how to interpret and apply these provisions, makes it more likely that they choose to err on the side of caution and deny access or simply not respond to requests for information.

Ordinarily, the existence of a public interest override could have assisted in addressing this inclination to refuse access. However, the fact that the application of the public interest override is so narrowly and restrictively framed,⁴⁰² as to require that the disclosure of the record in question must also show ‘evidence of a substantial contravention of or failure to comply with the law’ or ‘an imminent and serious public safety or environmental risk’, renders successful reliance on this clause problematic.⁴⁰³

For starters, it places the burden of proof on the requester to show the existence of a contravention or non-compliance, which invariably can only be adequately satisfied by a scrutiny of the requested information.⁴⁰⁴ Furthermore, the fact is that the provision is rarely applied in practice, perhaps as a result of the absence of guidance on what amounts to ‘public interest’ and the objective process to be adopted in applying the provision.⁴⁰⁵ Moreover, the public interest override inexplicably does not apply to the mandatory ground for refusing access to information held for the purpose of enforcing legislation related to the collection of revenue.⁴⁰⁶

Nevertheless, Courts have frowned at attempts by public bodies to: rely solely on confidentiality clauses in refusing to disclose information without establishing the

⁴⁰¹ Strict grounds of refusal are those that merely require that the record contain a specific kind of information, while conditional grounds go further to require that a specific consequence will follow the disclosure of the information, in the case of PAIA ‘would be likely to’ or ‘could be reasonably expected to’. See Peekhaus, W. ‘South Africa’s Promotion of Access to Information Act: An Analysis of Relevant Jurisprudence’ (2014) 4 *Journal of Information Policy* 571.

⁴⁰² See generally Currie, I. and Klaaren, J. (2002) *The Promotion of Access to Information Act: Commentary* Westlake South Africa: SiberInk 109.

⁴⁰³ This restrictiveness has been acknowledged in several decisions such as *De Lange v Eskom Holdings Limited and Others* 2012 (1) SA (GSJ), 139 and *Centre for Social Accountability v The Secretary of Parliament and Others* 2011 (5) SA 279 (ECG) paras 90 and 108.

⁴⁰⁴ Allan, K. ‘Applying PAIA: Legal, Political and Contextual Issues’ in Allan K. (ed) (2009) *Paper Wars: Access to Information in South Africa* Wits University Press: Johannesburg 165

⁴⁰⁵ As above.

⁴⁰⁶ Section 46 lists the relevant grounds for refusal to which the public interest override applies to. Section 35 is omitted from this list.

existence of the harm contemplated,⁴⁰⁷ shield the Government from criticism or embarrassment,⁴⁰⁸ or avoid a situation 'where the shoe might pinch officials in government',⁴⁰⁹ wrongfully refuse access thereby allowing political office bearers or senior public servants to 'perform their duties under a cloud of suspicion of incompetence or dishonesty'.⁴¹⁰

5.4.3.4 Exclusion of cabinet records

Section 12 of PAIA excludes the records of Cabinet and its Committees completely from the purview of PAIA. This provision is problematic as it renders absolutely inaccessible, key information about the reasoning and justification for laws, policies and decision made on behalf of the people which may impact on their daily lives. While the sensitivity of certain cabinet records, especially those leading up to decision making by Cabinet is understandable, this category of information should exist, if at all, as a mandatory or discretionary ground for refusal and made subject to the public interest override.⁴¹¹

5.4.3.5 The monitoring and enforcement model

PAIA establishes the SAHRC as the mechanism to, amongst other things, promote and monitor compliance, educate the general public and public bodies and make recommendations for the effective implementation of PAIA.⁴¹² Early on, the SAHRC faced much criticism for its apparent inability to proactively play its role in terms of monitoring the implementation of PAIA by public and private bodies.⁴¹³ In its defence, the SAHRC

⁴⁰⁷ This is in relation to the mandatory protection of confidential information provided for in section 37(1) (a) of PAIA as in *Transnet Ltd v SA Metal Machinery Co (Pty) Ltd*, 2006 (6) SA 285 (SCA). See also

⁴⁰⁸ This was in relation to information that could be reasonably expected to inhibit candid consultation, discussion or deliberation by a public body as provided for in section 44(1)(b)(i)(bb) of PAIA. See *Public Service Accountability Monitor v Director General: Office of the Premier, Eastern Cape*, {2008} ZAECHC 70, para 24. See also *De Lange v Eskom Holdings Ltd*, 2012 (1) SA 280.

⁴⁰⁹ *Mail and Guardian Centre for Investigative Journalism and Another v Minister of Public Works and Another* (67574/12) [2014] ZAGPPHC 226, para 35.

⁴¹⁰ *Right to Know Campaign and Another v South African Police Service and Another* [2015] 1 All SA 367, para 45.

⁴¹¹ Recent international best practice is to exclude cabinet records as a ground for refusal. See the Freedom of Information Law Nigeria (2011), Right to Access Information Act Sierra Leone (2013), Rwanda (Law No 04/2013 Relating to Access to Information) and the Model Law.

⁴¹² See section 83 of PAIA.

⁴¹³ For example, the fact that the SAHRC submitted only 1 annual report to Parliament (in 2003) within the first four years of PAIA (2001 to 2005) coming into force was criticised, as well as the poor quality of the report. See Darch, C. and Underwood, P. 'Freedom of Information Legislation, State Compliance and the

pointed out that, being saddled with additional responsibilities under PAIA, without a corresponding increase in financial and human resources to enable it effectively fulfil its broadened mandate, presented little prospects of success.⁴¹⁴

In addition to the shortcomings of the promotional and monitoring mechanism established under PAIA, is the absence of a specialised enforcement mechanism, leaving persons aggrieved by denial of information no other real option than to approach the High Court for relief.⁴¹⁵ Given the high cost of litigation, and the high levels of illiteracy, poverty and problems of access to justice in South Africa, this effectively puts enforcing PAIA beyond the reach of the average South African. Despite the adoption of new rules of procedure⁴¹⁶ allowing PAIA requests to be enforced through Magistrates' Courts which came into force in November 2009,⁴¹⁷ not much has changed as was predicted, because litigation before Magistrate Courts like High Courts, present similar challenges with regard to 'costs, speed and specialism'.⁴¹⁸

Although the SAHRC incrementally made considerable strides in its promotion and monitoring role, the original arguments in support of the establishment of an independent body, capable of making litigation a last resort remained. Having an independent body, which in addition to promoting and monitoring compliance of the Act, is empowered to

Discourse of Knowledge: The South African Experience' (2005) 37 *The International Information and Library Review* 80.

⁴¹⁴ See 'Critically Reflecting on an Institutional Journey: The South African Human Rights Commission 2002-2009, 28-29. Available at < http://www.gov.za/sites/www.gov.za/files/critically_reflecting_report.pdf> (accessed 10 July 2015).

⁴¹⁵ Although section 91 of PAIA empowers the Public Protector to receive and investigate complaints of maladministration in relation to PAIA and to resolve disputes by mediation, conciliation or negotiation, and also empowers SAHRC in section 83(3)(c) assist anyone seeking to exercise a right under PAIA, in practice, neither the Public Protector nor SAHRC has done so. Allan, K. 'Applying PAIA: Legal, Political and Contextual Issues' in Paper Wars <http://www.saha.org.za/publications/paper_wars.htm> (accessed 10 July 2015).

⁴¹⁶ The Portfolio Committee on Justice and Constitutional Development of the National Assembly adopted the rules together with the report of the committee on 19 November 2008. See Klaaren, J. 'PAIA Through the Courts: Case Law and Important Developments in PAIA Litigation'. Available at <<http://wiredspace.wits.ac.za/bitstream/handle/10539/9207/PAIAThroughtheCourtsv1a.pdf?sequence=1&isAllowed=y>> (accessed 10 July 2015).

⁴¹⁷ 'The Rules of Procedure for application to Court in Terms of the Promotion of Access to Information Act 2 of 2000', Government Notice No. R.965, Government Gazette No. 32622 of 9 October 2009. The Rules came into force on 16 November 2009.

⁴¹⁸ 'Promotion of Access to Information Act: Commissioned Research on the Feasibility of the Establishment of an Information Commissioner's Office', Open Democracy Advice Centre, 14 July 2004, 7. Available at <http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_papers/southafrica/sahrc_info_commissioner_research_odac.pdf> (accessed 11 July 2015).

make binding decisions and punish non-compliance is extremely important for the implementation of an ATI law. The establishment of such a body which also provides a simple, cheap and inexpensive process for appealing denials of requests for information by public or private bodies, is the legislative model which has emerged in more recently adopted access to information laws in Africa,⁴¹⁹ as well as the Model Law.⁴²⁰

With the enactment of the Protection of Personal Information (POPI) Act in 2013, the weak enforcement provisions of PAIA have been substantially addressed.⁴²¹ POPI establishes the office of an independent Information Regulator,⁴²² which is empowered to receive complaints from requesters who have been denied access, investigate these complaints and issue notices confirming the refusal or ordering disclosure of requested information.⁴²³ Non-compliance with orders of the Information Regulator is punishable by a fine or up to 10 years imprisonment.⁴²⁴ However, it remains to be seen⁴²⁵ whether the establishment of this mechanism would materially improve the situation with respect to the enforcement of PAIA.⁴²⁶

5.3.3.6 Awareness and education

Although PAIA places an obligation on the SAHRC to ‘develop and conduct educational programmes to advance the understanding of the public’ and, in particular, disadvantaged

⁴¹⁹ See for example Freedom of Information Act of Liberia (2010), which establishes the office of an Information Commissioner; and the Right to Access Information Act of Sierra Leone (2013) which creates an Information Commission both with strong enforcement powers.

⁴²⁰ See Part V (sections 45-88) of the Model Law on Access to Information for Africa. Available at <http://www.achpr.org/files/news/2013/04/d84/model_law.pdf> (accessed 11 July 2015).

⁴²¹ Note that the monitoring, educational and all other roles of the SAHRC in relation to PAIA, have been transferred to the Information Regulator. See section 40(4) of POPI, which provides that the power and duties of the Information Regulator in terms of PAIA are contained in Parts 4 and 5 of PAIA.

⁴²² The office comprises a chairperson and four other members. See section 41 of POPI.

⁴²³ See generally sections 90 to 94 of POPI.

⁴²⁴ Sections 103(1) and 107 POPI.

⁴²⁵ Only Part A of Chapter 5 of POPI on the establishment of the Information Regulator, along with provisions on the definitions and issuing of Regulations by the Minister of Justice came into force by Proclamation of the President in the Gazette No 37544 of 11 April 2014. Available at <https://www.saica.co.za/Portals/0/Technical/LegalAndGovernance/37544_pro25.pdf> (accessed 20 July 2015).

⁴²⁶ In July 2015, the Portfolio Committee on Justice and Correctional Services invited nominations for 5 suitable persons for membership of the Information Regulator. 10 candidates were shortlisted and in September 2016 five of these have been nominated by Parliament for appointment by the President. See <<http://www.news24.com/SouthAfrica/News/former-iec-head-tlakula-gets-nod-for-information-regulator-top-post-20160907>> (accessed 7 September 2016).

communities about PAIA and how to utilise its provisions,⁴²⁷ there remains severely low levels of public awareness on the law.⁴²⁸ Furthermore, there is no corresponding obligation on the SAHRC to educate information officers in public and private about the PAIA, more so, giving the complexity of the grounds for refusal and the dichotomy of mandatory and discretionary and the strict and conditional grounds for denial. This initially contributed to the widespread ignorance about the existence and the contents of PAIA within public bodies.⁴²⁹ As a result, civil society organisations were forced to fill in the gap by organising trainings on PAIA, mostly for the benefit of grassroots organisations.⁴³⁰ Today, awareness about PAIA remains low but has certainly steadily increased with the combined advocacy and training initiatives of SAHRC⁴³¹ and civil society.⁴³²

⁴²⁷ See section 83(2)(a).

⁴²⁸ The SAHRC's 'PAIA and Records Management Consolidated Audit Report: 2008-2012' at page 20, indicated that only 13% of front line officials in audited public bodies were aware of PAIA procedures, while 28% of other staff in these public bodies were aware of these procedures. Available at <<http://www.sahrc.org.za/home/21/files/Consolidated%20PAIA%20Audit%20Report%202012.doc2.pdf>> (accessed 10 July 2015).

⁴²⁹ For example, a 2002 survey revealed that that 54% of public bodies and 89% of private bodies were not aware of the existence of PAIA. See Meyer, V. and Tilley, A. 'Access to Information Law and the Challenges of Effective Implementation: The South African Case' in Calland, R. and Tilley, A. (2002) *The Right to Know, the Right to Live: Access to Information and Socio-Economic Justice* (ODAC: Cape Town).

The glaring exceptions to this were the Department of Defence and the South African Police Force which introduced education and awareness campaigns on PAIA early on. See McKinley, D. 'The State of Access to Information in South Africa', Research Report for the Centre for the Study of Violence and reconciliation, July 2003, 9. Available at <http://siteresources.worldbank.org/INTPCENG/Resources/state_of_access_to_information_in_south_africa.pdf> (accessed 9 July 2015).

⁴³⁰ These include organisations like ODAC, FXI, Khulumani Support Group. McKinley, D. 'The State of Access to Information in South Africa' 10.

⁴³¹ For example, in the 2012/2013 financial year, the SAHRC conducted 22 training sessions for information officers in public and private bodies and within local communities. The SAHRC has also established a PAIA Law Clinic in collaboration with the University of Witwatersrand to increase awareness about PAIA. See the SAHRC Promotion of Access to Information Act Annual Report (2012/2013). Available at <<http://www.sahrc.org.za/home/21/files/PAIA%202012-13%20Annual%20report.pdf>> (accessed 16 July 2015).

In the previous financial year (2011/2012) 33 training sessions were held at which 1,065 Deputy Information Officers were trained. See the SAHRC Promotion of Access to Information Act Annual Report (2011/2012). Available at <<http://www.sahrc.org.za/home/21/files/PAIA%20Annual%20Report%20201112.pdf>> (accessed 16 July 2015).

⁴³² The South African History Archive (SAHA) has for example over the years conducted training for community based organisations and municipalities on the use of PAIA by various issues such as transitional justice, gender based violence, environment, HIV/AIDS, and LGBTI. More recently, training has been conducted for officials at the local government-municipalities. See generally the SAHA Freedom of Information Capacity building Project, available at <http://www.saha.org.za/projects/freedom_of_information_programme_capacity_building_project.htm> (accessed 16 July 2015).

5.4.3.7 Compliance by public and private sector

Several reports by civil society, the SAHRC and government have outlined the numerous problems that have plagued the implementation of PAIA over the last 15 years. These include procedural failures in terms of requests for information submitted pursuant to PAIA such as failure to respond within statutory time frames (also known as deemed refusals),⁴³³ and non-con-recognition of the supremacy of PAIA.⁴³⁴ Other problems include: non-consideration of applicability of the public interest override, minimal consideration of the suitability of severance, failure to submit affidavits where requested information does not exist or cannot be found, failure to provide records where access has been granted.⁴³⁵

Challenges with substantive compliance with requirements under PAIA to prepare and publish manuals⁴³⁶ and to submit reports on the implementation of PAIA to the SAHRC⁴³⁷ also show a poor level of compliance.⁴³⁸ For example, in 2014 only 35 out of 56 national departments published a PAIA manual on their website,⁴³⁹ and only 23 out of 43 national departments submitted their reports in 2012/2013.⁴⁴⁰

⁴³³ See sections 27 and 58 of PAIA. A 2006 survey showed that 62% of requests went unanswered within the 30 day time frame for responding to requests under PAIA. See Transparency and Silence: A Survey of Access to Information Laws and Practices in 14 Countries, September 2006, Open Society Justice Initiative, page 43. Available at < <http://www.opensocietyfoundations.org/publications/transparency-and-silence-survey-access-information-laws-and-practices-14-countries>> (accessed 10 July 2015).

More recently however, the PAIA CSN Shadow Report 2014 showed 37% of requests to public bodies ended in deemed refusals. PAIA Civil Society Network (CSN) Shadow Report 2014. Available at <http://foip.saha.org.za/uploads/images/PCSN_ShadowRep2014_final_20150202.pdf> (accessed 15 July 2015).

⁴³⁴ Following responses received by SAHA from public bodies refusing to disclose information based on the provisions of other legislation rather than PAIA, SAHA requested, and the SAHRC issued a notice on the supremacy of PAIA which is available at <<http://www.sahrc.org.za/home/21/files/Notice%20on%20the%20supremacy%20of%20PAIA.pdf>> (accessed 10 July 2015).

⁴³⁵ See generally PAIA CSN Shadow Report (n 433 above) 2.

⁴³⁶ The combined effect of Section 14(1) of PAIA and Regulation No. 187, is that manuals must be published and made available on websites of public bodies. See Government Gazette No. 23119 of 15 February 2002. Available at <http://www.justice.gov.za/legislation/regulations/r2002/2002_187_access%20to%20info.pdf>)

⁴³⁷ Section 32 of PAIA.

⁴³⁸ Under PAIA, the head of the public body is the Information Officer, and the person to whom internal appeals lie, hence the need to appoint deputy information officers in all departments to deal with initial requests.

⁴³⁹ See PAIA CSN Shadow Report (n 433 above) 17.

⁴⁴⁰ SAHRC PAIA Report 2012-2013, 34. Available at <<http://www.sahrc.org.za/home/21/files/PAIA%202012-13%20Annual%20report.pdf>> (accessed 10 July 2015). Note that the number of national departments were increased in 2014, following the general elections.

More broadly, however, a lot has been said about the lack of proper systems to ensure compliance with PAIA at all levels of government. Common problems include:⁴⁴¹ failure to appoint and ignorance on the identity of Deputy Information Officers; failure to appoint personnel exclusively dedicated to the implementation of PAIA; lack of training and development, absence of internal systems to process requests; poor records management systems; non-inclusion of PAIA in strategic plans, and poor resource allocation.

5.5 Case study country three: Uganda

5.5.1 Background to the development of the Access to Information Act 2005

Similar to the South African Constitution, article 41(2) of the 1995 Constitution of Uganda required Parliament to adopt an access to information law to prescribe the classes of information to be accessed and the procedure for accessing such information. However, unlike in South Africa, no specific time limit or consequence in the event of delay by Parliament in the fulfilment of this requirement was prescribed by the Constitution. In the end, it took ten years for a law to be adopted despite persistent advocacy by civil society about the importance of the adoption of an ATI law in aiding development and tackling , corruption.⁴⁴² In fact, when a Private Members Bill was eventually tabled in Parliament on 17 February 2004,⁴⁴³ it was the culmination of collaborative efforts between civil society organisations under the aegis of the Coalition on Freedom of Information (COFI)⁴⁴⁴ and an opposition Member of Parliament, Abdu Kutuntu.⁴⁴⁵

⁴⁴¹ See generally SAHRC PAIA Audit Report (2008-2012) (n 427 above).

⁴⁴² This included organisations such as Advocates Coalition for Development (ACODE), Foundation for Human Rights Initiative (FHRI), and Anti-Corruption Coalition of Uganda (ACCU).

⁴⁴³ 'Uganda: Buturu Caught Napping'. Available at <<http://allafrica.com/stories/200402180032.html>> (accessed 26 July 2015). See also 'Uganda: Parliament Okays Katuntu Motion'. Available at <<http://allafrica.com/stories/200402240546.html>> (accessed 26 July 2015).

⁴⁴⁴ Access to Information in Africa Project: The Case of Uganda, Greenwatch, 2013, 22. Available at <<http://www.greenwatch.or.ug/files/downloads/Access%20to%20Information%20in%20Africa%20Report.%20The%20%20Case%20of%20Uganda%20.pdf>> (accessed 26 July 2015).

⁴⁴⁵ 'Implementing Right to Information: A Case Study of Uganda' World Bank Report, 2012, 5. Available at <<http://www.jawnos.pl/wp-content/uploads/2014/04/2014-Uganda-raport-Banku-S%CC%81wiatowego-w-zakresie-implementacji-prawa-do-informacji-publicznej..pdf>> (accessed 20 July 2015).

In what was seen by some as an effort by government to ‘take the credit’ for the adoption of the law,⁴⁴⁶ Kutuntu was persuaded by the government to withdraw the Bill, on the promise that a Bill would be tabled by government in Parliament in the next few weeks.⁴⁴⁷ However, the Bill was introduced in Parliament in April 2004 by Hon. James Buturo, then Minister of Information, it was strikingly similar to the Private Members Bill, leading to these words by Katuntu:⁴⁴⁸

I am extremely delighted that the bill has been tabled for the first reading; I however, register my protest about the manner in which the minister has handled this matter. What the Government did was to plagiarise my work. To me this is theft.

Despite the glaring similarities, the Bill presented by Government introduced some significant provisions such as a public interest override, whistle blower protection, and the proactive publication of information by public bodies, not previously contained in the Private Member’s Bill, which substantially strengthened its content.⁴⁴⁹ Parliament subsequently adopted the Bill, which was thereafter signed into law by President Museveni on 7 July 2005. On 28 February 2006, the Minister of Information issued the Commencement Instrument, notifying all Government departments and agencies that the Access to Information Act would come into force on 20 April 2006.⁴⁵⁰

Following the coming into force of the law, steps were taken by the government that seemed to signal the political will to ensure its effective implementation. To start with, in

⁴⁴⁶ ‘Reporters Loose Landmark Case on Access to Official Information’. Available at <http://www.right2info.org/resources/publications/case-pdfs/uganda_charles-mwanguhya-mpagi-and-izama-angelo-v.-attorney-general_newspaper-article> (accessed 26 July 2015).

⁴⁴⁷ World Bank Report (n 444 above).

⁴⁴⁸ The New Vision, 15 April 2004, quoted in Benon, M.A ‘the Right to Know: An Analytical Study of The Access to Information Act in Uganda and its Implications for Journalism Practice’ 9. M.A thesis, Makerere University, 2011 <http://docs.mak.ac.ug/sites/default/files/copy%20of%20edited%20thesis%20for%20final%20%20submission%202011_0.doc> (accessed 29 July 2015).

⁴⁴⁹ Memorandum on the Ugandan Access to Information Bill, 2004 by Article 19 (Global Campaign for Free Expression), May 2004. Available at <<https://www.article19.org/data/files/pdfs/analysis/uganda-bill-no.-7.pdf>> (accessed 29 July 2015).

⁴⁵⁰ The Access to Information (Commencement) Instrument, 2006. Available at <<http://www.ulii.org/ug/legislation/statutory-instrument/2006/11>> (accessed 29 July 2015). ‘Uganda: It’s Your Right to get Information’ by Vincent Babalanda, The Monitor, 18 October 2006. Available at <http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_papers/uganda/its_ur_rt_to_get_info_vincent_babalan_da.pdf> (accessed 26 July 2015).

October 2006, a circular was issued to all permanent secretaries and heads of public bodies notifying them of their obligations under section 7 of the Act to: have an information officer, who must be the chief executive in each public body; publish information manuals within six months of the coming into force of the Act; update and publish these manuals biennially; and make the manuals available as prescribed by the Act.⁴⁵¹ To assist with development of the required manuals, a model manual was attached to the circular, for use as a template.

Another encouraging step was the inauguration of a multi-stakeholder task force in 2008, comprising public bodies and two civil society organisations, to develop a five-year Access to Information Implementation Plan (ATIP).⁴⁵² The development of the Plan which was coordinated by the Directorate of Information and National Guidance in the Prime Minister's Office, set out to, *inter alia*, create awareness of the Act, foster a culture of transparency and build the capacity of public bodies to implement the Act.⁴⁵³

However, the delay in adopting regulations providing specific modalities for the implementation of the Act such as the 'retrieval and reproduction of the information', the prescribed forms for requesting access, uniform criteria for information officers in determining the categories of information to be proactively disclosed and those exempt from disclosure, overshadowed these 'positive steps'.⁴⁵⁴ What this effectively meant was that despite the adoption of ATIA to give effect to the constitutional right of access to information, the modalities for the actual implementation of key provisions of ATIA such as the form for making requests, fees to be paid once access is granted and format in which information could be accessed, was left to the individual discretion of each public body. Thus, the journey towards giving full effect to the right of access to information under the Constitution lasted another six years.

⁴⁵¹ Circular on Compliance with the Access to Information Act, 2005 of 31 October 2006. Available at <http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_papers/uganda/office_of_pm_letter_to_public_bodies_re_compliance_with_ati_act_2005.pdf> (accessed 29 July 2015).

⁴⁵² The two organisations were HURINET- Uganda and FHRI. See World Bank Report, (n 445 above) 11.

⁴⁵³ The Plan has however remained largely un-implemented due to the unavailability of resources. Implementing Right to Information, World Bank Report (n.445 World Bank report above) 11.

⁴⁵⁴ See generally section 47 of the ATIA.

When the draft regulations were finally developed by the Directorate on Information and National Guidance in 2008, and forwarded to Cabinet in February 2009, the expectation was that it would be approved by Cabinet and gazetted no later than July 2009.⁴⁵⁵ However, the draft regulations inexplicably sat in Cabinet for two years, until finally approved in April 2011 and gazetted in May 2011.⁴⁵⁶ During this period, civil society continuously exerted pressure on the Government. However, the regulations only came into the public domain for the first time in July 2011, an obvious pointer to the lack of public consultation in its finalisation.

In short, the failure to lay down strict time lines in the Constitution, effectively delayed the adoption and implementation of the constitutionally mandated ATI law in Uganda by 16 years. This fact was in a sense conceded by the former Minister of Information and National Guidance who pointed out, in early 2011, that submission of reports by Ministers on the Implementation of ATIA could only be expected to commence upon the adoption of Regulations setting out a formal procedure for requesting access to information.⁴⁵⁷

5.5.2 Overview of the Access to Information Act 2005

As will be shown below, the influence of the provisions of PAIA in the drafting of ATIA is evident in several parts of the Act. However, some of the more progressive provisions most worthy of emulation were not replicated. Notably, ATIA does not apply to private bodies, nor does it expand the scope of applicable public bodies to include bodies which perform public functions, provide public services or receive public funds. Furthermore, it is unclear why, unlike PAIA, ATIA does not also vest the oversight of compliance with the Act in an independent and constitutionally established National Human Rights Institution

⁴⁵⁵ See Implementing Right to Information: A Case Study of Uganda' (n 446 above) 11

⁴⁵⁶ Access to Information Regulations, 2011, Gazette No 28, volume CIV of 21 April 2011. Available at <<http://www.ulii.org/ug/legislation/statutory-instrument/17-1>> (accessed 29 July 2015).

⁴⁵⁷ The letter was written in response to a request for information by the Africa Freedom of Information Centre (AFIC) on the reports submitted by Ministers to Parliament pursuant to section 43 of ATIA. The text of the letter is available at <[file:///C:/Users/User/Downloads/Uganda%20none%20compliance%20RTI%20report%20\(1\).pdf](file:///C:/Users/User/Downloads/Uganda%20none%20compliance%20RTI%20report%20(1).pdf)> (accessed 30 July 2015).

(the Uganda Human Rights Commission).⁴⁵⁸ Some salient features of the ATIA are now discussed.

5.5.2.1 Purpose of Act

The objectives of AITA are to: promote transparent and accountable government; give effect to the constitutional right of access to information; protect disclosure of contraventions of the law, maladministration or corruption by whistle blowers; promote transparency and accountability through timely, accessible and accurate information and to ensure public scrutiny and participation in decision-making processes.⁴⁵⁹

5.5.2.2 Scope of application

In line with the provisions of section 41 of the Constitution, the ATIA restricts the enjoyment of the right of access to information only to citizens of Uganda.⁴⁶⁰ Furthermore, citizens can only request 'records' from public bodies. A public body is defined to 'include a government ministry, department, statutory corporation, authority or commission'.⁴⁶¹

5.5.2.3 Proactive disclosure

Public bodies are required to publish biennially, a description of the categories of information 'automatically available' without the need for a request and whether such information can be accessed by inspection; purchase or copying; or free of charge.⁴⁶²

In addition, every public body must publish and update biennially, a manual containing: its functions; full contact details of the information officer and deputy information officers; office address at which requests can be lodged; formal and informal procedures for requesting access; types and categories of information held; categories of proactively

⁴⁵⁸ The Uganda Human Rights Commission was established by an Act of Parliament (the Ugandan Human Rights Commission Act 1997) pursuant to section 51 of the Ugandan Constitution. The Commission is an independent institution empowered to investigate human rights violations and promote human rights awareness amongst others, and possesses broad powers (like a Court) to issue summons or orders, question any person or require the disclosure of information related to its investigations and commit persons for contempt. See generally sections 51 to 58 of the Ugandan Constitution. See generally, Uganda Human Rights Commission, 17th Annual Report, 2014. Available at <http://www.uhrc.ug/sites/default/files/ulrc_resources/UHRC%20Annual%20Report%202014-Popular%20version.pdf>

⁴⁵⁹ See section 3.

⁴⁶⁰ Section 5(1).

⁴⁶¹ See sections 2(1), 4 and 5(1).

⁴⁶² Section 8.

published information; services provided to the public and how to access such services; avenues for public involvement in policy formulation or exercise of powers and functions; and remedies available to the public in cases of its acts or omissions.⁴⁶³

5.5.2.4 Procedure for access

Requests for information must be in writing in the prescribed form.⁴⁶⁴ However a request must not be denied solely for its failure to be made on the prescribed form.⁴⁶⁵ Where however the requester is illiterate or disabled, a request can be made orally which must be reduced into writing by the information officer.⁴⁶⁶ The reasons given by the requester for demanding access or the information officers beliefs as to the reasons of the requester is irrelevant.⁴⁶⁷

A request must be responded to in writing by the information officer within 21 days, granting or refusing the request,⁴⁶⁸ or extending the time by another 21 working days,⁴⁶⁹ or transferring the request to the appropriate public or private entity within 21 days of receipt.⁴⁷⁰

5.5.2.5 Exemptions

The following categories of information are exempted from disclosure: cabinet and committee minutes; personal information of a third party; commercial information of a third party; confidential information of a third party; information endangering the life or safety of a person or the security of buildings, transport systems or property; law enforcement and legal proceedings; legally privileged documents; defence, security and international relations; consultations for decision making or which would frustrate deliberative processes of public bodies.⁴⁷¹ Furthermore, the ATIA does not apply to cabinet records

⁴⁶³ Section 7.

⁴⁶⁴ Section 11(1).

⁴⁶⁵ See regulation 3(8).

⁴⁶⁶ Section 11(3).

⁴⁶⁷ Section 6.

⁴⁶⁸ Section 16.

⁴⁶⁹ Section 17.

⁴⁷⁰ Section 13.

⁴⁷¹ Sections 25 to 33.

and that of its committees, as well as records of court proceedings prior to the conclusion of the case.⁴⁷²

5.5.2.6 Public interest override

In a 'public interest override' provision identical to that of PAIA,⁴⁷³ irrespective of the listed exemptions, information must be disclosed if it would reveal substantial contravention or failure to comply with the Act; imminent and serious public safety, public health or environmental risk; and where the 'public interest in the disclosure of the record is greater than the harm contemplated in the provision in question'.⁴⁷⁴

5.5.2.7 Appeals

No clear internal appeal mechanism is provided for under ATIA although reference is made to the right of a requester to lodge an internal appeal where access has been denied by an information officer.⁴⁷⁵ It is however unclear clear to whom or what process such internal appeal should follow. It is however clear that an appeal against denial of access by an information officer can be made to the Chief Magistrate.⁴⁷⁶ Further appeal against the decision of the Chief Magistrate can be made to High Court, within 21 days of the decision of the Chief Magistrate.⁴⁷⁷

5.5.2.8 Oversight mechanism

The Minister of Information is empowered to make regulations on any matters required by the Act to be prescribed, fees, notices, forms or requests, criteria to be adopted by information officers in determining proactive disclosure provisions, prescribe categories of exempted information with regard to specific sections, any administrative or procedural matters in relation to the Act. Furthermore, each Minister is to submit annual reports to Parliament indicating requests for access in that Ministry.⁴⁷⁸ The Directorate of Information and National Guidance (DINA) within the Office of the Prime Minister has however become the *de facto* oversight mechanism.

⁴⁷² Section 2(1) and (2).

⁴⁷³ See section 46 of PAIA.

⁴⁷⁴ Section 34.

⁴⁷⁵ Section 16(3).

⁴⁷⁶ Section 37.

⁴⁷⁷ Section 38.

⁴⁷⁸ Section 43.

5.5.3 Overview of the implementation of ATIA

There appears to be a consensus that the promise of ATIA ‘remains largely unfulfilled’.⁴⁷⁹ Challenges to the effective implementation of ATIA encompass normative inadequacies of the Act itself as well as extrinsic matters commonly experienced on the journey of implementation ATI laws, and are thus not peculiar only to Uganda. Some of these challenges are now considered.

5.5.3.1 Primacy

The ATIA is silent on the status of the Act in relation with any other law which has the effect of restricting access and is thus inconsistent with the objectives and provisions of ATIA. There is thus no clarity on the supremacy or otherwise of the Act in relation to existing or future laws which conflict with the ATIA.⁴⁸⁰ The only reference in ATIA to other laws is to the effect that nothing in ATIA ‘detracts from the provisions of any other written law conferring a right of access to information held by public bodies.’⁴⁸¹ In other words, the enactment of ATIA does not prevent the application or affect the validity of any other law allowing access to information held by public bodies.

5.5.3.2 Scope of application

Only citizens of Uganda can utilise the Act to access information held by public bodies. This clearly goes against the established principle in the African Charter, the Declaration of Principles and the Model Law, which require that the right is guaranteed to ‘every individual ‘every one’ and ‘every person’ respectively.’⁴⁸²

Furthermore, ATIA does not allow for access to information held by private bodies’ *simpliciter*; or private bodies performing public functions, providing public services or utilising public funds, nor does it adopt a broad definition of public bodies that encompasses those performing public functions, providing public services or utilising

⁴⁷⁹ ‘Implementing Right to Information: A Case Study of Uganda’ (n 446 above) 10.

⁴⁸⁰ Some of such conflicting provisions have been identified in existing laws such as the Official Secrets Act, the Evidence Act, the Parliament (Powers and Privileges) Act, Oaths Act, the Public Service Act and the Education Service Act. See generally, ‘An Analysis of Laws Inconsistent with the Right of Access to Information’, HURINET Uganda, July 2010. Available at <<http://www.right2info.org/resources/publications/uganda-analysis-of-laws>> (accessed 29 July 2015).

⁴⁸¹ Section 2(3).

⁴⁸² See article 9 of the African Charter, Principle IV of the Declaration and section 2 of the Model Law.

public funds. Considering the reality in Africa today, that services and functions previously strictly provided by government are increasingly being privatised or carried out by other bodies which do not fall within the definition of a public body under the ATIA, this state of affairs leaves ordinary Ugandans with no recourse where information is required from these 'organisations' to enforce their rights.

5.5.3.2 Fees

Under ATIA, the fee payable by requesters who have been granted access is simply the actual cost of retrieval and reproduction of the information.⁴⁸³ The regulations however impose further fees on the requester which were not originally contemplated by the Act, and are over and above the 'actual cost of retrieval and reproduction'.⁴⁸⁴ First, is the required payment of a non-refundable access fee of 20,000 Ugandan Shillings (approximately \$6) at the time of requesting access.⁴⁸⁵ Although this access fee can be waived where the information requested 'is in the public interest' or is 'likely to benefit a large section of the public',⁴⁸⁶ there is no guidance to information officers in the regulations as to the application of this waiver. Secondly, where a requester is unable to submit a request in the prescribed form due to illiteracy or disability, such requester must bear the cost of having the request reduced into writing by the information officer.⁴⁸⁷ Clearly, both these fee requirements are likely to prove onerous to the average Ugandan citizen.

5.5.3.3 Exemptions

It has been argued that the categories of exemptions contained in ATIA are unconstitutional, as they go beyond the exemptions embedded in section 41 of the Constitution- which is limited to information 'likely to prejudice the security or sovereignty of the State or interfere with the right to the privacy of any other person'.⁴⁸⁸ In any case,

⁴⁸³ Section 47(2).

⁴⁸⁴ The retrieval and reproduction costs vary, depending on the nature of the reproduction. For example, an A4 page of photocopy is .005 of a currency point, one page of braille photocopy is .025 of a currency point. See schedule 3 of the Regulations.

⁴⁸⁵ By section 47, the Minister is empowered to make regulations determining the fees for access. Accordingly, schedule 3 of the Access to Information Regulations 2011 No 17, adopted on 21 April 2011, stipulates the payment of an access fee of one currency point (equivalent to 20,000 Ugandan Shillings) in addition to the stipulated costs of reproduction. See also regulation 7(1).

⁴⁸⁶ Regulation 7(3).

⁴⁸⁷ See section 3(7) of the Regulations.

⁴⁸⁸ Section 41(1) ATIA. See for example Kakuru, K. 'Access to Information in Uganda'. Available at <<http://www.greenwatch.or.ug/files/downloads/Access%20to%20information%20in%20%20Uganda->

in the only 2 cases have been decided in relation to ATIA, the application of exemptions and the public interest override provision have come up for consideration.

In *Charles Mpagi and Izama Angelo v Attorney General*,⁴⁸⁹ the respondent had refused access to a request by the applicants for certified copies of Production Sharing Agreements (PSAs) between the government of Uganda and several oil companies, for oil exploration and production in the Lake Albert region. In refusing access, the Attorney General argued that the confidentiality clauses in the PSAs rendered disclosure to third parties, without the prior consent of the prospecting companies, a breach of contract. In support of this position, the respondent relied on the provisions of the ATIA, which exempts from disclosure, information that 'would constitute an action for breach of a duty of confidence owed to a third party in terms of an agreement'.⁴⁹⁰

In its judgement, the Chief Magistrates Court rightly found untenable, the argument by the respondents that the non-disclosure was justifiable to prevent a breach of contract in terms of confidentiality. However, rather than begin with a determination of whether the requested information rightfully fell within the exempted categories of information in section 28(1)(a) of the Act, and if so, determine if the public interest override applied, the Court dispensed with the issue of the applicability of section 28(1)(a), by holding that an 'Order of Court supersedes any agreement between the parties' and as such any Order emanating from the Court on the matter could not result in a breach of contract. This approach seemingly suggests that once a refusal of information by an information officer is appealed to a Court, the exemption provisions relied upon in justifying non-disclosure under the Act becomes redundant. Moreover, it goes without saying that any Court Order in respect of disclosure is binding on both parties, irrespective of the reason canvassed for non-disclosure.

Having then found that the exemption did not apply, the Court rather than order the disclosure of the documents, superfluously proceeded with a misapplication of the public interest override. According to the Court, the applicants failed to prove that the public

1.pdf> (accessed 29 July 2015). The author believes the Act is a bad law because it creates limitations to the constitutional right of access and therefore, most of its provisions are null and void.

⁴⁸⁹ Miscellaneous Cause No. 251, 2009, Chief Magistrates Court of Nakawa.

⁴⁹⁰ See section 28(1)(a).

interest in the release of the information is greater than the harm by the confidentiality clause, and that in particular, the application was brought in the public interest and how the information will be accessed by the public or utilised in ensuring a more transparent, accountable and efficient use of petroleum resources by Government. Even more worrying is the Court's ultimate conclusion that it is not all what 'government holds in trust for its people it must always disclose' but what is required of the public is to have confidence that the Government is acting in the best interest of the people.

This reasoning of the Court in applying the public interest override was flawed in two respects. First, the Act specifically provides that the reason for requesting access to information is irrelevant in determining disclosure.⁴⁹¹ Second, in line with regional and international normative standards, the onus is on the public body to prove that the public interest override does not apply and not on the requester to prove that it does. An appeal against the decision remains pending in the High Court.

A subsequent decision of a Magistrate Court four years later, has however affirmed the position that each request for information must be treated on its merits irrespective of the reason for the request and that the failure of the public body to prove that public interest would be prejudiced by the release of information requested was fatal to its case.⁴⁹² The difference in outcome between these two cases might be the fact that at the time the latter case was decided, the ATI regulations had been adopted which amongst other things showed, in terms of the prescribed form, that a requester was not required to give reasons for a request.⁴⁹³

5.5.3.4 Public awareness and education

There is generally a poor level of awareness about the existence of ATIA and its content, and information is not readily accessible due to illiteracy as most information is created in English.⁴⁹⁴ In one survey conducted, 68 percent of staff of public bodies had no or

⁴⁹¹ Section 6(a).

⁴⁹² *Edward Sekyewa and Another v National Forestry Authority* (unreported) Miscellaneous Cause No. 73 of 2014, Chief Magistrate Court of Mengo.

⁴⁹³ See the Request Form, Schedule 2, The Access to Information Regulations 2011. Available at <file:///C:/Users/User/Downloads/Uganda%20ATI%20Regulations2011%20(2).pdf> (accessed 29 July 2015)

⁴⁹⁴ Schwarte, C. 'Public Participation and Oil Exploration in Uganda', International Institute for Environment and Development, Gatekeeper Series No. 138, December 2008, 9. Available at <<http://pubs.iied.org/pdfs/14574IIED.pdf>> (accessed 30 July 2015).

inadequate knowledge of the ATIA.⁴⁹⁵ This situation is further exacerbated by a lack of coordinated efforts by Ministries to generate awareness on the law within the public or internally amongst their staff.⁴⁹⁶ As a result, civil society organisations have been forced to fill the gap by training public officials and information officers, on the Act, often in collaboration with the Directorate. For example, HURINET Uganda has over the last few years, conducted training for information officers at both central and district levels; undertaken community outreach sessions and production of radio adverts to generate public awareness on the Act, and undertaken more targeted sectoral trainings for civic educators and resource monitors, postgraduate students, and journalists on the Act.⁴⁹⁷

5.5.3.5 Procedure for request

It appears that gaining access to information is more a function of personal relationships with officials of public bodies rather than the process laid down by the ATIA, because formal requests often lead to unnecessary ‘bureaucratic hurdles, delays and excuses’.⁴⁹⁸ In a recent survey of public officials involved in the implementation of the Act, 61% indicated that they received requests for information through informal channels as opposed to the prescribed form required by the Act.⁴⁹⁹

Perhaps as a result of the delay in adopting regulations, different processes for requesting access, which do not conform to the Act are followed by different public bodies. For example, some public bodies implement an appeal process whereby an appeal against the decision of the information officer lies to the relevant Minister or Prime Minister who

⁴⁹⁵ The Struggle for Access: An Assessment of the Capacity of Public Bodies to Implement Uganda’s Access to Information Act, 2005’ Africa Freedom of Information Centre, March 2012. Available at <file:///C:/Users/User/Downloads/The%20Struggle%20for%20Access-%20Uganda%20(1).pdf> (accessed 30 July 2015).

⁴⁹⁶ As above, 10.

⁴⁹⁷ Human Rights Network- Uganda Annual Report 2010, 12-14. Available at <<http://hurinet.or.ug/wp-content/uploads/2015/01/2010-HURINET-U-Annual-Report-2010.compressed.pdf>> (accessed 7 August 2015). Human Rights Network- Uganda Annual Report 2011, 16. Available at <<http://hurinet.or.ug/wp-content/uploads/2015/01/2011-Annual-Report.pdf>> (accessed 7 August 2015). Human Rights Network- Uganda Annual Report 2013, 12. Available at <<http://hurinet.or.ug/wp-content/uploads/2015/01/2013-ANNUAL-REPORT-final.pdf>> (accessed 7 August 2015).

⁴⁹⁸ Schwarte (n 493 above) 10.

⁴⁹⁹ ‘Ugandan Public Officials’ Perception of Using ICT to Advance the Right to Information’ CIPESA ICT Policy Research Series No. 1, 15 January 2015. Available at <<http://repository.up.ac.za/bitstream/handle/2263/25615/00front.pdf?sequence=1&isAllowed=y>> (accessed 8 August 2015).

may release such information at his/her discretion.⁵⁰⁰ In some instances, inconsistent procedures are followed within the same institution such as requesters being required to write letters requesting access to executive heads and in other cases to the human resource manager, in addition to filling the prescribed forms.⁵⁰¹

5.5.3.6 Monitoring and enforcement

ATIA does not provide for an independent mechanism to oversee the implementation of the Act, enforce compliance, create awareness or build the capacity of public bodies to comply with the Act. All the law does is to empower the Minister to make regulations and oblige each Minister to report to Parliament on the requests received under the Act. The 'appointment' of the Directorate to fill this lacuna by spearheading the implementation of the Act raises several concerns. A major concern is the absence of a direct statutory basis for this 'appointment' under ATIA, which is backed up by the necessary statutory powers thereby enabling the Directorate to effectively oversee the implementation of the Act. Furthermore, the status of Directorate as a government body, located in the office of the Prime Minister raises questions as to its independence. While the Directorate appears to have taken positive steps such as leading the drafting of the regulations, the development of the National Access to Information Programme and an Implementation Plan,⁵⁰² the effective implementation of any access to information law as exemplified by the Model Law, requires the establishment of an independent body with the necessary powers to monitor, enforce and promote implementation. This is unfortunately lacking in Uganda.

The inadequacy of the monitoring model under the ATIA is further reflected in the poor record of public bodies with regard to the submission of manuals, proactive disclosure of information and submission of reports to Parliament. Until the Ministry of Land, Housing and Urban Development developed its ATI manual for 2012/2013 in January 2012,⁵⁰³ no single public body had done so. Since then, no other manual has been published and neither has any public body published the categories of information automatically

⁵⁰⁰ The Struggle for Access (n 495 above).

⁵⁰¹ Access to Information in Africa Project: The Case of Uganda (n 443 above) 78.

⁵⁰² World Bank Report (n 445 world bank report above) 11.

⁵⁰³ The manual is available at <file:///C:/Users/User/Downloads/MLHUD%20ACCESS%20TO%20INFORMATION%20MANUAL.pdf> (accessed 3 August 2015). Note that the Manual has not been updated since published as required by the Act.

available as required by the Act, and neither has any one Minister presented a report to Parliament on the implementation of the Act.

In response to a February 2011 request for information on the details of reports by Ministers to Parliament about requests for information as required by ATIA,⁵⁰⁴ the Minister for Information sighted the relocation of the Directorate of Information and National Guidance, which has been mandated to oversee implementation from the Office of the President to that of the Prime Minister which occurred as far back as 2006, as a major reason for delayed implementation.⁵⁰⁵ The promise was that submission of reports would commence as soon as the regulations were adopted.⁵⁰⁶ Over 4 years later, not a single report has been submitted.

5.5.3.7 Compliance by public bodies

A 2011 survey showed that less than half of public bodies assessed (only 42 percent) had internal mechanisms for dealing with requests for access to information, which were in themselves deficient.⁵⁰⁷ This is exacerbated by the finding that 85% of the public bodies assessed had no budgetary allocation for the implementation of ATI and those that did, actually utilised less than 10 percent of allocated funds on ATI.⁵⁰⁸

And although 77 percent of public bodies had public relation officers who are ordinarily required to assist with implementation of the Act in addition to their roles of providing information to the public, their actual roles in relation to the ATI were poorly defined.⁵⁰⁹ Generally, additional staff have not been recruited to deal exclusively with access to information requests, but rather existing staff are required to take on the additional burden of administering requests made pursuant to the Act.⁵¹⁰ Furthermore training and capacity building has been found to be severely lacking.⁵¹¹

⁵⁰⁴ See section 43.

⁵⁰⁵ The letter was written by the Africa Freedom of Information Centre (AFIC) and the text of which is available at <file:///C:/Users/User/Downloads/Uganda%20none%20compliance%20RTI%20report%20(1).pdf> (accessed 30 July 2015).

⁵⁰⁶ As above.

⁵⁰⁷ The Struggle for Access (n 495 above) 7.

⁵⁰⁸ As above, 14.

⁵⁰⁹ As above, 8.

⁵¹⁰ As above.

⁵¹¹ As above, 8.

5.5.3.8 Record keeping

Generally, the poor record management systems in Uganda often make it practically difficult for public bodies to comply with the Act.⁵¹² Factors such as lack of staff training, inadequate financial resources and obsolete record management infrastructure and systems, all contrive to inhibit the proper collection, storage, retrieval and dissemination of information at the central and most especially district levels.⁵¹³

5.6 Conclusion

This Chapter sought to examine the impact of the international and continental emphasis on transparent and accountable governance in the last three decades, and the attendant world-wide increase in the adoption of access to information laws, on socio-economic progress in Africa.

In assessing the current access to information landscape on the continent, this Chapter finds that the recent rapid increase in the number and as normative strength of access to information laws in Africa is in many ways attributable to the efforts of the African Commission, especially its development of the Model Law. However, an overview of the content of the existing ATI laws on the continent shows that while most laws incorporate the key principles of ATI as embodied in international and regional standards such as the Model Law, the degree of compliance of these laws with the standards espoused by these principles vary widely, such that even some of the laws widely perceived as progressive, like those of Nigeria⁵¹⁴ and South Africa,⁵¹⁵ contain provisions which run contrary to key ATI principles. Common problems include: restriction of the right only to citizens; application of the law only to strictly public bodies thereby excluding private bodies and bodies performing public functions or utilising public funds; absence of primacy provisions, weak proactive disclosure provisions, requesting processes that do not address the needs of vulnerable groups, imposition of fees for requests beyond actual

⁵¹² The Struggle for Access (n 495 above) 14.

⁵¹³ World Bank Report (n 445 above) 12-13.

⁵¹⁴ In Nigeria, the oversight mechanism is the Ministry of Justice, which can hardly be regarded as an independent mechanism or necessarily comprising experts in the field of human rights generally or transparency in particular. The absence of neither an internal review process or

⁵¹⁵ PAIA for example excludes cabinet documents from the purview of the Act, has a complex public interest override provision and a weak enforcement mechanism.

reproduction costs; absence of internal appeal and/or quasi-judicial appeal mechanisms, vague and broadly worded exemption provisions and weak enforcement mechanisms. In Nigeria, a fundamental weakness of the law is the lack of reference to human rights or the Nigerian Constitution as a basis for its enactment. An assessment of the decisions of courts in South Africa and Uganda, whose laws were expressly enacted to give effect to the constitutional right of access to information, differently to those of Nigeria, shows the weightiness attached to access to information cases brought pursuant to their ATI laws, is absent in Nigerian cases.

In attempting to determine the contribution of ATI laws to socio-economic progress in Africa, case studies are undertaken of South Africa, Uganda and Nigeria. What all three case studies reveal at a general level, is that beyond intrinsic problems with the text of an ATI law, there are several other extrinsic problems that determine the extent of their effectiveness. Common problems include poor level of awareness within public institutions and society at large about the existence and usefulness of the law; failure to dedicate adequate financial and human resources within institutions for implementation; poor record keeping culture and poor level of compliance by public institutions with obligations under the relevant laws. These problems combine to hamper effective implementation of these ATI laws, which is emblematic of the situation across Africa.

However, two other challenges stand out. The overwhelming culture of secrecy in the public service of African States is perhaps the most important factor militating against the effective implementation of ATI laws. The default position is often one of secrecy. Even requests that are intentionally made to access *information already in the public domain* are routinely refused.⁵¹⁶ Another critical problem which this chapter reveals is the challenges related to the absence of strong enforcement mechanisms for ATI laws which are quick, simple, accessible and affordable to every person, especially the most vulnerable in society. Such mechanisms are few and far between in Africa whether on paper or in reality. As a result, the only recourse is often litigation to ensure compliance

⁵¹⁶ This has been the experience of civil society organisations like Section 27 in South Africa. See 'South Africa: The Land Where the Corrupt Go Free' Lisa Steyn, Mail and Guardian, 14 September 2015. Available at <<http://mg.co.za/article/2015-09-14-south-africa-the-land-where-the-corrupt-go-free>> (accessed 14 September 2015).

by public or private institutions. However, just like constitutional litigation, litigating to force compliance with an ATI law is a costly and time consuming exercise, which effectively puts realisation of the right of access beyond the reach of the average person.⁵¹⁷

⁵¹⁷ In South Africa for example, it cost AmaBhungane, the investigative arm of the Mail and Guardian Newspaper which exposed the Nkandla Saga, R300 million in utilising PAIA to access information on the R248 million upgrades. Again, the Mail and Guardian's long drawn out court battle to gain access to the report on the 2002 Zimbabwean presidential elections, spanned seven years. See (n 516 above).

CHAPTER SIX: ACCESS TO INFORMATION LEGISLATION AND SOCIO-ECONOMIC PROGRESS IN AFRICA: CASE STUDIES FROM NIGERIA, SOUTH AFRICA, AND UGANDA

6.1 Introduction

Bearing in mind the widely accepted usefulness of access to information in promoting democracy, governance and transparency and by extension its potential to influence socio-economic development, on the one hand, and the challenges to the implementation of access to information laws as typified by the experiences of Nigeria, South Africa and Uganda, on the other hand, questions as to the efficacy of ATI laws in aiding socio-economic progress arise.

It thus becomes necessary to ascertain whether attempts by the AU to encourage the adoption of access to information laws and the steady increase in the number of African States adopting access to information laws, has been successful, at the national level, in contributing to socio-economic progress in Africa.

This Chapter therefore examines the practical effect of the implementation of access to information legislation on socio-economic progress in Africa, using Nigeria, South Africa and Uganda as case studies. This is undertaken by a discussion of instances in which the utilisation of the access to information laws of these three countries has contributed to socio-economic progress. The particular factors which enhance or limit this contribution are examined, as well as other possible ways that these laws can be better utilised to further contribute to socio-economic progress in each case study country and, by extension, across the continent.

6.2 Case study country one: Nigeria

Being a relatively new law, the Nigerian FOI Act has had minimal opportunity to display its capacity to improve socio-economic progress in Nigeria. This is however not to say that the FOI Act has not been utilised and tested severally, especially by the vibrant Nigerian civil society. Since the coming into force of the FOI Act in March 2011, over

twenty cases have been dealt with by the courts with several others pending.¹ However, even where judgements have been favourable, public institutions have appealed such decisions. As a result, the tangible impact of FOI Act on socio-economic progress is a work in progress. Nevertheless, two case studies that have in no way involved litigation, show evidence of FOI Act contributing to socio-economic progress in Nigeria.

6.2.1 Case study one: Construction of classrooms at Nkume and Amuche, Imo State, Nigeria

In 2012, the Federal Government of Nigeria as part of the national budget, allocated a sum of 15 million naira² for the construction of a block of three classrooms each at Central School, Nkume and Central School Amucha, both in the Njaba Local Government Area of Imo State, in South East Nigeria. When by May 2013 these classrooms had neither been built nor were any efforts towards commencement of building activities, the Centre for Social Justice (CSJ), a local civil society organisation, filed a request for information under the FOI Act at the Ministry of Education.³

The CSJ requested information on the award of the contract. Specifically, the following was requested: the name of the company both projects has been awarded to; the address of these companies; the amount so far released to the companies, and the level of work done thus far.⁴ While no official response was received from the Minister for Education, the legal officer of the CSJ responsible for handling the FOI request was approached by aides to a legislator representing the area and requested to 'stop pursuing the matter' in exchange for a bribe.⁵ The legal officer declined.⁶

Within a week of this 'offer', the construction of the classrooms began in both Nkume and Amucha and have since been completed.⁷ It can thus be safely be concluded that the

¹ See for example the Right to Know Nigeria, FOI Case Tracker. Available at <<http://r2knigeria.org/index.php/foi-case-tracker?start=20>> (accessed 20 November 2015).

² This is approximately \$75,000.

³ The request for information was made by a letter dated 6 May 2013 and signed by Mr Eze Onyekpere, Director of the Centre for Social Justice. (On file with author).

⁴ As above.

⁵ Interview with Mr Kingsley Nnajiaka, Legal Officer, Centre for Social Justice, 13 October 2015, Abuja, Nigeria.

⁶ As above.

⁷ Though the exact date of completion could not be verified, Mr Nnajiaka, confirms that the both sets of classrooms were completed by the time he returned 'home' for Christmas in December 2013.

singular act of making the FOI request spurred action on the execution of the contract, first through an attempt to bribe the requester, and when that failed, the inception and subsequent completion of the classrooms. The request under the FOI Act thus directly contributed to the improvement of education infrastructure for residents of the Nkume and Amucha communities of Imo State, Nigeria.

6.2.2 Case study two: The Network of University Legal Aid Institutions' FOI Clinics

The Network of University Legal Aid Institutions (NULAI) is a non-governmental organisation established to promote clinical legal education, legal aid and access to justice in Nigeria. In 2013, NULAI commenced a project with the support of the Open Society Justice Initiative (OSJI) on 'Mainstreaming the Utilisation of the New Freedom of Information Act 2011 by Nigerian University-based Law Clinics'. A major objective of this project was to build the capacity of law teachers, law students, civil society and local communities as end users of the FOI Act.

The project's strategy was to train law teachers and students from nine law clinics across the country on the FOI Act, to in turn undertake community outreaches on the Act.⁸ Each of these nine clinics subsequently facilitated community outreaches educating community members on the importance of the FOI Act for community development by focusing on how to utilise the Act as a social audit tool.⁹

6.2.2.1 University of Abuja Legal Aid Clinic Project

In May 2014, 36 law students from the University of Abuja were trained on the FOI Act. They in turn conducted community outreach within the Angwan Azara, Jeshi, Angwan and Angwan Shanu communities.¹⁰ During the community outreach, the Law Clinics discussed issues of concern in respect of which community members would want to submit FOI requests. Based on this interaction, residents of the of the Angwan Shanu

⁸ These clinics include: Abia State University Law Clinic, Adekunle Ajasin (now Akungba) University Law Clinic, Ambrose Alli University Law Clinic, Ebonyi State University Law Clinic, Nigeria Law School Bagauda Law Clinic, Olabisi Onabanjo University Law Clinic, University of Abuja Law Clinic, University of Ilorin Legal Aid Clinic, University of Uyo Law Clinic.

⁹ 'Mainstreaming the Utilisation of the New Freedom of Information Act, 2011 by Nigerian University-based Law Clinics' Report of Law Clinics Activities, 2014. (On file with author).

¹⁰ As above.

community revealed the persistent lack of power supply suffered by the community and enlisted the help of the students of the University of Abuja Law Clinic in submitting an FOI request on the matter.

Subsequently, the Clinic submitted an FOI request on behalf of Members of the Angwan Shanu to the Gwagwalada Area Council, for its budgetary allocation for maintenance of power supply in areas under its mandate.¹¹ Although the Gwagwalada Area Council did not respond to the request, it promptly procured two electricity transformers to rectify the power supply problem, which have since been installed.¹²

6.2.2.2 The Ebonyi State University Law Clinic

In August 2015, the Ebonyi State University (EBSU) Law Clinic carried out a training of community leaders on the FOI Act in Abakaliki, Ebonyi State.¹³ At the end of this training, the Law Clinic was approached to file requests on eight different issues faced by some of these communities, most of which were socio-economic requests.¹⁴ One of such issues was the persistent power supply problem at the Hausa quarters in Abakaliki. As a result, a request was filed by the Law Clinic in September 2015 to the Ministry of Works, requesting reasons for the persistent power supply problem at the Hausa quarters in Abakaliki.¹⁵ Upon delivery of the request at the Ministry of Works, representatives of the EBSU Law Clinic were directed to the Enugu Electricity Distribution Company (EDDC). At the EDDC, the requested information was provided.¹⁶ Significantly, two weeks after filing the request, a new transformer was installed in the Hausa Quarters by the EDDC and power has since become stable in the area.¹⁷

6.3 Factors affecting contribution to socio-economic progress

Civil society has been the major reason why, despite its relatively short life-span, the FOI Act has had any impact in general and on socio-economic progress in particular, in

¹¹ As above.

¹² Telephone interview with Mr Nasiru Mukhtar, Director, University of Abuja Law Clinic, 12 November 2015.

¹³ Interim Report on the FOI Act Community Based Workshop Follow-Up on Filed Requests. (On file with author).

¹⁴ As above.

¹⁵ As above.

¹⁶ As above.

¹⁷ Telephone interview with Prof Amari Omaka, Director, EBSU Law Clinic, 3 December 2015.

Nigeria. They have sought to strategically utilise FOI Act to induce transparency and accountability on issues of public interest such as service delivery,¹⁸ astronomical salaries earned by public officials,¹⁹ and flaws in public procurement processes.²⁰ It thus clear that by strategically utilising the FOI Act to demand greater transparency on service delivery and interrelated issues, the law has been successfully utilised at a macro level to improve socio-economic progress.

In examining both case studies highlighted above, it is also clear that utilising the FOI Act to address service delivery problems at local government level is a common denominator. Thus, like in Uganda, it may be safe to assume that though the requests were not officially responded to, the fact that the requests originated from a local community and local indigene generated the necessary unease for the service delivery problems to be addressed.

6.4 Potential contribution to socio-economic progress

As the largest oil producer,²¹ and largest economy in Africa,²² Nigeria ordinarily should be a prosperous nation with high levels of socio-economic development. Instead, Nigeria continues to be listed as one of the least developed countries in the world,²³ with 63

¹⁸ See *Registered Trustees of the Socio-Economic Rights Accountability Project (SERAP) v Governor of Oyo State*, Suit No, 1/778/2011, Oyo State High Court.

¹⁹ See *LEDAP v National Assembly* FHC/ABJ./CS/805/2011; *Uzoegwu v Central Bank of Nigeria* FHC/ABJ./CS/1016/2011.

²⁰ The Public and Private Development Centre (PPDC) has led this strategy of utilising the FOI Act together with Public Procurement Act to ensure transparency in procurement processes and ultimately in service delivery. Judicial decisions in cases filed by PPDC under the FOI Act are available at <<http://procurementmonitor.org/ppdc/law-reports/>> (accessed 22 November 2015). Requests for information by PPDC and responses by public institutions are also available at <<http://library.procurementmonitor.org/categories.php>> (accessed 22 November 2015).

²¹ Nigeria produces 2.4 million barrels of oil a day, making it the largest oil producer in Africa. See 'The Biggest Oil Producers in Africa' Investopedia, 12 October 2015. Available at < <http://www.investopedia.com/articles/investing/101515/biggest-oil-producers-africa.asp>> (accessed 20 November 2015).

²² Nigeria became the largest economy in Africa in April 2014, overtaking South Africa. See 'Nigeria: Africa's New Number One', *The Economist*, 12 April 2014. Available at <<http://www.economist.com/news/leaders/21600685-nigerias-suddenly-supersized-economy-indeed-wonder-so-are-its-still-huge>> (accessed 20 November 2015).

²³ The United National Development Programme's Human Development Index (2014) which ranks countries based on three indicators: length and quality of life, education and standard of living, ranks Nigeria 152nd out of 187 countries.

percent of its population living in absolute poverty.²⁴ This is largely attributed to corruption. Despite attempts at addressing corruption through the establishment of mechanisms for anti-corruption,²⁵ and transparency within the extractives industry,²⁶ the perception still remains one of widespread corruption within the public service, with little progress in stemming this tide.²⁷

With the adoption of the FOI Act, however, ordinary Nigerians have been empowered not only to seek and obtain directly from relevant public institutions, information likely to reveal corrupt activities which are detrimental to socio-economic development, but also utilise the Act to ensure that the public institutions tasked with addressing such corrupt activities, execute their mandates in a diligent and transparent manner and are held accountable for failure to do so.

Another avenue for addressing corruption and improving socio-economic progress is by making public the asset declarations of public servants. The constitution of Nigeria requires the President and Vice-President, Ministers, Special Advisers, Governors and Deputy Governors, Commissioners, and all other public officers to declare their assets upon assumption of office,²⁸ and, thereafter, every four years and at the end of their term in office.²⁹ A code of conduct bureau is established by the constitution,³⁰ and is empowered to receive, examine, retain custody of asset declarations and 'make them

²⁴ See Annual Abstracts of Statistics 2012, National Bureau of Statistics, 88. Available at <<http://www.nigerianstat.gov.ng/nbslibrary/nbs-annual-abstract-of-statistics/nbs-annual-abstract-of-statistics>> (accessed 21 November 2015).

²⁵ A major effort on addressing corruption was the establishment of the Economic and Financial Crimes Commission (EFCC) in 2004, which though recording some successes, has failed to make a real impact on high-level corruption in Nigeria. See generally, 'Corruption on Trial?: The Record of the Economic and Financial Crimes Commission', Human Rights Watch Report, August 2011. Available at <<https://www.hrw.org/sites/default/files/reports/nigeria0811WebPostR.pdf>> (accessed 20 November 2012).

²⁶ The Nigeria Extractives Transparency Initiative was established in February 2004 pursuant to an Act of Parliament to implement the global EITI process, which promotes transparency in national revenue from petroleum and other extractive activities, was launched in 2002. At its inception, NEITI's potential to address corruption in oil revenue appeared promising, its effectiveness has however since dwindled. See generally, Shaxson, N. 'Nigeria's Extractive Industry Transparency Initiative: Just a Glorious Audit?' November 2009 Available at <https://eiti.org/sites/default/files/migrated_files/NEITI%2520Chatham%2520house_0.pdf> (accessed 20 November 2015).

²⁷ See generally, Owasanoye, B. 'Justice or Impunity?: High Profile Corruption Cases Crawling or Gone to Sleep' 2014, Stop Impunity Nigeria Campaign'. Available at <http://stopimpunitynigeria.org/wp-content/documents/Justice_or_Impunity.pdf> (accessed 20 November 2015).

²⁸ See sections 140, 149, 152, 185, 194 and Part II, Fifth Schedule to the Constitution.

²⁹ See Fifth Schedule to the Constitution, Part 1, 11(1)(a).

³⁰ This body is established by section 153(1)(a) of the Constitution.

available to the public on such terms and conditions as may be prescribed by the National Assembly'.³¹

Presently, the position of the Code of Conduct Bureau (CCB) is that the requisite rules for public release of asset declarations are yet to be prescribed by the National Assembly. As a result, the content of assets declarations by public officers is known only to the public officer who made the declaration. However, given the primacy of the FOI Act, this interpretation by the CCB appears flawed, especially as the FOI Act calls for proactive disclosure of information in addition to conferring a 'right on any person to access or request information, whether or not contained in any written form'.³²

Thus, the FOI Act could serve as a useful tool for empowering citizens at large, in holding elected officials and public servants accountable. By requiring the proactive disclosure of basic details of asset declarations made to the CCB, and access to these asset declaration forms upon request, thereby empowering ordinary citizens to ensure that elected officials and public servants do not utilise their positions of trust to illicitly divert public funds at the expense of service delivery. In addition, the sanctions associated with contravention of the Code of Conduct by, for example, providing false asset declarations is punishable by: vacation of office; disqualification from holding public office for 10 years and forfeiture of assets acquired through abuse of office or corruption. These sanctions if diligently applied, can serve as a strong deterrent against corruption and abuse of office by public officials.

6.5 Case study country two: South Africa

Despite the shortcomings in the implementation of PAIA highlighted in the preceding chapter, there are numerous instances in which requested information have been provided and successfully utilised in advancing socio-economic progress. In other instances, litigation has been utilised to force the release of requested documents which have in the end contributed to socio-economic progress in South Africa. Two main case studies are considered.

³¹ Third Schedule, Part 1A(3) of the Constitution.

³² Section 1(1) FOI Act.

6.5.1 Case Study 1: The ArcelorMittal case

In 1928, ISCOR (now ArcelorMittal) was established as a South African government parastatal to produce iron, steel and create employment.³³ By 1989, as part of a general privatisation strategy, ISCOR was privatised.³⁴ The steel production and mining divisions of ISCOR were in 2001, separated into ISCOR and Kumba resources respectively, with ISCOR subsequently being acquired by LNM Holdings NV in 2003, and then LNM Holdings being acquired by Ispat International NV in December 2004 and renamed Mittal Steel South Africa.³⁵ A merger of the two largest steel producers in the world (Mittal Steel and Arcelor SA) created the world's largest steel producer ArcelorMittal (AMSA) in 2006.³⁶

6.5.1.1 Pollution in the Steel Valley: The Vanderbijlpark steel plant

The Vanderbijlpark steel plant which was constructed by ISCOR in 1948 had about 500 smallholders neighbouring it to the west, in a community called Steel Valley. The plant began operations in 1952, years before the enactment of the Air Pollution Protection Act of 1956 (Pollution Act) which only came into force in 1959.³⁷ Despite the existence of a Pollution Act, the nature of ISCOR as a government parastatal allowed it to receive preferential treatment in terms of its environmental obligations under the Act, as it was issued a 'permit of exemption' and regulated by a special 'steering committee'³⁸ rather than the strict regulatory standards of the Pollution Act.³⁹ This preferential treatment set

³³ Available at <http://southafrica.arcelormittal.com/Company/History.aspx> (accessed 16 July 2015).

³⁴ Cock, J. and Munnik, V. 'Throwing Stones at a Giant: An Account of the Steel Valley Struggle against Pollution from the Vanderbijlpark Steel Works' Report Prepared by the Centre for Civil Society, University of Kwazulu Natal, March 2006, 7. Available at <http://www.wits.ac.za/files/l8khr_676600001349109519.pdf> (accessed 18 July 2015).

³⁵ N 33 above.

³⁶ See 'Arcelor and Mittal Agree to €27bn Merger' by Peter Marsh in Financial Times UK, 26 June 2006. Available at <<http://www.ft.com/cms/s/0/ffc47b5e-047b-11db-8981-0000779e2340.html#axzz3gb9DDrfd>> (accessed 20 July 2015).

³⁷ Munnik, V. 'Discursive Power and Environmental Justice in the New South Africa: The Steel Valley Struggle Against Pollution (1996-2006). Unpublished PhD thesis, University of Witwatersrand 2012, 173. Available at < <http://cer.org.za/wp-content/uploads/2014/11/Munnik-PhD-Steel-Valley-struggle-2012.pdf>> (accessed 20 July 2015).

³⁸ The steering committee comprised officials of the Department of Water Affairs, the South African Bureau of Standards, and the Water Institute of South Africa.

³⁹ The preferential treatment is evident in several respects such as: the categorisation of the details of the meeting as confidential; agreement that ISCOR's production processes will not be interfered with by the Committee and anti-pollution efforts to be based on what was 'economically feasible'; and that any complaints about ISCOR's activities would be dealt with directly by ISCOR and not the Committee. Munnik (n 37 above) 173.

the tone for government's deference to ISCOR's environmental polluting activities in the course of the next four decades.

The Vanderbijlpark plant was built on an elevated plane, which allowed highly contaminated waste water to flow easily into unlined evaporation dams and through unlined canals and ultimately into the Vaal river, and in the process seep into the ground water consumed by communities surrounding the plant.⁴⁰ Knowledge of the pollution caused by ISCOR's activities by government (the steering Committee) and ISCOR dates back to 1961,⁴¹ but it was only after the extent of the pollution became obvious and families living around the Steel Valley threatened legal action that ISCOR began to pay any real attention to their concerns.⁴²

With growing media attention, increased concern by Parliament, court cases and pressure from the Department of Water Affairs and Forestry, ISCOR undertook to develop a 'comprehensive environmental management plan', addressing eleven main issues of concern identified by the DWAF.⁴³ Following a gap analysis of this ten year plan, the result of which formed the basis on which a Master Plan was to be developed, ISCOR insisted that the content of future water license applications and by extension, the Master Plan, must be kept confidential.⁴⁴ As ISCOR had never accepted the existence of or liability for any pollution in the Steel Valley, the secrecy of the Master Plan was vital to preventing public knowledge of the nature, extent and proposed actions to address the 'non-existent

⁴⁰ Cock and Munnik (n 34 above) 11.

⁴¹ Minutes of the first meeting of the Steering Committee which came to light during subsequent court proceedings showed that at the time, there was discussion of the pollution of water and land as well as measures proposed by ISCOR to manage the situation but not to stop or prevent further pollution. Munnik thesis (n 37 above) 174. See also Cock, J. and Munnik, V. Throwing Stones (n 34 above) 11, which details six instances between 1961 and 1985 in which evidence about pollution was brought to the attention of ISCOR.

⁴² In the first case which was led by John Horne, a group of 168 individuals' instituted proceedings against ISCOR, but in the end settled. See Cock and Munnik (n 34 above) 21. In the second case, 16 residents of steel Valley who had applied to the Courts for interdicts *inter alia* stopping ISCOR from polluting the water. The interdict proceeding was however dismissed in 2003 and with the exception of 3 residents, the applicants withdrew after their properties were bought by ISCOR. See 'Valley of Death' by Fiona Macleod and Yolandi Groenewald Mail and Guardian, 14 June 2005. Available at <<http://mg.co.za/article/2005-06-14-valley-of-death>> (accessed 22 July 2015).

⁴³ Hallows, D. and Munnik, V 'Poisoned Spaces: Manufacturing Wealth, Producing Poverty' The groundWork Report 2006. Available at <<http://www.groundwork.org.za/reports/gWReport2006.pdf>> (accessed 18 July 2015).

⁴⁴ As above.

pollution'. Thus, 'scientific uncertainty' as to the cause of the pollution became ISCOR's strategy to avoid accountability.⁴⁵

As was later revealed by a whistle blower,⁴⁶ the Master Plan was a comprehensive document aimed to 'clean up production processes, to minimise existing pollution and prevent new pollution, and start with remediation processes', and had assisted ISCOR in developing a baseline of existing pollution.⁴⁷ Apart from a few hours during a Water Use Permit Process in 2003 during which participants were allowed to read a summary report of the Master Plan,⁴⁸ all efforts by community members and organisations like the Vaal Environmental Justice Alliance (VEJA) to gain access to the document was unsuccessful.⁴⁹ Ultimately this led to formal requests being made under PAIA to ISCOR (by this time now known as ArcelorMittal South Africa (AMSA) by the Centre for Environmental Rights (CER) on behalf of VEJA.⁵⁰

In December 2011, VEJA through its attorneys demanded from AMSA the Master Plan for the Vanderbijlpark site, together with all updated and amended versions as well as progress reports on its implementation.⁵¹ Despite VEJA clearly stating that the request was made in the public interest, to protect environmental rights as guaranteed by section 24 of the Constitution and that the documents were required to ensure AMSA complies

⁴⁵ Munnik, V. phd thesis (n 37 above) 281.

⁴⁶ Dr Pieter Van Eeden who was employed briefly at ISCOR between April 2000 and October 2001, released 2 internal reports containing the Master Plan to the public-the Master Plan Integration Report by Dr Ockie Fourie and an Executive Report: Environmental Master Plan 2003. Dr Van Eeden also revealed that toxicological tests proved that while individual tests for specific chemicals showed ISCOR met regulations, tests equally showed that the combination of existing chemicals in the water was toxic. See Munnik phd thesis, 109, 272.

⁴⁷ Cock and Munnik (n 34 above) 13.

⁴⁸ See Founding Affidavit, *Vaal Environmental Justice Alliance v Company Secretary of ArcelorMittal*, para 14. Available at <<http://cer.org.za/wp-content/uploads/2012/12/Founding-Papers-part-1.pdf>> (access ed 18 July 2015).

⁴⁹ See ArcelorMittal: Going Nowhere Slowly: A Review of the Global Steel Giant's Environmental and Social Impacts in 2008-2009. Available at <<http://bankwatch.org/publications/arcelormittal-going-nowhere-slowly-review-global-steel-giants-environmental-and-social->> (accessed 18 July 2015).

⁵⁰ See 'Steel Giant's Environment Record Exposed'. Available at <<http://cer.org.za/news/steel-giants-environmental-records-exposed>> (accessed 20 July 2015).

⁵¹ See Founding Affidavit, *Vaal Environmental Justice Alliance v Company Secretary of ArcelorMittal*, paras 18-20. Subsequently, VEJA also requested information on the illegal waste dumping at the Vaal Disposal Site in Vereeniging, para 30.

with relevant laws, to prevent and remediate pollution, AMSA denied the request on grounds of non-compliance with section 50 of PAIA as to why the record was required.⁵²

6.5.1.2 The Court Case

Following the denial of the request for information by AMSA, VEJA launched proceedings in the High Court in June 2013, requesting a declaration that the refusal of access was invalid and an application requesting an order for the release of the requested information.⁵³

VEJA argued that while the environmental pollution from AMSA's Vanderbijlpark plant was a matter of public record and had been formally acknowledged by public authorities, the lack of reliable information, as contained in the Master Plan, prevented VEJA and members of the community from holding AMSA accountable and impeded public participation in legitimate government processes.⁵⁴ AMSA, on its part, contended that VEJA's reliance on section 24 of the Constitution was misplaced as there was no allegation of this right having been violated by ISCOR. AMSA further contended that VEJA's stated objective of assessing compliance by AMSA, did not constitute a right but an attempt to 'bypass statutory mechanisms and processes' for compliance.⁵⁵ Furthermore, AMSA contended that the Master Plan was 'out-dated and irrelevant' and had no connection with the right sought to be protected and that because the Master Plan was never adopted but remained in draft form, 'never updated or implemented', the requested document did not exist and could thus not possibly assist in the exercise or protection of the right alleged.⁵⁶

⁵² See annexures to the Notice of Motion *Vaal Environmental Justice Alliance v Company Secretary of ArcelorMittal* Available at <<http://cer.org.za/wp-content/uploads/2012/12/Founding-Papers-part-2.pdf>> (accessed 18 July 2015).

⁵³ See Notice of Motion, *Vaal Environmental Justice Alliance v Company Secretary of ArcelorMittal*, para 1-2. Available at <<http://cer.org.za/wp-content/uploads/2012/12/Founding-Papers-part-1.pdf>> (accessed 18 July 2015).

⁵⁴ Founding Affidavit (n 51 above) paras 43-47.

⁵⁵ See paras 15 to 28, Respondent's Answering Affidavit *Vaal Environmental Justice Alliance v Company Secretary of ArcelorMittal*. Available at <<http://cer.org.za/www10.jnb1.host-h.net/wp-content/uploads/2013/06/Mittal-AA.pdf>> (accessed 18 July 2015).

⁵⁶ See paras 29 to 38, Respondent's Answering Affidavit *Vaal Environmental Justice Alliance v Company Secretary of ArcelorMittal*.

In finding for VEJA, the High Court rejected the arguments of AMSA and declared that VEJA could validly rely on section 24 of the Constitution and had satisfied the threshold requirement under section 50 of PAIA.⁵⁷ On appeal by AMSA to the Supreme Court of Appeal, in a hard hitting judgement, the Court dismissed the appeal and criticised AMSA's attitude prior to and during the case as 'disingenuous in claiming ignorance of the existence of its own Master Plan' and also its characterisation as 'simplistic', a consideration of the harm to be caused by disclosure or otherwise of the information.⁵⁸

The decision of the Supreme Court of Appeal in this case has potentially far-reaching consequences for environmental activists on one hand and for access to information activists on the other. For environmental activists in South Africa, it gives hope that community efforts to hold powerful and often recalcitrant private corporations accountable for environmental pollution can succeed, with a combination of their sheer determination and judicial sensitivity to the disastrous consequences of environmental pollution which section 24 of the Constitution seeks to prevent. For access to information advocates who have long pointed to the less stringent obligations on private bodies (as opposed to public bodies) to disclose information under PAIA as a major impediment to the realisation of the right, it signals a progressive move towards a more generous interpretation of section 50 of PAIA, especially in relation to the enforcement of a right contained in the Bill of Rights. This opens up possibilities for the realisation of other socio-economic rights. This is clearly evident in the judgement where the following is said:

Corporations operating within our borders, whether local or international, must be left in no doubt that in relation to the environment in circumstances such as those under discussion, there is no room for secrecy and that constitutional values will be enforced.⁵⁹

⁵⁷ *Vaal Environmental Justice Alliance v Company Secretary of ArcelorMittal* Case No 39646/12.

⁵⁸ *Company Secretary of ArcelorMittal v Vaal Environmental Justice Alliance* Case No 69/2014, para 81. Available at <<http://cer.org.za/wp-content/uploads/2012/12/VEJA-v-AMSA-SCA-Judgment.pdf>> (accessed 18 July 2015).

⁵⁹ *Company Secretary of ArcelorMittal v Vaal Environmental Justice Alliance* Case No 69/2014, para 81. Available at <<http://cer.org.za/wp-content/uploads/2012/12/VEJA-v-AMSA-SCA-Judgment.pdf>> (accessed 18 July 2015).

6.5.1.3 Release of the Master Plan and preliminary findings

The Master Plan was released by AMSA to VEJA on 17 December 2014, and has since been released to the public on 22 June 2015 by VEJA.⁶⁰ The release of the Master Plan is the first step towards holding AMSA accountable for decades of pollution in the Steel Valley. Numerous studies have documented the toll of AMSA's activities on the health of residents of Steel Valley, their land, livelihoods and quality of life.⁶¹ A social implications study in 1998 reported that one third of subjects reported three groups of illnesses which they ascribed to the polluted water: sinus problems, skin irritations (boils, rashes and allergies) and more dangerous ailments such as kidney, liver and intestinal problems, strokes and cancer.⁶²

Another study undertaken in the course of the 2001 interdict application, recorded that all 500 persons to whom medical questionnaires were administered, reported health problems. 'Almost everyone mentioned itchy eyes, stomach pains, kidney problems, skin rashes and headaches, "aching bones and joints", "headaches everyday", loss of energy and strength'.⁶³ More concerning was the result of tests performed on 26 people, the result of which indicated that cadmium⁶⁴ levels which were 30 percent higher than the South African reference levels and 50 percent higher than the international reference level.⁶⁵ However, AMSA at the time disputed that the high cadmium levels was connected

⁶⁰ See ArcelorMittal's Environmental Master Plan Made Public by Vaal Communities-Media Briefing 22 June 2015. <<http://www.groundwork.org.za/archives/2015/news%2020150619.php>> (accessed 18 July 2015). The 8,000 page document has been archived at the South African History Archive and the North West University, Vaal Campus.

⁶¹ A study also focuses on the impact of pollution on former and current employees of AMSA. See 'Steel at any Cost: A Community Voice Perspective on the Impacts of ArcelorMittal's Operations in Vanderbijlpark, South Africa', November 2013. Available at <http://bench-marks.org.za/press/arcelor_mittal_report_nov2013.pdf> (accessed 23 July 2015).

⁶² Munnik (n 37 above) 207.

⁶³ As above 208.

⁶⁴ Cadmium is a chemical element which is used in steel production and is known to be toxic. Short-term effects include lung problems such as bronchial and pulmonary irritation and long-term effects include kidney diseases such as proteinuria; lung diseases such as bronchiolitis; reproductive effects such as low birth weights in humans and low fetal weight, skeletal malformations and decreased reproduction. Cadmium has been classified a human carcinogen (cancer causing agent). See the United States Environmental Protection Agency Hazard Summary, available at <<http://www.epa.gov/ttnatw01/hlthef/cadmium.html>> (accessed 22 July 2015)

Since 2003, Cadmium has been subject to restricted use by the European Union but an outright ban is now imminent. See 'Toxic Cadmium One Step Closer to EU-wide Ban' available at <<http://www.euractiv.com/sections/science-policymaking/toxic-cadmium-one-step-closer-eu-wide-ban-314831>> (accessed 22 July 2015)

⁶⁵ Environmental Master Media Briefing of 22 June 2015 (n 60 above).

to its activities, claiming rather that it was as a result of exhaust fumes from a neighbouring highway.⁶⁶ Consequently, due to lack of convincing scientific evidence, the case was dismissed in 2008.⁶⁷

With the release of the Master Plan, it is now clear that sample tests conducted as part of the Master Plan, showed substantial pollution of the groundwater and soil by numerous contaminants (metals) including cadmium, which ought to have prompted more specific testing of the groundwater.⁶⁸ In not carrying out these tests, AMSA confirms the claims of the whistle blower Dr Van Eeden, that AMSA was unconcerned and even contemptuous about the impact of its activities on the environment and by extension the residents of Steel Valley.⁶⁹

The Integration Report (which is part of the Master Plan) also revealed a 'potentially unacceptable impact' of contaminants on the surface water in some areas and a 'potentially unacceptable' risk to the environment and human health by 'potentially' affecting drinking water which was 'generally unacceptable' on the site, the western perimeter of the plant and 'for a distance beyond the perimeter'.⁷⁰ The report identified as priority areas for action, residential areas and agricultural smallholdings but due to the nature and extent of the pollution, the report recommended remediation but also 'institutional measures', where remediation was too difficult or expensive and technically impracticable to ensure 'acceptable risk to human health and the environment'.⁷¹

The publication of the report clearly shows that not only was AMSA aware of the extensive and harmful nature of its activities on the people, land and air of Steel Valley, but also that rather than take full responsibility, it chose to acquire the houses and land of residents without fair compensation for their property, land and the devastating impact on their health and loss of livelihood.

⁶⁶ Munnik phd thesis, (n 37 above) 92.

⁶⁷ As above, 294.

⁶⁸ Environmental Master Media Briefing of 22 June 2015 (n 60 above).

⁶⁹ Munnik phd thesis (n 37 above) 272.

⁷⁰ 'Steel Giant's Environmental Records Exposed', available at <<http://cer.org.za/news/steel-giants-environmental-records-exposed>> (accessed 22 June 2015).

⁷¹ As above.

While the actual impact of the release of the Master Plan will have on any future court proceedings by residents in claiming compensation from AMSA for damages to their health and well-being, loss of income due to contamination of their agricultural land and other negative effects suffered due to the contamination remains to be seen,⁷² there are indications that VEJA will be working together with GroundWork, the South African Water Caucus, and the Right to Know Campaign to take this matter forward and hold AMSA accountable.⁷³

It is noteworthy that, to cushion the potential backlash from the court ordered release of the Master Plan, AMSA released an environment summary report in December 2014.⁷⁴ The aim of the report, AMSA claimed, was to ‘place the so-called Vanderbijlpark “Master Plans” and the progress made in terms of Environmental Management at this facility into perspective’ because ‘the “Master Plans” read in an isolated manner without the context of this executive summary would be an incomplete view’.⁷⁵ In reality, the report only detailed efforts undertaken by AMSA to improve air, water and land pollution, with no indication of the base line information on the state of the Vanderbijlpark plant prior to these efforts.

6.5.1.4 A second look at the pollution in the Steel Valley using PAIA

Following a preliminary analysis of the Master Plan which revealed clear evidence of land and water contamination at AMSA’s Vanderbijlpark Works, on behalf of VEJA, CER sought to establish whether AMSA had complied with the clear provisions of the National Environmental Management: Waste Act (NEMWA) 2008 with regard to contamination. Specifically, section 36(5) and 37 of NEMWA obliges the owner of significantly contaminated land or person who causes significant contamination of land, to notify the Minister of Environmental Affairs or MEC responsible for waste management in the

⁷² According to CER, the Master Plan contains thousands of pages of technical scientific information which is still being evaluated by experts to determine the true extent and circumstances of the contamination, and by extension, AMSA’s complicity. Telephone interview with Ms Christine Reddell, attorney at CER, 10 November 2015.

⁷³ Environmental Master Media Briefing of 22 June 2015 (n 60 above).

⁷⁴ ArcelorMittal Vanderbijlpark Works Environment: Summary Report December 2014 <<http://southafrica.arcelormittal.com/Portals/0/Vanderbijlpark-Works-Environmental-Summary-Report-2014-Web.pdf>> (accessed 18 July 2015).

⁷⁵ As above, 1.

Province in question, of this contamination. The Minister or Member of Executive Council (MEC)⁷⁶ is empowered to then instruct the owner or person responsible for the contamination of the land (which land then becomes an investigation area) to conduct a site assessment to determine the extent of the contamination, and if necessary thereafter, issue a remediation order to address the contamination.⁷⁷

Thus, in July 2015, CER submitted a PAIA request to the Department of Environmental Affairs (the Department), requesting *inter alia*: correspondence from AMSA notifying the Department of the contamination of the land in the Vanderbijlpark site to undertake a site assessment, and any steps the department had taken pursuant to NEMWA in respect of the notification.⁷⁸

The department's August 2015 release of requested information pursuant to PAIA,⁷⁹ revealed that AMSA had indeed given the mandatory notification to the Department in March 2015.⁸⁰ In response to the notification, the Department instructed AMSA to conduct a site assessment, and if the site assessment revealed contamination, to submit a remediation plan alongside the site assessment report.⁸¹ However, the site assessment is yet to be conducted by AMSA and unfortunately, NEMWA does not provide a time limit for the conduct of site assessments and the subsequent drawing up of a remediation plan. CER has thus written to the department urging it to ensure compliance by AMSA with the

⁷⁶ Each Province in South Africa has a cabinet known as the Executive Council, which is made up of the Premier and 5 to 10 members.

⁷⁷ See sections 36 and 37 of the National Environmental Management Act.

⁷⁸ PAIA Request of 5 July 2015 by the Centre for Environmental Rights on behalf of the Vaal Environmental Justice Network (VEJA). (On file with author).

⁷⁹ In granting access, the department provided to CER *inter alia*, the notification of contamination from AMSA, the department's response to the notification instructing AMSA to conduct a site assessment, a copy of the National Contaminated Land Register, a copy of the notification database, a notice to AMSA from the department of CER's PAIA request and an email response from AMSA indicating no objection to the release of information to CER.

⁸⁰ The Notification of Contaminated Land Report by AMSA is dated 20 March 2015 signed by the Environmental Manager. (On file with author). The notification is curious in the sense that while notifying the department of contamination at Vanderbijlpark, the existence of contamination is effectively denied.

⁸¹ Letter of 14 April 2015 signed by the Director for Land Remediation at the Department of Environmental Affairs and titled 'Acknowledgement of Receipt of Notification of Investigation Areas in Terms of the National Environmental Management: Waste Act 2008 (No. 59 of 2008) for ArcelorMittal Vanderbijlpark in Gauteng Province'. (On file with author).

department's instruction to undertake a site assessment and if necessary, develop a remediation plan.⁸²

Once conducted, such assessment is expected to confirm the contamination of Steel Valley as already revealed by the Master Plan, which would in turn oblige the development of a remediation Plan that would inevitably address the negative impact of the contamination on the land and water of residents of the Steel Valley. In light of this, the accrual of socio-economic progress flowing from both the initial PAIA request by CER which resulted in litigation and the subsequent request about the notification of contamination will, barring any unforeseen circumstances, materialise in due course.

6.5.2 Case Study two: Water supply to Ntambanana Municipality

For the 6,000 residents of Emkhandlwini village in Ntambanana Ward 2, located in the uThungulu district municipality of KwaZulu Natal, the end of apartheid had brought little change in terms of access to basic services such as healthcare, roads, water and electricity.⁸³ Like some neighbouring villages, residents of Emkhandlwini had no access to running water. Instead, they were forced to make daily trips to a river several kilometres away to satisfy all their water needs.⁸⁴

In 2000, a water scheme was developed to provide water to the area. However, because Emkhandlwini had no accessible roads, it had been excluded from the scheme. Winnie Biyela, a resident, approached her local Councillor for information of his plans to ensure the scheme and all future infrastructural development were extended to her village. Nothing came of this.⁸⁵ Following elections, a new Councillor came into office who assured Winnie and other residents that their request had been forwarded to the Ntambanana Municipality, and that they would soon receive running water.⁸⁶ Yet, no

⁸² Letter dated 1 October 2015 and titled 'Site Assessment in Respect of Investigation Area at Arcelor Mittal Vanderbijlpark in Terms of Part 8 of the National Environmental Management: Waste Act 2008. (On file with author).

⁸³ The Right to Know: A Fight for Dignity in South Africa, film produced for ODAC by Green Delta Media <http://www.unesco.org/archives/multimedia/index.php?s=films_details&id_page=33&id_film=2032> (accessed 23 July 2015).

⁸⁴ As above.

⁸⁵ As above.

⁸⁶ As above.

feedback was forthcoming. This made her and others increasingly frustrated by the lack of communication from the Councillor about the prospects of their water problem being resolved.⁸⁷

Soon afterwards, however, the municipality found a temporary solution. It decided to supply water through a truck from Empangeni. But not only was there only one truck for the entire community, the tank into which the water in the truck was to be deposited for the community was fixed so far away from their houses, that it was better for residents to keep accessing water from the river. For Emkhandlwini, it was as good as still having no access to water.⁸⁸

During a workshop organised by ODAC in 2004, Winnie and her neighbour Bongzi Makhoba discussed their challenges of accessing water, prompting the ODAC fieldworker, Melvis Pieterse, to advise them on the possibility of using PAIA to elicit information on the Council's plans for water supply to Ntambanana.⁸⁹ With the support of residents of Emkhandlwini, Pieterse sent a PAIA request to the Ntambanana Municipality, seeking disclosure of the minutes of the meeting of the Municipality where the water supply plans had been discussed, a copy of the Municipality's Integrated Development Plan (IDP) and the IDP budget.⁹⁰

It took six months to receive a response, which revealed that it was the uThungulu district municipality, and not the Ntambana Municipality, which was directly responsible for the provision of water to Emkhandlwini.⁹¹ Furthermore, the response revealed that there was a detailed and well thought out 5-year water supply implementation plan which had been developed by the uThungulu district municipality, to address the water situation of its municipalities, including Emkhandlwini.⁹² This plan involved the construction of water pipes and in the short-term, the supply of water tanks to affected communities including

⁸⁷ As above.

⁸⁸ As above.

⁸⁹ 'Edmunds, M. 'Working the Information Act' Marion Edmunds, Mail and Guardian, 12 December 2006 <<http://www.armsdeal-vpo.co.za/articles09/working.html>> (accessed 23 July 2015).

⁹⁰ Calland, R. 'Review of Impact and Effectiveness of Transparency and Accountability Initiatives: Freedom of Information' Institute of Development Studies October 2010 <<https://www.ids.ac.uk/files/dmfile/IETAnnex3FreedomofInfoCallandFinal28Oct2010.pdf>> (accessed 23 July 2015).

⁹¹ As above.

⁹² As above.

Emkhandlwini, which were to be filled regularly with water from mobile tankers.⁹³ Nearly a year after the PAIA request was made, the Municipality fulfilled its promise of installing a new tank that was easily accessible to the residents of Emkhandlwini and was regularly replenished by water trucks.⁹⁴

Although the Water Supply Development Plan clearly showed an intention by the Municipality to provide water to Emkhandlwini in the long run, the singular act of requesting information using PAIA and the ensuing media attention on the plight of residents of Emkhandlwini, undoubtedly forced the Municipality to take immediate action.⁹⁵ Today, although the uThungulu district Municipality lists access to water and sanitation, and the need for water infrastructure as the foremost challenges it faces in the delivery of services in the Ntambanana municipality,⁹⁶ significant progress in the provision of access to water has been made in the municipality, especially in Ntambanana Ward 2, within which Emkhandlwini falls. Notably, between 2001 and 2011, the percentage of residents within Ntambanana without access to water has reduced from 81 percent to 42 percent.⁹⁷

Also significant is the fact that the annual IDPs of the Ntambanana and uThungulu are now easily available on the websites of both institutions, thus obviating the need for residents of Ntambanana and uThungulu as a whole, to request through PAIA, access to these documents.⁹⁸

⁹³ Dimba, M. Access to Information as a tool for Socio-Economic Justice, International Conference on the Right to Public Information, Carter Centre, Atlanta, February 2008, 7 <<http://www.opendemocracy.org.za/documents/sectionfiledetail/21>> (accessed 20 December 2014).

⁹⁴ As above.

⁹⁵ Calland (n 90 above).

⁹⁶ uThungulu District Municipality Integrated Development Plan 2012/13-2016/17, 2nd Review, March 2014, 237. Available at <<http://mfma.treasury.gov.za/Documents/01.%20Integrated%20Development%20Plans/2014-15/03.%20Districts/DC28%20Uthungulu/DC28%20uThungulu%20IDP%20Draft%202nd%20Reveiw%202014%202015.pdf>> (accessed 23 July 2015).

⁹⁷ See 'Ntambanana Integrated Development Plan 2014/2015, 125. Available at <<file:///C:/Users/User/Downloads/final%20ntambanana%20%20idp%20201415.pdf>> (accessed 23 July 2015).

⁹⁸ Most recent IDPS for Ntambanana are available at <http://www.ntambanana.org.za/index.php?option=com_phocadownload&view=category&id=4&Itemid=11>. Most recent IDPS for uThungulu are available at <<http://www.uthungulu.org.za/uThungulu/node/6>> (accessed 23 July 2015).

6.5.3 Synopsis of further actual contributions to socio-economic progress

6.5.3.1 The Gauteng school toilets case⁹⁹

In early 2014, a Gauteng school principal requested the Department of Education to build a fence for the safety of its students. Instead, what they got was the award of a contract for the construction of new toilets for the school. The construction of the toilets was however abandoned before completion, leaving the school with toilets that posed serious health risk to staff and students.

Through the help of Corruption Watch and SAHA, the school authorities filed a request for information under PAIA to the Department of Education. Specifically, they requested records of planning meetings and the needs assessments undertaken in respect of the project. They also requested all contracts, tender documents and service level agreements related to the award of the contract. The requested documents were provided and it was revealed that the toilet construction was part of a wider infrastructure upgrade to schools by the Department. More importantly, the documents revealed that the agreed date for the completion of the project had passed with no real effort to make the contractor accountable for the non-completion. With this information, Corruption Watch was able to assist the school in ensuring the toilet construction was completed and that the more urgent need for a fence was addressed.

6.5.3.2 Challenging unfair discrimination in the workplace: The case of a transsexual¹⁰⁰

In 2013, Christien, who was employed by a public body as a man, subsequently came out as transsexual and transitioned to a woman. As a result, her manager re-assigned her from her ordinary duties and required her to undergo psychological evaluation to ensure that the hormones she was taking would not affect her ability to function in her ordinary duties. Even when the evaluation confirmed that her professional abilities were

⁹⁹ See 'Accessing Information for Better Basic Education', South African History Archive, 31-32. Available at <file:///C:/Users/User/Downloads/newA4_PAIA_BETTER_BASIC_ED_WEB%20(1).pdf> (accessed 23 July 2015).

¹⁰⁰ 'Accessing Information in the LGBTI Sector: A Guide to using the Protection of Access to Information Act to Advance the Position of Lesbian, Gay, Bisexual, Transgender and Intersex Persons in South Africa', 24. South African History Archive, 2012 <file:///C:/Users/User/Downloads/PAIALGBTIGUIDEWB VERSION_20120323.pdf> (accessed 23 July 2015).

unaffected, her manager refused to reinstate her to her ordinary duties, prompting Christien to seek legal assistance for her reinstatement.

When efforts by her lawyers failed to elicit a response from her employer, SAHA stepped in to assist by making a PAIA request to Christens' employer for: its policies and practices addressing unfair discrimination; complaint procedures open to employees who experience unfair discrimination; the number of unfair discrimination complaints received in the last five years and available counselling services for employees who face discrimination. Like the lawyers, SAHA received no response. However, decisive action was taken. The head of Christien's organisation sent out an email to all staff indicating that unfair discrimination was unacceptable and also ensured that Christien was reinstated to her ordinary duties.

6.5.3.3 Waste Disposal in Aliwal North¹⁰¹

For Monwabisi Charlie, a resident of Aliwal North in Maletswai Local Municipality within the Joe Gqabi Municipality of Eastern Cape, waste collection in surrounding informal settlements had for a long time been problematic. Irregular waste collection in these areas meant that accumulated waste was left for extended periods of time at a land-fill site facing the informal settlements, creating unhygienic conditions which were severely detrimental to the health and over all well-being of residents.

After several failed attempts by Mr Charlie to alert the local authorities to the waste management problem in Aliwal North, the issue came to the attention of CER through an Environmental Rights Clinic in 2011. CER made a PAIA request on behalf of Mr Charlie to the Maletswai Local Municipality, requesting information to enable it identify the reasons for the persistent waste problem. The response received from the Municipality revealed that the root cause of the problem included capacity and resource constraints within the Municipality to implement an effective waste collection system. Armed with this information, CER acting on behalf of Mr Charlie approached the local Member of the

¹⁰¹ Environmental Rights Blog: The Story of Monwabisi Charlie, Environmental Rights Activist'. Available at <<http://cer.org.za/news/environmental-rights-blog-the-story-of-monwabisi-charlie-environmental-rights-activist>> (accessed 10 November 2015).

Executive Council (MEC)¹⁰² responsible for environmental affairs and sought his intervention on the matter.

As a result of this intervention, the Department of Economic Development, Environmental Affairs and Tourism (DEDEAT) of the Eastern Cape conducted an investigation which found non-compliance by the Maletswai Local Municipality with provisions of the National Environmental Management: Waste Act 2008 and the Local Government: Municipal Systems Act 2000 and made a series of recommendations. This included DEDEAT assisting the Municipality with the development of an Integrated Waste Management Plan, sourcing of financial resources and training of personnel. Although the situation is now far from perfect, there has since been a marked improvement in the waste collection system of Aliwal North.

6.6 Factors influencing contribution to socio-economic progress

From the above case studies, the following key factors can be identified as having played a critical role in influencing the utilisation of PAIA for socio-economic progress.

6.6.1 Coordinated and sustained civil society engagement on implementation of PAIA

The outlined successes of utilising PAIA for improving socio-economic conditions of individuals and communities in South Africa owes much to the persistence and determination of civil society organisations. This has been exemplified by a wide range of activities such as: training at community level about the utility of PAIA in addressing everyday concerns;¹⁰³ providing practical assistance with formulating and transmitting requests for information; following-up on requests for information; analysing the information received and formulating strategies to utilise received information; and engaging in litigation to force public and private and public bodies to comply with PAIA. In fact, most if not all cases resulting in litigation under PAIA have emanated from civil

¹⁰² The Executive Council in South Africa is the 'cabinet' of a Provincial Government, which is led by the Premier of the relevant Province, in this case, the Eastern Cape Province. The three tiers of governance in South Africa are the national, provincial and municipal.

¹⁰³ Without exception, each of the case studies highlighted above have had the partial or total involvement of civil society organisations such as CER, ODAC and SAHA.

society organisations instituting proceedings on behalf of themselves,¹⁰⁴ or providing direct technical and financial support to affected individuals or communities.¹⁰⁵ Where this has not been the case, civil society has acted as *amici curiae* (friends of the court), thereby utilising their specialist knowledge and expertise on PAIA and access to information in general, to assist the courts in making well-informed decisions.¹⁰⁶

Of course, in many instances as illustrated by the case studies discussed above, the success of civil society organisations in the utilisation of PAIA in advancing socio-economic progress could not have been possible without the persistence and resolve of affected individuals and communities. The determination of individuals and communities to pursue the disclosure of requested information and the use of such information to a logical conclusion, is thus a critical factor in the success of civil society support in the implementation of PAIA generally, and for socio-economic progress, in particular.

6.6.2 Increasing progressive judicial interpretation of PAIA

Despite some of the constraints in the terms of the normative content of PAIA, the courts have increasingly adopted progressive interpretations of PAIA in such a manner as to ensure the spirit and intent of the PAIA in giving effect to the constitutional right of access to information is observed to the utmost. Thus, the Constitutional Court having found that the 30 days provided under PAIA within which an application may be filed against the refusal to disclose information to be unconstitutional, has increased it from 30 to 180 days.¹⁰⁷

Also, in terms of the application of PAIA to private bodies which due to the higher threshold of requesters having to prove the information is 'required for the exercise or protection' of any right' in section 50 of PAIA, courts are increasingly adopting a less restrictive interpretation of this provision. For example, in *ArcelorMittal v Vaal Economic*

¹⁰⁴ See for example *Right to Know Campaign and SAHA v Minister of Police*, Case No 2013/32512. Available at <http://www.r2k.org.za/wp-content/uploads/SKMBT_36314120315510.pdf> (accessed 10 November 2015).

¹⁰⁵ See for example *Mittal Steel South Africa v Mondli Hlatshwayo*, (2007) 1 All SA 1 (SCA). In this case Mondli Hlatshwayo was supported by ODAC.

¹⁰⁶ For example, SAHA has acted as amicus in *Brummer v Minister for Social Development*, 2009 (6) SA 323 (CC) and in *Mail and Guardian v Minister of Public Works* (2014) ZAGPPHC 226.

¹⁰⁷ *Stefan Brummer v Minister for Social Development* 2009 (6) SA 323 (CC).

Justice Alliance discussed above,¹⁰⁸ the Supreme Court of Appeal in finding that the applicants had met the threshold requirement under section 50 of PAIA, took into consideration the fact that VEJA was acting in the public interest, and the need for it to adopt 'a common sense approach' in determining the necessity for 'public participation and collaboration'. This approach is a markedly different from the more 'mechanical' approach of the courts in earlier cases, in which courts have interpreted the word 'required' so narrowly as to substantially restrict the application of PAIA to information held by private bodies.¹⁰⁹

Similarly, the difficulty associated with the application of the public interest override emanating from the two-tiered requirement that there having been 'substantial contravention of or failure to comply with the law' or 'imminent and serious public safety and environmental risk' and also that the public interest in the disclosure outweighs the harm being protected, making reliance on this provision problematic has gradually been more progressively interpreted. Thus, in *De Lange and Another v Eskom Holdings and Others*,¹¹⁰ the Court interpreted 'public interest' in section 46 to 'mean more than the meagre aspect specifically identified in that section' but also includes the public awareness of public safety and environmental risks as well as public interest in furthering the general goals of PAIA.¹¹¹ The Court in finding the existence of an imminent public safety and environmental risk, took into consideration a number of factors. This included the fact that the substantial financial loss incurred by Eskom, which was partly as a result of price fluctuations related to aluminum price, had resulted in 'load shedding'.¹¹² The domino effect of load shedding is reliance by households on alternative energy sources such as coal, with obvious health and environmental dangers such as smoke/gas inhalation and cancer,¹¹³ as well as disruptions to commuter systems. In the long run, this

¹⁰⁸ See pages 8-17 above.

¹⁰⁹ This includes cases such as *Claase v South Africa Airways* (2005) ZAGPHC 321 and *Unitas Hospital v Van Wyk* 2006 (4) SA 436 (SCA).

¹¹⁰ 2012 (1) SA (GSJ).

¹¹¹ Para 139.

¹¹² Para 146-147.

¹¹³ Para 149.

state of affairs is capable of causing severe damage to the economy with a possibility of mass actions and widespread job loss.¹¹⁴

While this projection of events is certainly not far-fetched, it is clear that in an effort to ensure the applicability of section 46 to the instant case, the court adopted a 'broader than usual' interpretation of the provision, and concluded that the public safety and environmental risks as presented was 'relatively imminent',¹¹⁵ as opposed to the legislative threshold of 'imminent and serious'.

6.6.3 The role of the Constitution as an anchor for PAIA

The implementation of PAIA is inextricably linked to the origin of its formulation as a legislative imperative under the Constitution. Although it has been clearly decided that with the enactment of PAIA, section 32 of the Constitution can no longer be directly relied upon in enforcing the right of access to information,¹¹⁶ the intended transformative role of access to information in moving away from the apartheid culture of secrecy to one of transparency and openness has been a central consideration of South African courts in adjudicating PAIA related cases.

Thus, the Constitutional Court in *Stefan Brummer v Minister of Social Development* stated:¹¹⁷

The importance of this right ... in a country which is founded on values of accountability, responsiveness and openness, cannot be gainsaid. To give effect to these founding values, the public must have access to information held by the State. Indeed one of the basic values and principles governing public administration is transparency. And the Constitution demands that transparency 'must be fostered by providing the public with timely, accessible and accurate information'.

Similarly, in the *ArcelorMittal* Case, the Court was greatly influenced by the fact that PAIA, as evident by its preamble, was adopted pursuant to a constitution which sought to break-

¹¹⁴ Para 150.

¹¹⁵ As above.

¹¹⁶ See *Institute for Democracy in South Africa and Others v African National Congress and Others*, 2005 (5) SA 39 (C), para 33. This is the position save for instances in which the subject matter of the litigation is the constitutionality of PAIA, other laws or actions outside the scope of PAIA.

¹¹⁷ N 107 above.

away from the apartheid legacy of a 'secretive and unresponsive culture' which fostered 'abuse of power and human rights violations' into a constitutional democracy.¹¹⁸

6.7 Potential contribution to socio-economic progress

For several years, increasingly violent 'civic protests' have been a common feature in the South African media, in what has been termed 'a rebellion of the poor'.¹¹⁹ The hope of socio-economic progress which the end of apartheid brought just over two decades ago, has given way to frustration about the high levels of poverty.¹²⁰ An analysis of the civic protests occurring in South Africa between 2007 and 2014 reveals that 80 percent of these protests stemmed from poor service delivery, corruption and maladministration as well as broader socio-economic problems at the municipal and provincial levels.¹²¹

In many cases however, it is not the mere fact of the poor service delivery that instigates these protests, but the lack of communication or information to residents by government about actions or planned actions to address these service delivery issues. This was precisely the situation in the case of the Ntambanana municipality discussed above.¹²²

Another example of how lack of information intersects with service delivery, is how the popular social movement organisation Abahlali BaseMjondolo (ABM), frustrated by the lack of information from the eThekweni Municipality long-term housing plans for residents of the Kennedy Road informal settlement, in September 2006 utilised PAIA to request information from the Municipality.¹²³ Ultimately, through a multifaceted approach, ABM was able to negotiate a housing strategy for residents of Kennedy Road and two other informal settlements in Durban.¹²⁴ PAIA has also been used by local communities such as the Rysmierbult community in the North West Province who following a successful

¹¹⁸ (n.57 above) para 78.

¹¹⁹ See generally Powell D. et al 'Civic Protests Barometer 2007-2014'. Available at <<http://mlgi.org.za/talking-good-governance/20150219%20Civic%20Protest%20Barometer%20Published%20%20DP.pdf>> (accessed 23 July 2015).

¹²⁰ According to Statistics South Africa, 56.8% of South Africans currently live in poverty and the country has a gini coefficient (which measures the level of inequality) of 0.7. Available at <http://www.statssa.gov.za/?page_id=739&id=1> (accessed 23 July 2015).

¹²¹ Civic Protest Barometer (n 119 above).

¹²² As above, 11-13.

¹²³ See 'Abahlali Delivers PAIA Request'. Available at <<http://abahlali.org/node/812/>>(accessed 23 July 2015).

¹²⁴ See Vartak, M. 'A Report on ABM and the Kennedy Road Settlement' Available at <<http://abahlali.org/node/6122/>> (accessed 23 July 2015).

land restitution claim, but with no information of the process afterwards, filed PAIA requests to access information about details of the trustees, beneficiaries and the precise size and location of the land.¹²⁵

The potential of PAIA to improve service delivery in terms of the right to housing, has been further enhanced by the Constitutional Court's interpretation of section 26(2) of the Constitution as imposing an obligation on the State to take 'reasonable legislative and other measures' to include 'meaningful engagement' with persons to be affected by evictions.¹²⁶ In particular, the Court stated that 'secrecy is counter-productive to the process of engagement' and that the 'constitutional value of openness is inimical to secrecy'.¹²⁷ This imperative for the State to meaningfully engage with potential evictees has been subsequently reaffirmed by the Constitutional Court in multiple instances.¹²⁸

More generally, PAIA affords communities the potential to access information on broader service delivery issues such as circumstances surrounding the provision of sub-standard housing,¹²⁹ determine accountability for deficient refuse collection in informal settlements,¹³⁰ and the application of low electricity tariffs by the national electricity provider to private companies at the expense of ordinary citizens.¹³¹

6.8 Case study country three: Uganda

In spite of the outlined challenges to the implementation of Uganda's ATI law, there are numerous instances in which the ATIA has been utilised for the advancement of socio-

¹²⁵¹²⁵ See further 'Accessing Information for your Community' South African History Archive, 2013. Available at <file:///C:/Users/User/Downloads/ATICOMMUNITYBOOKLET-LOWRES_20120703%20(1).pdf> (accessed 23 July 2015).

¹²⁶ *Occupiers of 51 Olivier Road v City of Johannesburg*, 2008 (3) SA 208 (CC).

¹²⁷ As above, para 21.

¹²⁸ See *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others*, (CCT 22/08) 2011 ZACC 8; *Abahlali Basemjondolo and Another v Premier of the Province of KwaZulu-Natal and Others* (CCT 12/09), 2009 ZACC, 31.

¹²⁹ Donollet, L. 'The Right to Demand Answers' Mail and Guardian, 29 April 2011. Available at <<http://mg.co.za/article/2011-04-29-the-right-to-demand-answers/>> (accessed 25 July 2015).

¹³⁰ See 'SJC/NU Call on City of Cape Town to Release Service Delivery Agreements For Contractors Operating in Informal Settlements'. Available at <<http://www.sjc.org.za/posts/sjcnu-calls-on-city-of-cape-town-to-release-service-delivery-agreements-for-informal-settlements>> (accessed 25 July 2016).

¹³¹ A PAIA request by Media 24 on the contract detailing electricity tariffs payable by two companies in the BHP Billiton Group of companies ultimately revealed this following court action. See *De Lange and Another v Eskom Holdings* 2012 (1) SA 280 (GSJ).

progress. Four cases are discussed to illustrate the actual and potential use of the ATIA in advancing socio-economic progress in Uganda.

6.8.1 The Bushenyi Stadium Case

In 2005, the Bushenyi District Council (BDC) awarded a contract for the construction of a stadium at a cost of 900 million shillings (approximately \$375,000 at the time).¹³² The contract was awarded to HABA Construction Company, owned by a member of the Executive Committee of the ruling National Resistance Movement (NRM).¹³³

After four years with no progress, residents of Bushenyi became increasingly dissatisfied with the lack of progress on the construction and even held protests and petitioned local authorities to ensure the completion of the project.¹³⁴ In July 2010, the Western Ankole (formally Bushenyi) CSO Forum, a platform for civil society organisations operating in the Ankole region of South West Uganda, wrote to district authorities demanding information about the stalled stadium construction.¹³⁵ Specifically, the CSO Forum requested the following: signed contracts for the development of the stadium; bill of quantities and architectural plans for the stadium construction; certificates submitted by the contractor, details of payments to the contractors and status reports on the project.¹³⁶

This first request was made to the chief administration officer (CAO) of the BDC, copying the Resident District Commissioner, who is responsible for monitoring government programmes at the district level.¹³⁷ When no response was received, the matter was escalated to the Office of the Prime Minister (the monitoring and Evaluation Unit), as well

¹³² Musungisi, G. 'Ushs. 900m Stadium in Ruins' Uganda Radio Network, 20 August 2009. Available at <<http://udistrigandaradionetwork.com/story/ushs-900m-bushenyi-stadium-in-ruins>> (accessed 5 August 2015).

¹³³ 'Uganda: The Challenge of Accessing Government Information' CIPESA, 4 November 201. <http://www.cipesa.org/2011/11/uganda_the_challenge_of_accessing_public_information/> (accessed 5 August 2015).

¹³⁴ 'Bushenyi District Residents Petition RDC over Stadium' by Paul Aruho, The Daily Monitor, 10 December 2009. Available at <<http://www.monitor.co.ug/News/National/-/688334/820540/-/wg1ann/-/index.html>> (accessed 8 August 2015).

¹³⁵ 'Bushenyi District Stadium Contracts Information Case up for Hearing' <<http://hurinet.blogspot.com/2011/06/bushenyi-district-stadium-contracts.html>> (accessed 6 August 2015).

¹³⁶ 'Bushenyi District Stadium Contracts Information Case up for Hearing' (n 135 above).

¹³⁷ As above.

as that of the President (the Department of Ethics and Integrity) but no feedback was ever received.¹³⁸

With no response in sight from the District Council, the CSO Forum in April 2011 instituted proceedings in the Magistrate's Court pursuant to ATIA, to compel disclosure of the requested information, with the legal support of HURINET-U.¹³⁹ Following a postponement of the hearing originally scheduled from June to July, the pressure on the BDC finally paid off.¹⁴⁰ In response to the CSO Forum request received by HURINET-U in July, but 'backdated' to 10 May 2011, the BDC released all the requested information.¹⁴¹ The released documents revealed that the entire contract sum of 906,874,020 million shillings had been paid to HABA Construction in three phases and that certificates of completion for each of the four phases of the project had been certified by the District Council in favour of HABA Construction, when in fact very little had been done.¹⁴²

Subsequently, the newly elected district leadership cancelled the contract with HABA Construction and re-awarded the stadium construction to another company, Rose ST construction limited.¹⁴³ The stadium has since been completed.

There is no doubt that the pressure brought about by the request and subsequent institution of proceedings against the BDC led to the release of information regarding the stadium construction and the eventual completion of the stadium by the new leadership keen to distance itself from the 'corrupt' activities of its predecessor. In the absence of a request, in all likelihood, the non-completion of the stadium would have been swept under the carpet like many other instances of corruption in public procurement processes in

¹³⁸ 'Uganda: The Challenge of Accessing Government Information' Uganda: The Challenge of Accessing Government Information' (n 133 above).

¹³⁹ Bushenyi District Stadium Contracts Information Case up for Hearing', (n 135 above).

¹⁴⁰ Bushenyi District Stadium Contracts Information Case up for Hearing', (n 135 above).

¹⁴¹ See Uganda ESCR Coalition google group email dated 13 July 2011, from Patrick Tumwine, HURINET-U, Advocacy, Information and Research Officer. Available at <<https://groups.google.com/forum/#!topic/escr-coalition/BCR3b5Dp7MI>> (accessed 8 August 2015).

¹⁴² As above.

¹⁴³ 'Basajjabalaba Could Refund Sh 1bn for Bushenyi Stadium Contract' the New Vision, 18 October 2011. Available at <<http://www.newvision.co.ug/news/18511-basajjabalaba-could-refund-sh1bn-for-bushenyi-stadium-contract.html>> (accessed 8 August 2015).

Uganda.¹⁴⁴ This is particularly so considering that the petition by the CSO Forum and other organisations to the Inspector General of Government¹⁴⁵ against HABA Construction and the implicated former District officials did not result in them being held accountable to refund the over 900 million shillings received.

6.8.2 The Uganda Land Commission Case

The Uganda Land Commission (ULC) is an independent constitutional body, established pursuant to section 238 of the Ugandan Constitution and empowered to ‘hold and manage any land in Uganda vested in or acquired by the Government of Uganda’.¹⁴⁶ As part of its mandate, the ULC administers the Uganda Land Fund (ULF).¹⁴⁷ The ULF was amongst other things established to enable land occupants to acquire registrable interest in land and also resettle persons who have been left landless as a result of Government action or natural disasters.¹⁴⁸ As part of this process, the ULC through the ‘Government Project: Support to the Uganda Land Commission’, embarked on a project to acquire land from land-owners on a willing buyer-willing seller basis, as a temporary measure to halt the eviction of *bona fide* occupants.

However, there were reports that the ULF was being misappropriated, as money intended to buy land under the scheme, was instead being used to buy land belonging to high-level government officials and army generals at highly inflated prices.¹⁴⁹ There was also a general lack of transparency in the land redistribution process, such that the effectiveness of the project was unclear, as many intended beneficiaries continued to remain landless.¹⁵⁰

¹⁴⁴ For detailed examples of such instances, see, ‘Graft Unlimited?: A Dossier on Corruption in Uganda 2000-2012’, report by Uganda Debt Network, May 2013. Available at <file:///C:/Users/User/Downloads/UDNDossieronCorruption(2013)%20(1).pdf> (accessed 8 August 2015).

¹⁴⁵ The Inspector General of Government, heads the Inspectorate of Government, an institution empowered by the constitution in sections 223 to 232 to amongst other things, eliminate corruption, promote and foster the rule of law and principles of natural justice in public offices and enforce the Leadership Code of Conduct.

¹⁴⁶ Section 239, Constitution of Uganda.

¹⁴⁷ The Uganda Land Fund was established by Section 41(1) of the Land Act 1998.

¹⁴⁸ See section 41(4) of the Land Act 1998.

¹⁴⁹ Interview with Mr Edward Sekyewa, Executive Director, Hub for Investigative Media, 10 December 2015, Pretoria, South Africa.

¹⁵⁰ As above.

In light of the above, Edward Sekyewa, a Ugandan journalist, sought to investigate these reports by relying on ATIA. On 7 January 2013, he requested the following information from the (ULC) on the Land Fund:

- i. List of individuals or entities that have been paid off under the Uganda Land Fund;
- ii. The sum of money each of these individuals or entities were paid; and
- iii. The details of the location and acreage of the land for which each individual or entities were paid.

When information officer refused the access to information request by the ULC on grounds that the information was exempted under section 33 of ATIA,¹⁵¹ Mr Sekyewa filed an action before the Nakawa Chief Magistrate's Court in July 2013.¹⁵²

Shortly after the institution of proceedings, the management of the ULC underwent an overhaul. The Chair of the ULC was retired and both the Chief Accountant and the Secretary to the ULC were fired. The new management of the ULC then sought to settle the matter amicably, by requesting a meeting with Edward Sekyewa to share with him the requested information. During this meeting, the Secretary to the ULC provided the names of the beneficiaries of the ULF and the location and acreage of lands for which money had been paid under the fund.¹⁵³ In essence, the exact amount paid for each land was not provided.

The incomplete provision of information notwithstanding, the operations of the ULC has, since the request for information and subsequent institution of court proceedings by Mr Sekyewa, become more transparent and accessible to the public.¹⁵⁴ This has in turn led to qualifying citizens now becoming beneficiaries of the ULF and curtailment of blatant corrupt activities that prevailed at the ULC.¹⁵⁵ In addition, the records relating to the ULF are now systematically stored in an electronic format to facilitate quick and easy

¹⁵¹ It is difficult to ascertain the specific ground on which the request was refused as section 33 permits the non-disclosure of information in two main instances- where the information contains an opinion, advice or recommendation which was obtained or prepared or a consultation or deliberation that has occurred; and information that would frustrate the deliberative process in a public body by inhibiting opinion, advice or recommendation or the conduct of a consultation or deliberation.

¹⁵² Notice of Refusal of Access dated 31 January 2013. (On file with author).

¹⁵³ Email communication from Mr Edward Sekyewa, 26 January 2016.

¹⁵⁴ As above.

¹⁵⁵ As above.

responses to requests for information.¹⁵⁶ While there is no direct evidence to prove that it was the request for information and the subsequent institution of court proceedings by Mr Sekyewa that led to the government taking action to ‘clean-up’ the ULC, it is clear that the new leadership of the ULC took deliberate steps to avoid litigation by restructuring the activities of the organisation thereby making it possible for a greater number of intended beneficiaries of the ULF to acquire registerable interest in land.

6.8.3 Synopsis of further case studies

6.8.3.1 Reversing shortage of medicine supply at Mpugwe Health Centre¹⁵⁷

In the Masaka district of Central Uganda, following training on the ATIA in May 2012, one of the participants Margaret Musoke sought to utilise the knowledge acquired from the training to seek information relating to the persistent problem of unavailability of anti-malaria medicines at the local health centre.¹⁵⁸ She thus requested information from officials at the Mpugwe Health Centre for records relating to the quantity and frequency of anti-malaria medicine supply, and staff attendance.

The response to Mrs Musoke’s request revealed that the shortages experienced were questionable, as the Health Centre routinely received adequate supplies of medication. With this knowledge in hand, Mrs Musoke insisted that this information be conspicuously displayed to ensure the information was accessible to all. This request and in particular, the proactive publication of medicine supplies has since ended the acute shortage of anti-malaria medication at the health centre.

¹⁵⁶ As above.

¹⁵⁷ ‘Access to Information Training in Uganda-Highlights 2010 – 2014’ Africa Freedom of Information Centre, on file with author. ‘Access to Information in Africa: Examining Progress Since the APAI Declaration 2013’, 80. Available at <http://www.right2info.org/resources/publications/publications/ati-in-africa_odac_2013> (accessed 5 August 2015).

¹⁵⁸ ‘Why Uganda and East Africa Should Embrace Open Contracting’. Available at <<http://ucmc.ug/7-why-uganda-and-east-africa-should-embrace-open-contracting>> (accessed 11 August 2015).

6.8.3.2 The Gravity Water Project¹⁵⁹

In 2010, a 500 million shilling (approximately \$275,000 at the time) gravity water project was commissioned by the Government in the Hoima district of western Uganda. Soon after completion, residents were unable to access water, due to a fault within the system. The Catholic Diocese of Hoima subsequently lodged a request for information under the ATIA for the records of the Gravity Water project. This request stirred the district authorities into making the necessary budgetary allocation to get the project functioning and re-establish water supply to the affected areas.

6.8.3.3 Missing supplies at the Kanoni Health Centre¹⁶⁰

In the Mbarara district a request by the Kazo Development Initiative revealed that mosquito nets and drugs were going missing at Kanoni Sub-county Health Centre III. The authorities subsequently took action to address the thefts.

6.8.3.4 VIP latrine construction¹⁶¹

The construction of Ventilated Improved Pit (VIP) latrines in a public school in the Iganga district of southeastern Uganda had stalled for over two years, until a request was made to the district for details of the contract agreement with the contractor for the construction of the latrines. Within four days of the request, the contractor resumed construction of the latrines.

6.9 Potential contribution to socio-economic progress

Apart from the instances highlighted above in which ATIA has been successfully utilised to advance socio-economic conditions in Uganda, there are numerous other areas in which implementation of the ATIA could assist in tackling widespread problems affecting the socio-economic concerns of Ugandans. A few of these are discussed.

¹⁵⁹ Right of Access to Information in Uganda: A tool for Citizen Engagement and Public Accountability', AFIC 2013. Available at <file:///C:/Users/User/Downloads/WS%20Info%20requests%20sheet%20.pdf> (accessed 5 August 2015)

¹⁶⁰ As above.

¹⁶¹ Why Uganda and East Africa Should Embrace Open Contracting (n 125 above).

6.9.1 Addressing poor service delivery

As with many African countries, service delivery in Uganda is problematic in many sectors, especially health and education. The results of the first service delivery indicator survey released in September 2013 revealed for example that 86 percent of classes in public schools had no access to textbooks and only 44 percent of health care facilities had all 6 essential drugs available to citizens.¹⁶² This survey is generally in line with public perception that social services, particularly health and education, are two main areas requiring government's attention.¹⁶³

By its own admission, the government of Uganda's performance on service delivery is below average.¹⁶⁴ This is despite the fact that budgetary allocation in the last four years (2011-2014) in six main sectors: works and transport, water, agriculture, education, energy, environment, health) more than doubled.¹⁶⁵ Factors such as poor planning and allocative efficiency; poor absorption of funds by institutions; delayed land acquisition; poor implementation and follow-up of government programmes; and diversion and misuse of funds have been identified by government as responsible for the poor service delivery situation in Uganda.¹⁶⁶ The successful reliance of ATIA in ensuring availability of required medication in the Mpugwe Health Centre and of addressing missing healthcare supplies in the Kanoni Health Centre discussed above,¹⁶⁷ provides empirical evidence of the potential of ATIA in making a difference in the delivery of healthcare services as with all other basic service delivery issues affecting the people of Uganda.

¹⁶² 'Education and Health Services in Uganda: Data for Results and Accountability, Service Delivery Indicators, World Bank, November 2013. 5,300 teachers and healthworkers were surveyed in 400 primary schools and 400 health facilities across Uganda. Available at <http://www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2013/11/18/000456286_20131118105216/Rendered/PDF/826660ESW0Ugan090Box379862B00OUO090.pdf> (accessed 11 August 2015).

¹⁶³ See Afrobarometer News Release 'Are Promises Kept? Understanding citizens' development agenda' 29 October 2015. Available at <http://afrobarometer.org/sites/default/files/press-release/uganda/uga_r6_pr1_government_performance_29102015.pdf> (accessed 6 November 2015).

¹⁶⁴ This admission was made by Patrick Ocaillap, Deputy Secretary to the treasury in the foreword to 'Improving Service Delivery in Uganda, Budget, Monitoring and Accountability Unit Discussion Paper 1/14, November 2014, Ministry of Finance, Planning and Economic Development, 4. Available at <<http://www.finance.go.ug/dmdocuments/BMAU%20Discussion%20Paper%2014.%20Improving%20Service%20Delivery%20in%20Uganda,%20November%202014.pdf>> (accessed 12 August 2015).

¹⁶⁵ As above, page 7, para 13.

¹⁶⁶ As above, page 29, para 109.

¹⁶⁷ See pages 277-278 above.

6.9.2 Tackling endemic corruption

A major cause of the poor service delivery being experienced in Uganda is corruption.¹⁶⁸ The endemic nature of corruption in Uganda is well documented.¹⁶⁹ Transparency International's Corruption Perception Index which measures public perception of corruption in the public service, in 2014 for example, ranked Uganda 142 out of 175 on a scale of least to most corrupt in the world, and 23 out of 39 within Africa.¹⁷⁰ The World Bank's Worldwide Governance Indicator, which measures six dimensions of governance, one of which is corruption, also shows that control over corruption in Uganda has sharply declined, especially in the last four years.¹⁷¹

Over the years, numerous scandals of high-level corruption by public officials negatively impacting on the provision of basic services and the overall socio-economic development of Uganda have come to light.¹⁷² Disturbingly, these cases often go unpunished, thereby entrenching a culture of impunity and desensitising the public to corruption.¹⁷³ Being a country substantially reliant on foreign aid, the levels of corruption also continues to adversely affect the flow of foreign aid, as foreign donors have on several occasions withdrawn or withheld aid due to concerns about corruption related to the implementation of development projects.¹⁷⁴

¹⁶⁸ See also example 'Corruption and the Service Delivery Tragedy in Uganda: Stories from the Eastern Leg of the Anti-Corruption Caravan', ActionAid Uganda, September 2014. Available at <http://www.actionaid.org/sites/files/actionaid/anti-corruption_report.pdf> (accessed 12 August 2015).

¹⁶⁹ See generally, Tangri, R and Mwenda, A. *The Politics of Elite Corruption in Africa: Uganda in Comparative African Perspective* (Routledge: New York 2013). See also 'Letting the Big Fish Swim: Failures to Prosecute High-Level Corruption in Uganda', Human Rights Watch Report, October 2013. Available at <<https://www.hrw.org/report/2013/10/21/letting-big-fish-swim/failures-prosecute-high-level-corruption-uganda>> (accessed 12 August 2015). The African Peer Review Mechanism has described corruption in Uganda as 'pervasive'. See the Republic of Uganda APRM Country Review Report No 7, January 2009, 37. Available at <http://www.aprm-au.org/admin/pdfFiles/CRR_No7-Uganda_EN.pdf> (accessed 2015)

¹⁷⁰ Transparency International, *Corruption Perception Index 2014: Results*. Available at <<https://www.transparency.org/cpi2014/results>> (accessed 13 August 2015).

¹⁷¹ World Bank *Worldwide Governance Indicators 1996-2014*. Available at <<http://info.worldbank.org/governance/wgi/index.aspx#home>> (accessed 13 November 2015).

¹⁷² See for example, 'Why Uganda and East Africa Should Embrace Open Contracting' (n 158 above). See also 'Nine Corruption Scandals to Look Back at'. Available at <<http://www.newvision.co.ug/mobile/Detail.aspx?NewsID=637209&CatID=1>> (accessed 14 August 2015)

¹⁷³ As above.

¹⁷⁴ In August 2012, the United Kingdom froze all aid to the office of the Prime Minister of Uganda and in November 2012, suspended all direct aid to Uganda. See 'UK Suspends Aid to Uganda as Concerns Grow Over Misuse of Funds', *The Guardian*, 16 November 2012. Available at <<http://www>.

Practically therefore, for any real and sustained improvement in socio-economic development to take place in Uganda, corruption must be addressed head on. In doing so, although Uganda possesses an impressive legislative framework for 'governance and the management of corruption', the implementation of such frameworks has been less than impressive,¹⁷⁵ mostly due to the lack of political will.¹⁷⁶ Thus access to information can make a difference, by strategically and persistently utilising ATIA to garner information of suspected cases of corruption in all spheres of government, and in so doing raising public awareness on the extent of corruption. By so doing, increased pressure can be brought on the government to better implement existing anti-corruption frameworks not on the basis of speculation, which is often the case, but on hard facts.¹⁷⁷

6.9.3 Transparency in the extractive industry

Historically, the Ugandan economy has been largely reliant on its agricultural sector which employs 80 percent of the population and produces coffee, tea and cotton for export.¹⁷⁸ However, the 2006 discovery of oil and gas deposits near Lake Albert, with a potential capacity of 3.5 billion barrels of oil and the existence of large deposits of as many as 27 different viable minerals in Uganda, has resulted in the rise of exploration and exploitation of natural resources in Uganda, which is set to intensify over the course of the next decade.¹⁷⁹ For example, by 2014, the Ministry of Energy and Mineral Development issued

theguardian.com/global-development/2012/nov/16/uk-suspends-aid-uganda-misuse> (accessed 14 August 2015). The European Union, World Bank, Austria, Belgium, Germany, Ireland and Sweden also suspended aid to Uganda over the corruption scandal involving the office of the Prime Minister. See 'Donors Cut all Budget Support to Uganda' available at <<http://www.africareview.com/News/Donors-cut-all-direct-aid-to-Uganda/-/979180/1636076/-/11k5ymv/-/index.html>> (accessed 14 August 2015)

¹⁷⁵ 'Tracking Corruption Trends in Uganda: Using the Data Tracking Mechanism', 4th annual report, Inspectorate of Government, 2014, x. Available at <http://www.igg.go.ug/static/files/publications/tracking_corruption_annual_report_4th_edition.pdf> (accessed 14 November 2015).

¹⁷⁶ See generally Graft Unlimited? A Dossier on Corruption in Uganda: 2000 – 2012', (n 144 above).

¹⁷⁷ It is noted that organisations such as Hub for Investigative Media (HIM) have sought to adopt this strategy. However, to be better effective this strategy could benefit from the involvement of a higher number of civil society organisations, acting in a coordinated manner.

¹⁷⁸ Modise, L. 'Can Uganda's Oil Endowment Support its Economic Development?', South African Institute of International Affairs (SAIA) Policy Briefing 26, December 2010 .

¹⁷⁹ See the cabinet approved national vision statement; 'Uganda Vision 2040: A Transformed Ugandan Society from a peasant to a Modern and Prosperous Country by 2030', pages 47-50. Available at <<http://npa.ug/wp-content/themes/npatheme/documents/vision2040.pdf>> (accessed 14 November 2015).

136 exclusive prospecting licences and 15 mining leases, in the Karamoja sub-region of North-East Uganda.¹⁸⁰

The proceeds of these exploration and mining activities hold the promise of vastly improving the socio-economic conditions of the communities in which explorations are taking place and Ugandans. However, the fulfilment of this promise is to a great extent dependent on the proper management of the income from these extractive activities into much needed infrastructure and development projects. The signing into law in February 2015 of the Public Finance Management Act (PFMA),¹⁸¹ which amongst other things establishes a system for the management of revenue from the exploitation of Uganda's petroleum resources, is thus a positive development in this regard. However, there remains a real likelihood that as is the case with many other well thought-out laws and policies adopted in Uganda, the implementation of the PFMA will be less than satisfactory. To begin with, the Regulations for the operationalisation of the PFMA is yet to be passed.

Beyond the management of oil revenue there is also the need to ensure the existence of effective mechanisms for the communities affected by exploration for oil and minerals and the general citizenry, to participate in relevant process in the conduct of exploration and exploitation activities which directly affect them such as the terms of licenses to third parties, to which the ATIA easily lends itself. This is so, despite the less than positive judicial outcome of past attempts in cases like *Charles Mpagi and Izama Angelo v Attorney General*,¹⁸² to utilise ATIA for ensuring transparency in the award of prospecting licenses.

While some judges may show deference to the Executive on matters such as oil revenue, there bound to be other judges equally less sympathetic to the Government and willing to uphold transparency over secrecy. Furthermore, as has been experienced in South Africa, with the passage of time and the gradual development of jurisprudence on the

¹⁸⁰ 'Human Rights Implications of Extractive Industry Activities in Uganda: A Study of the Mineral Sector in Karamoja and the Oil Refinery in Bunyoro', 14-15. Available at <http://www.asf.be/wp-content/uploads/2014/09/ASF_UG_ExtractiveSectorHRImplications.pdf> (accessed 15 November 2015).

¹⁸¹ The PPMA was adopted by Parliament in November 2014 and signed into law by President Museveni in February provides a framework for the overall fiscal and macroeconomic management for Uganda. See section 3 of the Act.

¹⁸² Miscellaneous Cause No. 251, 2009, Chief Magistrates Court of Nakawa.

ATIA, there is the potential for increased judicial readiness to move away from rigid interpretation and application of ATIA towards a more purposive approach. Viewed from this perspective, ATIA continues to afford ordinary Ugandans the opportunity to ensure transparency in these extractive related processes, which are set to increase in the coming years.

6.10 Factors affecting contribution to socio-economic progress

A few factors which can be gleaned from the case studies highlighted above as having played a role in the utilisation of ATIA for advancing socio-economic progress are now discussed.

6.10.1 Civil society's strategic use of the Access to Information Act

The poor level of awareness by most Ugandans about the existence of ATIA and the lack of political will to facilitate compliance has meant that the burden of ensuring its effective implementation, especially on the demand side, has fallen largely on civil society organisations. In all the cases highlighted above in which ATIA has contributed successfully to socio-economic progress in Uganda, civil society organisations have been strategically involved, either directly requesting for information using ATIA or by first conducting training sessions within communities to generate awareness of ATIA and its usefulness in the realisation of other rights, and then subsequently providing technical support to communities in addressing pressing socio-economic concerns, using ATIA.¹⁸³

6.10.2 Responsiveness of local authorities to requests for information

It appears that the responsiveness to requests of a socio-economic character is affected by the proximity of the requester to the public institution from which the information is requested. Thus, requests made to officials at the district level appear to generate more positive response in terms of providing the requested information and spurs quick action

¹⁸³ Thus, majority of the case studies on the actual contribution of the ATIA to socio-economic progress, emanate from projects implemented by civil society. For example AFIC in collaboration with HURINET is implementing a project which involves hosting a series of workshops in various part of Uganda. These workshops seek to empower community based groups focusing on thematic areas such as agriculture, health and education. See 'Right of Access to Information in Uganda: A Tool for Citizen Engagement and Public Accountability' (n 159 above).

by local authorities in terms of addressing the relevant socio-economic issue. The possible reason for this could be that public servants at the district level are more likely to live within or close to the communities seeking information on socio-economic issues and are thus more likely to feel a sense of duty to ensure the resolution of problems facing the community, be equally affected by the socio-economic issue or face negative repercussions from the community for failure to address complaints. By contrast, public servants at the national level are often far removed from the situation and generally not directly affected by the subject matter of the request or unlikely to face any direct consequences for failure to provide requested information or take the necessary action to address a socio-economic problem which may come to their attention through a request made pursuant to ATIA.

6.11 Conclusion

The case studies examined in this Chapter reveal that despite the numerous intrinsic and extrinsic problems that exist with their adoption and implementation, ATI laws have successfully been utilised for the improvement of socio-economic progress. In South Africa, over the last 15 years, the dogged advocacy by civil society, the constitutional backing that PAIA has, and the increasing progressive interpretation and application of PAIA by the judiciary have in many ways contributed to the usefulness of PAIA with regard to socio-economic issues in South Africa. From tackling big corporations involved in environmental pollution and challenging unfair discrimination to addressing service delivery issues such as water supply and education, PAIA has worked and has the potential to continue to address some of the most critical challenges facing South Africa today, such as poor service delivery.

Similarly, for Uganda and Nigeria where implementation of their laws has only begun in the last five years, the chapter provides similar examples of how these laws have influenced socio-economic progress. In both countries, similar to South Africa, the critical role of civil society in testing the boundaries of these laws and strategically utilising ATI laws for socio-economic development is illustrated. Case studies highlighted the utility of ATI laws in addressing corruption related to service delivery, especially in terms of ensuring that service delivery projects instituted by government are not only executed,

but executed timeously and according to intended standards. The case studies also show that it is by empowering local communities to utilise the ATI laws that access to information finds meaning in the lives of some of the most vulnerable society and more often than not, need it most. This is most important, given that case studies from all three countries showed local authorities taking action to address socio-economic issues arising from ATI requests brought by local communities directly affected.

More generally, the Chapter finds that beyond the actual contributions that the case studies reveal, the respective ATI laws have the potential to further improve socio-economic progress by addressing issues such as corruption and mismanagement of national resources, especially as they relate to service delivery as well as ensuring transparency in the extractive industries of Nigeria and Uganda in particular.

In summary, the case studies show that advancing socio-economic progress through ATI laws, generally occurs in three forms. First, a mere request for information can trigger the specific action about which the request was made. Second, where information received pursuant to an ATI request is put in the public domain, the public discussions or outcry it generates could force the relevant institution to act. Third, information received pursuant to an ATI request can be used to directly engage with the relevant public or private institution, leading to the requisite action.

A common feature of the judicial decisions examined in this Chapter is the reliance on other relevant laws guaranteeing a right of access by requesters for information. The next Chapter thus investigates the added value of relying on other general legal frameworks which allow for access to information whether in conjunction with constitutional right of ATI, an ATI law or independently.

CHAPTER SEVEN: ALTERNATIVE LEGAL FRAMEWORKS ON ACCESS TO INFORMATION AND SOCIO-ECONOMIC PROGRESS IN AFRICA

7.1 Introduction

The wanting state of socio-economic development in Africa is well documented. The United Nations Development Programme (UNDP) Human Development Index of 2015, which measures socio-economic development based on health, education and standard of living, classifies 44 states, of which 37 (84 percent) are in sub-Saharan Africa, as having the lowest human development in the world.¹ Likewise, 70 percent of countries on the United Nations Economic and Social Council's (ECOSOC) list of least developed countries, measured by low income, poor human assets index (nutrition, health, education and adult literacy), and economic vulnerability are in sub-Saharan Africa.²

The regrettable paradox is that, with the abundance of natural resources³ in the form of mineral deposits, arable land and human resources, most African States are well placed to ensure the standard of living necessary for a dignified life for its people. From the millions of dollars received in revenue from oil in Angola and Nigeria,⁴ bauxite in Guinea,⁵

¹ The full list of countries is available at <<http://hdr.undp.org/en/composite/HDI>> (accessed 14 December 2015).

² This list of least developed countries was first developed by the UN General Assembly in 1971, to identify the poorest and most vulnerable States needing international support. The list is maintained by the UN Committee on Development Policy of the Economic and Social Council of the United Nations. See <http://www.unohrrls.org/en/ldc/25/>. Presently, 34 of the 48 countries on the list are in Sub-Saharan Africa. The full list of countries is available at <http://www.un.org/esa/policy/devplan/profile/ldc_list.pdf> (accessed 29 November 2015). See generally, the Least Developed Countries Report 2014 'Growth with Structural Transformation: A Post-2015 Development Agenda'. Available at <http://unctad.org/en/PublicationsLibrary/ldc2014_en.pdf> (accessed 29 November 2015).

³ Two thirds of the world's diamonds, a third of the world's minerals, and a tenth of the world's petroleum is found in Africa. <<http://www.theatm.org/2015/05/20/the-african-continent-is-home-to-a-third-of-the-planets-mineral-reserves-a-tenth-of-oil-and-it-produces-two-thirds-of-the-diamonds/>> (accessed 29 November 2015).

⁴ Nigeria and Angola are the 12th and 14th largest oil producers in the world. See <<https://www.cia.gov/library/publications/the-world-factbook/rankorder/2241rank.html>> (accessed 29 November 2015).

⁵ Guinea has the world's largest reserves of bauxite, the world's main source of aluminium, measuring 7400 million tonnes. See <<http://www.mining-technology.com/features/featurebauxite-behemoths-the-worlds-biggest-bauxite-producers-4274090/>> (accessed 29 November 2015).

diamonds⁶ in Botswana⁷ and Democratic Republic of Congo (DRC),⁸ to the vast areas of arable land for agriculture and fast growing population providing the necessary human capital for economic growth,⁹ Africa should by all standards be the epitome of prosperity and self-sufficiency.

Instead, Africa has been the poster child for the 'resource curse'.¹⁰ Natural resources have fuelled civil wars such as in diamond-rich DRC and Sierra Leone, resulting in high levels of poverty, hunger and severely retarded socio-economic development in these countries. Thus, although the DRC is the third largest producer of diamonds and accounts for 17 percent of the world's diamond production,¹¹ hunger has more than doubled over the last two decades, during which a five-year civil war, labelled as the deadliest war since World War II, occurred.¹²

⁶ Eleven of the world's top fifteen producers of diamonds are in Africa. These are Botswana, Democratic Republic of Congo, South Africa, Angola, Zimbabwe, Namibia, Sierra Leone, Lesotho, Tanzania, Ghana, and Guinea. In total, Africa produces more than 56 percent of the world's diamonds. See the 'Kimberley Process Annual Global Summary: 2014 Production, Imports, Exports and KPC Counts'. Available at <https://kimberleyprocessstatistics.org/static/pdfs/public_statistics/2014/2014GlobalSummary.pdf> (accessed 5 December 2015).

⁷ Botswana is the world's second largest producer of diamonds. Kimberley Process Annual Global Summary, as above.

⁸ Democratic Republic of Congo is the world's third largest producer of diamonds, n.6 above.

⁹ 15 percent of the world's population lives in Africa and it is estimated that at its present growth rate of 2,3 percent per year, by 2100, Africa's current population of just over 1 billion, will more than triple to 3.6 billion. See 'State of the World Population 2011', UNFPA. Available at <<https://www.unfpa.org/sites/default/files/pub-pdf/EN-SWOP2011-FINAL.pdf>>. (accessed 29 November 2015).

¹⁰ The 'resource curse' or 'paradox of plenty' theorises that countries or regions with abundant natural resources or 'commodity wealth' fair worse in economic growth and developmental progress, than those with less. More recently however, there is a growing acceptance that this theory is defective, especially in that it fails to take into account the multiplicity and diversity of factors that enable some 'resource-rich' countries to be more effectively channeled towards socio-economic development better than others. See generally Rosser, A. 'The Political Economy of the Resource Curse: A Literature Survey', Institute of Development Studies, Working Paper 268, April 2006. Available at <<https://www.ids.ac.uk/files/WP268.pdf>> (accessed 29 November 2015). See also Stevens, P. et al 'The Resource Curse Revisited', Chatham House, the Royal Institute of International Affairs, Research Paper, August 2015. Available at <https://www.chathamhouse.org/sites/files/chathamhouse/field/field_document/20150804ResourceCurseRevisitedStevensLahnKooroshy_0.pdf> (accessed 29 November 2015).

¹¹ Millennium Development Goals Report Card: Measuring Progress Across Countries, September 2010, page 11. Available at <<http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/6172.pdf>> (accessed 30 November 2015).

¹² The war which began in 1998 and involved 9 countries and over twenty armed groups, ended with the signing of a peace agreement in 2003. However, fighting still continues in Eastern DRC. See Robinson S. 'The Deadliest War in the World', Times Magazine of Sunday May 28, 2006. Available at <<http://www.time.com/time/magazine/article/0,9171,1198921,00.html>> (accessed 30 November 2015). See 'Rumblings of war in Heart of Africa', McLaughlin A. and Woodside D. *The Christian Science Monitor* 23

Likewise, the abundance of natural resources has substantially increased the propensity for high-level corruption, such as in oil-rich Nigeria and bauxite-rich Guinea. Thus, despite the billions of dollars received in oil revenue giving Nigeria's position as the largest oil producer and exporter in Africa, the percentage of people living in poverty (on less than \$1.25 a day) has steadily risen from 49 percent in 1990 to over 77 percent today.¹³ This has been attributed to corruption.¹⁴ Between 1960 and 1999, an estimated \$380 Billion in oil revenue was lost to corruption in Nigeria.¹⁵ Widespread corruption has also been reported in Angola which is the second largest oil producing country in sub-Saharan Africa.¹⁶ In the period between 1997 and 2002 about \$4.2 Billion, an amount almost equal to the total foreign aid and domestic socio-economic expenditure for that period, reportedly 'disappeared from government coffers'.¹⁷

Similarly, in Equatorial Guinea, the discovery of oil in 1992 has since catapulted the nation to the fourth largest oil producer in sub-Saharan Africa, increasing the country's GDP from \$147 million in 1991 (the period immediately preceding the oil boom) to \$18.5 Billion in 2008.¹⁸ Yet, over 70 percent of the population live in poverty,¹⁹ and the average life expectancy at birth is as low as 51.1.²⁰ This has been attributed to widespread corruption and nepotism,²¹ resulting in a decline in government expenditure on basic services. For

June 2004 available at <<http://www.csmonitor.com/2004/0623/p01s04-woaf.html>> (accessed 30 November 2015). 'World War Three' available at <<http://mydd.com/2006/7/24/wo>> (accessed 30 November 2015).

¹³ Millennium Report Card (n 11 above) 11.

¹⁴ See generally Smith D.J, *A Culture of Corruption: Everyday Deception and Popular Discontent in Nigeria* (2006) Princeton: Princeton University Press.

¹⁵ 'Chop Fine: The Human Rights Impact of Local Government Corruption and Mismanagement in Rivers, State, Nigeria'. Human Rights Watch Report, January 2007 Volume 19, No. 2(A). Available at <[http://www.hrw.org/sites/default/files/reports/nigeria0107\[1\].pdf](http://www.hrw.org/sites/default/files/reports/nigeria0107[1].pdf)> (accessed 20 November 2015)

¹⁶ See generally, 'Transparency and Accountability in Angola,' Human Rights Watch Report, 2010 Available at <http://www.hrw.org/sites/default/files/reports/angola0410webwcover_1.pdf> (accessed 5 December 2015).

¹⁷ As above.

¹⁸ See 'Well Oiled: Oil and Human Rights in Equatorial Guinea' Human Rights Watch Report, 2009. Available at <http://www.hrw.org/sites/default/files/reports/bhr0709web_0.pdf> (accessed 23 November 2015).

¹⁹ See Africa Economic Outlook Country Report on Equatorial Guinea, available at <http://www.africaneconomicoutlook.org/fileadmin/uploads/aeo/Country_Notes/2011/Short/En-Eq_Guinea_short.pdf> (accessed 24 November 2015).

²⁰ UNDP Human Development Index 2015 (n 1 above).

²¹ Equatorial Guinea was ranked as the 11th most corrupt country in the world (no. 172 out of 182 countries, with a score of 1.9 out of a possible 10 by the Transparency Corruption Perception Index in 2011. See generally 'Well Oiled: Oil and Human Rights in Equatorial Guinea' (n 18 above).

example, government expenditure on health dropped from 6.43 percent in the period between 1992 and 1996 ²² to 3.9 percent in 2010.²³

Corruption is however a continent-wide problem, equally pervading the socio-economic development of non-resource-rich countries in Africa. More African States feature at the top of the list of most corrupt States, than any other region in the world. ²⁴ The African Union has estimated that African economies loose more than \$148 billion (25% of Africa's GDP) to corruption each year.²⁵ Some years ago, Transparency International estimated that over \$30 billion in foreign aid for Africa – an amount twice the annual gross domestic product of Ghana, Kenya and Uganda combined – ended up in foreign bank accounts.²⁶

In essence, good governance in the management of the process and proceeds of natural resource exploitation, in such a manner that ensures the national wealth is not only utilised for the provision of high quality basic services to all by thereby ensuring a good standard of living, but that at the same time, the process of exploitation is such that it mitigates the negative socio-economic impact on communities directly affected by these activities, and the nation as a whole, is critical for socio-economic development. To achieve this balance, numerous laws are adopted by States, including those in Africa, to ensure transparency in the procurement of goods, construction and services; tackle corruption in all spheres of governance; and to identify and mitigate the impact of natural resource exploitation, all in a bid to achieve the best attainable standard of development.

Against this background, this Chapter seeks to explore the use of generic legal frameworks which though not specifically enacted to give effect to the right of access to information, contain provisions which in one way or the other allow for access to information and may thus be relied upon in giving effect to this right. In doing so, this Chapter examines the use of access to information provisions embedded in three generic laws in Africa: public procurement, environmental impact assessment, and anti-corruption

²² 'Well Oiled: Oil and Human Rights in Equatorial Guinea', as above.

²³ World Health Organisations Country Statistics <<http://www.who.int/countries/gnq/en/>> (accessed 30 November 2015).

²⁴ See Transparency International Corruption Perception Index 2014 <file:///C:/Users/User/Downloads/2014_CPIBrochure_EN%20(2).pdf> (accessed 20 November 2015).

²⁵ Smith B. Good Governance and Development. (2007) Palgrave Macmillan p,175.

²⁶ <<http://www.humanrightsinitiative.org/publications/default.htm>> (accessed 30 September 2012)

to advance socio-economic progress in South Africa, Nigeria and Uganda respectively. This is with a view to assessing the actual and potential contribution of these generic frameworks, bearing in mind the role of the constitutional right of access to information and ATI laws in contributing to socio-economic progress.

The term 'generic' is thus used in this context to refer to laws that do not specifically deal with access to information, but are commonly found within the legal frameworks of States.

7.2 Case study country one: Nigeria

7.2.1 Public procurement, access to Information and socio-economic progress in Nigeria

Public procurement refers to the process through which governments obtain goods and services required to fulfill public functions in the ordinary course of governance.²⁷ It is the entire process through which goods and services needed are identified, a supplier is identified and the contract between the contracting entity and the supplier is implemented.²⁸ Thus, governments adopt public procurement regulatory frameworks that ensure competition, transparency, integrity, best value for money and efficiency in procurement processes,²⁹ as it is expected that a competitive and transparent public procurement process which is managed efficiently and with integrity, will provide the best value for money.³⁰

Generally, the adoption of legal frameworks on public procurement is considered as a key tool in the fight against corruption.³¹ A well formulated and implemented public procurement process goes a long way in preventing wastage of public funds and corruption, by tightening systems and ensuring that public funds are efficiently and effectively utilised to provide the widest range of basic social services to as many people as possible.

²⁷ Arrowsmith, S. (2005) *The Law of Public and Utilities Procurement* Sweet and Maxwell: London 1.

²⁸ As above.

²⁹ Williams-Elegbe, S. 'A Comparative Analysis of the Nigerian Public Procurement Act Against International Best Practice' (2015) 59 *Journal of African Law* 85.

³⁰ Public procurement may have other secondary or horizontal objectives which could be environmental, social or industrial related. As above.

³¹ Williams-Elegbe, S. (2012) *Fighting Corruption in Public Procurement: A Comparative Analysis of Disqualification or Disbarment* Hart Publishing: London 1

7.2.2 Overview of Public Procurement Legislation in Africa

In the last two decades, the elaboration of public procurement regulations and principles has gained momentum globally.³² In Africa, the public procurement discourse has in recent times focused on reform. This reform has largely formed part of a series of efforts geared towards the establishment of clear legislative frameworks for the regulation of public procurement, while at the same time, improving good governance and preventing corruption.³³

The earliest step in this process was the 1998 convening of a landmark conference on public procurement reform in Africa by the Common Market for Eastern and Southern Africa (COMESA), the African Development Bank (ADB) and several other regional and international organisations.³⁴ At the end of this conference, the 30 African States, together with the numerous development organisations present, resolved that there was a need to: modernise public procurement in Africa in line with international best practice; convince stakeholders of the urgency of public procurement reforms; and promote national procurement reform processes predicated on accountability, transparency and efficiency.³⁵

This was to be the start of a public procurement legislative revolution in Africa. Following the conference, numerous African States undertook wide-ranging reform processes, leading to the widespread adoption of procurement laws across the continent.³⁶ At the sub-regional level, organisations such as the West African Economic and Monetary Union

³² The two main global regulatory regimes for public procurement- the World Trade Organisation (WTO) Agreement on Government Procurement and the UNICRATAL Model Law on Procurement of Goods, Construction and Services, both underwent a comprehensive overhaul. See Quinot, G. and Arrowsmith, S. (eds) *Public Procurement Regulation in Africa* 2013 (New York: Cambridge University Press), 2-3.

³³ See generally Karangizi, S. 'Framework Arrangements in Public Procurement: A Perspective from Africa' in Tillipman, J. and Arrowsmith, S. (eds) in *Reform of the UNICITRAL Model Law on Procurement: Procurement Regulation for the 21st Century* (Eagan, Minnesota: West Publishing) 2010.

³⁴ Other organisers included: the West African Economic and Monetary Union (WAEMU); the African Capacity Building Foundation (ACBF); the World Bank; and the Organisation for Economic Co-operation and Development (OECD). COMESA Public Procurement Reform and Capacity Building Projects: Project Performance Evaluation Report, 2012, African Development Bank Group. Available at <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Evaluation-Reports-_Shared-With-OPEV/COMESA_%20Project%20Performance%20Evaluation%20Report_web.pdf> (accessed 30 November 2015).

³⁵ As above, 2.

³⁶ See generally Williams-Elegbe, S. 'A Comparative Analysis of Public Procurement Reforms in Africa' (2015) 1 *Procurement Law Journal* 11. Countries like Botswana, Burundi, Ethiopia, Ghana, Kenya, Namibia, Nigeria, Rwanda, South Africa and Uganda have adopted procurement laws.

(WAEMU)³⁷- which is otherwise known by its French acronym UEMOA- and COMESA have with the financial assistance of the ADB, also initiated projects which sought to encourage Member States to undertake procurement related reform.

In COMESA,³⁸ an initial project funded by the ADB,³⁹ led amongst other things to the adoption of the Public Procurement Framework Directive in 2002, which provided a framework to guide Member States in undertaking legislative reforms aimed at modernising their respective procurement systems.⁴⁰ A follow-up project went further on to consolidate procurement reforms, by *inter alia*, developing and facilitating the adoption of the COMESA Public Procurement Regulations in 2009.⁴¹ The combined effect of both projects was the alignment of procurement systems in 14 of the 19 Member States with the Directive, as well as a commitment to the harmonisation of non-discriminatory procurement systems in each Member State by 2014.⁴² These projects also succeeded in increasing awareness amongst Member States on the importance of enhancing good governance and transparency in procurement as well as in improving accountability in the administration of public funds.⁴³

At the level of WAEMU,⁴⁴ with the financial and technical support of the ADB and the World Bank, a two-phased project set out to harmonise and modernise the public procurement system of Member States.⁴⁵ This was achieved through a comprehensive assessment of

³⁷ The West African Economic and Monetary Union (WAEMU) is otherwise known by its French name Union Economique et Monetaire Ouest Africaine (UEMOA).

³⁸ COMESA comprises 19 Member States namely: Burundi, Comoros, Djibouti, Democratic Republic of Congo, Egypt, Ethiopia, Eritrea, Kenya, Libya, Rwanda, Malawi, Madagascar, Mauritius, Swaziland, Seychelles, Sudan, Uganda, Zambia, and Zimbabwe.

³⁹ The COMESA Public Procurement Reform project took place from May 2002 to December 2004.

⁴⁰ The Directive was adopted by the Authority of the Heads of States and Government of COMESA held in Sudan, in March 2002. 'COMESA: Enhancing Procurement Reforms and Capacity and Project', Appraisal Report, African Development Bank, May 2006, vi. Available at <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/Multinational_-_COMESA_-_Enhancing_Procurement_Reforms__Capacity_Project_-_Appraisal_Report.pdf> (accessed 1 December 2015).

⁴¹ COMESA Public Procurement Regulations, Legal Notice No 3 of 2009. Published in the Official Gazette of COMESA, Vol. 15 No 3, 9 June 2009. Available at <<http://www.comesa.int/attachments/article/26/2009%20Gazette%20Vol%2015%20No3.pdf>> (accessed 1 December 2015).

⁴² COMESA Public Procurement Reform and Capacity Building Projects: Project Performance Evaluation Report, 2012, African Development Bank Group, ix.

⁴³ As above.

⁴⁴ The following countries constitute WAEMU: Benin, Burkina Faso, Côte d'Ivoire, Guinea-Bissau, Mali, Niger, Senegal and Togo.

⁴⁵ The first phase of the project was implemented between 2002 and 2005.

existing procurement systems within Member States in line with international best practice, and then the adoption in 2005, of Community Regulations consisting of two sets of Public Procurement Guidelines to address the numerous shortcomings of these procurement systems.⁴⁶ The second phase involved the implementation of these Directives by their incorporation into the national laws of Member States, with positive outcomes.⁴⁷

On the whole, most African States have put in place regulatory frameworks for public procurement which incorporate transparency as a key objective. To achieve this objective, several provisions which can be described as facilitating the right of access to information in the context of procurement processes have been made present. Some of these provisions include: open and competitive bidding; wide dissemination of procurement opportunities; maintenance of updated records at all stages of the procurement process such as bid, award and implementation documents; access to requested information subject to express limitations; regular updates to lists of participants in the procurement process such as bidders and suppliers; publication and dissemination of notices related to the subsequent award of tenders; maintenance of all records relating to the procurement process for a specified number of years following its completion; and establishment of a complaints or appeal mechanism for the simple, quick and effective disposal of procurement related grievances.⁴⁸

However, as with all other laws, the strength of these procurement laws- in terms of the extent to which the provisions of these procurement laws conform to international standards- together with their effective implementation, are the two most important factors

⁴⁶ The Regulation was adopted on 9 December 2005 by the WAEMU Councils of Ministers and comprised two directives: Directive N°04/2005/CM/UEMOA on procedures for the award, implementation and payment of public contracts and Directive N°05/2005/CM/UEMOA on procedures for the control and regulation of public procurement. See 'Project in Support of Public Procurement Systems Reform in WAEMU Zone (Phase II)', African Development Fund, September 2006, 8-10.

⁴⁷ 'Strengthening Country Procurement Systems: Results and Opportunities, 4th High Level Forum on Aid Effectiveness, 73-74. Available at <<http://www.unpcdc.org/media/352128/strengthening-country-procurement-systems-oecd-dac-hlf4-2011.pdf>> (accessed 1 December 2015).

⁴⁸ Ekwekwuo, C. 'Regimes of Access to Public Procurement: Examples from Africa', 2-3. (On file with author).

determining the extent to which their stated objectives, including that of transparency, are attained.

7.2.3 The Nigerian Public Procurement Act 2007

Prior to the enactment of the Public Procurement Act (PPA) in 2007, Nigeria had no legislative framework for regulating public procurement. All that existed were policies and procedures guiding public procurement. In particular, Nigeria relied on the Financial Regulations annually issued by the Ministry of Finance to regulate and delegate public procurement and financial responsibilities.⁴⁹ These regulations made provision for procurement related issues such as the composition and functioning of Tender Boards and the procurement process at the federal level. In the States making up the federation however, the Financial Regulations were supplemented by circulars and guidelines by each administrative branch of each State government.⁵⁰

The deficiencies in the existing procurement system, led the World Bank's Country Procurement Assessment team to conclude in its 2000 report, that the existing system was grossly defective in several respects, such as the absence of: a statutory framework governing the entire process; a central policy-making body or one which monitors and oversees the process; transparency in the system; and a complaints mechanism for aggrieved participants.⁵¹ As a result, the report made wide ranging recommendations,⁵² which in terms of the legislative and regulatory framework of procurement in Nigeria, was to establish a procurement regulatory body' and also 'introduce a public procurement law based on the United Nations Commission for International Trade Law (UNICTRAL) Model'.⁵³

⁴⁹ 'Nigeria Country Procurement Assessment Report (CPAR), June 2000, (Volume 1), 3. Available at <http://www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2001/06/08/000094946_01053004005048/Rendered/PDF/multi0page.pdf> (accessed 1 December 2015).

⁵⁰ As above.

⁵¹ As above.

⁵² The recommendations were grouped into 7 main themes : legal and regulatory framework; procedures and practices; organisation and resources; performance on bank-assisted projects; private sector procurement, trade customs and practices and electronic commerce.

⁵³ As above.

In implementing the recommendation of the World Bank's Country Procurement Assessment Report (CPAR), the Nigerian government prioritised public procurement reform as a key component of its overall economic reform agenda.⁵⁴ Subsequently, a Budget Monitoring and Price Intelligence (BMPI) Unit was established in March 2003, to develop and enforce compliance with guidelines and procedures for the procurement of capital projects and associated goods and services.⁵⁵ It was this BMPI unit that was to later develop the Public Procurement Bill which was presented to the National Assembly by the government.⁵⁶ The Bill was passed by the National Assembly on 30 May 2007 and signed into law on 4 June 2007.⁵⁷

7.2.3.1 Overview of key provisions

The PPA incorporated to a large extent, the provisions of the UNICTRAL Model Law on Procurement of Goods, Construction and Services of 1994, as recommended by the CPAR.⁵⁸ Some of its key provisions are discussed.

a. Scope of application

The PPA applies to all procurement of goods, works and services undertaken by the Federal Government and all procurements entities, as well as any other entity that utilises at least 35 percent of funds from the Consolidated Revenue fund⁵⁹ for procurement purposes.⁶⁰ However, the PPA does not apply to procurement involving national defence or national security, unless expressly approved by the President.⁶¹

⁵⁴ Background to the development of the Nigerian Public Procurement Act. Available at <http://www.bpp.gov.ng/index.php?option=com_content&view=article&id=109&Itemid=739> (accessed 29 November 2015).

⁵⁵ Ekwewwuo, C. *Pathway for an Improved Procurement System in Nigeria* (2012) Veritable Silver Prints: Abuja.

⁵⁶ As above.

⁵⁷ Background to the development of the Nigerian Public Procurement Act, n.54 above.

⁵⁸ This Model Law has since been replaced by the UNICTRAL Model Law on Public Procurement 2011, which was adopted in July 2011 and reflects international best practice in public procurement. See generally, 'Guide to the Enactment of the UNICTRAL Model Law on Public Procurement'. Available at <<http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/Guide-Enactment-Model-Law-Public-Procurement-e.pdf>> (accessed 3 December 2015).

⁵⁹ By section 120 of the 1999 Constitution of Nigeria, all revenue received by 36 States of the federation are to be paid into the Consolidated Revenue Fund.

⁶⁰ Section 15(1) PPA.

⁶¹ Section 15(2). A broad approval has however been given for these types of procurement by the former President Yaradua, which remains in force. Ekwewwuo, C. *Pathway for an Improved Procurement System in Nigeria* (n 55 above) 17.

b. Fundamental principles for procurement

The PPA requires that all public procurement must: be subject to open competitive bidding;⁶² transparent, timeous and equitable;⁶³ provide value for money and fitness for purpose;⁶⁴ promote competition, economy and efficiency;⁶⁵ and comply with the procedures and timelines in the Act.⁶⁶

c. Regulatory mechanism

The PPA establishes the Bureau of Public Procurement (BPP) to oversee the implementation of the Act,⁶⁷ under the guidance of the National Council on Public Procurement (NCP).⁶⁸ The BPP, which is headed by a Director General, serves as the secretariat of the NCP,⁶⁹ with the support of such other staff as may be necessary to perform its functions.⁷⁰

In line with the fundamental principles of public procurement under the Act, the listed objectives of the BPP are mostly to ensure transparency in procurement processes. Specifically, the BPP is to amongst other things: harmonise government policies and practices to ensure probity, accountability, and transparency in the procurement process;⁷¹ ensure the application of fair, competitive, transparent value for money standards and practices in procurement and disposal of public assets and services;⁷² and attain transparency, competitiveness, cost-effectiveness and professionalism in the public procurement system.⁷³ The BPP is also responsible for overseeing the complaints

⁶² Section 16(1)(c)

⁶³ This is to ensure accountability and compliance with the Act. Section 16(1)(d).

⁶⁴ Section 16(1)(e)

⁶⁵ Section 16(1)(f)

⁶⁶ Section 16(1)(g)

⁶⁷ Part II, sections 3-14.

⁶⁸ Part I, sections 1 and 2. The NCP comprises 5 persons acting in their official capacity.

⁶⁹ Section 6(2).

⁷⁰ Sections 8 and 9.

⁷¹ Section 4(a)

⁷² Section 4(c).

⁷³ Section 4(d).

system under the PPA⁷⁴ and oversees the enforcement of its stipulated Code of Conduct.⁷⁵

On its part, the NCPP which is headed by the Minister or Finance, comprises 5 other members in their official capacity,⁷⁶ 6 part-time members representing various stakeholders,⁷⁷ and the Director General of the BPP. The specific functions of the NCPP are to: approve policies on public procurement;⁷⁸ approve the appointment of Directors of the BPP;⁷⁹ approve audited reports of the BPP;⁸⁰ and authorise changes to the procurement process.⁸¹

d. Procurement process

The PPA makes provision for a two-staged procurement process, namely procurement planning and procurement implementation.

i. Procurement planning

The procurement process is to originate with procurement planning,⁸² which is undertaken by the Procurement Planning Committee (PPC) of each procuring entity established in each financial year, as is mandated under the Act.⁸³ The PPC is responsible for planning all activities related to a proposed procurement exercise as follows:⁸⁴

- a. preparing the needs assessment and evaluation;
- b. identifying the goods, works or services required;
- c. carrying out appropriate market and statistical surveys and on that basis, prepare analysis of the cost implications of the proposed procurement;

⁷⁴ Section 54(1)-(7).

⁷⁵ Section 57(1)-(13).

⁷⁶ These are: the Minister of Justice and Attorney General; Secretary to the Government of the Federation; The Head of Service of the Federation and the Economic Adviser to the President. See section 1(2) (a)-(f).

⁷⁷ These are representatives of the Nigerian Institute of Purchasing and Supply Management; Nigerian Bar Association; Nigerian Association of Chambers of Commerce, Mines, Industry and Agriculture; Nigerian Society of Engineers, Civil Society; and the Media.

⁷⁸ Section 2(b).

⁷⁹ Section 2(c).

⁸⁰ Section 2(d).

⁸¹ Section 2(e).

⁸² Section 18.

⁸³ Sections 18(g), 21(1) and (2).

⁸⁴ Section 18(a) -(f).

- d. aggregating requirements whenever possible, both within the procurement entity and between procuring entities, to obtain economy of scale and reduce procurement cost;
- e. integrating procurement expenditure into its yearly budget; and
- f. prescribing any method for effecting the procurement in line with the PPA.

ii. Procurement implementation

In implementing the procurement plan, a procuring entity must advertise for bids in accordance with the provisions of the PPA and guidelines set out by the BPP from time to time.⁸⁵ All bids received by the procuring entity must be evaluated by its Tenders Board,⁸⁶ which is responsible for the award of the procurement of goods, works and services.⁸⁷ In terms of procurement implementation, certain principles are paramount as discussed below.

a. Open competitive bidding

All procuring entities must conduct procurement activities by open competitive bidding.⁸⁸ Open competitive bidding is defined under the PPA as the process by which ‘a procuring entity, relying on previously defined criteria, effects procurement by offering to every interested bidder, equal simultaneous information and opportunity to offer the goods and works needed.’⁸⁹

b. Lowest cost bidder

The PPA also prescribes that successful bid ought to be that submitted by the lowest cost bidder, unless the procuring entity is able to show ‘good grounds’ for acting otherwise, which grounds are supported by the provisions of the PPA.⁹⁰

⁸⁵ Section 19(1).

⁸⁶ Section 22(1)

⁸⁷ Section 22(3).

⁸⁸ Section 24(1).

⁸⁹ Section 24(2).

⁹⁰ Section 33(1) and (2).

c. Exclusion

To ensure achievement of its stated principles, the PPA identifies and addresses certain circumstances in relation to a bidder, in which they may be excluded from the procurement process such as: conflict of interest; corrupt practices;⁹¹ recent history of unsatisfactory execution of procurement contracts;⁹² on-going receivership, insolvency or bankruptcy proceedings;⁹³ in arrears of taxes, charges, pension and social insurance contributions;⁹⁴ history of criminal activities in the execution of procurement contracts.⁹⁵

7.2.3.2 Access to information and the Public Procurement Act

Several provisions of the PPA directly or indirectly facilitate access to information and can thus be relied upon in advancing socio-economic progress.

First is that procuring entities must maintain comprehensive records of every procurement process.⁹⁶ These records are to be made available upon request to any person upon the acceptance of a tender bid or the termination of the process without resulting in procurement,⁹⁷ and also to persons who participated in the procurement process without successfully securing a procurement contract.⁹⁸ Thus, prior to the award of a contract, procurement information is not accessible, except by a Court Order.⁹⁹

Furthermore, every procuring entity is required to submit records and information on procurement to the BPP, in any format that may be required by the BPP, in cases where wrongdoing has been alleged or proven.¹⁰⁰ At the request of the BPP, a procuring entity must also make available any reports, audited accounts or other information requested by the BPP.¹⁰¹

⁹¹ Section 16(8)(a).

⁹² Section 16(8)(b).

⁹³ Section 16(8)(c).

⁹⁴ Section 16(8)(d).

⁹⁵ Section 16(8)(e) and (f).

⁹⁶ Section 38(1).

⁹⁷ Section 38(2)(a).

⁹⁸ Section 38(2)(b).

⁹⁹ Section 38(3).

¹⁰⁰ Section 6(1)(h).

¹⁰¹ Section 6(3)(b).

The BPP in turn has extensive responsibilities in terms of proactive information gathering, maintenance and dissemination.¹⁰² These include obligations to: publish details of major contracts in the procurement journal;¹⁰³ publish paper and electronic versions of the procurement journal;¹⁰⁴ develop and maintain a database;¹⁰⁵ establish an internet portal to serve as the 'primary and definitive source of information on all government procurement', and which 'displays all public sector information at all times'.¹⁰⁶

These apparently progressive 'access to information' provisions in the context of public procurement are however effectively watered down by limiting the information which may be freely accessed by the public to only 'unclassified' procurement records.¹⁰⁷

Perhaps the most revolutionary provision of the PPA, in terms of access to information, is the introduction of civil society organisations as observers of each procurement process. By section 19(b), a procuring entity is required to invite as observers of the procurement process, two credible persons. While one must be from a private sector organisation with relevant expertise on the subject matter of the procurement, the other must be from a civil society organisation with expertise on transparency, accountability and anti-corruption issues.¹⁰⁸ Such observer though not allowed to intervene directly in the procurement process, can submit recorded observations to any relevant body or organisation.¹⁰⁹

Thus, the access to information obligations imposed on procuring entities and on the BPP, combined with the express obligation to involve civil society organisations in the entire procurement process, creates opportunities for the information accessed to be utilised by CSOs and other members of the public at large to ensure procurement processes are credible and in accordance with the fundamental principles of the PPA. More importantly,

¹⁰² See generally section 5.

¹⁰³ Section 5(f).

¹⁰⁴ Section 5(g).

¹⁰⁵ Section 5(q).

¹⁰⁶ Section 5(r).

¹⁰⁷ Section 16(14).

¹⁰⁸ Though not expressly required under the Act, the BPP has accredited civil society organisations for the purpose of observing procurement processes. The list is available at <http://www.bpp.gov.ng/index.php?option=com_joomdoc&view=documents&path=CSO_LIST.pdf&Itemid=569> (accessed 4 December 2015)

¹⁰⁹ Section 19(b).

this combination of provisions allows for access to information to be used as a tool for socio-economic progress.

7.3 Case study country two: South Africa

7.3.1 Environmental impact assessment, access to information and socio-economic progress in South Africa

Access to information is essential for public participation in decision-making affecting every aspect of life, including the environment. The need to balance the pursuit of development through the exploitation of natural resources, with the potential negative social, economic and cultural effects such developmental activities may have on the environment, has since the early 70's, become an issue of such significance as to require the establishment of regulatory frameworks for this purpose. Environmental Impact Assessments (EIAs) have thus come to be a mechanism adopted to balance often competing development activities with environmental concerns, in such a manner as to achieve sustainable development.¹¹⁰

In simple terms, EIA is the process of examining the environmental consequences of any proposed development project. EIA has been defined more intricately as 'the process of identifying, predicting, evaluating and mitigating the biophysical, social and other relevant effects of development proposals, prior to major decisions being taken and commitments made.'¹¹¹ A properly conducted EIA must on the one hand observe some basic principles which must be applied at all stages of an EIA to ensure that the essential objectives of EIA are achieved in accordance with international best practice,¹¹² and on the other hand,

¹¹⁰ Saidi, T. 'Environmental Impact Assessment as Policy Tool for Integrating Environmental Concerns in Development' Africa Institute of South Africa (AISA) Policy Brief No 19, June 2010, 1.

¹¹¹ 'Principles of Environmental Impact Assessment Best Practice', International Association for Impact Assessment, January 1999. Available at <http://www.iaia.org/uploads/pdf/principlesEA_1.pdf> (accessed 4 December 2015)

¹¹² These basic principles require that an EIA is: purposive; rigorous; practical; relevant; cost-effective, relevant; efficient; focused, adaptive; participatory, interdisciplinary, credible; integrated, transparent and systematic.

be guided throughout the entire process by certain operating principles in the application of these basic principles.¹¹³

7.3.2 Overview of environmental impact assessment legislation

EIAs originated from the United States of America, with the adoption of the National Environmental Policy Act (NEPA) in 1969. This Act required the proponent of an action to prove that an assessment of the environmental consequences of a proposed action has been undertaken and the findings are such that the relevant authorities can decide whether or not to grant permission for its implementation.¹¹⁴ The adoption of NEPA was followed by several countries, mostly in Europe and Asia, introducing legal frameworks for EIA in quick succession.¹¹⁵ Today, over 100 countries have adopted EIA legislation.¹¹⁶

In Africa, more than 75 percent of States have adopted specific EIA laws, with over half of these laws having being passed in the last ten years.¹¹⁷ While earlier EIA laws generally contained limited provisions which could be relied upon for access to information and public participation,¹¹⁸ more recently adopted laws contain stronger requirements, especially in terms of public participation, thus providing wider scope for access to information.

Over more than four decades since the first law on EIA was adopted, the scope and content of EIAs have evolved in numerous ways.¹¹⁹ This is in part due to the outcome of a major international review of EIAs in the mid-90s which was in the form of a comparative

¹¹³ These operating principles require that the EIA is conducted: as early as possible in decision making and during the entire lifespan of the activity; for any proposed activity likely to cause significant effects; to determine biophysical impacts and socio-economic factors such as health, culture, age and gender, and other factors relevant to the principle of sustainable development; in a manner that allows for participation of affected communities and business and the general public; and in compliance with internationally recognised best practices.

¹¹⁴ Walther, P. (1998) *Environmental Impact Assessment: Theory and Practice* Routledge: London.

¹¹⁵ Examples include: Australia (1974), Thailand (1975), France (1976), and Philippines (1978).

¹¹⁶ Craik, N. (2008) *The International Law of Environmental Impact Assessment: Process, Substance and Integration* Cambridge University Press: Edinburgh 23.

¹¹⁷ Nugent, C. 'Review of Environmental Impact Assessment and Monitoring in Africa' (2009) *FAO Fisheries and Aquaculture Technical Paper*, No. 527, 57.

¹¹⁸ Bekhechi, M. and Mercier, J. 'The Legal and Regulatory Framework for Environmental Impact Assessments: A study of selected countries in Sub-Saharan Africa', (2002) *The World Bank, Law Justice and Development Series* 24131.

¹¹⁹ Weaver, A. 'EIA and Sustainable Development: Key Concepts and Tools' available at <<http://www.saiea.com/saiea-book/introduction1.pdf>> (accessed 12 December 2015)

in-depth and comprehensive analysis of EIAs.¹²⁰ Generally, the original focus of EIAs on biophysical aspects has now been expanded to include consideration of socio-economic considerations; analogous issues such as climate change and biodiversity; and EIAs now generally play a more central role in the environmental decision-making process.¹²¹

The evolution of domestic frameworks for EIAs around the world and in Africa have also been influenced by international standard setting principles on the environment and development, agreed to by States such as: the Declaration of United Nations Conference on the Human Environment held in 1972 in Stockholm,¹²² the 1992 Declaration of the United Nations Conference on the Environment and Development held in Rio de Janeiro,¹²³ and the Declaration of the Johannesburg World Summit on Sustainable Development held in 2002.¹²⁴

7.3.3 Environmental impact assessment in South Africa

The Environmental Conservation Act (ECA) of 1989 was the first South African environmental legislation to lay down the procedure and considerations for conducting EIAs. Under section 22 and 23(2) of the ECA, any activity that may have a detrimental effect on the environment or which is proposed to be undertaken in a limited development area, can only be authorised after a consideration of reports on the impact of the proposed activity or of proposed alternative activities on the environment. The ECA also empowers the Minister to make Regulations prescribing the content of Environmental Impact Reports (EIRs), the process of drafting and evaluating EIRs and the necessary steps to be taken to prevent or address concerns raised in EIRs.¹²⁵

¹²⁰ See Sadler, B. 'Environmental Impact Assessment in a Changing World: Evaluating Practice to Improve Performance', June 1996. Canadian Environmental Assessment Agency. Available at <https://www.ceaa-acee.gc.ca/Content/2/B/7/2B7834CA-7D9A-410B-A4ED-FF78AB625BDB/iaia8_e.p df> (accessed 12 December 2015).

¹²¹ As above.

¹²² Available at <<http://www.unep.org/documents.multilingual/default.asp?documentid=97&articleid=1503>> (accessed 15 December 2015)

¹²³ Available at <<http://www.unep.org/documents.multilingual/default.asp?documentid=78&articleid=1163>> (accessed 15 December 2015).

¹²⁴ Available at <<http://www.joburg.org.za/pdfs/johannesburgdeclaration.pdf>> (accessed 15 December 2015).

¹²⁵ These Regulations were subsequently enacted in 1997 (Environmental Impact Regulations GN R 1182 – 1184 in Government Gazette No 18261 of 5 September 1997) and supplemented by Guidelines issued

The adoption of the 1996 Constitution ushered in a new era for environmental issues, including EIAs in South Africa. Section 24 of the Constitution provides that everyone has the right to an environment that is not harmful to their health or well-being and to have the environment protected through reasonable legislative and other measures that prevent pollution and ecological degradation, promote conservation; and balance sustainable development and use of natural resources while promoting justifiable economic and social development.

Following a comprehensive three-year consultative process, an Environmental Management Policy (EMP) was published in May 1998 by the then Department of Environment Affairs and Tourism (DEAT), setting out the framework for giving effect to section 24 of the Constitution.¹²⁶ Subsequently, to give effect to the EMP, the National Environmental Management Act (NEMA) was passed into law in 1998,¹²⁷ and came into force on 1 January 1999.

The golden thread running through NEMA, is the centrality of sustainable development in the management of environmental affairs in South Africa. Specifically, NEMA rests on key principles to the effect that 'development must be socially, environmentally and economically sustainable',¹²⁸ and that 'sustainable development requires the consideration of all relevant factors'.¹²⁹ Of particular relevance are principles stating that 'decisions must take into account the interests, needs and values of all interested and affected parties',¹³⁰ and 'decisions must be taken in an open and transparent manner, and that access to information must be provided in accordance with the law'.¹³¹

Under section 24(1) of NEMA, activities requiring authorisation and which may significantly affect the environment must be 'considered, investigated and assessed' for their potential impact on the environment, socio-economic conditions and cultural

by the DEAT in 1998 (DEAT, Guideline Document, EIA Regulations, Implementation of sections 21, 22 and 26 of the Environment Conservation Act, April 1998).

¹²⁶ See Government Gazette No.18894, Vol.395 of May 1998. Available at <https://www.environment.gov.za/sites/default/files/legislations/environemntal_management.pdf> (accessed 16 December 2015).

¹²⁷ See Government Gazette No.19519, Vol. 401 of 27 November 1998.

¹²⁸ Section 2(3).

¹²⁹ Section 2(4)(a).

¹³⁰ Section 2(4)(g)

¹³¹ Section 2(4)(k)

heritage. The procedure and requirements for these investigations are also enumerated and include 'public information and participation, independent review and conflict resolution in all phases of the investigation and assessment of impacts'.¹³²

7.3.4 Environmental impact assessment Regulations

Over the years, several EIA Regulations have been adopted to provide in more detail, the types of activities requiring the conduct of EIAs and the processes to be followed in their conduct, including the public participation process. Following the adoption of NEMA, the EIA Regulations adopted pursuant to the ECA were replaced in July 2006,¹³³ and August 2010 respectively,¹³⁴ with the most recent Regulations being adopted in 2014.¹³⁵ These amendments may be seen as attempts to address apparent weaknesses in the EIA system as revealed by judicial decisions¹³⁶ and advocated by numerous stakeholders.¹³⁷

The EIA Regulations of 2014 was adopted on 4 December 2014 and came into force on 8 December 2014. These Regulations seek to regulate the process for the 'preparation, evaluation, submission, processing and consideration' of applications for environmental authorisations to 'avoid or mitigate the detrimental impacts on the environment and to optimise positive environmental impacts'.¹³⁸

As with the 2010 Regulations, the 2014 Regulations require Scoping and Environmental Impact Assessment for procuring the required environmental authorisation for certain activities of 'significant impact',¹³⁹ while Basic Assessments are conducted as pre-

¹³² Section 24(7)(d).

¹³³ Government Gazette No. 28753, 21 April 2006. These Regulations became operational on 2 July 2006.

¹³⁴ Government Gazette No. 33411, 18 June 2010.

¹³⁵ Government Gazette No.38282, 4 December 2014.

¹³⁶ See for example *Earthlife Africa (Cape Town) v Director General: Department of Environmental Affairs and Tourism* 2005 (3) SA 156 (CC)

¹³⁷ This includes academics and environmentalist civil society organisations. See for example Murombo, T. 'Beyond Public Participation: The Disjuncture Between South Africa's Environmental Impact Assessment (EIA) Law and Sustainable Development' (2008) 11 *Potchefstroom Electronic Law Journal* 160.

¹³⁸ Regulation 2.

¹³⁹ This includes activities that must undergo the full EIA process and activities located in specific geographic areas that require an EIA. See Environmental Impact Assessment Listing Notice 2 of 2014: List of Activities and Competent Authorities Identified in terms of sections 24(2)(d) and 24D, Government Notice R984, Gazette No.38282, 4 December 2014 and Environmental Impact Assessment Listing Notice 3 of 2014: List of Activities and Competent Authorities Identified in terms of sections 24(2)(d) and 24D, Government Notice R985, Gazette No.38282, 4 December 2014 respectively.

condition for obtaining the necessary environmental authorisation for smaller, less controversial activities.¹⁴⁰ A central aspect of both processes is the conduct of a public participation process of no less than 30 days.¹⁴¹

7.3.4.1 International standards on public participation in EIA processes

Public participation in the EIA process is greatly dependent on the context and circumstances of each State.¹⁴² However, the nature of public participation has been shaped by international standards such as the Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters',¹⁴³ which was adopted to give guidance to States on Principle 10 of the UN Conference on Environment and Development (Rio Declaration) of 1992. Principle 10 of the Declaration states that 'environmental issues are best handled with the participation of all concerned citizens' and in particular, 'at the national level, each individual shall have access to information concerning the environment that is held by public authorities'.¹⁴⁴

On its part, the Guidelines encourage States to undertake the following with regard to public participation:¹⁴⁵

- i. early and effective opportunities to be created for public participation in the decision making process;
- ii. public participation should proactively be sought in a transparent and consultative manner;
- iii. all information relevant to decision making should be available in an objective, understandable, timely and effective form;
- iv. comments of the public must be taken into account and decisions must be made public;

¹⁴⁰ See Listing Notice 1 of 2014: List of Activities and Competent Authorities Identified in terms of sections 24(2)(d) and 24D, Government Notice R983, Gazette No.38282, 4 December 2014.

¹⁴¹ Regulation 3(8).

¹⁴² See generally, Murombo, T. 'Beyond Public Participation' (n 137 above).

¹⁴³ This was adopted by the Governing Council of UNEP in decision SS.XI/5, part A of 26 February 2010, during its 11th Special Session in Bali, Indonesia.

¹⁴⁴ As above.

¹⁴⁵ See guidelines 8-14.

- v. where a review process is undertaken in which new significant issues arise, the public must be informed and allowed to participate to the extent possible;
- vi. the public should be allowed to give input in the development of legal rules likely to impact on policies, planning and management of the environment
- vii. capacity building should be provided to facilitate public participation in environmental decision making.

7.3.4.2 Public participation under the EIA Regulations of 2014

A close review of the EIA Regulations of 2010 and that of 2014, reveals the substantial strengthening of public participation and the explicit introduction of access to information into the EIA process, in the context of public participation. Specifically, there are three newly incorporated provisions which have the effect of strengthening public participation.

First is the requirement that the public participation process undertaken pursuant to the application for environmental authorisation must be for a period of not less than 30 days.¹⁴⁶ For further emphasis, the Regulations explicitly requires that the public participation process for Basic Assessments which covers the Basic Assessment Report (BAR), Environmental Management Programme (EMPr) and where applicable, the Closure Plan, and that of Scoping and Environmental Impact Assessment encompassing the Scoping Report, Environmental Impact Assessment and EMPr, must allow all potential or registered interested and affected parties no less than 30 days to comment on each of these reports.¹⁴⁷

Furthermore, while all potential or registered interested and affected persons **may** be provided an opportunity to comment on reports and plans connected with Basic Assessments and Scoping and Environmental Impact Assessments prior to the submission of the application for environmental authorisation, they **must** be allowed to comment once the application has been submitted to the competent authority.¹⁴⁸

¹⁴⁶See Regulation 3(8). Previously, the public participation process was not subject to any minimum time frame.

¹⁴⁷ Regulation 40(1).

¹⁴⁸ Regulation 40(3).

Undoubtedly, this provision has been introduced into the revised regulations following the decision of the Constitutional Court in the Earthlife Africa case.¹⁴⁹

Finally, and of particular relevance, is the fact that the public participation process must provide 'access to information that reasonably has or may have the potential to influence any decision with regard to an application'.¹⁵⁰ This requirement of access to information must necessarily include consultation with the authority responsible for issuing the environmental authorisation (competent authority); every State department administering a law related to a matter affecting the environment which is relevant to the application for environmental authorisation; all organs of the State having jurisdiction over the activity to which the application relates; and all potential or registered interested and affected parties.¹⁵¹

Generally, however, any person seeking environmental authorisation to undertake an activity in respect of which a BAR or S&EIAR is required, must undertake the following public participation process:

- i. obtain the written consent to undertake the proposed activity, from the owner or person in control of the land where such person is not the owner or person in control of the land;¹⁵²
- ii. give notice to all potential interested and affected parties of the application or proposed application for environmental authorisation by:
 - a) fixing a notice at a place which is conspicuous and accessible to the public, on the site of the proposed activity and any alternative;¹⁵³
 - b) giving written notice to the occupiers of the site, as well as the owner or person in control of the land where the proponent is not the owner or person in control of the land; owners, persons in control of and occupiers of lands adjacent to the site of the proposed activity; the municipal Councillor of the ward in which the site or alternative site of the proposed activity; the municipality with jurisdiction over the area; any organ of state with

¹⁴⁹ N 53 above.

¹⁵⁰ Regulation 40(2).

¹⁵¹ As above.

¹⁵² Regulation 39(1).

¹⁵³ Regulation 41(2)(a).

jurisdiction over any aspect of the proposed activity; and any other party as may be required by the authority responsible for granting the environmental authorisation.¹⁵⁴

- c) Placing an advertisement in a local newspaper or any official Gazette published for the specific purpose of providing public notice under the Regulations;¹⁵⁵
 - d) Placing an advertisement in one provincial newspaper or national newspaper, where the impact of the proposed activity has or may extend beyond a specific municipality;¹⁵⁶
 - e) Using any agreed alternative methods to give notice to persons desirous of participating but are unable to do so due to illiteracy, disability or any other disadvantage.¹⁵⁷
- iii. The notice or advertisement must provide details of the application or proposed application, including: whether a Basic Assessment or a Scoping and Environmental Impact Assessment will be undertaken; the nature and location of the application or proposed application; where further information about the application or proposed application can be obtained; the manner in which and the persons to whom representations about the application or proposed application can be made.¹⁵⁸
 - iv. Ensure that all information containing all the relevant facts with regard to the application or proposed application is provided to potential interested and affected persons and that participation by potential or registered interested and affected persons is facilitated in such a manner as to give such persons reasonable opportunity to comment on the application or proposed application for environmental authorisation.¹⁵⁹

¹⁵⁴ Regulation 41(2)(b).

¹⁵⁵ Regulation 41(2)(c).

¹⁵⁶ Regulation 41(2)(d). This requirement however needs not be complied with, if an advertisement has been placed in a Gazette in terms Regulation 41(2)(c).

¹⁵⁷ Regulation 41(2)(e).

¹⁵⁸ Regulation 41(3).

¹⁵⁹ Regulation 41(6).

- v. Open and maintain a register of interested and affected persons to be submitted to the competent authority. The register must contain the names, contact details and addresses of persons: who have submitted comments or attended meetings with the proponent, applicant or Environmental Assessment Practitioner (EAP), as part of the public participation process in respect of the application in question; who have requested in writing to the proponent or applicant, that their name be included on the register; and all organs of State having jurisdiction over the activity to which the application relates.¹⁶⁰
- vi. Ensure that the comments of registered interested and affected parties on all reports and plans submitted are recorded in such reports and plans, and these comments and the responses to such comments, together with the records of meetings are submitted to the competent authority.¹⁶¹

From the above, it is clear that South Africa's EIA process provides ample opportunity for public participation and integral part of which is access to information, taking into account international best practice, domestic legal requirements and experiences on the matter.

7.5 Case study country three: Uganda

7.5.1 Anti-corruption, access to information and socio-economic progress in Uganda

As with many contemporary concepts, corruption does not lend itself to easy definition. As a result, the United Nations Convention Against Corruption (UNCAC) as well as other continental anti-corruption treaties and standards, do not attempt a concise definition of corruption. Rather, these instruments provide a description of actions that are tantamount to corruption and other related offences.¹⁶² Nevertheless, a commonly used definition of corruption is 'the use of (public office or entrusted power) for private gain'.¹⁶³ Admittedly,

¹⁶⁰ Regulation 42.

¹⁶¹ Regulations 43 and 44.

¹⁶² See for example, articles 16 -24 of the UN Convention Against Corruption, articles VI, VIII and IX of the Inter-American Convention Against Corruption and article 4(1) of the African Union Convention on Preventing and Combatting Corruption.

¹⁶³ This definition has been adopted by organisations such as the World Bank and Transparency International though both recognising this as falling short of an all embracing definition. See 'Helping Countries Combat Corruption: The Role of the World Bank', The World Bank, September 1997, 8. Available

this definition is not all embracing, as it does not take into account the full scope of corrupt activities, especially that which occurs in the private sphere.

Much has been said about the devastating impact of corruption on socio-economic development in terms of perpetuating poverty, inequality and poor service delivery especially amongst the most vulnerable in society. Kofi Annan, former UN Secretary General has for example stated that:

Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a government's ability to provide basic services, feeding inequality and injustice, and discouraging foreign investment and aid. Corruption is a key element in economic under-performance, and a major obstacle to poverty alleviation and development.¹⁶⁴

However, beyond the rhetoric, there is a general difficulty in establishing a clear causal link between corruption and poor socio-economic development in terms of measuring its impact at the macro level. What exists commonly, are perception-based measurements,¹⁶⁵ which have been heavily criticised for relying on subjective opinion of a privileged few, rather than objective quantitative data, without taking into account the international dimensions of corruption especially in the African context.¹⁶⁶

at <<http://www1.worldbank.org/publicsector/anticorrupt/corruptn/corrptn.pdf>> (accessed 14 January 2016). See also Transparency International's 'How Do You Define Corruption?' <<http://www.transparency.org/what-is-corruption/#define>> (accessed 14 January 2016)

¹⁶⁴ Statement on the General Assembly's adoption of the UN Convention Against Corruption, 31 October 2003, New York. Available at <<https://www.unodc.org/unodc/en/treaties/CAC/background/secretary-general-speech.html>> (accessed 16 January 2016). See further *World Development Report 2000/2001: Attacking Poverty*, (2000) Oxford University Press: New York. Available at <<https://openknowledge.worldbank.org/handle/10986/11856>> (accessed 16 November 2016). See also Gupta, S. et al 'Does Corruption Affect Income Inequality and Poverty?' International Monetary Fund Working Paper, May 1998. Available at <<https://www.imf.org/external/pubs/ft/wp/wp9876.pdf>> (accessed 16 November 2016)

¹⁶⁵ The most popular example of this is Transparency International's annual Corruption Perception Index. The 2015 Corruption Perception Index is available at <<http://www.transparency.org/cpi2015>> (accessed 16 January 2016). The World Bank's Worldwide Governance Indicators also measures 'control of corruption' which is a conglomeration of over 30 data sources. Available at <<http://info.worldbank.org/governance/wgi/#doc>> (accessed 16 January 2016).

¹⁶⁶ See generally, 'Measuring Corruption in Africa: The International Dimension Matters' Africa Governance Report IV, 2016, United Nations Economic Commission for Africa. Available at <http://www.uneca.org/sites/default/files/PublicationFiles/agr4_eng_fin_web_11april.pdf> (accessed 1 July 2016). The report further decries the 'naming and shaming' approach of these measurements which fail to provide useful policy insights' or 'recommendations to inform policy and institutional reforms'.

This difficulty notwithstanding, the direct effect of corruption on key drivers of economic growth, such as investment, competition, entrepreneurship, government revenue and expenditure, as well as the provision of basic services, which in turn affects development is far less problematic to prove.¹⁶⁷ Measuring the exact impact of corruption on socio-economic development is however extremely important in effectively addressing this problem by amongst other things, identifying key drivers, designing effective responses and monitoring results of whatever interventions are eventually adopted.¹⁶⁸

This difficulty in measuring corruption is mainly due to the lack of information about this phenomenon. This is not surprising because by its very nature, corruption thrives best in secrecy. Moreover, the gathering and processing of information on corruption in a comprehensive manner is generally not an attractive exercise for offending institutions in the public or private sphere to engage in voluntarily, largely due to the negative publicity and public distrust it generates. As a result, the establishment of any mechanism that facilitates the disclosure of corruption related information makes measuring and addressing corruption, at least at a micro level, a productive exercise.

7.5.2 Overview of anti-corruption legislation in Africa

At the continental and sub-regional level, Africa has sort to address corruption through the adoption of binding normative frameworks. The Regional Economic Communities (RECs) took the first initiative in this regard, starting with the adoption the Southern Africa Development Community (SADC) Protocol Against Corruption (SADC Protocol) in August 2001.¹⁶⁹ This was followed soon afterwards in December 2001, by the Economic Community of West African States (ECOWAS) Protocol on the Fight Against Corruption

¹⁶⁷ Organisation for Economic Cooperation and Development (OECD) Issues Paper on Corruption, Available at <<http://www.oecd.org/g20/topics/anti-corruption/Issue-Paper-Corruption-and-Economic-Growth.pdf>> (accessed 16 January 2016).

¹⁶⁸ Kaufman D, et al, 'Measuring Corruption: Myths and Realities' World Bank Note. Available at <<http://www1.worldbank.org/publicsector/anticorrupt/corecourse2007/Myths.pdf>> (accessed 18 January 2016).

¹⁶⁹ The Protocol was adopted in Blantyre, Malawi, on 14 August 2001 and came into force on 6 July 2005 with ratification by the 9th Member State, in line with article 18 of the Protocol. Available at <http://www.sadc.int/files/7913/5292/8361/Protocol_Against_Corruption2001.pdf> (accessed 20 January 2016)

(ECOWAS Protocol).¹⁷⁰ Eventually, a continent-wide treaty, the African Union Convention on Preventing and Combatting Corruption (AU Corruption Convention), was adopted in July 2003.¹⁷¹ The East African Community (EAC) has also been in a drawn out process of adopting a Protocol on Corruption.¹⁷²

A common feature of these three existing treaties is the recognition of the importance of access to information in the fight against corruption. While the SADC Protocol lists as a preventive measure to be undertaken by Member States, the adoption of 'mechanisms to promote access to information to facilitate eradication and elimination of opportunities for corruption', the ECOWAS Protocol speaks of Member States taking measures to 'establish and consolidate the right to information'.¹⁷³

However, the AU Corruption Convention is unique in that it goes beyond recognising the fight against corruption as a democracy, governance and accountability issue to also one of human rights, and in particular the right to dignity and to the general enjoyment of social, economic and political rights.¹⁷⁴ Furthermore, the Convention gives prominence to the right of access to information as an essential tool in the fight against corruption by obliging Member States to adopt legislative and other measures to give effect to the right of access to information that is necessary to combat corruption, as a self-standing article and not merely as one of the numerous preventive measures for tackling corruption.¹⁷⁵ This appears to be tacit recognition not only that the right of access to information is integral to all aspects of fighting corruption-from preventing to punishment, and also that the fight against corruption cannot be located completely outside the realm of human rights discourse.

¹⁷⁰ The Protocol was adopted on 21 December 2001 in Dakar, Senegal and came into force on 14 December 2005. Available at <https://www.unodc.org/documents/corruption/publications_compendium_e.pdf> (accessed 20 January 2016).

¹⁷¹ The Convention was adopted on 11 July 2013 in Maputo, Mozambique and came into force on 5 August 2006. Available at <<http://www.au.int/en/treaties/african-union-convention-preventing-and-combating-corruption>> accessed 21 January 2016).

¹⁷² A draft of the proposed Protocol is available at <<https://www.google.co.za/#q=EAC+protocol+on+corruption>> (accessed 21 January 2016).

¹⁷³ Article 5(i) of the ECOWAS Protocol.

¹⁷⁴ See paragraph 4, Preamble to the AU Corruption Convention (n 171 above).

¹⁷⁵ As above, article 9. The ECOWAS and SADC Protocols as outlined above, on the other hand list access to information/ right to information as one of the numerous measures to be adopted by States in preventing corruption.

Due to the multifaceted nature of corruption, legal frameworks for fighting corruption, including those in Africa, generally consist of numerous and multiple layered normative and institutional frameworks. This is the case with each of the case study countries covered by this research.

Thus in South Africa for example, there exists several laws addressing corruption such as the Constitution,¹⁷⁶ the Prevention and Combatting of Corrupt Activities Act 2004,¹⁷⁷ the Protected Disclosures Act 2000,¹⁷⁸ the Public Finance Management Act 1999 and Regulations,¹⁷⁹ and the Special Investigating Units and Tribunal Act 1996.¹⁸⁰ These and other relevant anti-corruption and related laws are enforced by an equally diverse number

¹⁷⁶ Section 217 of the Constitution requires that public institutions procure goods and services in a 'fair, equitable, transparent, competitive and cost effective' manner.

¹⁷⁷ Available at < <http://www.justice.gov.za/legislation/acts/2004-012.pdf> > This law which was specifically adopted to tackle corruption, addresses corruption as a general offences as well as in specific spheres of public life (such as public officials, legislature, judiciary including foreign public officials), private life (such as sporting events, gambling) or occurring in both the public and private sphere such as contracts, procurement and auctions. The Act in sections 29 to 33 also introduces the maintenance of a Register of Tender Defaulters by the National Treasury for the inclusion of names of persons accused of impropriety related to contracts or tenders upon conviction and issuance of the relevant Order by the Court. As yet, there is no name on the Register, as no such Order has been made by any Court. See <<http://www.treasury.gov.za/publications/other/Register%20for%20Tender%20Defaulters.pdf> > (accessed 21 January 2016).

¹⁷⁸ Available at <<http://www.justice.gov.za/legislation/acts/2000-026.pdf>> (accessed 21 January 2016). This law allows employees of both public and private institutions who make 'protected disclosures' to a lawyer, employer, member of the executive, a specific person or institution such as the Public Protector and Auditor General or to any other person, from being subject to 'occupational detriment' by reason of such disclosure.

¹⁷⁹ This Act ensures transparency and accountability in the management of 'revenue, expenditure, assets and liabilities of public institutions. In particular, the 'Regulations adopted pursuant to this Act, addresses corruption in public procurement processes.

¹⁸⁰ Available at <<http://www.justice.gov.za/legislation/acts/1996-074.pdf>> accessed 23 January 2016). The Act establishes the Special Investigating Unit, which is charged with investigating serious cases of malpractice in relation to public institutions, assets or funds.

of institutions such as the National Prosecuting Authority (NPA),¹⁸¹ the Public Protector,¹⁸² the Auditor General¹⁸³ and the Special Investigating Unit.¹⁸⁴

Similarly, in Nigeria, corruption is tackled through a variety of laws and institutions. Some of the laws include: the Constitution,¹⁸⁵ the Criminal Code Act 1916,¹⁸⁶ the Corrupt Practices and Other Related Offences Act 2000,¹⁸⁷ the Economic and Financial Crimes Commission Establishment Act 2002,¹⁸⁸ and the Fiscal Responsibility Act 2007.¹⁸⁹ Like in South Africa, these laws are enforced by a wide range of institutions such as: the Attorney General,¹⁹⁰ the Independent Corrupt Practices and Other Related Offences

¹⁸¹ The National Prosecuting Authority was established to institute criminal proceedings on behalf of the State

in 1998, by the adoption of the National Prosecuting Authority Act 1998, as mandated by section 179 of the Constitution. The NPA thus institutes criminal charges of corruption under anti-corruption laws such as the Prevention and Combatting of Corrupt Activities Act.

¹⁸² The Public Protector is mandated by section 182 of the Constitution as supplemented by the Public Protector Act 1994, to investigate, report and take remedial action with regard to improper conduct in any sphere of government.

¹⁸³ The Auditor General is a constitutionally mandated body established to by virtue of section 188 of the Constitution to audit and report on the accounts of all levels of government and any other institution authorised to receive public funds. The Public Audit Act 2004, further grants the Auditor General power to investigate misappropriation or misuse of public funds or wasteful expenditure.

¹⁸⁴ This unit is tasked with preventing and recovering financial loss to the State emanating from corruption, fraud and maladministration as provided under the Special Investigating Units and Tribunal Act 1996.

¹⁸⁵ Section 15(5) of the Constitution requires the State to abolish corruption and abuse of power. Furthermore, Part 1 of the fifth Schedule to the 1999 Constitution of Nigeria contains a Code of Conduct for public officers, which prohibits conflict of interest, bribery, corruption, abuse of office and other related offences

¹⁸⁶ Available at <<http://www.nigeria-law.org/Criminal%20Code%20Act-Tables.htm>> (accessed 23 January 2016). This include sections 98 to 104 of the Criminal Code provide for corruption and abuse of office in respect of public officials as criminal offences.

¹⁸⁷ Available at <<http://icpc.gov.ng/wp-content/uploads/downloads/2012/09/CORRUPT-PRACTICES-ACT-2010.pdf>>. This law prohibits corrupt practices by public officers such as bribery and fraudulent acquisition of property.

¹⁸⁸ Available at <[http://www.nigeria-law.org/Economic%20And%20Financial%20Crimes%20Commission%20\(Establishment\)%20Act.htm](http://www.nigeria-law.org/Economic%20And%20Financial%20Crimes%20Commission%20(Establishment)%20Act.htm)> (accessed 23 January 2016). This law prohibits offences relating to public officers such as, financial malpractice; economic and financial crimes; and terrorism.

¹⁸⁹ Available at <<http://www.nigeria-law.org/Criminal%20Code%20Act-Tables.htm>> (accessed 23 January 2016). This The Act provides for measures to ensure prudent allocation and management of public expenditure, revenue collection as well as fiscal accountability and transparency.

¹⁹⁰ By virtue of section 174 of the Constitution, the Attorney General is empowered to institute and undertake or take over criminal proceedings against anyone and in any court of law in Nigeria, other than a Court Martial, in respect of any law or Act of Parliament.

Commission,¹⁹¹ the Economic and Financial Commission¹⁹² and the Fiscal Responsibility Commission.¹⁹³

In Uganda, the legal framework for the prevention and combatting corruption in Uganda is equally multi-faceted and is now considered in greater detail.

7.5.3 The policy and legal framework on anti-corruption in Uganda

Given the high level of corruption in Uganda, a lot of focus has been on creating an enabling policy and legislative framework to address this scourge. In terms of policies, two policy documents, the National Anti-Corruption Strategy (2008-2013) followed by that of (2014-2019) have been developed to supplement the legislative framework for the addressing corruption in Uganda, which is made up of a combination of statutes and constitutional provisions.

7.5.3.1 The 1995 Constitution of Uganda

The Constitution has some general provisions that speak to the responsibility of the State and individuals to fight corruption. Principle XXVI of the National Objectives and Directive Principles of State Policy in the constitution, obliges the State to ‘take all lawful measures to expose, combat and eradicate corruption and abuse or misuse of power’ by political and public office holders.¹⁹⁴ It is also the duty of every citizen of Uganda to ‘combat corruption and misuse or wastage of public property’.¹⁹⁵

¹⁹¹ The Commission was established pursuant to the Corrupt Practices and Other Related Offences Act. Specifically the Commission is empowered to receive and investigate complaints from the public of corrupt practices by public officials; of its own accord, review practices and systems in public institutions and advise on means of eliminating corruption as well as educate the public and enlist support in combatting corruption. See section 6 ICPC Act.

¹⁹² The Commission was established pursuant to the EFCC Act and tasked with enforcing provisions of the EFCC Act and other laws prohibiting economic and financial crimes such as: Advanced Freed Fraud and Other Fraud Related Offences Act, Money Laundering Act 1995, Miscellaneous Offences Act, and the Banks and Other Financial Institutions Act 1991.

¹⁹³ Established pursuant to the Fiscal Responsibility Act 2007, the Commission is tasked with monitoring fiscal transparency by ensuring government provides full and timely disclosure of all transactions involving public revenue and expenditure, the publication of audited accounts of the federal government as well as summary reports on the execution of the federal budget annually.

¹⁹⁴ Constitution of Uganda 1995 (as amended) is available at <https://www.constituteproject.org/constitution/Uganda_2005.pdf> (accessed 29 January 2016). See principle XXVI.

¹⁹⁵ See article 17(1)(i) of the Constitution.

The Constitution however also contains specific anti-corruption provision, in that it establishes the office of the Inspectorate of Government (IG), tasking it *inter alia* with the responsibility to 'eliminate and foster elimination of corruption, abuse of authority and of public office'.¹⁹⁶ In addition, the Constitution mandates the adoption of a Leadership Code of Conduct for public officers, which amongst other things, prohibits corrupt practices.

7.5.3.2 The Anti-Corruption Act 2009

This law was enacted to consolidate the anti-corruption legal framework of Uganda in that it replaces the outdated Prevention of Corruption Act of 1970 which it expressly repeals, as well as amend provisions of the Leadership Code Act and the Penal Code Act.

Specifically, the new Act of 2009 extends the definition of corruption beyond public bodies to include corruption in the private sphere, in line with growing international practice.¹⁹⁷

Furthermore, new offences such as diversion of public resources, influence peddling, conflict of interest, loss of public property, sectarianism, nepotism and embezzlement are introduced, while offences previously contained in the Penal Code such as abuse of office, unauthorised administration of oaths and impersonating a public officer are retained.

7.5.3.3 The Leadership Code Act 2002

The Constitution authorises Parliament to enact a law setting out a Leadership Code of Conduct (to be enforced by the Inspectorate of Government)¹⁹⁸ for certain categories of public officers with the aim of: declaring 'their income, assets and liabilities from time to time' and prohibiting conduct involving 'corruption in public affairs' or negatively impacts on the 'public good or welfare or good governance'.¹⁹⁹

As constitutionally required, the Leadership Code Act was adopted by Parliament in 2002.²⁰⁰ This law requires public officials,²⁰¹ to submit declarations in the prescribed

¹⁹⁶ See section 225(1)(b) of the Constitution.

¹⁹⁷ The definition of corruption in section 2 of the Prevention of Corruption Act

¹⁹⁸ Section 234 of the Constitution.

¹⁹⁹ Section 233(2) of the Constitution.

²⁰⁰ Available at <<https://www.igg.go.ug/static/files/publications/leadership-code-act.pdf>> (accessed 2016).

²⁰¹ The public officials' to whom the law applies, are listed in the second schedule to the Act and includes all possible categories of public officials.

form,²⁰² of their incomes, assets and liabilities, and that of their spouses, children and dependent every two years.²⁰³ Failure to do so is breach of the Code. The content of such Declarations are regarded as public documents and is to be released to the public upon application made to the Inspector General in the manner prescribed by the Act.²⁰⁴

Other prohibitions under the Act are conflict of interest,²⁰⁵ receipt of gifts to influence public officials to give a favour,²⁰⁶ abuse of public property, and misuse of official information,²⁰⁷

The Inspectorate of Government is tasked with enforcing the Code. In doing so, it is empowered to: receive and examine declarations; determine whether public officials have corruptly influenced or entered into contracts in contravention of the Code; investigate breach of the code on its own accord or upon application by a member of the public.²⁰⁸ In terms of punishment for breach of the Code, this may include dismissal, removal from office or conviction, in which case the person in question is precluded from holding public office for 5 years.²⁰⁹

7.5.3.4 The Anti-Money Laundering Act 2013

This Act law essentially criminalises wilfully dealing with property or other proceeds of crime with the intention to conceal its origin, source or location; use or administer it, assist another to benefit; or facilitate the commission of a crime.²¹⁰

The Act establishes a Finance Intelligence Authority to facilitate the identification of proceeds of crime and prevent money laundering; implement its provisions; make information it collects available to relevant authorities in order to ensure adherence of laws in force in Uganda.²¹¹ In the course of performing this task, the Authority is empowered to process, analyse, and interpret information it receives. And where

²⁰² Relevant form is available at <<https://www.igg.go.ug/static/files/publications/declaration-income-assets-liabilities-form.pdf>> (accessed 2016).

²⁰³ Section 4, Leadership Code Act.

²⁰⁴ Section 7, Leadership Code Act.

²⁰⁵ Section 18, Leadership Code Act.

²⁰⁶ Section 11.

²⁰⁷ Section 14

²⁰⁸ Section 3.

²⁰⁹ Section 20(3)

²¹⁰ Section 3, Anti Money Laundering Act.

²¹¹ Sections 18 and 19.

necessary, refer information received to the appropriate law enforcement agency for action.²¹² The Act also provides for the seizure, freezing and forfeiture of assets acquired through money laundering, through the imposition of confiscation and pecuniary penalty Orders.²¹³

7.5.3.5 The Whistleblower Protection Act 2010

This Act protects a person who discloses information revealing *inter alia*, 'that a corrupt, criminal or other unlawful act has been committed, is being committed or is likely to be committed'.²¹⁴ The categories of persons who can make disclosures,²¹⁵ and of institutions to whom such disclosures are to be made are also detailed.²¹⁶ A whistleblower who faces victimisation as a result of his or her disclosure can file a Complaint with the IG or the Uganda Human Rights Commission,²¹⁷ as well as bring a civil action in a court of law.²¹⁸ As part of the protection provided under the Act, the unlawful disclosure of the identity or details of the disclosure, victimisation of the whistleblower, or failure to take action upon receipt of disclosure are all punishable offences.²¹⁹ Interestingly, a whistleblower is entitled to five percent of the net sum recovered as a result of his or her disclosure.²²⁰

7.6 The Institutional framework on anti-corruption in Uganda

With the multiplicity of laws focused to varying degrees on preventing and combatting corruption in all its manifestations in Uganda, there are several institutions which play a role in enforcing these laws, with their enforcement functions often overlapping. To

²¹² Section 20(1)(a) and (b).

²¹³ See generally Part V of the Act.

²¹⁴ Section 2(1)(a).

²¹⁵ By virtue of section 2(3)(1) disclosures can only be made by 'an employee in the public or private sector in respect of their employer; an employee in respect of another employee; by a person in respect of another person; or by a person in respect of a private or public institution'.

²¹⁶ Apart from cases where the disclosure is internal, in that it is made by an employee in relation to his/her employment, external disclosures can also be made in terms of section 2(4) to the following: The importance of balancing the pursuit of much needed development through the exploitation of the Inspectorate of Government; Directorate of Public Prosecutions; Uganda Human Rights Commission; Directorate for Ethics and Integrity; office of the Resident District Commissioner; Parliament of Uganda; National Environment Management Authority; and the Uganda Police Force.

²¹⁷ Section 9(3).

²¹⁸ Section 9(4).

²¹⁹ Sections 14-18.

²²⁰ Section 19.

address this overlap, and in line with article 99(4) of the Constitution which empowers the President to delegate the exercise of executive functions conferred by the Constitution, the President in 1996 delegated oversight for anti-corruption activities to the Vice-President through the establishment of the Anti-Corruption Coordination Unit.²²¹ The unit was renamed the Directorate for Ethics and Integrity (DEI) in 1998 and given the additional task of restoring ethics and integrity in Uganda.²²²

However, with the development of the National Anti-Corruption Strategy (NACS) 2008 – 2013,²²³ which sought to enforce a zero tolerance of corruption by improving accountability and reducing corruption, an anti-corruption Inter-Agency Forum (IAF), consisting of 19 public institutions responsible for implementation or management of anti-corruption in Uganda,²²⁴ was established to oversee its implementation.²²⁵ The DEI is the secretariat for the IAF and coordinates its activities.²²⁶

7.6.1 The Inspectorate of Government

Chapter 13 of the Constitution of Uganda establishes the office of the Inspectorate of Government (IG). The IG is an independent entity, answerable only to Parliament, through the submission of reports every six months.²²⁷ Its independence is further guaranteed through an independent budget appropriated by Parliament.²²⁸

The IG is a unique institution in that it is constitutionally empowered to combine multiple interrelated functions of: overall responsibility for fighting corruption, abuse of authority and abuse of office;²²⁹ the role of ombudsman in terms of ensuring adherence to rule of

²²¹ Directorate for Ethics and Integrity, Office of the President <<http://www.dei.go.ug/background.html> > (accessed 10 January 2016).

²²² As above.

²²³ Available at <[National%20Strategy%20to%20Fight%20Corruption%20and%20Rebuild%20Ethics%20and%20Integrity%202008-2013.pdf.pdf](#)> (accessed 10 January 2016).

²²⁴ These include: The Directorate of Ethics and Integrity, the Inspectorate of Government, directorate of Public Prosecution, the Auditor General, the Public Service Commission, the Public procurement and Disposal of Public Assets Authority, and the Inspectorate of Courts.

²²⁵ As above. See Annex 1.

²²⁶ See (n 221 above).

²²⁷ Sections 227 and 230 of the Constitution and section 10 IG Act.

²²⁸ Section 229 of the Constitution.

²²⁹ Section 225(1)(b) of the Constitution.

law and principles of natural justice as well as good governance;²³⁰ and overseeing the enforcement of declaration of assets by public officers.²³¹

In exercising its anti-corruption functions, the IG is further empowered by virtue of the Inspectorate of Government Act 2002, to detect and prevent corruption in public service by: identifying practices and procedures which may encourage corruption; advise the relevant offices of various avenues to reduce corruption; disseminate information on the negative effects of corruption as well as receive public complaints on incidents or suspected incidents of corruption and make recommendations.²³²

In exercising its functions, the IG is empowered to investigate, arrest, prosecute persons; enter and search any premises and to examine or retain any relevant documents or items found on the premises; and to make any Orders or give such directions as are necessary.²³³

Of particular importance are two provisions which allow the IG is empowered to access important information relevant to any investigations by: compelling a public officer or any other person to 'answer questions on his or her duties or those of another person',²³⁴ and also to compel a public officer to provide any document in his or her custody or control within a specified time.²³⁵ Certainly these two provisions are essential in ensuring that access to information which is necessary to enable the IG effectively fulfill its anti-corruption mandate is guaranteed.

Apart from the specific powers and functions conferred on the IG by the constitution and the Inspectorate of Government Act of 2002, the IG, by virtue of the multiplicity of legal frameworks on anti-corruption has other powers. The IG is also empowered by the Anti-Corruption Act to investigate and prosecute corruption and other related offences under

²³⁰ Section 225(1)(a) and (c) of the Constitution.

²³¹ Section 225(1)(d) of the Constitution.

²³² See section 8(1)(i) Inspectorate of Government Act 2002. Available at <<https://www.igg.go.ug/static/files/publications/ig-act.pdf>> (accessed 10 January 2016).

²³³ Section 230(1)-(3) of the Constitution.

²³⁴ Section 12(b) Inspectorate of Government Act.

²³⁵ Section 12(c) Inspectorate of Government Act.

the Act; enforce declaration of assets requirements under the Leadership Code Act, and file complaints of victimisation under the Whistleblowers Act.

7.7 Conclusion

The primary aim of this Chapter is to provide an overview of existing alternative legislative and institutional normative frameworks that provide a right of access to information, although not primarily developed for this purpose, and in so doing, highlight the potential of these frameworks to contribute to socio-economic progress.

In doing so, this Chapter starts off by reiterating the dire socio-economic conditions in Africa, which has been widely acknowledged by individual States as well as sub-regional and continental institutions. This acknowledgement is arguably most evident by the numerous legal and institutional frameworks that have been established to address issues such as conflict and insecurity, corruption, bad political and economic governance, all issues which have contributed to the poor level of socio-economic development in Africa. Specifically, environmental impact assessment, public procurement and anti-corruption frameworks in South Africa, Nigeria and Uganda are examined, with a view to ascertaining the extent to which these identified mechanisms contain access to information provisions which can potentially be relied upon in achieving socio-economic progress.

In the case of EIAs, it is evident that for development to be sustainable and mutually beneficial to all, proponents of the relevant developmental activity must provide access to all relevant information that enables meaningful participation in the decision making process by those likely to be most affected by their proposed activities. There is no doubt that in South Africa, which served as the case study, the significant attention paid to the EIA process is largely influenced by the express constitutional recognition of the need to balance sustainable development in the use of natural resources with the promotion socio-economic development.²³⁶ Furthermore, the legal framework has incrementally strengthened the public participation aspects of the EIA process in response to judicial decisions and experiences faced in its implementation, such that the existing framework

²³⁶ Section 24(2)(c) of the South African Constitution.

undoubtedly presents avenues for obtaining critical information necessary for ensuring proposed activities do not only pose no environmental risks but also benefit those most affected.

The discussion on public procurement also shows that the fact that this concept encompasses the entire process through which States acquire the necessary goods and capacity to render basic services, which in turn has a direct impact on socio-economic conditions, makes access to information by the public about this process extremely important. In the last two decades, procurement reform has focused mainly on ensuring transparency in the system through the adoption of legislative frameworks espousing this purpose. As a result, numerous provisions in public procurement laws across the continent require all procurement processes to be guided by transparency as exemplified by the Nigerian Public Procurement Act, which goes even further by allowing civil society organisations participate in the evaluation of procurement processes.

Anti-corruption frameworks on their part comprise a necessarily intricate and complex web of laws and institutions due to its multifaceted nature. The nature of corruption as a clandestine activity and the difficulty this presents in measuring its prevalence and impact further compounds efforts to effectively address its negative influence on socio-economic progress. Nevertheless, this Chapter finds that in Uganda, there are numerous normative and institutional frameworks which can be utilised to access the requisite information in order to improve socio-economic progress. However, this multiplicity has the potential to create confusion, both amongst institutions and in the mind of citizens, as to the processes and responsible institutions for fighting corruption. To succeed therefore, a strong coordinating mechanism thus appears a necessity in any national anti-corruption framework.

Ultimately, this Chapter concludes that while each of the frameworks assessed have, as an integral part of their implementation, provisions allowing for access to information, what remains paramount is the effective implementation of this normative and institutional frameworks in a manner that yields socio-economic progress. As with all legal frameworks, the extent to which access to information provisions in this context influences

socio-economic progress is dependent on a variety of factors, as the following Chapter seeks to further illustrate.

CHAPTER EIGHT: CASE STUDIES ON ALTERNATIVE LEGAL FRAMEWORKS OF ACCESS TO INFORMATION AND SOCIO-ECONOMIC PROGRESS

8.1 Introduction

As the preceeding Chapter has shown, the quest for sustainable development, especially in terms of creating the ideal socio-economic environment that guarantees a good standard of living for citizens, has become a major focus at the national and continental level in Africa. To achieve this, States have in recent times adopted numerous legislative frameworks amidst the increasing knowledge and expertise on socio-economic stimulators, which inevitably seek to uphold good governance principles of transparency, accountability and public participation -all core elements of access to information.

To a large extent, normative frameworks on public procurement, environmental impact assessment and anti-corruption focus on making sure that resources, whether financial or material, are utilised or developed in such a manner that ensures that the socio-economic needs of citizens are prioritised and maximised. In doing so, it is clear that citizens as beneficiaries of these resources must as a necessity be able to have the necessary information to assess for themselves how these resources are being managed, and to participate in decision making processes around them. This may be directly, as in the case of EIAs or indirectly, through monitoring of public procurement processes or anti-corruption frameworks , especially with regard to the delivery of basic services.

This Chapter thus looks into the extent to which the alternative legal frameworks on access to information discussed in the preceeding chapter, have actually been utilised in a manner in which socio-economic progress was achieved. As in other Chapters, the factors which facilitate this contribution are identified, as well as other opportunities for future contributions to socio-economic progress by these legal frameworks.

8.2 The Public Procurement Act and socio-economic progress in Nigeria: The Almajiri schools

In Nigeria, over 10 million children of school going age are regarded as Almajiri¹ (itinerant Quranic school pupils) and as a result, miss out on formal basic education.² To address this problem, the federal government of Nigeria in 2010, developed a national framework and action plan to mainstream Almajiri education into the national basic education system by amongst other things, developing a 'dynamic Almajiri Education Model', which catered for the needs of this class of children.³ The framework set out the role and responsibilities of the federal government, State governments and other stakeholders in relation to all aspects of the project, including funding, curriculum development, development of learning environment, and monitoring and evaluation and National Implementation Committee was established for the purpose of overseeing its implementation with the assistance of the Universal Basic Education Commission (UBEC).⁴ A key aspect of the programme was the construction of Almajiri schools across the 36 States of the federation and the Federal Capital Territory, Abuja.

However, years after the inception of the programme, there was no information from the government about its implementation and whether the Almajiri Education Model schools were fully operational and fulfilling the intended purpose of ensuring access to quality basic education for Almajiri children in Nigeria. What circulated were reports of non-

¹ The term 'almajiri' is derived from the Arabic word 'Al-Muhajir which means a 'seeker of Islamic knowledge' or 'Al-Muhajirrun' meaning 'emigrants to be granted alms or assistance'. Mostly based in the Northern part of Nigeria, Almajiri children, some as young as 4 years old, are placed by their parents under a 'mallam' for the purposes of learning the Quran. During the day, these children are forced to beg for alms for their sustenance as well as that of their 'Mallam', while attending Quranic classes in the evenings. See Yushu'a M. et al 'Problems and Prospects of Almajiri Education in Nigeria' (2013) 2 *Scientific Journal of Applied Sciences* 125.

² National Framework for the Development and Integration of Almajiri Education into UBE Programme' Universal Basic Education Commission, 2010. Available at <<http://nigeria-education.org/content/national-framework-development-and-integration-almajiri-education-ube-programme-universal-1>> (accessed 5 December 2015)

³ As above, 10.

⁴ 'FG Inaugurates Almajiri Education Committee' *ThisDay Newspaper*, 19 October 2010. Available at <<http://allafrica.com/stories/201010200325.html>> (accessed 5 December 2015).

completion of contracts awarded for the construction of Almajiri schools and a generally uneven progress in the implementation of the programme.⁵

In January 2014, an Abuja based organisation, the Public and Private Development Centre (PPDC), in a bid to determine the status of basic education related procurement activities, made a request for information pursuant to the FOI Act to UBEC. PPDC requested for 'a list of contracts and their values' awarded by UBEC in the 2012 and 2013 financial years,⁶ as well as the procurement plans of UBEC for the year 2014.⁷ Every government agency is required to develop a procurement plan annually under the Public Procurement Act of 2007.⁸

Though UBEC initially refused to make available its procurement plans for 2014 to PPDC,⁹ in the end the procurement plans as well as list of contracts were released pursuant to a request by a sister organisation, Civil Society Legislative Advocacy Centre (CISLAC).¹⁰

With the release of the UBEC procurement plans for 2014,¹¹ PPDC's teams of procurement monitors set out to verify the information provided by UBEC on the status of the Almajiri schools.¹² In the course of this process, procurement monitors were able to trace an Almajiri Model School to Gwagwalada in the Federal Capital in May 2015.¹³ The

⁵ In an in depth empirical investigation on the progress of implementation of the Almajiri Education Programme, the Leadership newspaper discovered unsatisfactory progress with the implementation of the programme. 'Is The FG Almajiri System of Education Working' Leadership Newspaper, 9 February 2014. Available at <<http://leadership.ng/news/344016/fgs-almajiri-system-education-working>> (accessed 5 December 2015).

⁶ Letter from PPDC to UBEC requesting the list of awarded contracts is available at <<http://library.procurementmonitor.org/files/PPDC%20TO%20UBEC%20REQUESTING%20LIST%20OF%20CONTRACTS%20AWARDED%20IN%202012%20AND%202013.pdf>>.

⁷ Letter from PPDC to UBEC requesting the procurement plans is available at <<http://library.procurementmonitor.org/files/PPDC%20TO%20UBEC%20PROCUREMENT%20PLAN%202014.pdf>> (accessed 5 December 2015).

⁸ See section 18 and 21(1) and (2) of the PPA.

⁹ See responses by UBEC to PPDC at <<http://library.procurementmonitor.org/files/UBEC%20RESPONSE%20TO%20PPDC%20FEB%202014.pdf>> and <<http://library.procurementmonitor.org/files/UBEC.pdf>> (accessed 5 December 2015).

¹⁰ Letter of request by SISLAC to UBEC at <<http://library.procurementmonitor.org/files/UBEC.pdf>> (accessed 5 December 2015).

¹¹ The UBEC Procurement Plan for 2014 is available at <[http://library.procurementmonitor.org/files/UBEC%20-PROCUREMENT%20PLAN%202014%20\(WORKS%201\).pdf](http://library.procurementmonitor.org/files/UBEC%20-PROCUREMENT%20PLAN%202014%20(WORKS%201).pdf)> (accessed 5 December 2015).

¹² Telephone interview with Ms Seember Nyager Chief Executive, PPDC on 3 November 2015.

¹³ PPDC Procurement Monitor Bulletin, No 37, 3 September 2015. Available at <<http://us5.campaign-archive2.com/?u=01684c1e72bc44a3108a6413b&id=2fed2b106c>> (accessed 5 December 2015).

contract for the construction of the school had been awarded through a national competitive bidding process at a cost of over 56 million naira.¹⁴ It was discovered that though the school had been completed in December 2014, it remained closed and non-operational, despite the great need for the school by the community.¹⁵ Furthermore, many in the community neither had knowledge that the school had been constructed, nor the purpose for which it was intended.¹⁶

To bridge the information gap, PPDC convened a press conference on the Gwagalada Almajiri Model School in June 2015, with officials of the Ministry of Education, UBEC, Federal Capital Territory (FCT) Universal Basic Education Board (UBEB) - the State-level body responsible for basic education in the FCT, the Almajiri community in Gwagwalada and other stakeholders.¹⁷ A key outcome of the press briefing was that the continued closure of the school was due to the inaccessibility of adjoining roads and the lack of running water.¹⁸ The FCT's UBEB thus made a commitment to ensure that all efforts were made to ensure that both issues are addressed and school is opened to learners by September 2015.¹⁹ A commitment was also made to provide requisite training for teachers on the combined western and Almajiri curriculum and implement an awareness campaign about the school for the benefit of the community and prospective students.²⁰

PPDC however continues with its mission of monitoring the proper implementation of the Almajiri Model Schools programme and has made a series of information requests in this regard. In May 2015, PPDC sought from UBEC 'a list of all Almajiri schools in Nigeria', including 'the location, cost and status of each project'.²¹ Following a response from UBEC in August 2015 in which only part of the requested information was provided to

¹⁴ PPDC Procurement Monitor Bulletin, No 35, 1 July 2015. Available at <<http://us5.campaign-archive2.com/?u=01684c1e72bc44a3108a6413b&id=67644467ca>> (accessed 5 December 2015)

¹⁵ PPDC Procurement Monitor Bulletin, No 36, 1 July 2015. Available at <<http://us5.campaign-archive2.com/?u=01684c1e72bc44a3108a6413b&id=efee64e0a>>

¹⁶ PPDC Procurement Monitor Bulletin, No 35 (n 14 above).

¹⁷ As above.

¹⁸ Interview with Ms Nyager (n 12 above).

¹⁹ As above.

²⁰ As above.

²¹ A copy of the letter is available at <<http://library.procurementmonitor.org/files/FOI%20REQUEST%20UNIVERSAL%20BASIC%20EDUCATION%20COMMISSION%20.pdf>> (accessed 5 December 2015).'

PPDC,²² a further request was made for details of the costs and location of the schools, and for explanation of the discrepancy between the numbers provided by UBEC (117) and the Ministry of Education (124).²³ With UBEC's response that it has knowledge of only 117 schools²⁴ and that school sites are determined at the State level,²⁵ PPDC intends to make requests to all 36 State UBEBs to ascertain the true number and operational status of the Almajiri Model Schools in Nigeria.

The case of the Almajiri Model Schools is an apt illustration of the utility of public procurement frameworks for actualising the right of access to information and through that, the advancement of socio-economic progress. Although in making requests for information, PPDC relied solely on the provisions of the FOI Act, this was as a result of severe difficulties it had experienced in accessing to information on procurement related issues solely on the basis of the PPA, prior to the adoption of the FOI Act.²⁶ Nevertheless, in making these requests, reliance was placed, though not expressly on the provisions of the PPA laying down the public procurement process and the obligation to produce documents in adherence to the procedures prescribed by the Act. Thus, the categories of information requested were such that all government agencies are obligated to create by the PPA.

In essence, while the FOI Act on its own could have been relied upon in accessing procurement related information, it is doubtful the extent to which such requests will be possible in the absence of a public procurement regulatory framework. Thus, the failure to quote the relevant section of the PPA in making the requests should not be seen as nullifying the influence of the PPA in influencing the granting of the requested information

²² Only 117 schools and the status of their construction was provided to PPDC. No information on their location was provided. The letter of Response from UBEC is available at <<http://library.procurementmonitor.org/files/FOI%20RESPONSE-%20UNIVERSAL%20BASIC%20EDUCATION%20COMMISSION%20TO%20PPDC%20-%20AUGUST%202015.pdf>> (accessed 6 December 2015). A copy of the list of schools as provided by UBEC is available at <<http://library.procurementmonitor.org/files/FOI%20ALMAJIRI%20DOCUMENT.pdf>> (accessed 5 December 2015).

²³ A copy of the letter is available at <<http://library.procurementmonitor.org/files/FOI%20REMINDER-%20UBEC.pdf>> (accessed 10 December 2015)

²⁴ A copy of UBEC's letter is available at <<http://library.procurementmonitor.org/files/FOI%20RESPONSE-%20UNIVERSAL%20BASIC%20EDUCATION%20COMMISSION%202.pdf>> (accessed 5 December 2015)

²⁵ A copy of UBEC's letter is available at <<http://library.procurementmonitor.org/files/FOI%20RESPONSE%20UBEC.pdf>> (accessed 5 December 2015)

²⁶ Telephone interview with Ms Nyager (n 12 above).

and in so doing, the right to education of the Almajiri children in Gwagwalada. Rather, it may be argued that such express reference would be superfluous, giving the familiarity of such agencies as UBEC with procurement process as laid down by the PPA.

8.3.1 Environmental impact assessment and socio-economic progress in South Africa: The Shongweni landfill site

In 2003, Enviroserv, a Waste Management Company, made an application to the KwaZulu-Natal Department of Agriculture and Environmental Affairs (DAEA), for the development of a Health Care Risk Waste (HCRW) facility to incinerate medical waste at their landfill site in Shongweni, Durban.²⁷ Shongweni is located within the eThekweni Municipality of the South Durban Basin, in the KwaZulu Natal Province of South Africa.

The establishment of South Durban as an industrial hub dates back to 1938 during the time of apartheid, when blacks were forcibly evicted to create room for industrial complexes and then relocated to surrounding poorly serviced areas to provide cheap labour for these industries.²⁸ Living conditions in these 'black occupied' areas was one of overcrowding and poverty, surrounded by toxic dumps and major sewage works.²⁹ Today, South Durban remains a highly industrialised area with over 600 industries, including two oil refineries and considerable pollution that has had a negative impact on the health and quality of life of residents.³⁰

As part of the approval process, the application required an EIA to be conducted in line with the National Environmental Management Act of 1998 and the EIA Regulations of 1997, which were in force at the time.³¹ By these legal standards, Enviroserve's EIA was required to contain: a description of alternatives to the proposed activity, their impact and

²⁷ Background Information Document: EIA for the proposed Health Care Risk Waste Facility' Available at <http://www.pravinamar.com/reports/downloads/enviroserv_hcrw/Enviroserv%20Background%20Information%20Document%2027-06-05.pdf> (accessed 8 March 2016).

²⁸ 'National Report on Community-Based Air Monitoring in South Africa: Air Pollution in Selected Industrial Areas in South Africa' Groundwork, 2003. Available at <<http://www.groundwork.org.za/specialreports/AirMonitoringReport2003.pdf>> (accessed March 2016).

²⁹ As above.

³⁰ South African Environmental Justice Struggles Against Toxic Petrochemical Industries in South Durban: The Engen Refinery Case'. Available at <<http://umich.edu/~snre492/brian.html>> (accessed 10 March 2016).

³¹ 'Background Information Document (n 27 above).

possibilities for mitigation of these impact; comparative assessment of all alternatives; and appendices containing required information such as the public participation process, interested and affected persons.³²

With the submission of the draft EIA Report for public participation in August 2003, members of the community and environmental rights organisations opposed the granting of authorisation for the proposed activity.³³ More than 5,600 letters were sent to DAEA opposing the granting of the authorisation.³⁴ The main concerns of individuals and civil society were as follows:³⁵

- i. Incinerators cause air pollution, releasing over 170,000 chemicals such as cancer-causing chemicals dioxins and furans into the air;
- ii. Incinerators emit toxic substances like cadmium, lead and mercury which affect the bodies' hormonal, immune and reproductive systems, causing severe health problems in humans;
- iii. The fly ash and bottom ash which are collected by an incinerator's air filter system and furnace respectively, are more dangerous to health than original waste substances and must thus be disposed of on a hazardous landfill site;
- iv. Incinerators encourage waste production rather than deter it, as they require a minimum amount of waste to be delivered each day to be operational;
- v. Incinerators provide minimal socio-economic benefit to persons in communities in which they are installed as they do not provide considerable employment opportunities for locals, rather, they require large capital investment which often results in more money being paid by locals through taxes e.t.c., for them to function; and
- vi. In many cases as in this, the project location of incinerators perpetuate racial and economic discrimination as they are established in low income communities populated by black communities.

³² Section 24(7) NEMA.

³³ See 'Civil Society Victory for Protecting Community Health'. Available at <<http://www.groundwork.org.za/archives/2005/20050822.php>> (accessed 5 March 2016).

³⁴ 'Incineration and POPs Release in South Africa', 6. Available at <http://ipen.org/sites/default/files/documents/4saf_incineration_and_pops_release_in_south_africa-en.pdf> (accessed 5 March 2016).

³⁵ As above.

Furthermore, the draft EIA report was also denounced by environmental activists as 'flawed and misleading' as it had grossly understated the level of dioxin, a cancer-causing chemical, that would be released into the air through the process of incineration, thus making the emission rate in the EIA 500 times less than should have been projected.³⁶

In response to these concerns of community members and environmental activists, authorities were prompted to take a closer look at the objections raised by the community and ask more questions on Enviroserve.³⁷ As a result, between October 2013 and June 2015, Enviroserve was forced to produce additional reports and conduct research on a variety of issues. These included: 'Comments and Response Report required by the Department of Agricultural and Environmental Affairs (DAEA); an Alternative Site Location study; a study on proven examples; an assessment of the "No Go" option; a Risk Assessment; a study on waste quantities; a report on the effectiveness of the proposed technology; an Occupational Health & Safety Assessment; a Traffic Impact Assessment and an update on the weather data on which the buffer study was based'.³⁸

In July 2005, Enviroserve announced that it was abandoning plans to build incinerators in favour of adopting autoclaving as the method of treating the HCRW at the facility.³⁹ A new EIA process was commenced, beginning with a public meeting in July 2005, the opening of a register of interested and affected persons and soliciting for comments and queries from the public.⁴⁰

The enormity of the potential health hazard that was averted by the successful objection by the community and civil society organisations of the plans to build the incinerator in favour of autoclaving is significant. Pollution from waste incinerators has been linked to different types of cancer such as: sarcoma, non-hodgkins lymphoma, lung cancer, cancer of the larynx, liver cancer and various childhood cancers.⁴¹ High incidents of respiratory

³⁶ National Report on Community-Based Air Monitoring in South Africa (n 28 above) 7.

³⁷ 'The EIA Process for the Medical Incinerator at the Shongweni Landfill Site' Available at <<http://www1.durban.gov.za/durban/government/media/press/531>> (accessed March 2016)

³⁸ As above.

³⁹ As above.

⁴⁰ As above.

⁴¹ 'Incineration and Human Health: State of Knowledge of the Impacts of Waste Incinerators on Human Health', Greenpeace Report, March 2001, 26-34. Available at <<http://www.greenpeace.org/international>

diseases, congenital malformations and immune system depression have also been recorded within communities that have utilised this method of medical waste disposal in various parts of the world.⁴²

Thus, the successful utilisation of the public participation process and the access to information about the EIA, which this public participation required to be provided to all interested and affected persons, created the useful opportunity for members of the Shongweni community directly affected by the proposed incinerator to ensure that their concerns about the impact of the proposed activities on their health and their environment was considered. It is clear that without such access to the details of the proposed activity and the opportunity to participate in the decision making process, the requisite authorisation would have been granted, with negative consequences to the health and the environmental well-being of the Shongweni community.

8.4 Anti-corruption and socio-economic progress in Uganda: The IGG and implementation of the Northern Uganda Social Action Fund (NUSAF) II

The two decades of civil war waged by the Lord Resistance Army (LRA) in Northern Uganda left the region ravaged by poverty, severe underdevelopment and economic stagnation.⁴³ As with any typical post-conflict environment, access to basic socio-economic services became elusive for most of the population of northern Uganda and human development indicators far worse than all other parts of the country.⁴⁴ To address this, the World Bank provided a loan of US\$100 million⁴⁵ to the government of Uganda under the Northern Uganda Social Action Fund (NUSAF) project.⁴⁶ This intervention which was implemented between 2003 and 2009 with the oversight of the Office of the Prime Minister, sought to empower communities in northern Uganda to ‘implement

/Global/international/planet-2/report/2001/2/incineration-and-human-health.pdf> (accessed 11 March 2016)

⁴² As above.

⁴³ NUSAF Project Information Document, 1. Available at <<http://documents.worldbank.org/curated/en/770771468761353278/pdf/multi0page.pdf>> (accessed March 17 2016).

⁴⁴ As above

⁴⁵ This was complemented by US\$13.5 million commitment from the government of Uganda and US\$20 of local contributions.

⁴⁶ All information about this project is available on the World Bank website <<http://web.worldbank.org/external/projects/main?pagePK=104231&theSitePK=40941&menuPK=228424&Projectid=P002952>> (accessed 15 March 2016).

sustainable development initiatives that improve socio-economic services'.⁴⁷ Though largely successful, NUSAF was plagued by allegations of corruption, with many arrests and prosecution of fund managers in several of the 18 districts in which NUSAF was implemented.⁴⁸

In the meantime, in 2005, the government of Uganda as part of peace talks with the LRA, developed the Northern Uganda Peace, Recovery and Development Plan (PRDP).⁴⁹ This plan, which was formulated over a two-year period, with consultations held with all relevant stakeholders at district at national level, was subsequently launched in September 2007.⁵⁰ The PRDP is a three-year strategy to 'eradicate poverty and improve the welfare' of the population of Northern Uganda at an estimated cost of US\$ 600,000,000 million, focusing on four main objectives: consolidation of State authority; rebuilding and empowering communities; revitalisation of the economy; and peace building and reconciliation.⁵¹

In continuation of its assistance to the government of Uganda in addressing the poor socio-economic conditions in northern Uganda and as part of the implementation of the PRDP, the World Bank in 2009, extended a further US\$ 100 million loan to Uganda. This was in the form of another project, this time referred to as NUSAF II, which was executed between November 2009 and February 2016.⁵² This project whose objective was to empower selected communities in northern Uganda to 'improve their livelihoods and access to basic socio-economic services',⁵³ had four components: public works programme; income generation and investment; community infrastructure rehabilitation

⁴⁷ NUSAF Project Information Document, 3.

⁴⁸ Okino, P. 'Corruption Probe Leads to Further Arrests, Institute for War and Peace Reporting, 28 August 2008. Available at < <https://iwpr.net/global-voices/corruption-probe-leads-further-arrests>> accessed 17 March 2016). See also 'Kitgum Police Registers 75 Cases Against NUSAF'. Available at < <http://ugandaradionetwork.com/story/kitgum-police-registers-75-cases-against-nusaf>> (accessed 17 March 2016); 'Gulu Probes Corruption in NUSAF' Dennis Ojwee, *New Vision*, Available at < http://web.worldbank.org/archive/website01_397/WEB/IMAGES/7_TRANSP.PDF> (accessed 17 March 2016).

⁴⁹ Available at <https://www.brookings.edu/wp-content/uploads/2016/07/Uganda_PRDP-2007.pdf> (accessed 17 March 2016).

⁵⁰ As above, vi.

⁵¹ As above.

⁵² NUSAF II Project Information Document, 1. Available at <<http://documents.worldbank.org/curated/en/872781468318880848/pdf/PCN0PID.pdf>> (accessed 17 March 2016).

⁵³ As above, 2.

and institutional development.⁵⁴ The methodology adopted in identifying and funding subprojects ensured that only those projects agreed on by communities as being needed were implemented. To achieve this, communities were required to ‘organise themselves, prioritise their needs and implement projects that address their needs’.⁵⁵

In a bid to avoid a repetition of widespread corruption in its implementation, the World Bank put in place some measures in the institutional development component of NUSAF II. In this regard, the institutional development component focused on activities aimed at facilitating the ‘effectiveness, efficiency, accountability and transparency’ of project resources and comprised two sub-components: Project Implementation Support and Transparency, Accountability and Anti-Corruption (TAAC).⁵⁶

The TAAC sub-component, which was overseen by the Inspectorate of Government, focused on promoting good governance in project implementation through a combination of enforcement and preventive measures and focusing on a methodology that integrated monitoring and inspections, public awareness, investigations and prosecution,⁵⁷ by promoting the following 9 core principles:⁵⁸ ‘community level transparency; prompt reporting of grievances; collaboration with anti-corruption agencies; audit, financial and procurement management; mechanisms for rewards and sanctions; participatory monitoring tools; rapid results initiatives; development communication and gender mainstreaming’.

More specifically, the IGG developed a Social Accountability and Community Monitoring (SACM) framework which provided capacity building to communities benefiting from the project to identify corruption and ensure accountability.⁵⁹ This capacity building was provided by a consortium of NGOs, selected through a competitive bidding process and

⁵⁴ As above, 2-3.

⁵⁵ As above.

⁵⁶ Inspectorate of Government Report to Parliament: January – June 2015, 38. (On file with author).

⁵⁷ Inspectorate of Government Report to Parliament: June – December 2015, 28. Available at <http://www.igg.go.ug/static/files/publications/IG_Report_to_Parliament_July_-_Dec_2015.pdf> (accessed 15 August 2016).

⁵⁸ As above.

⁵⁹ As above.

led by the Uganda Debt Network (UDN).⁶⁰ The consortium trained community monitors and regional managers who comprised Community Monitoring Groups (CMGs) of 9 persons each on: roles and responsibilities, community monitoring, documentation of activities and anti-corruption reporting.⁶¹

The influence of the IGG in ensuring the success of NUSAF II and achieving a high level of accountability mainly involved investigations, inspections and public awareness on sub-projects, such that by 31 December 2015, UGX 281,963,052,973 out of a total of UGX 281,974,035,473 which was disbursed had been fully accounted for.⁶² Furthermore, a total of 5,617 persons had been trained as part of CMGs, which equipped them to gather first-hand information and monitor project implementation in their various locations.⁶³

There is no doubt that NUSAF II facilitated the improvement of socio-economic conditions in northern Uganda by providing community demand-driven basic services. While the project set out to support 9750 projects (8000 household income support, 1000 public work and 750 community infrastructure projects, these targets were surpassed. In the end, a total of 10,487 sub projects were completed (7,179 household income support, 782 public works and 2,526 community infrastructure subprojects).⁶⁴ Thus, under NUSAF II, 2,795 classrooms were constructed which provided access to basic education for 44,520 pupils, thereby facilitating increased enrolment in participating areas under the project.⁶⁵ Furthermore, 252 community access roads were constructed, providing improved access to about 912,000 people in the areas of implementation.⁶⁶ Also, by the end of the project, 689 new water supply schemes had been developed, allowing 73,300 households (approximately 366,500 beneficiaries) access to water.⁶⁷

⁶⁰ 'Uganda Debt Network Signs Contract with Inspectorate of Government'. Available at <http://www.igg.go.ug/static/files/publications/UDN_signs_contract_with_IG_2.pdf> (accessed 20 March 2016).

⁶¹ As above.

⁶² Inspectorate of Government Report to Parliament June – December 2015 (n 56 above).

⁶³ As above, 29.

⁶⁴ Second Northern Uganda Social Action Fund Project (NUSAF 2): P111633, Implementation Status and Results Report, World Bank, 1. Available at <<http://documents.worldbank.org/curated/en/450331468308073002/pdf/ISR-Disclosable-P111633-02-29-2016-1456761255545.pdf>> (accessed 17 March 2016).

⁶⁵ As above, 3.

⁶⁶ As above.

⁶⁷ As above, 4.

Two major areas in which the access to information element of the IGGs involvement in the successful implementation of NUSAF II, while preventing corruption, was in term of its preventive-inspections and enforcement-investigative efforts.

8.4.1 Investigations

As part of the TAAC, the IGG received several complaints in the course of the implementation of NUSAF II which were investigated and resolved, thus allowing for an effective implementation of project activities. In conducting these investigations, the IGG relied on its powers under the Constitution and sections 12(c) and (b) of the Inspectorate of Government Act to gain access to the necessary documents and information to ensure a proper and accurate conduct of investigations. Some of these investigations include the following:

- i. The IGG investigated a complaint by members of Kiteny West Youth and Orphans Restocking Sub-project in Otong Parish that following approval of their subproject by Ogom Sub-county, Pader District and the Office of the Prime Minister, their names had been substituted by district authorities with that of members from the Ogom Parish with the intention to divert the funds to these persons.⁶⁸ Investigations by the IGG confirmed this allegation and the Chief Administrative Officer of the Pader District Local Government was required to return the UGX 11,458,000 released for funding to the Office of the Prime Minister and to make a new request for funding of the rightful parish.
- ii. In Adjumani district, the IGG investigated complaints of illegal extortion of money from subproject groups by district officials. It was discovered through investigations that 79 subproject groups were forced to pay UGX 20,000 each at their sub-county for the issuance of registration certificates as community based groups. Furthermore, in Pakele sub-county, county officials charged groups an additional UGX 30,000 for the drafting of constitutions for each group, contrary to project requirements that Community Development Officers assist groups in developing their constitutions. The IGG required that sum of UGX 1,420,000 and UGX 420,000 illegally collected for

⁶⁸ Inspectorate of Government Report to Parliament: January – June 2013, 19. Available at <https://www.igg.go.ug/static/files/publications/Report_to_Parliament_2013.pdf> (accessed 15 March 2016).

registration and drafting of constitutions be refunded and the district officials involved sanctioned for their role in the extortion.

8.4.2 Inspections

A key factor in the successful completion of NUSAF activities was the extensive role the IGG played in inspecting subprojects to ensure their effective implementation in accordance with project specifications and devoid of corrupt practices.

i. Lamwo-Kitgum District⁶⁹

At the time of sub-project approval, Lamwo district was a county under Kitgum district. Subsequently, upon its designation as a district in its own right, funds allocated for subprojects continued to be disbursed to Kitgum district and because it was unclear how these funds were to be utilised, subprojects in the newly created Mamwi district stalled due to lack of funds and capacity to execute them. Working with the Office of the Prime Minister, the IGG was able to convene a meeting with relevant officers in both districts in which it was resolved that the funds would be released and adequate training provided to officials in the Lamwo district to implement the sub-projects. This agreement was implemented and thus allowed Lamwo district to benefit from NUSAF II.

ii. Amatolar district

Between June and December 2012, the IGG inspected 18 subprojects in Amatolar district which had received funds from the Office of the Prime Minister under the third and fourth disbursements of the NUSAF project.⁷⁰ By virtue of the inspection, the IGG was able to confirm that as at July 2012, UGX 2,036,551,021 was received from the Office of the Prime Minister for 151 subprojects. All subprojects had established the necessary committees and management teams and commenced implementation. However, 10 subprojects had failed to account for funds and many subprojects had not been monitored by the relevant officials in the district due to delays in receipt of fund from the office of the

⁶⁹ Inspectorate of Government Report to Parliament: July – December 2012, 18. Available at <https://www.igg.go.ug/static/files/publications/Report2Parliament_July-Dec2012.pdf> (accessed 15 March 2016).

⁷⁰ As above, 17.

Prime Minister. The IGG thus requested that the Office of the Prime Minister ensure timely release of funds and all funds received accounted for.

There is no doubt that the significant role played by the IGG, especially with regard to investigating allegations of corruption in the implementation of the NUSAF II project, was only possible through reliance on the provisions of the Inspectorate Act empowering it to access information by compelling a public officer or any other person to: answer questions about the execution of their duties or that of another person,⁷¹ produce any document,⁷² or do any other thing necessary for the performance of its functions.⁷³

8.5 Factors affecting contribution of alternative legal frameworks on access to information to socio-economic progress

A close examination of the case studies reveals a combination of factors, which can be identified as having made the contribution of each of these legal frameworks to socio-economic progress possible.

8.5.1 Strong enabling legislation

In all three alternative frameworks considered, the starting point towards socio-economic progress was the existence of enabling provisions allowing for access to information within the relevant law. It can however not be taken for granted that similar laws which exist in other States in Africa contain similar provisions. In terms of EIAs, for example, the current public participation and access to information provisions of the South African EIA regime is a result of numerous amendments over the last two decades brought about by judicial decisions as well as extensive consultations with various stakeholders. However, the fact that the case study discussed above took place prior to these numerous amendments, shows that even a moderately strong public participation provision in any EIA regime which incorporates elements of access to information is able to positively impact socio-economic conditions in affected communities.

⁷¹ Section 12(b) Inspectorate Act.

⁷² Section 12(c) Inspectorate Act.

⁷³ Section 12(d) Inspectorate Act.

For public procurement and anti-corruption legislation, the growing recognition of the importance of access to information in the prevention and enforcement of corruption and on the impact of corruption on public procurement has meant that in recent years both sets of laws developed or amended have begun to introduce elements of transparency, in general, and access to information, in particular, in their provisions. Thus, the provisions requiring the acquisition, maintenance and provision of procurement records to the public under Nigeria's PPA, is key to facilitating the use of information so obtained in advancing socio-economic progress. Likewise, the multiple legal frameworks on anti-corruption, many of which are enforced by the IGG in Uganda, contain far-reaching provisions allowing for access to information which is necessary for the effective functioning of the IGG and thus creates ample opportunity for the IGG to acquire information which can be utilised by itself or the public at large for socio-economic progress.

8.5.2 Facilitating role of civil society

As with the constitutional and legislative frameworks on access to information, civil society has played a fundamental role in the successful use of the alternative frameworks on access to information towards achieving socio-economic progress. In the case of public procurement and the Almajiri schools in Nigeria, the persistence of PPDC in forcing the education authorities to provide the requested information and take the necessary steps to address the continued closure of completed schools is evidence that public procurement laws are indeed useful in gaining access to the kinds of information that can be utilised to advocate for socio-economic progress by civil society. Likewise, organisations such as Groundwork and Earthlife, both members of the South Durban Community Environmental Alliance (SDCEA), worked to secure the change of the proposed project for the disposal of medical waste. Specifically, they educated community members on the negative impact on the proposed incinerators on their health and environment, as well as assisted them in sending letters of objection against the authorisation for the proposed activity. Certainly such efforts were crucial to the eventual change of methodology by Enviroserve from incinerator to autoclaving in Shongweni.

8.5.3 Wide reach and network of anti-corruption institutions

As was highlighted in the preceding chapter, the level of importance placed on the prevention and combatting of corruption in all its ramifications is such that numerous laws and institutions are inevitably involved in the process at the national level. Despite this multiplicity however, there is generally one institution established for the sole purpose of fighting corruption, which as in Uganda, is established in a manner that gives it the capacity to operate in all corners of the country. Thus, the fact that the IGG operates with a head office in Kampala and 16 regional offices spread across the country, allowed it the necessary geographical coverage to investigate and inspect the implementation of NUSAF II. This is crucial, as the often poor transportation and telecommunication infrastructure in many African countries as in Uganda often presents practical difficulties with undertaking such activities without adequate physical presence nationwide. In essence, the well-established inspection role under NUSAF II.

8.6 Potential contribution of alternative legal frameworks on access to information to socio-economic progress in Africa

The central role public procurement plays in the delivery of basic services by States to its citizens makes it imperative that access to information about the entire procurement process is within easy reach of the public for purposes of accountability. This realisation has been a central focus of public procurement reform in Africa, such that most public procurement laws in Africa contain various access to information provisions that can be relied upon by citizens in ensuring that socio-economic interests are protected and improved. The case study from Nigeria shows that the precepts of the Public Procurement Act which compel the maintenance of certain categories of procurement related information and make them available to the public makes it difficult for officials to withhold, and easier for citizens to demand, information related to socio-economic issues.

In terms of EIAs, across Africa, new development activities involving the exploitation of natural resources and construction of infrastructure, many of which have socio-economic consequences for local communities, are routinely undertaken. Apart from development activities, other activities that are harmful to the environment causing varying levels of pollution such as waste disposal, are also a necessary occurrence. As the case study

from South Africa illustrated, the provisions of laws requiring the conduct of EIA, and giving an opportunity to interested and affected persons to participate in the decision making process by making the results of the EIA available to them and soliciting their comments provides ample opportunities to influence socio-economic conditions.

The overwhelming emphasis of the need for public participation and access to information in the environmental decision-making process internationally has no doubt also influenced the fact that over 75 percent of African states have adopted EIA laws,⁷⁴ most of which incorporate public participation provisions to varying degrees. This is an indication of the extent to which this process is capable of serving as a viable means of ensuring that the socio-economic interests of affected communities and nations as a whole are not only protected but also promoted.

The multifaceted nature of corruption and the need for corresponding multifaceted frameworks to address the phenomenon provides a variety of opportunities for these frameworks, all of which contain access to information provisions, albeit in varying degrees, to be strategically utilised to influence socio-economic progress. Anti-corruption laws, asset declaration laws, whistleblower protection laws prohibiting economic and financial crimes, as well as laws establishing an ombudsman or some other institutions for guaranteeing rules of law and good governance within the public service, are some of the laws adopted to tackle corruption which can be found in most African States. Each of such laws and the corresponding institutions charged with their enforcement provide ample opportunity to ensure that information accessed can be successfully utilised in preventing corruption in the of public resources, and in so doing, improve socio-economic conditions of the people. Furthermore, the wide geographical reach of some of these anti-corruption institutions as is the case with the IGG in Uganda,⁷⁵ EFCC in Nigeria⁷⁶ and the

⁷⁴ Nugent, C. 'Review of Environmental Impact Assessment and Monitoring in Africa' (2009) *FAO Fisheries and Aquaculture Technical Paper*, No. 527,57.

⁷⁵ List of the 16 regional offices of the IGG is available at <<https://www.igg.go.ug/contact/>> (accessed 15 March 2016).

⁷⁶ The EFCC has its head office with 5 other offices in each of the geo-political zones of Nigeria. See <<https://efccnigeria.org/efcc/index.php/contact-us-2>> (accessed 15 March 2016).

Public Protector (Ombudsman) in South Africa,⁷⁷ increases their potential in influencing socio-economic progress.

8.7 Conclusion

This Chapter set out to illustrate the utility of selected alternative legal frameworks on access to information, namely public procurement, environmental impact assessments and anti-corruption, in advancing socio-economic progress in Africa.

With regard to the case study on public procurement in Nigeria, it is clear that without the adoption of the Public Procurement Act laying down in clear terms the two-stage procurement process of procurement planning and procurement implementation, together with provisions under the Act requiring that public institutions make available documents in relation to any procurement process to any person upon the award of a contract, no information on the Almajiri schools would have been obtained. This fact, together with the existence of an FOI Act, which was the vehicle through which the information was requested, made it possible for the requested information to be obtained.

Although the initial intended objective of commencement of classes did not succeed immediately, the case study shows in practical terms how public procurement frameworks, like that of Nigeria which are focused on ensuring transparency and accountability, provide useful opportunities for improving socio-economic-progress by allowing public scrutiny of procurements related to the provision of basic services. This is all the more pertinent, as the trend internationally and in Africa is to open up procurement processes to ensure transparency and accountability, in a manner which ensures value for money and high quality standards in the provision of goods and services for the public.

In terms of EIAs, the South African case study about the successful efforts of community members and civil society organisations in relying on the public participation process to prevent the proposed waste disposal plans through the construction of incinerators in

⁷⁷ The office of the Public Protector is headquartered in Pretoria, with offices in each of the 9 provinces of South Africa. See <http://www.pprotect.org/contact_us/provincial_regional_offices.asp> (accessed 15 March 2016).

Shongweni, illustrates clearly the utility of access to information in environmental and health matters. This success is even more capable of being replicated in South Africa bearing in mind that the EIA regulations in place at the time have undergone further amendments, which have expanded the requirements of public participation. Furthermore, access to information for interested and affected persons is now an express requirement as part of the EIA process.

The case study also brings to the fore what is perceived by many as fundamental defects of the EIA process, which is that it is often an instrument used to ‘conceal environmental malpractice’, because the process is often ‘manipulated to suit developer needs, poorly managed by consultants and inconsistently adjudicated’ by the relevant environmental authorities.⁷⁸ Of particular relevance is the lack of objectivity of ‘consultants’ commissioned by applicants to undertake and produce EIA reports. This lack of objectivity often translates into EIAs overwhelmingly underrepresenting the potential adverse effects of proposed activities on the environment and on the rights and general well-being of affected persons and communities as was the case in the Shongweni case study. To counteract this tendency, affected communities and environmental rights organisations must thus engage vigorously with the public participation process, and be prepared to conduct independent assessments to verify the authenticity of research and any documents produced by applicants as part of the EIA process.

On anti-corruption, the legal framework in Uganda, which is in many ways typical of what obtains across the continent, establishes an anti-corruption institution, which is unique in combining the functions of anti-corruption, ombudsman, asset declaration and whistleblowing protection. What this case study thus shows is that such an arrangement undoubtedly requires considerable human and financial resources as well as the development of effective organisational coordination strategies, to ensure the successful implementation of this broad mandate. In addition, the existence and accessibility of an effective complaints system by the IGG, which allows for intended beneficiaries at the

⁷⁸ Ridl, J. and Couzens, E. ‘Misplacing Nema? A Consideration of Some Problematic Aspects of South Africa’s New EIA Regulations’ (2010) 13 *Potchefstroom Electronic Law Journal* 82.

grassroots to successfully lodge complaints which are in turn diligently investigated were essential in yielding the positive results in this case study.

While the successes of the NUSAF II Project cannot be attributed entirely to the influence of the IGG, it is clear that the preventive and enforcement measures, based on the number, depth and outcome of the investigations and inspections undertaken by the IGG, contributed greatly to this success.⁷⁹ However, as the IGG, like most anti-corruption agencies does not issue binding decisions nor is it capable of compelling their enforcement, the cooperation of other institutions involved in tackling corruption is important. The assistance of institutions such as the police and the courts, combined with the political will displayed by the executive (in this case, the office of the Prime Minister which was responsible for the overall implementation of the project) were critical in ensuring the efforts of the IGG yielded positive results.

⁷⁹ A look at the reports of the IGG to Parliament during the period of the NUSAF II project implementation (2009 – 2016) reveals this. Available at <<https://www.igg.go.ug/publications/>>.

CHAPTER NINE: CONCLUSION AND RECOMMENDATIONS

9.1 Introduction

The primary premise this thesis set out to prove is that constitutional and legislative protection of the right of access to information have contributed and can further contribute to socio-economic progress in Africa. In doing so, the thesis sought to determine whether despite the emergence of access to information as an offshoot of freedom of expression, it has become internationally recognised as a human right in itself, such that the adoption and implementation of constitutional and statutory frameworks on access to information have left an imprint in Africa, especially in contributing to socio-economic progress.

Another objective of this thesis was to show that beyond constitutional and legislative guarantees of access to information, alternative legal frameworks exist for the realisation of the right of access to information that can and have been used for the advancement of socio-economic progress. Here, the aim is to show that given the limited number of stand-alone constitutional provisions on access to information and of specific laws laying down the procedure for giving effect to the right in Africa, viable generic legal options exist through which access to information can and does contribute to socio-economic progress on the continent. In other words, the thesis concerns itself with legal frameworks in three dimensions – constitutional, ATI-specific legislation and ‘generic’ legislation conducive to ATI.

Furthermore, conscious that socio-economic progress is influenced by an interplay of a variety of contexts and realities, and of the difficulty of postulating a direct causal connection between access to information and socio-economic progress, this thesis also sought to examine those factors that facilitate the socio-economic contributions of each of these three legal frameworks on access to information. In this process, it is necessary to avoid the analysis of case studies becoming an over simplistic illustration of the influence of access to information on socio-economic progress, instead of an accurate reflection of the major circumstances responsible for its contribution in each specific case.

More generally, the aim of this thesis is to show that beyond the general acceptance of the importance of access to information as an instrument for public participation, transparency, accountability and preventing corruption, and the persistent assertion by

ATI advocates of its potential ‘for the realisation socio-economic rights’, there are identifiable instances in which legal frameworks directly or indirectly giving effect to this right, have indeed resulted in the improvement of the socio-economic conditions of individuals, groups, communities or entire populations in Africa. A secondary and more latent consequence of these objectives, is that the thesis inevitably raises questions as to the comparative advantages and disadvantages of each of these categories of legal frameworks on access to information examined in this study, in providing the best possible mechanism for socio-economic progress in Africa.

To fulfill the main objectives, this thesis adopts a descriptive, analytical and qualitative case study approach. Specifically, Nigeria, South Africa and Uganda are relied on as case studies, to demonstrate the utility of the constitutional, legislative and alternative generic frameworks on access to information in contributing to socio-economic progress in these countries, and by extension, Africa. In doing so, variations in the normative content of these frameworks, their implementation and the extent to which such variations pose a challenge to the utility of access to information as a tool for improving socio-economic condition are explored. As the concluding chapter, this Chapter provides a summary of findings of the eight preceding chapters, and draws up the concluding remarks and recommendations emanating from the research.

9.2 Summary of findings

In answering the question whether access to information is an international human right properly so called and if so, determining its normative content, Chapter 2 of this thesis reveals that although not explicitly provided as a right in any of the international human rights instruments, access to information has come to be recognised internationally as a right, separate and distinct from the right of freedom of expression from which it has its origins. This study finds that in the last two decades, starting with the UN Special Rapporteur, the right to ‘seek, receive and impart information’,¹ to ‘receive and impart information’² and ‘receive information’,³ all components of the right to freedom of

¹ Article 19 UDHR, article 19 ICCPR, and article 13(1) ACHR.

² Article 10(1) ECHR.

³ Article 9 of the African Charter.

expression, have been found to confer a right to access information held by public bodies within the United Nations, Inter-American, European and African human rights systems.⁴

Tracing the evolution of access to information as a right, this thesis also shows that the incremental elaboration of the normative content of the right of access to information within the UN system, initially occurred chiefly through the reports of the Special Rapporteur and were thereafter solidified by General Comment 34 adopted by the UN Human Rights Committee in July 2011. This, combined with the adoption of a body of principles and Model Laws on Access to Information by the African and Inter-American regional human rights systems, and in the case of Europe, a binding treaty, has further entrenched the place of access to information as an internationally recognised right. Putting beyond doubt the place of access to information as a right, are the decisions of international human rights courts affirming the right of access to information. This refers here to the 2006 decision of the American Court on Human Rights in *Claudio Reyes v Chile*,⁵ and more recently of the European Court on Human Rights in *Gillburg v Sweden*,⁶ finding violations of the right of access to information by public authorities in Member States on the basis of freedom of expression provisions of the ACHR and the ECHR.

Moving beyond the recognition and judicial interpretation of access to information as a right, the study also finds that there has been an increased awareness and understanding of its nature as a cross-cutting right – one which is necessary for the realisation of other rights – and of its centrality to issues of democracy, governance and development. This understanding, which has been shaped by experiences and challenges in the implementation of access to information regimes around the world, has also generated best practices, thus stimulating the progressive expansion and strengthening of the normative content of the right of access to information.

Having established the recognition of access to information as a well-established right within international human rights law, in Chapter 3, the thesis investigates the extent to

⁴ The African human rights system recognises the right to access information held by private bodies where it is necessary for the exercise or protection of a right'. See Principle IV(2) of the Declaration of Principles on Freedom of Expression in Africa, 2002.

⁵ IACHR Series C no 151 (Official Case No.), September 2006.

⁶ See *Gillburg v. Sweden* [GC] - 41723/06, Judgment 3 April 2012.

which this recognition has translated to similar recognition and protection within the constitutional order of African States, and in particular, the arguments that can be advanced in favour of such constitutional protection. This survey is undertaken with a view to determining the utility of constitutional provisions on access to information in contributing to socio-economic progress. In answering these questions, Chapter 3 highlighted the historical and contemporary complexities with constitutions, constitution making and constitutionalism in Africa, and the impact this has on the constitutional protection of human rights on the continent.

The study finds that generally, constitutions in Africa have acquired the infamous label of ‘sham’ or ‘façade’ constitutions. This is because, while on the face of it they comprise those core elements engendering constitutionalism, in reality, they are often not complied with either because the process of enactment lacks legitimacy or because the balance of State power renders the existing democratic institutions too weak to compel effective implementation and compliance, or a combination of both.

Nevertheless, because human rights has become an overarching concern of constitutions in Africa, through, in particular, the influence of international human rights law in the elaboration, interpretation and application of human rights norms in constitutions, the right of access to information has found a place in the constitutional order of many African States. However, specific stand-alone constitutional provisions on access to information have only featured in constitutions adopted in the last two decades, in line with the inception of international recognition of access to information as a right. Nevertheless, the manner in which the right has been derived and the practice of courts around the world, leaves room for the reading-in of a right of access to information into the constitutional provisions on freedom of expression in the majority of African Constitutions.⁷

The study however finds that several factors determine the inclination of domestic courts to read-in the right of access to information, such as: the status of international law within the particular domestic system; the extent of protection and actual application of the Bill of Rights as a whole, awareness of international human rights by the legal profession,

⁷ See section 3.6 in Chapter 3 of this thesis.

and the extent of judicial independence. Thus, by adopting a constitutional provision on access to information, the uncertainty that comes with the fluidity of these factors and the need to 'read-in' is dispensed with altogether. This finding therefore affirms the added benefit of the express constitutional guarantee of a stand-alone right dealing with access to information.

This point is well illustrated by the general attitude of the courts as shown in the case study countries of South Africa and Uganda with stand-alone provisions. In these countries, the express constitutional status of access to information has engendered purposive interpretation and application of the right. This is in contrast to Nigeria, with only a freedom of expression provision, where there is as yet no case in which a court has given effect to the right of access to information solely on the basis of reading-in this right into the constitutional provision on freedom of expression.

In Chapter 4, the case studies from Uganda on the Bujugali Dam project and the *Mulago National Referral Hospital* case prove that the constitutional protection of access to information can and has contributed to the improvement of socio-economic conditions for individuals and communities, while the *Biowatch* case from South Africa also exemplifies similar contribution to socio-economic progress in South Africa. It can thus be concluded that the express constitutional guarantee of the right of access to information is an important starting point for the implementation of the right of access to information in general, and the contribution of this right to socio-economic progress in particular. In all case studies considered, the coming into light of information requested following hard fought battles, revealed severe inadequacies and even outright misrepresentation of facts which had a direct impact on socio-economic issues such as the physical health and well-being of citizens as well as access to electricity. This in effect shows the power that information has in forcing recalcitrant governments and private companies into taking responsibility for ill-advised decisions policies or procedures that have a direct negative effect on the socio-economic conditions under which people live.

It is also clear, however, that certain factors increase the propensity for constitutional provisions on access to information to contribute to socio-economic progress. In this regard, both the Constitutions of South Africa and Uganda are progressive in that they

expressly make provision for public interest litigation, guarantee, albeit in varying degrees, socio-economic rights, and espouse principles of openness, transparency and democratic participation. Furthermore, the persistent and coordinated effort of civil society organisations in strategically utilising these constitutional provisions with a view to achieving socio-economic progress has proven to be an equally critical determining factor in the successful reliance on both constitutional provisions. This in no small measure is a consequence of, and further exacerbated by, the high levels of poverty and illiteracy that contribute to difficulties of access to justice. This is further compounded by the expensive and time consuming nature of constitutional litigation which constitute a formidable limitation to the potential of constitutional provisions on access to information to contribute to socio-economic progress in Africa.

As constitutional rights are generally an embodiment of principles which must be 'given flesh' in the form of specific statutes and policies, Chapter 5 delves into whether access to information legislation are effective legal frameworks in upholding the right of access to information in general and in contributing to socio-economic progress in particular. While by and large, the eighteen existing ATI laws on the continent conform to the internationally recognised principles in varying degrees, the unequal and fragmented implementation of these laws, as typified by case studies on Nigeria, South Africa and Uganda highlight the fact that the progressiveness of ATI laws far from guarantees their effective implementation. Rather, effective implementation rests on several factors such as political will backed up by organisational preparedness, an independent and effective monitoring mechanism, as well as popular awareness and uptake. The experience in Africa, as with other parts of the world, is that attaining the required balance of these requisite factors, is often a long and arduous journey. This is perhaps made all the more difficult in Africa by the overwhelming culture of secrecy, a poor record-keeping culture and the increasing tendency of States to adopt ATI laws as a 'conditionality' for foreign aid⁸ or as a mere 'ticking the box' exercise to create a façade of an open and transparent government.⁹ Consequently, for States with ATI laws, transitioning into the ultimate utopia

⁸ The ATI law of Côte d'Ivoire was adopted in December 2013 with no public consultation and knowledge of its existence remained limited until over a year after its adoption.

⁹ Little is known of the Sudan ATI law, other than it was adopted in 2015. However, a paper delivered at a conference held by the Centre for Human Rights in December 2015, quoted a government official as stating

in which proactive disclosure is the norm and the need to request for information the exception based on ATI laws is a continuing process.

In Chapter 6, the research finds that the question of the actual contribution of ATI laws to socio-economic progress is aptly answered by an examination of case studies from South Africa, Nigeria and Uganda. These case studies reveal numerous instances in which ATI laws have contributed to socio-economic progress. In South Africa, instances such as the provision of water for the Ntambanana Municipality, challenging discrimination in the work place and addressing waste disposal problems in Aliwal North are proof of the utility of PAIA in contributing to socio-economic-progress. Similarly, in Uganda, despite the highlighted challenges of implementing ATIA especially at the national level, *the Uganda Land Commission* Case shows the positive influence of the law on socio-economic progress along with several other instances in which issues such as shortages in water supply, medical supplies and sanitation problems have been addressed at the district level. In Nigeria, the relatively short period of the operation of FOIA notwithstanding, specific instances have emerged in which mere requests for information have resulted in socio-economic progress for local communities. In all of these instances in which ATI laws have been shown to influence socio-economic progress, once again the relentless efforts of civil society organisations was a common denominator.

This research also found that in South Africa, the landmark *ArcelorMittal* case highlights not only the importance of the application of ATI laws to private companies but the critical role that the existence of a combination of a constitutional provision and a law on access to information plays in advancing socio-economic progress. While the full effect of the *ArcelorMittal* judgement on the socio-economic conditions on the residents of the Steel Valley continues to unfold, it is clear that litigation or threat of litigation plays a substantial role in compelling compliance with requests for information under ATI laws. It can thus be safely concluded that ATI laws like that of Zimbabwe, which confer no enforcement mechanism, particularly through litigation, do not only fall short of international standards but also fail to generate the necessary force to induce compliance with its provisions. By

that the adoption of the law signifies Sudan's ascension to the league of transparent nations. (On file with author).

extension, such laws provide extremely limited possibilities of influencing socio-economic progress.

The case studies also show that requests for information of a socio-economic nature often go unanswered because any truthful answer will bring to light corruption, maladministration, incompetence or severe wrongdoing by public institutions or private companies. Rather than respond, public institutions often take steps to correct the socio-economic issue giving rise to the request, to 'cover-up' the misdeed. In instances in which information is provided whether voluntarily or by court order, an avenue is often created for solutions to be proffered, thereby enabling 'socio-economic progress. Thus, seeking information through ATI laws can and does allow for socio-economic issues to be addressed and with that contribute to socio-economic progress.

However, this thesis also finds that the provision of a framework for litigation by an ATI law does not necessarily afford an accessible avenue for ensuring that ATI laws influence socio-economic progress. This is because as with the enforcement of a constitutional right of access to information through litigation, engaging in litigation is a costly and time consuming exercise. Furthermore, litigation often also brings to the fore the imbalance of power and resources between the State or (where the law also applies to private companies) large corporate entities and civil society organisations, local communities or ordinary people seeking to enforce their rights. And, even where favourable judicial decisions granting access are obtained, they must be put to strategic and coordinated use often through sustained efforts of civil society organisation and affected groups, as typified by the actions of VEJA and CER in the *ArcelorMittal* case. In contrast, despite judicial decisions granting access pursuant to ATIA in Uganda, through which corruption and wastage of public funds have been revealed, the lack of concerted effort by civil society and other stakeholders to strategically utilise such information has left litigation under ATIA with minimal impact on socio-economic progress in Uganda.¹⁰ In Nigeria, however, an assessment on the effectiveness of litigation under FOIA remains largely

¹⁰ Interview with Mr Edward Sekyewa, 9 December 2015. Mr Sekyewa revealed that there was no clear and coordinated strategy by Ugandan civil society of which he is part, to utilise information released pursuant to litigation under ATIA to hold public bodies accountable. In particular, he bemoaned the fact that journalists routinely fail to generate public awareness on these issues when such information is made available to them.

premature as those cases with the potential of contributing to socio-economic progress are at different stages of the appeal process.

On the contribution of access to information to socio-economic progress in States with neither a stand-alone constitutional provision nor a law on access to information, Chapter Seven identified three such legal frameworks as public procurement, environmental impact assessments and anti-corruption laws. In South Africa, the research finds that the EIA legal framework which is a combination of the constitution, statutes and regulations has a central requirement of public participation, with access to information as its core. By requiring full transparency in applications for environmental authorisation and ensuring all 'potential interested and affected persons' have the necessary information and are able to raise concerns about the proposed activity both as a means of ameliorating concerns and introducing new features, socio-economic progress can be integrated into the entire process for the benefit of individuals, communities and the nation as a whole.

Given that public procurement is the avenue through which basic services are provided by the State and the propensity for corruption and wastage of public funds in the process, this thesis also identifies public procurement laws as another important set of generic laws for advancing socio-economic progress in Africa. Specifically, the Nigerian Public Procurement Act of 2007 which grants access to any information upon the completion of a procurement process, requires the oversight agency to proactively disclose procurement related information. The Act also innovatively incorporates provisions mandating the oversight agency to invite two civil society organisations to actively monitor each procurement process. These provisions thus create a useful framework for accessing information on the procurement process so as to ensure that basic services are provided according to the needs of individuals and communities in a cost effective and transparent manner, thereby improving the socio-economic conditions of the relevant recipients and the nation as a whole.

On corruption, the acceptance of its negative impact on economic growth and on a variety of good governance indicators has resulted in its prevention, suppression and punishment being a major focus at the national, sub-regional and regional level in Africa. However, the nature of corruption as a multifaceted and secretive activity and the lack of objective

and reliable information about its prevalence and direct consequences make measuring its actual impact on socio-economic development and designing interventions to address this impact, a difficult exercise. This situation has led existing legal frameworks to include access to information provisions as a requirement for preventing corruption, thus creating avenues for access to information to directly influence socio-economic progress.

Furthermore, the research finds that the multifaceted nature of corruption has also meant that numerous national normative and institutional frameworks are adopted to address corruption in its varying forms and manifestations, as is illustrated with the overview of Uganda's anti-corruption framework. This potentially creates room for confusion and uncertainty in the implementation of anti-corruption frameworks, especially where no effort is made to establish a mechanism for effective coordination.

In Chapter 8, case studies illustrate the utility of access to information-enabling provisions in selected legal frameworks for the improvement of socio-economic progress in South Africa, Nigeria and Uganda. In each of these case studies, the importance of progressive enabling legislation establishing these frameworks in order to address contemporary governance challenges was noted. Just as with the case studies on constitutional provisions and laws on ATI, the case studies on all three alternative frameworks also show that it is not enough to have alternative laws with provisions allowing for access to information to guarantee socio-economic progress. In addition, these laws must be such that can be relied upon with relative ease by a proactive civil society that on its part makes use of every available opportunity to do so. Furthermore, there must be the necessary political will to ensure their effective implementation through for example, the provision of adequate human and financial resources to the institutions tasked with their enforcement. As the case study on the IGG in Uganda also shows, the extra backing of international donors is also sometimes important in allowing institutions tasked with implementing these generic laws utilise access to information to secure socio-economic benefits of developmental projects for citizens. This is particularly important as political will is not always present to implement these laws for this purpose.

A common denominator in respect of the alternative frameworks, is the centrality of information in ensuring the proper implementation of the respective laws, all of which have

a bearing on socio-economic conditions in any nation. In other words, for all three frameworks considered, the centrality of transparency which is reflected in provisions mandating information to be made available, allows for information to have a positive socio-economic impact on the relevant subject matter they address. Thus, laws that by their nature address socio-economic issues which in turn require information to be made available, are best placed to contribute to socio-economic progress.

9.3 Conclusions

In answering the research questions, this thesis reaches the following broad conclusions:

9.3.1 Access to Information has firmly been established as an internationally recognised right

It is now beyond doubt that access to information is an internationally recognised human right. Some initial misgivings about founding a positive right of access to government-held information upon the largely negative freedom of expression provisions of international human rights instruments, has given way to unequivocal acceptance of this right and the elaboration of its scope and unique role within the human rights family. Attention has now shifted towards its important role in fostering democracy, good governance, public participation, transparency and accountability and the adoption and implementation of legal frameworks giving effect to access to information at the domestic level for the realisation of other human rights.

9.3.2 The express constitutional recognition of access to information in Bill of Rights is ideal

Despite the intricacies connected with the constitution-making process in Africa and the widespread disconnect between constitutional provisions and their implementation, the constitutional protection of rights in general and of access to information in particular remains of utmost importance. The anchoring role of constitutions within the domestic legal framework, the centrality of human rights to the pursuit of constitutionalism and of access to information to the realisation of all human rights, make it imperative that access to information is expressly guaranteed as a stand-alone right within the Bill of Rights of African constitutions. Doing so also establishes a firm foundation for the adoption,

interpretation and implementation of ATI laws or other generic laws furthering the right of access to information.

Be that as it may, it is clear that successful reliance on access to information for socio-economic progress, is equally aided by the constitutional protection of the socio-economic right sought to be enforced. This 'assistance' may not necessarily be expressly conveyed in terms of judicial decisions, but certainly comes through in terms of galvanising political will, especially in States where adherence to constitutional provisions and values are held supreme. Thus, in the *Biowatch* case, it can be reasonably concluded that the political will displayed by the government in working with civil society to address key concerns about Genetic Modified Organisms (GMOs) following the Court's decision compelling disclosure of requested information on GMOs, was influenced by the Constitution. In particular, the constitutional right to a healthy environment in section 24 of the South African Constitution arguably resulted in the desire of the government not to be seen as willfully violating the Constitution.

9.3.3 The adoption of ATI specific laws is ideal

Beyond the need for establishing essential foundational principles on access to information which stand-alone constitutional provisions on access to information provide, is the need for detailed elaboration of the process for giving practical effect to the right in the form of ATI laws. ATI laws thus fill the necessary practical gaps that constitutional provisions are by their nature incapable of addressing. Specifically, they lay down in clear and detailed terms, the process of requesting information, obligation of public bodies (and where applicable private bodies) in terms of responding to such requests for information as well as appeal and enforcement mechanisms. Constitutional provisions do not provide any of this.

Experience from countries like Uganda, which only adopted an ATI law in 2005, ten years after access to information became a constitutional right, illustrate the difficulties of relying solely on a constitutional right of access to information for the implementation of this right. The ten-year delay in the adoption of the ATI law, which was compounded by another six-year delay in adopting regulations giving effect to the ATI law, meant that there was lack

of clarity of processes for giving effect to the right. This in turn severely limited attempts by individuals and groups to request for and gain access to information.¹¹ The result was that the only real recourse against refusal of information or the inability to request for information was constitutional litigation, which was out of reach of the average Ugandan. However, constitutional litigation was successfully relied upon by a few civil society groups with the expertise and financial resources to do so.¹²

Presently there are 18 ATI laws on the continent that attempt to do lay down the process of accessing information, most of which were adopted in the last five years.¹³ Although the recent rapid increase in the adoption of ATI laws on the continent is a positive development, it has also revealed major defects in earlier ATI advocacy campaigns. Generally, these campaigns focused solely on adoption of ATI laws in accordance with regional and international standards without sufficient regard paid to their implementation.

However, as the case studies on South Africa, Nigeria and Uganda have shown, upon adoption, effective implementation is dependent on numerous factors, chief of which is the existence of political will of the government, demonstrated by the dedication of the requisite human and financial resources and establishment of mandatory effective internal mechanisms for implementation. Without this political will, the existence of a strong enforcement mechanism established by law alone will achieve little. Conversely, defective provisions of an ATI law may be cured by a progressive interpretation of an enforcement mechanism that is independent and committed to giving effect to the spirit and intent of the law. This point is well illustrated by the creative way in which the decision of South African courts were reached in cases like *De Lange and Another v Eskom Holdings and Others*,¹⁴ and *ArcelorMittal v Vaal Economic Justice Alliance*,¹⁵ as discussed in Chapter 6.¹⁶

¹¹ See generally Chapter 5 of this thesis.

¹² As above.

¹³ For example, the ATI law of Zimbabwe is generally criticised as doing more to restrict access to information than granting the right, while that of countries like Angola and Tunisia are merely administrative provisions or 'decree loi' respectively, which lack the status of a law in the true sense of the word.

¹⁴ 2012 (1) SA (GSJ).

¹⁵ *Company Secretary of ArcelorMittal v Vaal Environmental Justice Alliance* Case No 69/2014.

¹⁶ This point is discussed in detail in Chapter 6.

Thus, the combination of a constitutional guarantee of access to information and an ATI law creates a more formidable prospect for the enforcement of the right, and with that, greater opportunities of advancing socio-economic progress, than the existence of only one of the two frameworks. This is clearly illustrated by the case studies in Chapters 3 and 6, examining the use of both frameworks in each of the three case study countries. While case studies from South Africa and Uganda show a number of diverse instances in which both frameworks have influenced socio-economic progress, the case studies from Nigeria are few and far between. Admittedly, the lack of a constitutional provision on ATI in Nigeria and the fact that the Nigerian FOI Act was adopted only in 2011, a decade after that of South Africa and six years after that of Uganda, means there has been less time and opportunity for the FOI Act to be implemented and for it to demonstrate its influence on socio-economic progress. However, it can equally be argued that many of the ambiguities created by the lack of a constitutional guarantee on ATI have hindered the implementation of the FOI Act. This omission reaffirms the proposition that the combination of both frameworks creates more prospects for access to information to contribute to socio-economic progress.

9.3.4 Reliance on alternative legal frameworks on ATI is a necessity for majority of African States

Given that only 13 States have stand-alone constitutional provisions on ATI, only six of which have also adopted ATI laws, the opportunities for individuals and organisations to rely on a combined constitutional and legislative framework is severely limited.¹⁷ In fact, a majority of African States (29 out of 54) have neither an ATI law nor a stand-alone constitutional provision on ATI. For these States, the only feasible opportunity for access to information to contribute to socio-economic progress is through alternative legal frameworks allowing for access to information.

Efforts by African States to address the severe underdevelopment on the continent, worsened by high levels of corruption and wastage of national resources, has led to the adoption of several normative frameworks to encourage sustainable development in a

¹⁷ These are Kenya, South Africa, South Sudan, Niger, Zimbabwe and Uganda.

manner that ensures more equitable socio-economic development for citizens. These legislative efforts, which have taken the form of law reform in some cases and in others, the adoption of entirely new laws, have also been undertaken by States in a bid to convince international donors of the resolve to ensure the proper management of the numerous development projects funded as part of international efforts to induce socio-economic development. EIAs, public procurement, and anti-corruption legislative frameworks examined by this thesis, are thus practical examples of the utility of these legislative frameworks that have been and can be used to facilitate socio-economic progress.

However, considering the diversity of legal origins and traditions in Africa, it is unlikely that all African States will have adopted all three sets of laws. Even if they have, it is unlikely that all such laws would necessarily incorporate strong access to information provisions capable of contributing to socio-economic progress. Beyond the three alternative frameworks examined in detail in this thesis, several others such as: asset declaration, whistleblower protection and anti-money laundering laws, are also commonly adopted by States and can equally be relied upon in accessing information and through that contribute to socio-economic progress. It is thus left to individuals and groups in each State to assess existing alternative frameworks to determine which best suits the desired outcome on a case-by-case basis.

From all of the above therefore, it is clear that neither of the three frameworks-constitutional, legislative and alternative legal frameworks on the right of access to information are in themselves sufficiently capable of facilitating access to information and with that, socio-economic progress in a robust manner. As a result, access to information has been described as a change process, which needs to be managed in terms of its social circumstances and not merely a constitutional or legislative issue.¹⁸ It can thus be concluded that ideally, all 3 legal frameworks are necessary though by themselves insufficient for the proper implementation of the right of access to information in such a manner that allows socio-economic progress.

¹⁸ Darch, C. and Underwood, P. 'Freedom of Information Legislation, State Compliance and the discourse of knowledge: The South African Experience' 2005) 37 *International Information and Library Review* 78.

9.3.5 Civil society organisations are fundamental to the implementation of human rights at the domestic level

A constant feature of the successful reliance on legal frameworks on access to information in contributing to socio-economic progress in this thesis, has been the role of civil society organisations. This is usually in the form of requesting or facilitating requests for information and then strategically utilising or supporting the use of information for socio-economic progress including through litigation, where necessary. This pattern is indicative of the indispensable role that civil society plays in ensuring that international human rights norms are implemented within a domestic legal system that has itself adopted laws and policies to give effect to these international commitments.

However, civil society is also often instrumental in forcing States to make the necessary adjustments within their domestic legal system to ensure compliance with international human rights treaties they have ratified. An apt illustration of this phenomenon, is the role that civil society in the Americas played in securing recognition of access to information as a human right for the first time by an international human rights court. The Inter-American Court in its landmark decision in *Claudio Reyes v Chile*,¹⁹ found that the freedom of expression provision in article 13 of the IACHR also formed the basis of an enforceable right of access to information. Significantly, this judgement arose out of a petition filed by several civil society organisations before the Inter-American Commission.

Thus, what initially started out as an attempt to gain access to information on the social and environmental impact of a logging project in Chile, soon saw civil society organisations in Argentina, Chile and Peru coming together to push for the recognition of access to information as a fundamental right within the Americas.²⁰ In the end, apart from the Inter-American Court finding that article 13 indeed confers a positive right of access to information, the government of Chile was ordered by the Court to *inter alia* enact

¹⁹ IACHR Series C no 151 (Official Case No.), September 2006. Available at <http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.pdf> (accessed 14 September 2016).

²⁰ Abril, D.S. 'The Role of Civil Society in the Recognition of Access to Information as a Fundamental Right in the Americas'. Available at <<https://www.oas.org/dil/esp/11%20-%20dario%20soto.LR.CV.219-236.pdf>> (accessed 14 September 2016).

domestic legislation giving effect to the right of access to information. Two years later, in 2008, Chile adopted an ATI law which came into force in April 2009.²¹

9.3.6 International human rights treaties make a difference at the domestic level

The aim of any human rights treaty is to compel compliance with its provisions by Member States within the domestic legal system. Despite widespread cynicism about the extent to which international treaties achieve this objective,²² the findings of this thesis reveal that international treaties can and do influence positive change within the domestic legal system. What this thesis in effect shows at a micro level, is that the recognition of access to information as a right within international human rights law, has resulted in the adoption of legal frameworks in the form of constitutional provisions and laws on ATI to give effect to this right at the domestic level. Furthermore, this thesis provides empirical evidence in the form of case studies from Nigeria, South Africa and Uganda of how these legal frameworks on access to information contribute to socio-economic progress.

This finding lends credence to the position of those like Simmons who believe that international human right treaties positively influence human rights at the domestic level, not necessarily by guaranteeing better rights protection, but by contributing to a political and social environment in which these rights are more likely to be respected.²³ In reaching this conclusion, Simmons undertakes a quantitative empirical study, demonstrating that States that ratified six specific international human rights treaties were more likely to have policies and laws at the domestic level to implement the treaty obligations. On a more theoretical level, she notes that international human rights treaties influence

²¹ Estrada, J. 'Chile: Transparency Laws Open Access to Information'. Available at <<http://www.ipsnews.net/2009/04/chile-transparency-law-opens-access-to-information/>> (accessed 14 September 2016).

²² Hathaway for example concludes that ratification of treaties results in worsening human rights protection at the domestic level. See Hathaway, O. 'Do Human Rights Treaties Make a Difference?' (2002) 112 *Yale Law Journal* 1942- 2042. This finding has however been referred to as flawed by subsequent writers because it fails to consider the process and conditions for the incorporation of international law within domestic systems, which is crucial factor in implementation of human rights treaties. See for example Goodman, R. and Jinks, D. 'Measuring the Effects of Human Rights Treaties' (2003) 14 *European Journal on International Law* 171-183.

²³ Simmons, B. *Mobilising for Human Rights: International Law in Domestic Politics* (2009) Cambridge University Press: New York.

implementation at the domestic level by bringing international issues onto the national agenda, prompting litigation and allowing for political and social mobilisation.²⁴

9.4 Recommendations

Access to information is not an end in itself but a means to an end. The successful reliance on available legal frameworks to gain access to any kind of information does not, generally, or in itself, yield any tangible results. Rather, it is the use to which the information acquired is put that determines the extent to which the right of access to information is capable of promoting or protecting rights, and in the case of this study, improving socio-economic progress. This entire thesis, especially the case studies on constitutional, legal and alternative frameworks on access to information illustrate this. As a result, across board, the factors determining the contribution of access to information to socio-economic progress in this study, involve the strategic use by individuals and civil society organisations of relevant frameworks to request for and/or utilise information, to bring about the desired change. Therein lies the basis of the common reference to access to information as an ‘enabling’²⁵ or ‘instrumental’²⁶ right. This study thus views successful reliance on access to information in contributing to socio-economic progress as occurring in two stages: the successful request and receipt of access to information, followed by the use of that information to secure socio-economic progress.²⁷

Based on the above, the recommendations provided by this study comprise both those targeted at the African Commission and Member States for ensuring the more effective implementation of the right of access to information in Member States or put differently,

²⁴ As above, 125-147.

²⁵ See ‘PAIA Unpacked: A Resource for Lawyers and Paralegals’, SAHA, January 2013. Available at <http://foip.saha.org.za/uploads/images/PAIA_UNPACKED.pdf> (accessed 8 September 2016).

²⁶ See for example, ‘Access to Information: An Instrumental Right of Empowerment’, Article 19, July 2007. Available at <<https://www.article19.org/data/files/pdfs/publications/ati-empowerment-right.pdf>> (accessed 8 September 2016).

²⁷ There are however two main exceptions to this general ‘formular’ which the case studies from this thesis have revealed. These include cases in which requests for information of socio-economic relevance, especially those related to service delivery instead of being responded to directly, are followed by provision of the relevant service by the responsible public body authority. There are also instances related to the use of alternative legal frameworks such as reliance on information received through the public participation and access to information provisions of EIAs or of information received from anti-corruption investigations by anti-corruption agencies which have used access to information provisions in enabling legislation to influence socio-economic progress.

increased enjoyment of the right of access to information in Member States generally. In addition, suggested actions are addressed to civil society organisations in Member States on strategically utilising legal frameworks on access to information to facilitate socio-economic progress.

9.4.1 The African Commission should intensify advocacy efforts for the adoption and implementation of legal frameworks on access to information

As the premier African Union institution charged with the promotion and protection of human rights, the African Commission has a major role to play in ensuring that the enjoyment of the right of access to information is a reality for the millions on the continent and making any other forms of interventions as may be necessary.

A major criticism of the framework of the African Commission is the lack of effective follow-up mechanisms with regard to conclusions and recommendation contained in the Concluding Observations issued by the African Commission, following the consideration of State Reports.²⁸ The dialogue between members of the African Commission and States Parties is often robust and results in the adoption of well-reasoned Concluding Observations. However, the lack of an effective mechanism to verify the extent to which these recommendations are implemented inevitably hampers the ability to hold Member States accountable in respect of shortcomings in the fulfillment of obligations related to access to information. In terms of the implementation of access to information related recommendations contained in the Concluding Observations of the African Commission, it is imperative that a proper system is put in place by the Special Rapporteur to continuously follow-up with Member States and where necessary, offer assistance to ensure their effective implementation.

Another major shortcoming of the promotional mandate of the African Commission is that its members must obtain approval of Member States prior to embarking on promotional

²⁸ See generally, Wachira, G and Ayinla, A. 'Twenty Years of Elusive Enforcement of the Decisions on the African Commission on Human and Peoples' Rights: A Possible Remedy' (2006) 6 *African Human Rights Law Journal* 465-493. See also, Mutua, M. 'The African Human Rights system: A Critical Evaluation' 20-21. Available at <<http://hdr.undp.org/sites/default/files/mutua.pdf>> (accessed 14 September 2016).

missions whether thematic or country specific.²⁹ As a result, conducting promotional missions to countries in which intervention is most urgently needed is often difficult. On its part, the Office of the Special Rapporteur on Freedom of Expression and Access to Information in Africa,³⁰ has developed the practice of undertaking advocacy visits to Member States to encourage the adoption of ATI laws which conform to the Model Law.³¹ This practice has resulted in positive progress in the adoption and implementation of ATI laws in countries such as Ghana and Mozambique.³² This is arguably due to the high esteem Member States tend to hold AU standards (the Model Law) and AU representatives (the Special Rapporteur), over and above civil society groups who often campaign on this and other human rights issues.

However, more still needs to be done. The Special Rapporteur ought to be provided adequate technical and financial capacity to undertake an increased number of advocacy visits and where possible official promotional missions. This together with the establishment of proper follow-up mechanisms that ensures sustained engagement with Member States in securing the adoption and implementation of existing legal frameworks on ATI is of utmost importance.

9.4.2 AU Member States should adopt constitutional provisions on access to information

A major conclusion of this thesis with regard to constitutionalism and human rights protection, is that the constitutional guarantee of access to information as a right is a must for any African State that lays claim to the practice of constitutionalism. Thus, in States without a stand-alone right of access to information in its Bill of Rights, whenever a

²⁹ This also extends to the protective mandate of the African commission in terms of fact-finding missions.

³⁰ The mandate and work of the Special Rapporteur is discussed in detail in Chapter 2, from pages 28-30.

³¹ In the last 2 years, the Special Rapporteur has undertaken advocacy visits to States like Ghana, Kenya, Malawi, Mauritius, Mozambique, Seychelles to meet with top government officials and advocate for the development of new or adoption of existing ATI Bills which conform with the Model Law. The researcher has been a part of all of these visits.

³² In Ghana, the Committee responsible for the adoption of the FOI Bill, in line with discussions during the visit, made far-reaching amendments following the visit by the Special Rapporteur in July 2014. In Mozambique, the Parliamentary Committee also committed to passing the law by the end of 2014, during the visit by the Special Rapporteur in June 2014. The Bill was passed by Parliament in October 2014 and signed into law by the President in December 2014.

constitutional amendment or reform process presents itself, the introduction of a robust and unambiguous constitutional right of access to information is the starting point for creating a conducive legal framework for access to information to influence socio-economic progress.

However, in doing so, care must be taken to ensure that these constitutional provisions are broad enough to accommodate key principles of access to information, yet concise enough to avoid superfluous provisions capable of restricting the enjoyment of the right. Because once adopted, constitutional provisions like those restricting the enjoyment of the right to citizens or its application only to public institutions and not private institutions or those performing public functions or services, seriously limit the ability to exercise the right of access information. Moreover, the nature of constitutions as the *grundnorm* – the fundamental norm within the domestic legal system from which all other laws derive their validity, means that a constitutional provision which fails to comply with basic principles of access to information will provide a wrong normative foundation and possibly lead to the adoption of a further less compliant ATI law.

9.4.3 AU Member States should adopt access to information legislation using the Model Law on Access to Information for Africa as a guide

The Model Law on Access to Information for Africa (Model Law) was adopted by the African Commission in February 2013, to assist Member States to the African Charter in translating their obligation as provided by article 1, to adopt legislative and other measures to give effect to the rights contained therein, in this case, the right of access to information. Although a non-binding document, the Model Law is the most detailed enumeration of the form and content an ATI law must take in order to comply with the right of access to information as guaranteed by article 9 of the African Charter.

Since the inception of the process of its development in October 2010, 13 States, most of whom have relied on the provisions of the Model Law, have adopted ATI laws.³³ Several other States have also relied on the Model Law in the development of existing

³³ There were only 5 States with ATI laws at the time. They were Angola, Ethiopia, South Africa, Uganda and Zimbabwe.

Bills.³⁴ The Model Law thus provides States with a ready-made 'ATI Bill' which has been specifically developed to address the peculiarities of African States with regard to the right of access to information. This model can then be adapted by States to meet their needs, taking into account their constitution and domestic legal systems.

Thus, African States should take advantage of the Model Law to develop ATI laws which conform with regional and international ATI access to information standards as embodied by the Model Law.

9.4.4 African civil society should prioritise efforts targeted at utilising access to information in contributing to socio-economic progress

The central role that civil society plays in the development, adoption and implementation of ATI laws cannot be over emphasised. Their even more important role in strategically utilising information to further socio-economic progress has also been revealed by the numerous case studies undertaken by this study in terms of each of the three legal frameworks examined. To ensure increased opportunities, the following recommendations are made:

9.4.4.1 Strategic capacity building by civil society on access to information and socio-economic progress

A major determining factor of the extent to which individuals and local groups engage with laws and policies is the level of knowledge they have on its existence and its process of implementation. As has been shown especially with ATI laws, the low level of awareness about the existence of these laws within the general population severely hinders demand for access to information.

Beyond the general knowledge about the right, is also the need for increased education, especially of vulnerable groups in society of the strategic use to which access to information frameworks can be utilised to address their 'bread and butter issues'.³⁵ In

³⁴ The researcher has first-hand knowledge of the influence of the Model Law in the development of ATI laws in countries like Kenya and Mozambique and ATI Bills in countries like Malawi and Ghana.

³⁵ This phrase was used by Jody Kollapen, quoted by Klaaren, J. in 'A Second Look at the South African Human Rights Commission, Access to Information, and the Promotion of Socioeconomic Rights' (2005) 27 *Human Rights Quarterly* 539-561, 556.

South Africa and Uganda, substantial efforts have been made to increase awareness on the existence of the ATI laws and the potential for addressing socio-economic progress. In fact, most of the case studies discussed in this thesis arose from the successful community awareness raising programmes embarked upon by civil society organisations.

In countries where no ATI law or Constitutional provisions exist, civil society should while advocating for the adoption of both of these two legal frameworks, simultaneously empower local communities with the knowledge of alternative frameworks that can be relied upon in improving their socio-economic conditions and provide the necessary guidance and support to them, in doing so.

9.4.4.2 Strategic collaboration by civil society on access to information to improve socio-economic progress

Civil society organisations specialising in access to information are themselves best strategically suited to rely on existing frameworks on access to information in furtherance of socio-economic progress. The level of expertise, financial and human resources required to successfully utilise information accessed for improving socio-economic progress is often beyond the average individual or community groups who most need it. As a result, systemic socio-economic issues which are best addressed through reliance on access to information frameworks should necessarily be taken up by specialist ATI civil society organisations well equipped to address them through advocacy and strategic litigation.

However, beyond these specialist organisations are others, especially those working on issues affecting the right of vulnerable groups like women, children and persons living with disabilities, who are well placed to integrate access to information into their struggle of advancing the socio-economic progress of these groups. In this regard, ATI specialist organisations need to focus on identifying and partnering with such organisations, especially at the community level, to build the necessary understanding and capacity to do so. This will certainly reduce the burden of ATI specialist organisations in their attempt to make socio-economic progress through the right of access to information a reality in the lives of those who need it most. Such partnerships will also ensure that in addressing

socio-economic issues of different groups, the voices of those most affected and most knowledgeable about the socio-economic needs of these vulnerable groups have priority.

9.5 Suggested areas of further research

This thesis has concluded that majority of African States lack specific ATI legal frameworks on access to information in the form of constitutional provisions and ATI laws which can be relied upon in achieving socio-economic progress. The thesis has also found that international human rights treaties do have an impact at the domestic level. Both these findings create room for further research to be undertaken to identify the extent to which continental treaties such as the 'Maputo Protocol'³⁶ and the AU Convention on Preventing and Combatting Corruption,³⁷ both of which contain express provisions on access to information, have been and can be further utilised in improving socio-economic progress on the continent. More generally, future research could also examine the specific impact civil society has had on the development and implementation of norms on access to information in Africa.

³⁶ The Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa was adopted in July 2003 in Maputo, Mozambique and came into force on 25 November 2005.

³⁷ The AU Corruption Convention was adopted in Maputo, Mozambique on July 2003 and came into force in August 2006.

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ANNEXURES

Annexure 1: List of Interviewees

Mr Kingsley Nnajiaka, Legal Officer, Centre for Social Justice, on 13 October 2015, in Abuja, Nigeria. (physical interview).

Ms Odinakaonye Lagi, Senior Programme Officer, Network of University Legal Aid Institutions, 13 October 2015, in Abuja, Nigeria. (physical interview).

Ms Seember Nyager Chief Executive, Public and Private Development Centre, Abuja, Nigeria, on 3 November 2015. (telephonic interview).

Ms Christine Reddell, attorney at Centre for Environmental Rights, Cape Town, South Africa on 10 November 2015. (telephonic interview).

Mr Nasiru Mukhtar, Director, University of Abuja Law Clinic, Abuja, Nigeria 12 November 2015. (telephonic interview).

Prof Amari Omaka, Director, Ebonyi State University Law Clinic, Ebonyi State, Nigeria, on 3 December 2015. (telephonic interview).

Mr Edward Ronald Sekyewa, Director, Hub for Investigative Media, on 10 December 2015, in Pretoria, South Africa (physical interview).

Ms Christine Namutebi, Legal Officer, Office of the Inspectorate General of Government, 4 March 2016, in Kampala, Uganda (physical interview).

Annexure 2: Table on constitutional provisions on access to information in Africa

Country	Access to Information provision
Angola	Article 200(4) Constitution of Angola 2010 Individuals shall be guaranteed the right to access archives and administrative records, without prejudice to the legal provisions for the security and defence matters, state secrecy, criminal investigation and personal privacy.
Egypt	Article 68 Constitution of Egypt 2014 Information, data, statistics, and official documents, are owned by the people. Disclosure thereof from various sources is a right guaranteed by the State to all citizens. The state shall provide and make them available to citizens with transparency. The law shall organise rules for obtaining such, rules of availability and confidentiality, rules for depositing and preserving such, and lodging complaints against refusals to grant access thereto. The law shall specify penalties for withholding information or deliberately providing false information.
Guinea	Article 7 Constitution of Guinea 2010 The right of access to public information is guaranteed to the citizen
Kenya	Section 35 Constitution of Kenya 2010 35. (1) Every citizen has the right of access to— (a) information held by the State; and (b) information held by another person and required for the exercise or protection of any right or fundamental freedom. (2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person. (3) The State shall publish and publicise any important information affecting the nation
Malawi	Section 37 Constitution of Malawi 1994 (as amended 2010) Subject to any Act of Parliament, every person shall have the right of access to all information held by the State or any of its organs at any level of government in so far as such information is required for the exercise of his or her rights.
Morocco	Article 27 Constitution of Morocco 2011 The citizens [feminine] and citizens [masculine] have the right of access to information held by the public administration, the elected institutions and the organs invested with missions of public service. The right to information may only be limited by the law, with the objective [but] of assuring the protection of all which concerns national defence, the internal and external security of the State, as well as the private life of persons, of preventing infringement to the fundamental freedoms and rights enounced in this Constitution and of protecting the sources and domains determined with specificity by the law.
Niger	Article 31 Constitution of Niger 2010

	Everyone has the right to be informed and to have access to information held by public authorities under the conditions determined by law.
Seychelles	Article 28 Constitution of Seychelles 1993 (as amended in 2011) (1) The State recognises the right of access of every person to information relating to that person and held by a public authority which is performing a governmental function and the right to have the information rectified or otherwise amended, if inaccurate. (2) The right to access information shall be subject to such limitations and procedures as may be described by law and are necessary in democratic society including- - For the protection of national security - For the prevention and detection of crime and the enforcement of law - For the compliance with an order of a court or in accordance with a legal privilege - For the protection of the privacy rights or freedoms of others (3) The State undertakes to take appropriate measures to ensure that information collected in respect of any person for a particular purpose is used only for that purpose except where a law necessary in a democratic society or an order of a court authorises otherwise. (4) The State recognises the right of access by the public to information held by a public authority performing a governmental function subject to limitations contained in clause (2) and any law necessary in a democratic society
Somalia	Article 32 Provisional Constitution of the Federal Republic of Somalia, 2012 (1) Every person has the right of access to information held by the state. (2) Every person has the right of access to any information that is held by another person which is required for the exercise or protection of any other just right. (3) Federal Parliament shall enact a law to ensure the right of access to information
South Africa	Section 32 Constitution of South Africa 1996 (1) Everyone has the 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. (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.
South Sudan	Section 32 Transitional Constitution of South Sudan 2011

	Every citizen has the right of access to official information and records, including electronic records in the possession of any level of government or any organ or agency thereof, except where the release of such information is likely to prejudice public security or the right to privacy of any other person.
Uganda	Article 41 Constitution of Uganda 1995 (as amended in 2005) (1) Every citizen has a right of access to information in the possession of the State or any other organ or agency of the State except where the release of the information is likely to prejudice the security or sovereignty of the State or interfere with the right to the privacy of any other person. (2) Parliament shall make laws prescribing the classes of information referred to in clause (1) of this article and the procedure for obtaining access to that information.
Zimbabwe	Section 62 (1) Constitution of Zimbabwe 2013 Every Zimbabwean citizen or permanent resident, including juristic persons and the Zimbabwean media, has the right of access to any information held by the State or any by and institution or agency of government at every level, in so far as the information is required in the interests of public accountability. Section 62 (2) Every person, including the Zimbabwean media, has the right of access to any information held by any person, including the State, in so far as the information is required for the exercise or protection of a right. Section 62 (4) Legislation must be enacted to give effect to this right, but may restrict access to information in the interests of defence, public security, or professional confidentiality, to the extent that the restriction is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom.

Annexure 3: Table on constitutional provisions on freedom of expression/right to information/access to information in Africa

No	Country	Constitution	Specific Constitutional provision on ATI	Constitutional provision on ATI as part of FOE or only FOE
1	Algeria	Constitution of the People's Democratic Republic of Algeria 1963 as amended in 2008		No provision Section 41 Freedom of expression, association and meeting are guaranteed to the citizen.
2	Angola	Constitution of the Republic of Angola 2010	Article 200(4) Individuals shall be guaranteed the right to access archives and administrative records, without prejudice to the legal provisions for the security and defence matters, state secrecy, criminal investigation and personal privacy.	
3	Benin	Constitution of the Republic of Benin 1990		No provision Article 7 The rights and duties proclaimed and guaranteed by the African Charter on Human and Peoples' Rights adopted in 1981 by the Organization of African Unity and ratified by Benin on January 20, 1986 shall be an integral part of the present Constitution and of Beninese law. Article 24

				Freedom of the press shall be recognised and guaranteed by the state. It shall be protected by the High Authority of Audio-Visuals and Communications under the conditions fixed by an organic law.
4	Botswana	Constitution of the Republic of Botswana 1966		Section 12 (1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence.
5	Burkina Faso	Constitution of Burkina Faso, 1991, last amended 2012		Article 8 The freedom of opinion, of the press and the right to information are guaranteed. Every person has the right to express and to disseminate his opinions within the order of the laws and regulations in force.
6	Burundi	Constitution of the Republic of Burundi 2005		No provision Article 19 The rights and the duties proclaimed and guaranteed, among others, by

				the Universal Declaration of the Rights of Man, the International Pacts relative to the rights of man, the African Charter of the Rights of Man and of Peoples, the Convention on the Elimination of all Forms of Discrimination concerning Women and the Convention relative to the rights of the child are an integral part of the Constitution of the Republic of Burundi. These fundamental rights are not subject to any restriction or derogation, except in certain circumstances justifiable by the general interest or the protection of a fundamental right. Article 31 Freedom of expression is guaranteed. The State shall respect the freedom of religion, thought, conscience and opinion
7	Cameroon	Constitution of the Republic of Cameroon 1972, revised 1996 and amended 2008		- Incorporates the UDHR and the African Charter in the preamble and also verbatim as an annexure to the end of the Constitution.
8	Cape Verde	Constitution of Cape Verde 1980, amended 1992		Article 43(1) All citizens shall have the right to access information, to be aware of computer files, and records and which relate to them, as well as the right to be informed of their purpose

				and use in order to request the correction or updating of the data. Article 43(2) The process of access to data shall be regulated by law. Article 45 (2) Everyone shall have the freedom to inform and be informed, to search for, receive and disseminate information and ideas and in any form, without limitation, discrimination or impediments.
9	Central African Republic	Constitution of Central African Republic 2004 (as amended 2010)		Article 13 Freedom of information, to express and disseminate ones opinions by speech, writing and image, subject to compliance with the rights of others, is guaranteed.
10	Chad	Constitution of Chad 1996 (as amended 2005)		No provision Article 27 Freedom of opinion and expression, communication, conscience, religion, press, association, assembly, movement, demonstrations and processions are guaranteed to all.
11	Comoros			No provision.
12	Côte d'Ivoire			Article 7

				Every human being has the right: to the development and to the full realization of his personality in the material, intellectual and spiritual dimensions. The State assures to all citizens equal access to health, to education, to culture, to information, to professional formation and to employment. The State has the duty to safeguard and to promote the national values of civilization as well as the cultural traditions not contrary to the law and to good morals
13	Democratic Republic of Congo	Constitution of the Democratic Republic of Congo 2006 (amended 2011)		Article 24 Everyone has the right to information. Freedom of the press, freedom of information and transmission of radio and the television, print media or any other means of communication are guaranteed subject to compliance with public order, morality and rights of others. The law establishes the procedures for exercising those freedoms. Audiovisual and print media are state utilities which access is guaranteed equally to all political and social trends. The status of state media is established by law

				that guarantees objectivity, impartiality and pluralism of opinions in the processing and dissemination of information.
14	Djibouti	The Constitution of Djibouti 1992 (as amended 2010)		No provision Article 15 Everyone shall have the right freely to express and disseminate his opinions by word, pen, or image.
15	Egypt	The Constitution of the Arab Republic of Egypt, 2014	Article 68 Information, data, statistics, and official documents, are owned by the people. Disclosure thereof from various sources is a right guaranteed by the State to all citizens. The state shall provide and make them available to citizens with transparency. The law shall organise rules for obtaining such, rules of availability and confidentiality, rules for depositing and preserving such, and lodging complaints against refusals to grant access thereto. The law shall specify penalties for withholding information or deliberately providing false information.	

16	Equatorial Guinea	The Constitution of the Republic of Equatorial Guinea (as amended in 2011)	.	No provision Article 13 Every citizen shall enjoy the following rights: a)The respect of his person ... b) Freedom of expression.
17	Eritrea**	The Constitution of Eritrea 1997 (yet to come into force).	Article 19(3) Every citizen shall have the right of access to information.	
18	Ethiopia	Constitution of the Federal Democratic Republic of Ethiopia 1994		Article 29(2) Everyone has the right to freedom of expression without any interference. This right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any media of his choice. Article 29(3) Freedom of the press and other mass media and freedom of artistic creativity is guaranteed. Freedom of the press shall specifically include the following: elements: a. Prohibition of any form of censorship. b. Access to information of public interest.
19	Gabon	Constitution of the Republic of Gabon 1991 (as amended in 2003)		No provision Article 1(2)

				Freedom of conscience, thought, opinion, expression, communication, free practice of religion shall be guaranteed to all, subject to compliance with public order.
20	Gambia	Constitution of the Second Republic of The Gambia 1997(as amended in 2004)		No provision Section 25(1) Every person shall have the right to - (a) freedom of speech and expression, which include freedom of the press and other media.
21	Ghana	Constitution of the Republic of Ghana 1992		Section 21(1) (f) All persons shall have the right to: information, subject to such qualifications and laws as are necessary in a democratic society
22	Guinea	Constitution of Guinea 2010	Article 7 The right of access to public information is guaranteed to the citizen	
23	Guinea-Bissau	Constitution of Guinea-Bissau 1984, last amended in 1996		<i>Article 34</i> Everyone has the right to information and judicial protection, in accordance with the law.
24	Kenya	The Constitution of Kenya 2010	Section 35 35. (1) Every citizen has the right of access to— (a) information held by the State; and	

			(b) information held by another person and required for the exercise or protection of any right or fundamental freedom. (2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person. (3) The State shall publish and publicise any important information affecting the nation	
25	Lesotho	Constitution of Lesotho 1993, last amended 2001		Section 14(1) Every person shall be entitled to, and (except with his own consent) shall not be hindered in his enjoyment of, freedom of expression, including freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with his correspondence.
26	Liberia	Constitution of the Republic of Liberia 1984		Article 15 a. Every person shall have the right to freedom of expression, being fully responsible for the abuse thereof. This right shall not be curtailed,

				restricted or enjoined by government save during an emergency declared in accordance with this Constitution. b. The right encompasses the right to hold opinions without interference and the right to knowledge. It includes freedom of speech and of the press, academic freedom to receive and impart knowledge and information and the right of libraries to make such knowledge available. It includes non-interference with the use of the mail, telephone and telegraph. It likewise includes the right to remain silent. c. In pursuance of this right, there shall be no limitation on the public right to be informed about the government and its functionaries.
27	Libya	Constitutional Declaration of Libya 2011 New Constitution being drafted		No provision Article 14 Freedom of opinion for individuals and groups, freedom of scientific research, freedom of communication, liberty of the press, printing, publication and mass media, freedom of movement, freedom of assembly, freedom of demonstration and freedom of peaceful strike shall be guaranteed by the State in accordance with the law.

28	Madagascar	Constitution of the Republic of Madagascar 1992		Article 11 Everyone has the right to information. Information in all its forms is not subject to prior restraint, except that which infringes the public order and morality. Freedom of information, whatever the medium, is a right. The exercise of this right includes duties and responsibilities, and is submitted to certain formalities, conditions, or sanctions specified by the law, which are the measures necessary in a democratic society
29	Malawi	Constitution of Malawi 1994 (as amended 2010)	Section 37 Subject to any Act of Parliament, every person shall have the right of access to all information held by the State or any of its organs at any level of government in so far as such information is required for the exercise of his or her rights.	.
30	Mali	Constitution of the Republic of Mali 1992, amended 1999		No provision Article 4 Everyone has the right to freedom of thought, conscience, religion, worship, opinion, expression and creation in accordance with the law.

31	Mauritania	Constitution of the Islamic Republic of Mauritania 1991 (as amended 2012)		No provision Article 10 The State guarantees to all citizens the public and individual freedoms, including: - Freedom of thought and opinion; - Freedom of expression;
32	Mauritius	Constitution of Mauritius 1968 (as amended 1983)		Article 12 (1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence.
33	Morocco*	Constitution of Morocco 2011	Article 27 The citizens [feminine] and citizens [masculine] have the right of access to information held by the public administration, the elected institutions and the organs invested with missions of public service. The right to information may only be limited by the law, with the objective [but] of assuring the protection of all which concerns national defence, the internal and external security of the State, as well as the private life of persons, of preventing infringement to the fundamental	

			freedoms and rights enounced in this Constitution and of protecting the sources and domains determined with specificity by the law.	
34	Mozambique	Constitution of Mozambique 2007		Article 48 1. All citizens shall have the right to freedom of expression and to freedom of the press, as well as the right to information. 2. The exercise of freedom of expression, which consists of the ability to impart one's opinions by all lawful means, and the exercise of the right to information shall not be restricted by censorship.
35	Namibia	Constitution of Namibia 1990 (as amended 2010)		No provision Article 21 (1) All persons shall have the right to: (a)freedom of speech and expression, which shall include freedom of the press and other media.
36	Niger	Constitution of Niger 2010	Article 31 Everyone has the right to be informed and to have access to information held by public authorities under the conditions determined by law.	
37	Nigeria	Constitution of Nigeria 1999		Section 39(1) Every person shall be entitled to freedom of expression, including

				freedom to hold opinions and to receive and impart ideas and information without interference.
38	Republic of the Congo	Constitution of Congo 2001		Article 19 Everyone has the right freely to express and disseminate his opinions in speech, writing, image, or any other means of communication. Freedom of Information and communication condition is guaranteed. Censorship is prohibited. Access to sources of information is free. Every citizen has the right to information and communication. Related activities in these areas shall be exercised in accordance with the law.
39	Rwanda	Constitution of Rwanda 2003(as amended 2010)		Article 19 Freedom of the press and freedom of information are recognized and guaranteed by the State. Freedom of speech and freedom of information shall not prejudice public order and good morals, the right of every citizen to honour, good reputation and the privacy of personal and family life. It is also guaranteed so long as it does not prejudice the protection of the youth and minors. The conditions for exercising such freedoms are determined by law.
40	Sao Tome and Principe	Constitution of Sao Tome 1975, (as amended 2003)		No provision Article 28(1)

				Everyone has the right freely to express and disseminate his thoughts by words, images or by any other means.
41	Senegal	Constitution of Senegal 2001 (as amended 2009)		Article 8 The Republic of Senegal guarantees to all citizens their individual fundamental freedoms, economic and social rights as well as group rights. These freedoms and rights are: Civil and political liberties, freedom of opinion, freedom of expression, press freedom, freedom of association, freedom to hold meetings, freedom of movement, freedom to protest, cultural freedoms, religious freedoms, philosophical freedoms, union freedoms, freedom of enterprise, the right to education, the right to literacy, the right to property, the right to work, the right to health, the right to a healthy environment, and the right to a variety of information. These freedoms and rights shall be exercised under the conditions provided by law.
42	Seychelles	Constitution of Seychelles 1993 (last amended 2011)	Article 28(4) The State recognises the right of access by the public to information held by a public authority	

			performing a governmental function subject to limitations contained in clause (2) and any law necessary in a democratic society. . Article 28(2) The right to access information shall be subject to such limitations and procedures as may be described by law and are necessary in democratic society including- e. For the protection of national security f. For the prevention and detection of crime and the enforcement of law g. For the compliance with an order of a court or in accordance with a legal privilege h. For the protection of the privacy rights or freedoms of others	
43	Sierra Leone	Constitution of Sierra Leone 1991(as amended 2008)		Section 25(1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, and for the purpose of this section the said freedom includes the freedom to hold opinions and to receive and impart

				ideas and information without interference, freedom from interference with his correspondence, freedom to own, establish and operate any medium for the dissemination of information, ideas and opinions, and academic freedom in institutions of learning:
44	Somalia	Provisional Constitution of the Federal Republic of Somalia, 2012	Article 32 (1) Every person has the right of access to information held by the state. (2) Every person has the right of access to any information that is held by another person which is required for the exercise or protection of any other just right. (3) Federal Parliament shall enact a law to ensure the right of access to information	
45	South Africa	Constitution of South Africa 1996	Section 32 (1) Everyone has the right of access to- (a) any information held by the state; and (b) any information that is held by another person and that is required for the exercise or protection of any rights. (2) National legislation must be enacted to give effect to this right, and may provide	

			for reasonable measures to alleviate the administrative and financial burden on the state.	
46	South Sudan	Transitional Constitution of South Sudan 2011	Section 32 Every citizen has the right of access to official information and records, including electronic records in the possession of any level of government or any organ or agency thereof, except where the release of such information is likely to prejudice public security or the right to privacy of any other person.	.
47	Sudan	Interim Constitution of Sudan 2005		Section 39 (1) Every citizen shall have an unrestricted right to the freedom of expression, reception and dissemination of information, publication, and access to the press without prejudice to order, safety or public morals as determined by law. (2) The State shall guarantee the freedom of the press and other media as shall be regulated by law in a democratic society. (3) All media shall abide by professional ethics, shall refrain from inciting religious, ethnic, racial or cultural hatred and shall not agitate for violence or war.

48	Swaziland	Constitution of Swaziland 2005		Section 24 (1) A person has a right of freedom of expression and opinion. (2) A person shall not except with the free consent of that person be hindered in the enjoyment of the freedom of expression, which includes the freedom of the press and other media, that is to say - (a) freedom to hold opinions without interference; (b) freedom to receive ideas and information without interference; (c) freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons); and (d) freedom from interference with the correspondence of that person.
49	Tanzania	Constitution of Tanzania 1977, last amended 2005		Article 18 Every person - (a) has a freedom of opinion and expression of his ideas; (b) has a right to seek, receive and, or disseminate information regardless of national boundaries; (c) has the freedom to communicate and a freedom with protection from interference from his communication; and (d) has a right to be informed at all times of various important events of

				life and activities of the people and also of issues of importance to the society
50	Togo	Constitution of the Republic of Togo 1992(as amended 2002)		Article 26 The freedom of the press is recognised and guaranteed by the State. It is protected by the law. Every person has the freedom to express and to disseminate through speech, writing or any other means, their opinions, or the information which they possess, within the respect for the limits defined by the law. The press may not be subject to prior authorisation, to caution (bail/security), to censorship or to other restraints. The prohibition of dissemination of any publication may only be pronounced by virtue of a decision of justice.
51	Tunisia	Constitution of Tunisia 2014		Article 18 The state guarantees the right to information and the right of access to information and communication networks.
52	Uganda	Constitution of Uganda 1995, as amended in 2005	Article 41 (1) Every citizen has a right of access to information in the possession of the State or any other organ or agency of the State except where the release of the information is likely to prejudice the security or	.

			sovereignty of the State or interfere with the right to the privacy of any other person. (2) Parliament shall make laws prescribing the classes of information referred to in clause (1) of this article and the procedure for obtaining access to that information.	
53	Western Sahara	Constitution of the Sahrawi Arab Democratic Republic 1976, last amended 1999		No provision Article 29 Freedom of oral and written expression is guaranteed and exercised under the law.
54	Zambia	Constitution of Zambia 1996		Section 20 Except with his own consent, a person shall not be hindered in Protection of freedom of conscience Protection of the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to impart and communicate ideas and information without interference, whether the communication be to the public generally or to any person or class of persons, and freedom from interference with his correspondence.
55	Zimbabwe	Constitution of Zimbabwe 2013	Section 62 (1)	

			Every Zimbabwean citizen or permanent resident, including juristic persons and the Zimbabwean media, has the right of access to any information held by the State or any by and institution or agency of government at every level, in so far as the information is required in the interests of public accountability. Section 62 (2) Every person, including the Zimbabwean media, has the right of access to any information held by any person, including the State, in so far as the information is required for the exercise or protection of a right. Section 62 (4) Legislation must be enacted to give effect to this right, but may restrict access to information in the interests of defence, public security, or professional confidentiality, to the extent that the restriction is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom.	

* Morocco is included although no longer a Member State of the African Union. This explains why the total number of States is 55 and not 54.

** Eritrea's Constitution has never come into force.

Annexure 4: Overview of key provisions of access to information laws in Africa

1. Angola (Law on Access to Documents held by Public Authorities 2002)

Scope of application

Only citizens can request for information. Information can be requested only from public bodies, which includes those performing government functions, statutory societies and other entities exercising 'public authority' by law.¹

Proactive disclosure

Public bodies to publish at least every 6 months, all documents, decisions, circulars and guidelines related to its activities; lists of documents of documents explaining legislation and describing administrative procedures.²

Procedure for access

Requests must be in writing,³ and responded to by the public authority within 10 days,⁴ by either granting the request, a full or partial refusal of the request or transfer of the request to the appropriate public body. Fees are payable up to an amount 'strictly corresponding to the cost of the materials used and the service rendered' to be determined by a Decree-Law.⁵ *No internal review*

Exemptions

These are: national security;⁶ on-going court proceedings and pending court judgements;⁷ inquests and inquiries prior to completion of disciplinary proceedings;⁸ and personal information of a third party.⁹

¹ Article 3.

² Article 11.

³ Article 13

⁴ Article 15(1).

⁵ Article 12(2).

⁶ Article 5.

⁷ Article 7(5).

⁸ Article 7(6).

⁹ Article 8 (1) –(4).

Oversight mechanism

A Monitoring Commission comprised of 7 members: a judge, nominated by the judicial High Council; two Members of Parliament elected by the National Assembly; a law professor, nominated by the President, two persons of high standing nominated by the government, and a lawyer nominated by the law society.¹⁰ The powers of this Commission are to: draft its internal rules; evaluate complaints submitted to it; advise on access to personal documents; present its position on the system of classification of documents; provide opinions on the implementation of the law and complimentary laws; and prepare annual reports on the implementation of the law and its activities for submission to the National Assembly, and published by government.¹¹

2. Côte d'Ivoire (Law on Access to Information in the Public Interest 2013)

Scope of application

Any natural or legal person is entitled to access information held by public bodies-which are defined to include: the State and its organs; judicial organs in terms of their administrative functions; and private legal entities which provide public services, fulfill a mission of service or of public interest, through a concession, delegation or authorization from the state.¹²

Proactive disclosure

Public bodies are required to disseminate to the public the information and public documents they hold.¹³

¹⁰ Articles 17 and 18.

¹¹ Article 19.

¹² Article 1.

¹³ Article 4.

Procedure for access

Requests must be made in writing and in French.¹⁴ The request must be responded to in writing within 30 days: granting the request,¹⁵ refusing the request,¹⁶ extending the time for responding to the request¹⁷, or directing the requester to the appropriate public body holding the requested information.¹⁸

Exemptions

Information is exempted, if its disclosure will adversely affect: secrecy of deliberations of the Government and the executive arm; secrecy of national defence; conduct of foreign policy of the State; state security, public safety or the safety of individuals; monetary and exchange rate policy of the State; conduct of proceedings before the courts or preliminary inquiries to such proceedings, except as authorized by the competent authority; and privacy or private interests, including trade secrets and commercial matters.¹⁹ Information can also not be disclosed with the consent of the person in question, if it relates to personal information such as: information assessing or making a value judgement; behaviour of the individual which disclosure may be harmful; and information which would undermine privacy, medical confidentiality and trade or commercial secrets.²⁰

Appeal

A requester may appeal against refusal of information through an internal appeal, then to the AIHRC and finally to a court of Law.²¹

Oversight mechanism

A Commission for Access to Public Interest Information and Documents Public (AIHRC) is established as an independent body to ensure compliance with the Act.²² The AIHRC is empowered to issue injunction and impose sanctions such as

¹⁴ Article 11..

¹⁵ Article 14.

¹⁶ Article 16.

¹⁷ Article 13.

¹⁸ Article 18.

¹⁹ Article 9.

²⁰ Article 8.

²¹ Article 22.

²² Article 19.

payment of fines for non-compliance such as refusal to receive a request without a legitimate reason; rejection of an application without motivation; and failure to respond to a request within the time limits provided for under the Act.²³

3. Ethiopia (Mass Media and Access to Information Proclamation 2008)

Scope of application

'All persons' have a right to request for information.²⁴ Information can be requested only from public bodies, which includes any 'body established under the Federal Constitution or state constitution or any other law which forms part of any level or branch of the federal or regional state or owned, controlled or directly or indirectly substantially financed by funds provided by the state or regional governments or accountable to the federal or regional states'.²⁵

Proactive disclosure

The following classes of information must be published and updated annually by each public body: structure, duties and responsibilities; powers and functions of staff and decision making processes; services; complaint hearing mechanism; types and content of information in its possession and process for access; regulations and policies on its operations and activities and that of employees; name and address of its public relations officer.²⁶ Public bodies must also publish information on decisions and policies affecting the public timeously; give reasons for these decisions; and inform the public and those likely to be affected by any planned project prior to its initiation.²⁷

Procedure for access

Requests must be in writing, but illiterate persons and those living with disabilities must be assisted in reducing their requests into writing and no requester must be compelled to provide a reason for a request.²⁸ A request must be responded to in writing by the public relations officer within no more than **30 days**, granting the request, extending the period of response

²³ Article 21.

²⁴ Article 12(1).

²⁵ Article 2(5).

²⁶ Articles 13(1) and (2).

²⁷ Article 13(3).

²⁸ Article 14 (1)-(7).

by a **further 30 working days** or refusing the request.²⁹ Where information is urgently required (crucial to the life or well-being of a person or required by the media to make public, impeding action by a public body), it must be released within 10 days.³⁰ Fees payable to access information 'must not exceed the actual cost of searching, collecting and duplicating' the information and is waived in the case of requests for personal information and by indigent persons.³¹

Exemptions

The following categories of information are exempted: personal information of a 3rd party;³² commercial information of a 3rd party;³³ information likely to endanger the life or safety of persons and of infrastructure;³⁴ law enforcement and legal investigation proceedings;³⁵ legally privileged documents;³⁶ defence, security and international relations;³⁷ cabinet documents;³⁸ economic and financial welfare of the Country and commercial activities of public bodies;³⁹ information provided for the purpose of formulating a policy or decision, capable of frustrating a deliberative process or the success of a policy.⁴⁰ 'A public body may not refuse a request for information unless the harm to the protected interest which would be caused by disclosure outweighs the public interest in disclosure.'⁴¹

Public interest override

Despite exemptions, information cannot be refused 'unless the harm to the protected interest which would be caused by disclosure outweighs the public interest in disclosure'.⁴²

²⁹ Article 14(8).

³⁰ Article 14(9).

³¹ Article 14(12).

³² Article 16.

³³ Article 17.

³⁴ Article 20.

³⁵ Article 21.

³⁶ Article 22.

³⁷ Article 23.

³⁸ Article 24.

³⁹ Article 25.

⁴⁰ Article 26.

⁴¹ Article 28.

⁴² Article 28.

Appeals

A requester can appeal to the head of the public body against the refusal of a request within 30 days of the refusal and a decision on that appeal must be made within 10 days.⁴³ A further appeal against the decision of the head of the public body must be made within 30 days of the receipt of the decision to the Ombudsman,⁴⁴ and then to the Courts.⁴⁵

Oversight mechanism

The Ombudsman is the designated oversight mechanism and is required to: develop a guide on the law;⁴⁶ receive annual reports from public bodies on their implementation of the law;⁴⁷ make appropriate recommendations to public bodies;⁴⁸ train public officers on implementation;⁴⁹ generate public awareness on the law;⁵⁰ make decisions on the publication of manuals by public bodies;⁵¹ disseminate guides on how to use the law;⁵² make appropriate recommendations for amendment/reform to the legislature;⁵³ submit annual reports to the legislature on the implementation of the law.⁵⁴ **Note issuance of certificates.**⁵⁵

⁴³ Article 31 (1)-(3).

⁴⁴ Article 31(4).

⁴⁵ Article 34(1).

⁴⁶ Article 32(1);

⁴⁷ Articles 32(2)(a) and 36.

⁴⁸ Article 31 (2)(b).

⁴⁹ Article 31 (2)(c).

⁵⁰ Article 31 (2)(d).

⁵¹ Article 31 (2)(e).

⁵² Article 31 (2)(f).

⁵³ Article 31 (2)(g).

⁵⁴ Article 31(4).

⁵⁵ Despite the public interest override, a head of a public body can issue a certificate stating that the requested information relates to national security, national defense or international relations and would cause serious harm. Such decision, cannot be reviewed by neither the ombudsman nor a court of law.

4. Guinea (Law on the Right of Access to Public Information 2010)

Scope of application

Any person, regardless of nationality or profession has a right to access information held by public organisations (any structure created by the State or any of its branches) a body likened to a public body (any structure which forms part of a public body; owned, controlled or mainly financed by public funds; or any private body which the State or any of its branches has assigned a mission), without the need to justify reasons for the request.⁵⁶

Proactive disclosure

Public institutions must annually publish and disseminate in any easily accessible form, the following categories of information: services provided to citizens; request or complaint mechanisms available and a summary of requests and complaints by the public against it and responses thereto; a guide with relevant information on the data management system, type of information held and procedure for information request; powers and duties of officers and decision making processes; policy guidelines, rules and manuals on how the organisation fulfils its functions; decisions and/or adopted policy guidelines affecting the public, reasons and context for such decisions; and processes for public participation in policy formulation or the exercise of powers of the institution.⁵⁷

Procedure for access

Requests can be made in writing or orally, in which case which must be reduced in writing in a register and endorsed by the applicant.⁵⁸ The employee or official in charge of information must respond to the request within **20 working days**, granting the request,⁵⁹ refusing the request,⁶⁰ extending the period for responding to the request by no more than **30 working days**,⁶¹ or assist the requester with identifying the appropriate public body holding the information.⁶² Where the

⁵⁶ Articles 1 and 3.

⁵⁷ Article 15.

⁵⁸ Article 10.

⁵⁹ Article 12.

⁶⁰ Article 13.

⁶¹ Article 11.

⁶² Article 11.

information relates to the life or liberty of a person, a response must be given within **48 hours**.⁶³ Only the cost of reproduction of information is payable.⁶⁴

Exemptions

The following categories of information are exempted from disclosure: information in the public domain; relating to the security affairs of the State or institutions holding such information; pending court proceedings; legally privileged information; information likely to endanger the life, health or safety of persons or their property; information whose disclosure is likely to cause the commission of an offence; information whose disclosure would significantly harm relations with a State or an international organisation; information on an uncompleted inspection monitoring or investigation mission; personal information that may affect the privacy and human dignity; commercial and confidential information of a 3rd party or information obtained in confidence from a State or international organisation.⁶⁵ Manifestly vexatious and frivolous requests are also exempt from disclosure.⁶⁶

Appeal

A requester refused access may within 2 months, lodge an administrative appeal to the Ombudsman. A further administrative appeal lies to President of the Tribunal of First Instance or the Justice of the Peace⁶⁷

Oversight mechanism

The Ombudsman is empowered to deal with administrative appeals against refusal of information, in accordance with article 127 of the Constitution.⁶⁸ The national human rights commission is also in relation to its mandate, empowered to guarantee the exercise and enjoyment of the right of access to information.⁶⁹

⁶³ Article 11.

⁶⁴ Article 14.

⁶⁵ Article 16.

⁶⁶ Article 17.

⁶⁷ Articles 18 and 19.

⁶⁸ Article 18.

⁶⁹ Article 20.

5. Kenya (Access to Information Act 2016)

Scope of application

Only citizens have a right to access information held by the State or any other person where that information is required for the exercise or protection of any right or fundamental freedom.⁷⁰

Proactive disclosure

Public entities are required to facilitate access to⁷¹ and update annually, the following categories of information: particulars of the organisation, functions and duties; powers and duties of employees; decision making processes; salary scales of employees; norms set for discharge of functions; guidelines utilised in dealing with the public; and a guide providing details of the classes of information held by it.⁷²

Furthermore, the following categories of information should be provided: all relevant information prior to the formulation of policies or decision-making;⁷³ reasons for decisions taken in respect of any person, to that person;⁷⁴ full particulars of any contract signed;⁷⁵

Procedure for access

Requests for information must be in written in Kiswahili or English⁷⁶ and must be responded to within **21 days**⁷⁷ except where the information requested concerns the life or liberty of a person, in which case it is **48 hours**.⁷⁸ Where a person is prevented by illiteracy or disability from submitting a written request, the information officer must assist by reducing the

⁷⁰ Section 4.

⁷¹ The information should be available for inspection, presentation of a copy upon request or on the internet. Section 5(3)

⁷² Section 5(1)(a) and (b).

⁷³ Section 5(c).

⁷⁴ Section 5(d).

⁷⁵ Section 5(e).

⁷⁶ Section 8(1).

⁷⁷ Section 9(1)

⁷⁸ Section 9(2).

request to writing.⁷⁹ No fees are payable for making requests for information. Only the actual cost of reproduction and if applicable, supplying to the applicant.⁸⁰

Exemptions

Certain classes of information are exempted from disclosure. Information likely to: undermine national security; impede the due process of law; endanger the safety, life or health of a person; involve unwarranted invasion of privacy; substantially prejudice the commercial interests of the entity or a third party; substantially harm the ability to manage the economy; significantly undermine the deliberative process of the public entity, damage the position of a public entity in legal proceedings; and infringe on legally recognised professional confidentiality.⁸¹ Public interest override.⁸²

Appeal

Appeal against the decision of a public entity can be made first to the Commission on Administrative Justice within **30 days** of such decision.⁸³

Oversight mechanism

The Commission on Administrative Justice is conferred with oversight and enforcement functions under the Act.⁸⁴ Specifically, it is empowered to do the following:⁸⁵ investigate violation of the Act; receive reports from public entities on the implementation of the Act; facilitate public awareness on the Act; work with private entities and other relevant bodies to ensure compliance with the right of access to information and on data protection respectively; monitor State compliance with international treaty obligations on access to information and protection of personal data; hear and determine complaints alleging violations of the right of access to information; promote data protection and perform any other functions considered necessary for the promotion of access to information and data protection.

⁷⁹ Section 8(2).

⁸⁰ Section 12(1) and (2).

⁸¹ Section 6.

⁸² Section 6(4).

⁸³ Section 14(1) and (2).

⁸⁴ Section 20.

⁸⁵ Section 21(1).

6. Liberia (Freedom of Information Act 2010)

Scope of application

'Everyone'⁸⁶ has a right to request for information, 'irrespective of their nationality or residence'.⁸⁷

Information can be requested from: public bodies (all agencies, entities, corporations bodies or institutions owned wholly or substantially by Government) and public authorities (any agency, ministry or institution of the Government or person acting on its behalf) 'supported by public resources';⁸⁸ private bodies 'performing public functions and/or providing public services';⁸⁹ and private bodies that 'receive public funds or benefits'.⁹⁰

Proactive disclosure

Information to be automatically published by every public authority include: its enabling statute; existing policies, procedures and rules; budgets; financial accounts; material contracts; organisational chart; procedure for appealing decisions of the authority; and other relevant information for dealing with the authority or monitoring its performance.⁹¹

Procedure for access

Requests can be in writing, email or oral, without the need to provide reason(s).⁹² A request must be responded to in writing by the designated personnel within **30 calendar days**, granting the request, refusing the request⁹³ or transferring the request to the appropriate public or private entity (within 15 days of receipt).⁹⁴ Only the 'actual cost of photocopying, transcribing, scanning or other forms of reproduction' must be paid.⁹⁵

⁸⁶ Section 1(4)(b).

⁸⁷ Section 3(2).

⁸⁸ Section 1(6)a.

⁸⁹ Section 1(6)(b).

⁹⁰ Section 1(6)(c).

⁹¹ Section 2(6).

⁹² Sections 3(4) and 3(5).

⁹³ Section 3(12).

⁹⁴ Section 3.(13).

⁹⁵ Section 3(11).

Exemptions

The following categories of information are exempted from disclosure: national defence, security and international relations; criminal investigations; trade secrets; personal information; and legally privileged communications.⁹⁶ Public interest override.⁹⁷

Appeals

An appeal can be made against a denial of access first by internal review to a 'senior official' in the relevant public body or private entity, who must make a decision in writing within **30 working days** of receipt.⁹⁸ A requester may appeal the decision of the information or the internal review decision of the senior official officer directly to the Information Commissioner.⁹⁹ Further appeal against the decision of the Information Commissioner lies to the High Court.¹⁰⁰

Oversight mechanism

An Independent Information Commissioner appointed by the President with the 'advice and consent' of the Senate, to be supported by a technical secretariat,¹⁰¹ is empowered to do the following: hear and mediate complaints arising under the Act; compel witnesses and evidence; review information held by public bodies and private entities; issue orders and recommendations to public bodies and private entities related to the implementation and compliance with the Act; investigate, monitor and promote compliance with the Act; order the release of requested information by public bodies or private entities; training and capacity building of personnel of public authorities and private entities; consult and provide support to information officers; develop guidelines and procedures; develop public awareness strategies and information dissemination campaigns; make recommendations for reform and harmonisation of laws and regulations related to access to information.¹⁰² The Information Commissioner is also to submit annual reports on the implementation of the Act to the National Legislature.¹⁰³

⁹⁶ Sections 4 – 4(6).

⁹⁷ Section 4(8)(c).

⁹⁸ Section 6(1) and 6(2).

⁹⁹ Section 6(3).

¹⁰⁰ Section 6(5).

¹⁰¹ Section 5(1).

¹⁰² Section 5(2).

¹⁰³ Section 5(4).

7. Mozambique (Right to Information Law 2014)

Scope of application

Only citizens can request for and be provided information¹⁰⁴ of 'public interest' from State organs and institutions and local authorities as well as private entities legally or contractually bound to carry out services of general interest or receiving public funds, regardless of the source.¹⁰⁵

Proactive disclosure

Public and private entities are to make available information of public interest through 'lawful means'. Such information include: services provided and decisions which may affect the rights of citizens;¹⁰⁶ work plans and annual budgets and their respective implementation reports;¹⁰⁷ reports of audits, inquiries, inspections and probes into their activities;¹⁰⁸ environmental assessment reports;¹⁰⁹ minutes of proceedings for public tenders;¹¹⁰ and contracts concluded, including and expenditure accounts.¹¹¹ 'Lawful means' includes: Official Gazette, print, radio, television, internet websites and posters at designated sites.¹¹²

Procedure for access

Requests are to be made to the administrator or support staff member responsible for records, data or archives management.¹¹³ Requests must be in writing where the information requested relates to: official correspondence; work-related information or is provided by employees about fellow employees.¹¹⁴ Oral requests must be reduced into writing,¹¹⁵

¹⁰⁴ Article 14.

¹⁰⁵ Article 3.

¹⁰⁶ Article 6(1)(a)

¹⁰⁷ Article 6(1)(b).

¹⁰⁸ Article 6(1)(c).

¹⁰⁹ Article 6(1)(d).

¹¹⁰ Article 6(1)(e).

¹¹¹ Article 6(1)(f).

¹¹² Article 6(3).

¹¹³ Article 15(1).

¹¹⁴ Article 15(2).

¹¹⁵ Article 15(3).

and disabled persons should be assisted in making requests.¹¹⁶ Information is to be provided within 21 days,¹¹⁷ or refused in accordance with the Act.¹¹⁸ Access to information is free of charge, except for payment of document reproduction costs or fees for notarised statements or affidavits.¹¹⁹

Exemptions

The following categories of information are exempted from disclosure:¹²⁰ State secret; judicial secrecy; information received in confidence from States or international organisations; professional secrecy; banking secrecy; personal data held in electronic files; protection of victims, Whistleblowers and witnesses; information on private life and privacy of citizens; trade or industrial secrets; secrets relating to literary, artistic or scientific works; information on on-going criminal proceedings, disciplinary hearings likely to prejudice on-going investigations and constitutional principles; scientific and technological research projects or final reports of research projects necessary to be kept secret for the security of society and the State.¹²¹

Appeal

An administrative appeal can be made against refusal of access within 5 days of that decision, to the official who makes such decision,¹²² or by a 'hierarchical appeal' within 90 days.¹²³ The relevant document review committee must provide an opinion on the appeal before a decision is made on the hierarchical appeal.¹²⁴

A judicial appeal can be lodged in the administrative courts in accordance with regulations on disputes in administrative processes.¹²⁵

¹¹⁶ Article 15(4).

¹¹⁷ Article 16.

¹¹⁸ Article 31.

¹¹⁹ Article 17.

¹²⁰ Article 20(2)(a) – (l).

¹²¹ These exemptions are elaborated in further detail in articles 21 to 29.

¹²² Article 34(a).

¹²³ Article 34(b).

¹²⁴ Article 35.

¹²⁵ Articles 33 and 36.

Oversight mechanism

Not expressly provided. However, the Governing Council of the States Archives National Information System is required to submit an annual report to the Ombudsman for onward submission to Parliament on the implementation of the Act.

8. Niger (Charter on Access to Public Documents, 2011)

Scope of Application

‘Anyone’ has a right to request for public information and ‘Everyone’ the right to know any information about him in administrative documents or which can be invoked against him.¹²⁶ Information can be requested from public bodies and private bodies performing public functions.¹²⁷

Proactive disclosure

Departments producing or holding government information are required to provide registers indicating the information in their possession.¹²⁸

Procedure for access

Requests must be in writing.¹²⁹ A request must be responded to in writing by the relevant official within **15 days (or 5 days** where the requester is a journalist or researcher),¹³⁰ granting or refusing the request.^{131 132}

Exemptions

The following categories of information are exempt from disclosure: deliberative secrets of government or any part of the executive; national defence secrets; foreign policy matters; state security, public security/safety or security of persons; currency or public debt; court/legal proceedings or preliminary operations of such proceedings, except permission is granted

¹²⁶ Article 4 and 6.

¹²⁷ Article 3.

¹²⁸ Article 15.

¹²⁹ Sections 3(4) and 3(5).

¹³⁰ Article 19.

¹³¹ Article 20.

¹³² Section 3(13).

by the competent authority.¹³³ To apply these information must be prohibited by law or other specific regulation.¹³⁴ In addition, in the absence of any law to the contrary, the following categories of information can only be disclosed to the person concerned: information which would infringe on privacy, media secrets, commercial and industrial secrets; information relating to an opinion or value judgement about a physical, named or identifiable person; information describing a person's behaviour, the disclosure of which would cause him prejudice; medical information (except where the person concerned authorises access to a medical officer).¹³⁵ **Disclosure of exempted information is liable to sanctions under the relevant law.**¹³⁶

Appeals

Any 'user' aggrieved by the decision of a public or private body can lodge: a formal appeal; an administrative appeal; an appeal with the ombudsman or an appeal to court.¹³⁷ A **citizen** 'facing difficulties with accessing information can lodge an appeal to the Ombudsman, who must share his 'opinion' on the matter with the aggrieved person and relevant institution within **10 days**, which the institution must then respond to **within 10 days**.'¹³⁸

Oversight mechanism

The ombudsman is empowered to oversee the implementation of the law

9. Nigeria (Freedom of Information Act, 2011)

Scope of application

'Any person' has a right to request for information.¹³⁹ Information can be requested from public institutions, which includes 'any legislative, executive, judicial, administrative or advisory body of the government, including boards, bureau, committees or commissions of the State, and any subsidiary body of those bodies, including but not limited to committees and sub-

¹³³ Article 13.

¹³⁴ As above.

¹³⁵ Article 14.

¹³⁶ Article 33.

¹³⁷ Article 27.

¹³⁸ Article 29.

¹³⁹ Section 1(1).

committees, which are supported in whole or in part by public funds or which expends public funds **and private bodies providing public services, performing public functions or utilising public funds.**¹⁴⁰

Proactive disclosure

Public institutions are required to proactively publish the following categories of information: description of the organisation and its responsibilities; a list of classes of records in its possession and manuals used by employees in performing their functions; description of documents containing decisions, opinions and orders of the institution; a list of applications for grants or permits, reports by independent contractors and contracts between the institution and other institutions or private entities; and the details of the officer of the institutions to whom applications can be made under the Act.¹⁴¹

Procedure for access

Requests can be made in writing, orally,¹⁴² and in the case of persons who are illiterate or living with disabilities through a third party,¹⁴³ without the need to indicate a 'specific interest in the information being applied for'.¹⁴⁴ A request must be responded to in writing by the authorised official **within 7 days**, granting the request,¹⁴⁵ refusing the request,¹⁴⁶ or transferring the request to the appropriate public or private entity (**within 3 but no later than 7 days** of receipt),¹⁴⁷ or extending the time by an additional 7 days.¹⁴⁸ Only the 'standard charges for document duplication and transcription fees' can be charged.¹⁴⁹

Exemptions

The following categories of information are exempted from disclosure: information which may be injurious to the conduct of international affairs and defence; ¹⁵⁰ information collected for administrative or law enforcement purposes, or which may

¹⁴⁰ Section 30(3).

¹⁴¹ Section 2 (1)-(3).

¹⁴² Section 3(4).

¹⁴³ Section 3.

¹⁴⁴ Section 1(2).

¹⁴⁵ Section (4)(a).

¹⁴⁶ Section (4)(b).

¹⁴⁷ Section 5.

¹⁴⁸ Section 6.

¹⁴⁹ Section 8.

¹⁵⁰ Section 11.

injure the security of penal institutions or facilitate the commission of an offence;¹⁵¹ personal information;¹⁵² trade secrets and commercial or financial information of a 3rd party;¹⁵³ legal, medical, journalistic, and all other professionally privileged documents;¹⁵⁴ research papers;¹⁵⁵ information utilised in administering academic examinations or determining qualification for a license or employment, building plans yet to be constructed, information identifying library users.¹⁵⁶ Note that the public interest override is included in almost every exemption i.e. that 'an application for information shall not be denied when the public interest in disclosing the information, outweighs whatever injury the disclosure would cause'.

Appeals

Any requester denied access to information can apply to the High Court against such denial within 30 days or such time as the court may allow, and such application shall be heard and determined summarily.¹⁵⁷

Oversight mechanism

The Attorney-General is empowered to ensure compliance by all public institutions with the Act¹⁵⁸ and encourage public institutions to comply with the Act.¹⁵⁹ In particular, the Attorney General is required to develop reporting and performance guidelines for annual reports to be submitted by all public institutions¹⁶⁰ and must itself submit annual reports to the National Assembly on the implementation of the law by public institutions.¹⁶¹

¹⁵¹ Section 12.

¹⁵² Section 14.

¹⁵³ Section 15.

¹⁵⁴ Section 16.

¹⁵⁵ Section 17.

¹⁵⁶ Section 19.

¹⁵⁷ Sections 20 and 21.

¹⁵⁸ Section 29(6).

¹⁵⁹ Section 29(8).

¹⁶⁰ Section 29(1) and (5).

¹⁶¹ Section 29(7).

10. Rwanda (Law Relating to Access to Information, 2013)

Scope of application

'Every person' has a right to request for information.¹⁶² Information can be requested from public organs which is any 'administrative entity established by the Constitution or any other laws or any other organ that uses money from the national budget or any money originating from tax revenues as provided by the law'.¹⁶³ The law also applies to private bodies, which are bodies other than public organs which 'carries any business in relation to public interest or to rights and freedoms of people'.¹⁶⁴ A competent Court can order that a private entity, to which the law does not ordinarily apply, provide information required to 'preserve the life or liberty of a person'.¹⁶⁵

Proactive disclosure

Public organs and private bodies are required to 'proactively disclose vital information to the public'.¹⁶⁶

Procedure for access

Request for information may be made in any of the official languages 'verbally, in writing, by telephone, internet or any other means of communication'.¹⁶⁷ A request must be responded to in writing by the information officer **within 3 working days**, granting the request, refusing the request, or transferring the request to the appropriate public or private entity.¹⁶⁸ However, where the information is required to preserve the life or liberty of a person, it must be provided **within 1 day** or by journalists for news gathering, **within 2 days**.¹⁶⁹ No fees are payable, only the cost of making copies or sending the information may be charged'.¹⁷⁰

¹⁶² Article 3.

¹⁶³ Articles 3 and 2(5).

¹⁶⁴ Article 3 and 2(4).

¹⁶⁵ Article 14.

¹⁶⁶ Article 7. A Ministerial Order is to lay out the procedure for determining such costs such information, however no such Ministerial Order has been issued.

¹⁶⁷ Section 2(1).

¹⁶⁸ Article 4 3 to 5, Ministerial Order No 007/07.01/13 of 27/2013, determining the time limit for the provision of information or the explanation for not providing it.

¹⁶⁹ Article 2, Ministerial Order No 007/07.01/13 of 27/2013.

¹⁷⁰ Article 10.

Exemptions

The following classes of information are exempt from disclosure. Information which may destabilise national security;¹⁷¹ impede the enforcement of law or justice; interfere with the privacy of an individual; violate trade secrets or intellectual property rights; obstruct legal proceedings against the management of a public organ.¹⁷² Public interest override.¹⁷³

Appeals

Nil.

Oversight mechanism

The Ombudsman is empowered to 'particularly monitor the enforcement of the law'.¹⁷⁴

11. Sierra Leone (Right of Access to Information Act, 2013)

Scope of application

'Every person' has a right to request for information.¹⁷⁵ Information can be requested from public authorities (which includes any body established under the Constitution; by statute; which forms part of any level or branch of government; owned controlled or substantially financed by government funds; carrying out a statutory or public function; or receives money on behalf of the peoples of Sierra Leone).¹⁷⁶ Information can also be requested from a private body where that information is 'necessary for the enforcement or protection of any right'.¹⁷⁷

¹⁷¹ By Ministerial Order No 005/07.01/13 of 19/12/2013 determining which information could destabilise national security, the following are the 3 classes of information: information related to defense and security; information related to foreign relations; and information related to critical economic interest and infrastructure security. See articles 14 to 16.

¹⁷² Article 4.

¹⁷³ Article 6.

¹⁷⁴ Section 17.

¹⁷⁵ section 3.

¹⁷⁶ Section 1.

¹⁷⁷ Section 2(2).

Proactive disclosure

Public authorities are required to proactively publish details of: the organisation, its functions and duties; powers and duties of officers and employees; decision making processes; methods of discharging functions; guidelines utilised in relating to the public; the classes of information it holds; processes for the public to contribute to the formulation or implementation of policies; its advisory bodies and access to the meetings of such bodies; directory of officers and employees; remuneration of officers and employees; budgets of its agencies; execution of subsidy programmes; concessions or permits granted; electronic information it holds; particulars of facilities available to obtain information; name, designation and contact details of information officers; applications received under the Act.¹⁷⁸

Procedure for access

Requests for information in English, Krio or any other local language¹⁷⁹ must be made in writing (by email, fax, post, telephone or any other medium)¹⁸⁰ or orally which must be reduced into writing by the information officer.¹⁸¹ A request must be responded to in writing by the information officer **within 15 working days**,¹⁸² granting the request, refusing the request,¹⁸³ extending the time by **another 15 working days**,¹⁸⁴ or transferring the request to the appropriate public or private entity **within 3 days** of receipt.¹⁸⁵ Information required to preserve the life of liberty of a person must be provided **within 1 day**.¹⁸⁶ Only the reasonable, cost-based amount for reproducing and sending information must be charged, as determined by Regulations.¹⁸⁷

Exemptions

The following categories of information are exempted from disclosure: 3rd party information; legally privileged information; personal information of an individual; trade secrets or commercial interest of a 3rd party; commercial interests of a public

¹⁷⁸ Section 8.

¹⁷⁹ Requests can be made in any other local language only where the applicant is unable to communicate in English or Krio. See section 3(5).

¹⁸⁰ Section 3(1)-(3).

¹⁸¹ Section 3(4).

¹⁸² Section 4(1).

¹⁸³ Section 13.

¹⁸⁴ Section 4(3).

¹⁸⁵ Section 5(1).

¹⁸⁶ Section

¹⁸⁷ Section 6

authority; some historical records; traditional rites or customary usages of groups in Sierra Leone.¹⁸⁸ Information is not exempt where ‘the public interest in accessing the information outweighs the harm the exemption seeks to prevent.’¹⁸⁹

Appeals

A requester can first appeal internally to the public authority,¹⁹⁰ then to the Commission, and finally to a High Court against an order of the Commission within 45 days of that order.¹⁹¹

Oversight mechanism

A Commission comprised of 5 members is required to: monitor and report on compliance with the Act; make recommendations for reform to public authorities; undertake training on access to information and implementation of the Act; refer cases disclosing criminal offences to the relevant public authority; publicise the content of the Act and the rights contained therein; and submit an annual report to the Minister on the performance of its functions, who submits it to Parliament.¹⁹² In executing these functions, the Commission is empowered to:¹⁹³ issue summons or orders;¹⁹⁴ administer oaths; examine any person on any issue under investigation; require disclosure of information by any person; or enter any premises to investigate.

12. South Africa (Protection of Access to Information Act, 2000)

Scope of application

‘Any person’ has a right to request for information.¹⁹⁵ Information can be requested from public bodies (which is any department of State or administration at the national, provincial or municipal level of government; any other institution exercising a power or performing a duty by virtue of the Constitution or exercising a public power or performing a public

¹⁸⁸ Sections 19-25.

¹⁸⁹ Section 12(2).

¹⁹⁰ Section 42

¹⁹¹ Sections 42, 43 and 46.

¹⁹² Section 32(2) and 41(1).

¹⁹³ Section 32(4).

¹⁹⁴ The Commission may order the release of information, payment of compensation or any other remedy. See section 3(5).

¹⁹⁵ See definition of requester in section 1 of the Act.

function by virtue of any legislation.¹⁹⁶ The law also applies to private bodies, which are natural persons, partnerships and former or juristic persons.¹⁹⁷

Proactive disclosure

Every public body is required to publish within 6 months of coming to force of the Act and annually thereafter manuals containing: description of its structure and functions; contact details of the information officer of the body and of every deputy information officer of the body; a description of the guide and how to obtain access to it; sufficient detail to facilitate a request for access to a record of the body, a description of the subjects on which the body holds records and the categories of records held on each subject; the latest notice regarding the categories of records of the body which are available without a person having to request access; services available to members of the public from the body and how to gain access to those services; arrangement or provision for the public to participate in or influence formulation of policy; or the exercise of powers or performance of duties, by the body; remedies available in respect of an act or a failure to act by the body; and such other information as may be prescribed.¹⁹⁸ Every public body and private body is required to publish annually, the 'categories of records that are automatically available' for inspection, purchase or copying; or free of charge and how to access these records.¹⁹⁹

Procedure for access

Requests must be made in writing,²⁰⁰ or orally in the case of persons who are illiterate or living with disabilities.²⁰¹ A request must be responded to in writing by the information officer **within 30 days**,²⁰² granting the request,²⁰³ refusing the request,²⁰⁴

¹⁹⁶ See definition of public body in section 1.

¹⁹⁷ See definition of public body in section 1.

¹⁹⁸ Section 14.

¹⁹⁹ Section 15 and 52.

²⁰⁰ Section 18 and 53.

²⁰¹ Section 18(3).

²⁰² Section 25(1) and 56(1).

²⁰³ As above.

²⁰⁴ Section 25(3) and 56(2).

deferring access,²⁰⁵ or extending the time by an additional **30 days**.²⁰⁶ An 'access fee' for the reproduction, postal fee and for search and preparation of the information is payable.²⁰⁷

Exemptions

Access to information **must** be refused where the requested information: involves the unreasonable disclosure of personal information of a 3rd party;²⁰⁸ was obtained for the purpose of enforcing legislation related to revenue collection;²⁰⁹ involves the disclosure of certain commercial information of a 3rd party;²¹⁰ involves the disclosure of certain confidential information of a 3rd party;²¹¹ endangers the life or physical safety of an individual;²¹² consists of police docket in bail proceedings;²¹³ is privileged from production in legal proceedings.²¹⁴ Access to information **may** be refused where the requested information: was supplied in confidence by a 3rd party;²¹⁵ may prejudice the security of property and persons;²¹⁶ involves the protection of legal proceedings and law enforcement;²¹⁷ prejudicial to the defence and safety or international relations of the republic;²¹⁸ materially jeopardise the economic interests and financial welfare of the republic and commercial activities of public bodies;²¹⁹ commercial information of a private body;²²⁰ on prior or ongoing research;²²¹ information prejudicial to policy making and the operation of public bodies;²²² is manifestly frivolous or vexatious or substantially and unreasonably divert resources.²²³ Information must however be released where it would reveal the contravention or failure to comply with the

²⁰⁵ Section 24.

²⁰⁶ Section 26 and 57.

²⁰⁷ Section 22(6) and 54(6).

²⁰⁸ Section 34 (1) and 63(1).

²⁰⁹ Section 35(1).

²¹⁰ Section 36(1) and 64(1).

²¹¹ Section 37(1)(a) and 65.

²¹² Section 38(1) and 66.

²¹³ Section 39(1)(a).

²¹⁴ Section 40 and 67.

²¹⁵ Section 37(1)(b).

²¹⁶ Section 38 (b).

²¹⁷ Section 39(i)(b).

²¹⁸ Section 41(l).

²¹⁹ Section 42.

²²⁰ Section 68.

²²¹ Section 43 and 69.

²²² Section 44.

²²³ Section 45.

law or an imminent and serious public safety or environmental risk, and when the public interest in the disclosure of the information outweighs the harm in question.²²⁴

Appeals

An appeal can be made against a denial of access by a public body application through an ‘internal appeal’ to the ‘relevant authority’ public or private body, who must make a decision in writing within **30 days** of receipt.²²⁵ Thereafter, a requester may appeal the decision of the internal appeal process to the Court.²²⁶

Oversight mechanism

The South African Human Rights Commission is empowered to: develop programmes and disseminate information to the public about the Acts with the cooperation and involvement of public and private bodies; make recommendations for reform of the Act, other legislation or common law relevant to the Act; monitor the implementation of the Act; assist persons to exercise their right of access to information; make recommendations to public bodies on the implementation of the Act; train information officers of public bodies; consult with public and private bodies on problems associated with the implementation of the Act or on the Commission’s functions under the Act;²²⁷ receive reports from public and private bodies on the implementation of the Act,²²⁸ and submit annual reports to Parliament consisting of recommendations and the implementation of the report by private and public bodies.²²⁹

²²⁴ Section 46 and 70. Note that this does not apply to section 35 on SARS and 43 on research for public bodies.

²²⁵ Sections 74 to 77.

²²⁶ Section 78 to 82.

²²⁷ Section 83.

²²⁸ Section 32.

²²⁹ Section 84.

13. South Sudan (Right of Access to Information Act, 2013)

Scope of application

Only citizens have a right to request for information.²³⁰ Information can be requested from public bodies (which includes any body established under the Constitution; by law; which forms part of any level or branch of government; owned controlled or substantially financed by government funds; carrying out a statutory or public) and private bodies.²³¹

Proactive disclosure

Every public body must publish and disseminate annually key information, including the following: its structure, functions and duties; services rendered to the public; request or complaints mechanism accessible to the public in respect of actions or inactions by the public body; simple guide on its record-keeping system, information in its possession and procedure for making requests; powers, duties and decision making procedures of senior officers; manuals and similar documents with information on how it discharges its functions; details of policies adopted which affect the public and reasons; mechanisms through which the public can influence decision making; and contracts with 3rd parties for service delivery, budget and expenditure for current and previous years.²³²

Procedure for access

Requests must be made in writing,²³³ or orally in the case of persons unable to speak or write in the official language.²³⁴ A request must be responded to in writing by the information officer **within 7 working days**,²³⁵ granting the request,²³⁶ refusing the request,²³⁷ or extending the time by an additional **20 days**.²³⁸

²³⁰ Section 6.

²³¹ Section 5.

²³² Section 17.

²³³ Section 9(1).

²³⁴ Section 9(4).

²³⁵ Section 10(1).

²³⁶ Section 11(1).

²³⁷ Section 11(2).

²³⁸ Section 10(3).

Only the reasonable reproduction cost is payable²³⁹ and this specifically excludes payment for searching, examining or transcribing the information.²⁴⁰ Fees are waived for requests for personal information;²⁴¹ and where the public or private body does not respond timeously or communicate to the requester in violation of section 10 or the requester is 'suffering financial hardship'.²⁴²

Exemptions

The following categories of information are exempted from disclosure: personal information of a 3rd party; legally privileged information; commercial and confidential information; information endangering the life, health or safety individuals; information jeopardising national defence and security; information prejudicial to public economic interests; information prejudicial to policy making and operation of public bodies.²⁴³ Information is not exempt 'unless in disclosure, the harm to the protected interest outweighs the public interest'.²⁴⁴

Appeal

An appeal can be made against a denial of access by an application for internal review to the head of the relevant public or private body, who must make a decision in writing within **15 days** of receipt.²⁴⁵ Thereafter, a requester may appeal the decision of the information officer or the internal review or make a variety of complaints to the Information Commissioner about the handling of the request for access.²⁴⁶

Oversight mechanism

An Information Commissioner and a Deputy appointed by the President from a list submitted by the Minister in consultation with media associations and civil society, with the approval of the National legislative assembly.²⁴⁷ The Information

²³⁹ Section 12(1).

²⁴⁰ Section 12(2).

²⁴¹ Section 12(3).

²⁴² Section 12(4).

²⁴³ Section 22 to 32.

²⁴⁴ Section 22.

²⁴⁵ Sections 46 to 48.

²⁴⁶ Section 41. An application may be made directly to the Information Commissioner without an application for internal review where: the request is for the personal information of a third party which has been refused by the information officer; information requested was previously in the public domain; an employee of a public or private body wishes to report wrongdoing or information necessary to safeguard life or liberty is not received within 48 hours. See section 41(2).

²⁴⁷ Section 35.

Commissioner is responsible for: monitor and report on compliance with the Act; make recommendations on reform to public bodies; train public officers on implementation; refer cases involving criminal offences to appropriate authorities; generate public awareness on the Act; and submit annual reports to the National Legislative Assembly on the implementation of the law.²⁴⁸ The Information Commissioner is empowered in its decisions to: reject applications; require the relevant body to comply with the Act or pay compensation to the requester; refer gross negligence by relevant bodies to a competent court; affirm, vary or set aside the decision of a public or private body; issue contempt orders and cost orders; make rulings on execution of warrants and search and seizure or any other orders.²⁴⁹

14. Sudan* text unavailable.

15 Togo (Law Establishing Freedom of Information and Public Documentation, 2016)

Scope of application

The law allows individuals to access information produced or held only by public bodies.²⁵⁰ Public bodies include private entities performing public services.²⁵¹

Proactive disclosure

Nil

Procedure for access

Requests for access to information must be in writing and accompanied by an identity document and sufficient details to enable identification of the information requested.²⁵² Responses to requests must be made in writing within **30 days** and in the case of researchers and journalists, within **15 days**.²⁵³

²⁴⁸ Sections 40(2) and (3).

²⁴⁹ Section 42(4).

²⁵⁰ Article 1.

²⁵¹ Article 3.

²⁵² Article 7.

²⁵³ Article 10.

Access to information is to be provided free of charge. Only the cost of transcription, reproduction and transmission is payable.²⁵⁴

Exemptions

The following categories of information are exempted from disclosure: security and national defence; deliberations relating to the exercise of executive power and foreign policy of the State; on-going courts cases; the health, private life or private interests of individuals;²⁵⁵ information relating to foreign governments, non-governmental or international organisations;²⁵⁶ information relating to negotiations between public bodies;²⁵⁷ certain kinds of information related to the economy;²⁵⁸ industrial and related secrets;²⁵⁹ information related to the prevention, detection or suppression of crime, deliberations or decisions by public bodies in the exercise of judicial functions;²⁶⁰ State security and national defence;²⁶¹ administrative decisions and policies still under deliberation;²⁶² ongoing audit or control process or investigation.²⁶³

Exempted information may be made available subject to the limitations and conditions as may be imposed by the Council of Ministers. The right of access to information is also subject to intellectual property rights.²⁶⁴

Appeals

An appeal against the decision of a public body may be made by administrative appeal, hierarchical recourse, and appeal to the Ombudsman and to the Courts.²⁶⁵

²⁵⁴ Article 9.

²⁵⁵ Article 2.

²⁵⁶ Articles 25 and 26.

²⁵⁷ Articles 27 and 28.

²⁵⁸ Article 29.

²⁵⁹ Articles 30-34.

²⁶⁰ Articles 35-37.

²⁶¹ Articles 38-40.

²⁶² Articles 41-44.

²⁶³ Article 45.

²⁶⁴ Article 6.

²⁶⁵ Article 46.

Oversight mechanism

The Ombudsman is empowered to ensure compliance with the right of access to information in accordance with the provisions of the Act.²⁶⁶

16. Tunisia (Decree No. 2011-41 on access to the administrative documents of public authorities 2011)

Scope of application

Any individual or legal entity can request for information.²⁶⁷ Information can be requested only from public authorities, which includes central and regional departments of the State administration, local communities, business and public establishments.²⁶⁸

Proactive disclosure

Public authorities are required to publish regularly: statistical economic and social data including national accounts and statistical surveys; all information relating to public finances, the economy, debts and interests on debts, medium-term debt forecasts, management of public finances and all data related to the budgets at the national, regional and local level; and data on social programmes and services.²⁶⁹

Procedure for access

Requests for information must be made in writing²⁷⁰ and must be responded to by the information agents of the public authority **within 15 days**, granting or refusing the request,²⁷¹ extending the time by **another 15 days**,²⁷² or transferring the request to the appropriate public or private entity **within 5 days** of receipt.²⁷³ Where the requested information has a direct

²⁶⁶ Article 48.

²⁶⁷ Article 3.

²⁶⁸ Article 2.

²⁶⁹ Article 5.

²⁷⁰ Article 7.

²⁷¹ Article 10.

²⁷² Article 12.

²⁷³ Article 14.

influence on the life or liberty of a person, it must be released **within 2 days**.²⁷⁴ Requested information should be given free of charge. Only the actual costs should be borne by the requester.²⁷⁵

Exemptions

The following categories of information are exempt from disclosure: relations between Tunisia and foreign countries and international organisations; political strategy of the government; public security or national defence; prevention of crime; arrest or sentencing of persons charged; proper functioning of the judiciary and principles of justice and fairness and transparency in the award of contracts; processing involving the exchange of ideas and expertise and the commercial and financial information of the relevant public authority.²⁷⁶

Appeals

Appeals against refusals or violations of the law can be made first to the head of the public authority **within 15 days** of the refusal, which must be responded to **within 10 days**.²⁷⁷ A further appeal against the decision of the head of the public body may be made to the administrative court.²⁷⁸

Oversight mechanism

All public authorities are required to within 10 days of the beginning of each quarter, a report on the progress of measures adopted for the implementation of the law.²⁷⁹

²⁷⁴ Article 11.

²⁷⁵ Article 15.

²⁷⁶ Article 17.

²⁷⁷ Article 19.

²⁷⁸ As above.

²⁷⁹ Article 22.

17. Uganda (Access to Information Act, 2005)

Scope of application

Only citizens have a right to request for information.²⁸⁰ Information can be requested only from public bodies (which includes a government ministry, department, statutory corporation, authority or commission).²⁸¹

Proactive disclosure

Public bodies are required to publish biennially a description of the categories of information 'automatically available' without the need for a request and how to access such information.²⁸² In addition, every public body must publish and update biennially, a manual with details of: its functions; full contact details of the information officer and deputy information officers; office address at which requests can be lodged; formal and informal procedures for requesting access; types and categories of information held; categories of proactively published information; services provided to the public and how to access such services; avenues for public involvement in policy formulation or exercise of powers and functions; remedies available to the public in cases of its acts or omissions.²⁸³

Procedure for access

Requests for information must be made in writing²⁸⁴ or can be made orally where the requester is illiterate or disabled and reduced into writing by the information officer.²⁸⁵ A request must be responded to in writing by the information officer **within 21 days**, granting or refusing the request,²⁸⁶ extending the time by **another 21 working days**,²⁸⁷ or transferring the request to the appropriate public or private entity **within 21 days** of receipt.²⁸⁸ The fee payable is the actual cost of retrieval and reproduction of the information.²⁸⁹

²⁸⁰ Section 5(1).

²⁸¹ Section 4 and 5(1).

²⁸² Section 8.

²⁸³ Section 7.

²⁸⁴ Section 11(1).

²⁸⁵ Section 11(3).

²⁸⁶ Section 16.

²⁸⁷ Section 17.

²⁸⁸ Section 13.

²⁸⁹ Section 47(2).

An access fee of 20,000 Ugandan Shillings (approximately \$6) is payable over and above the cost of reproduction.²⁹⁰ The Minister is empowered to issue regulations determining.²⁹¹

Exemptions

The following categories of information are exempted from disclosure: cabinet and committee minutes; personal information of a 3rd party; commercial information of a 3rd party; confidential information of a 3rd party; information endangering the life or safety of a person or the security of buildings, transport systems or property; law enforcement and legal proceedings; legally privileged documents; defence, security and international relations; consultations for decision making or which would frustrate deliberative processes of public bodies.²⁹² Information must however be disclosed if it would reveal substantial contravention or failure to comply with the Act; imminent and serious public safety, public health or environmental risk; and the 'public interest in the disclosure of the record is greater than the harm contemplated in the provision in question'.²⁹³

Appeals

An appeal can be made against a denial of access by an information officer to the Chief Magistrate.²⁹⁴ Further appeal against the decision of the Chief magistrate can be made to High Court, within 21 days of the decision of the Chief Magistrate.²⁹⁵

Oversight mechanism

The Minister of Information is to make regulations on any matters required by the Act to be prescribed, fees, notices, forms or requests, criteria to be adopted by information officers in determining proactive disclosure provisions, prescribe categories of exempted information with regard to specific sections, any administrative or procedural matters in relation to the Act. Each Minister is to submit annual reports to Parliament indicating requests for access in that Ministry.²⁹⁶

²⁹⁰ By section, the Minister is empowered to make regulations determining the fees for access. Accordingly, schedule 3 of the Access to Information Regulations 2011 No 17, adopted on 21 April 2011, stipulates the payment of an access fee of one currency point (equivalent to 20000 Ugandan Shillings) in addition to the stipulated costs of reproduction.

²⁹¹ Section 6

²⁹² Sections 25 to 33.

²⁹³ Section 34.

²⁹⁴ Section 37.

²⁹⁵ Section 38.

²⁹⁶ Section 43.

17. Zimbabwe (Access to Information and Protection of Privacy Act 2002 (as amended in 2008))

Scope of application

Every person has a right to request for information.²⁹⁷ However, the term 'every person' is qualified and only refers to a citizen, permanent resident, holder of temporary employment or resident permit or student permit,²⁹⁸ and specifically excludes any 'mass media service' or 'broadcaster' that is not registered under the Act or the Broadcasting Act respectively, and any foreign State.²⁹⁹

Information can be requested only from public bodies (which includes any government department, statutory corporation, authority, board, committee, commission council or other statutory body).³⁰⁰

Proactive disclosure

Nil

Procedure for access

Requests for information must be made in writing.³⁰¹ A request must be responded to by the head of the public body **within 30 days**,³⁰² granting or refusing the request,³⁰³ extending the time by **another 21 working days**,³⁰⁴ or extending the time by a further **30 days** or in certain circumstances, such longer period permitted by the Commission.³⁰⁵ Fees are payable for 'obtaining access and 'any service rendered in connection with the provision of access'.³⁰⁶

²⁹⁷ Section 5 (1).

²⁹⁸ Section 5(3)(a)

²⁹⁹ Section 5(3)(c) and (d).

³⁰⁰ Section 5 and second schedule to the Act.

³⁰¹ Section 6.

³⁰² Section 8.

³⁰³ Section 9.

³⁰⁴ Section 17.

³⁰⁵ Section 11.

³⁰⁶ Section 7.

Exemptions

The following categories of 'protected information' are exempt from disclosure: deliberations of cabinet and local government bodies; advice relating to policy; attorney-client privileged information; information that would prejudice law enforcement and national security; intergovernmental relations or negotiations; financial or economic information of public bodies or the State; research information; conservation of heritage sites; personal safety and health; information in the public domain; business interests (commercial, financial, scientific, or technical information) of a 3rd party; and personal privacy.³⁰⁷ **No public interest override.**

Appeals

An applicant whose request for information is refused by the head of the public body can request the Commission to review this decision.³⁰⁸

Oversight mechanism

A Zimbabwe Media Commission comprising a chairperson and eight members is empowered to amongst other general freedom of expression functions: ensure that there is wide access to information; comment on proposed laws affecting access to information; comment on implications of automated systems for collection storage, analysis and transfer of information; inform the public about the Act, and engage in research in relation to the purpose of Act.³⁰⁹ The ZMC is to submit annual reports to the Minister of Information 'on matters dealt with by the Commission during that year'.³¹⁰

³⁰⁷ Sections 14 to 25

³⁰⁸ Section 9(3).

³⁰⁹ Section 39.

³¹⁰ Section 42(1).