

THE IMPLEMENTATION OF THE CONSTITUTIONAL RIGHT OF ACCESS TO INFORMATION IN AFRICA: OPPORTUNITIES AND CHALLENGES

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Abstract

Unlike most other internationally-recognised human rights, access to information is an offshoot of a separately-recognised human right – the right to freedom of expression. However, these provisions on freedom of expression have been progressively interpreted and expanded by regional and international human rights bodies to include the right of access to information held by the state as a separate and distinct right. As with international human rights standards, most African constitutions do not contain a right of access to information. Thus, this chapter examines existing avenues for the constitutional recognition of access to information and their utility for the enjoyment of the right in Africa. The chapter finds that, although the inclusion of an express provision on access to information in African constitutions is ideal, the absence of a constitutional guarantee of access to information is not a barrier to the enjoyment of this right. However, several factors, such as the notoriety of Africa as a continent emblematic of ‘constitutions without constitutionalism’, and the fact that the nature of constitutional rights is such that the avenues for their enforcement are far beyond the reach of the ordinary African, make the constitutional recognition of access to information a necessary but insufficient avenue for the enjoyment of the right of access to information in Africa.

1 Introduction

The independence constitutions of most African states were modelled closely along the lines of those of their former colonial masters. The legitimacy of these constitutions was subsequently questioned due to the lack of popular participation that characterised their development,¹ and the minimal attention they devoted to continent-specific problems, such as

1 J Hatchard *Comparative constitutionalism and good governance in the Commonwealth: An Eastern and Southern African perspective* (2004) 15-19.

ethnic tensions and rivalries.² Not surprisingly, soon after independence many constitutions were amended under the guise of fostering nation building and socio-economic development.³ In many instances, however, the constitutional amendments led to the growth of dictatorial and authoritarian regimes⁴ symbolised by successive military *coups*⁵ and one-party states.⁶ While military *coups* inevitably suspended the operation of constitutions, many constitutions were amended to legitimise one-party rule,⁷ or to solidify the concentration of power in the hands of the executive.⁸

The 'third wave of democracy',⁹ the increasing emphasis on good governance at the regional level¹⁰ and its use as a condition for eligibility for receipt of financial aid,¹¹ and the 'radical change of heart' by former colonial powers towards former colonies,¹² brought with it a flurry of constitution making in many African states.¹³ Between 1990 and 2004, all

- 2 See generally B Munslow 'Why has the Westminster model failed in Africa?' (1983) 36 *Parliamentary Affairs* 218; R Howard 'Legitimacy and class rule in Commonwealth Africa: Constitutionalism and the rule of law' (1985) 7 *Third World Quarterly* 323.
- 3 C Fombad '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.
- 4 HW Okoth-Ogendo 'Constitutions without constitutionalism: Reflections on an African paradox' in I Shivji (ed) *State and constitutionalism: An African debate on democracy* (1991); LC Keith & A Ogundele 'Legal systems and constitutionalism in sub-Saharan Africa: An empirical examination of colonial influences on human rights' (2007) 29 *Human Rights Quarterly* 1065 1068.
- 5 The first military *coup* in Africa took place in Togo on 13 January 1963 and, by 1992, almost 90% of sub-Saharan Africa had either experienced a *coup*, a *coup* attempt or a *coup* plot. See generally JC Jenkins & A Kposowa 'The political origins of African military *coups*: Ethnic competition, military centrality and the struggle over the postcolonial state' (1992) 36 *International Studies Quarterly* 271.
- 6 In 1987, Zimbabwe became a one-party state and was the 35th African state to do so. See generally P Slinn 'A fresh start for Africa? New African constitutional perspectives for the 1990s' (1991) 35 *Journal of African Law* 1; P Nyong'o 'Africa: The failure of one-party rule' (1992) 3 *Journal of Democracy* 90.
- 7 Several independence constitutions were amended to introduce one-party rule, such as those of Ghana (in 1964), Tanzania (in 1965), Malawi (in 1966), Zambia (in 1972) and Sierra Leone (in 1978).
- 8 In Kenya, eg, the 1963 Independence Constitution was amended over 30 times, mostly to expand presidential power, while whittling down provisions ensuring checks and balances by the legislature and the judiciary. See Hatchard (n 1 above) 19-21.
- 9 S Huntington *The third wave: Democratisation in the twentieth century* (1991).
- 10 The transformation of the Organisation of African Unity to the African Union in 2000 brought with it a greater focus on issues of democracy, human rights and good governance.
- 11 See M Sinjela '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 as saying that '[g]overnments 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'.
- 12 F Reyjtens 'The winds of change. Political and constitutional evolution in Francophone Africa' (1991) 35 *Journal of African Law* 44.
- 13 See generally J Wiseman 'Democracy and the new political pluralism in Africa: Causes, consequence and significance' (1993) 14 *Third World Quarterly* 439; R Joseph 'Democratisation in Africa after 1989: Comparative and theoretical perspectives' (1997) 29 *Comparative Politics* 363.

independence constitutions were either entirely replaced or amended to place a greater focus on issues such as human rights and democratic governance.¹⁴ This period saw the liberalisation of the political systems in most African states and has been termed the 'second independence',¹⁵ 'second liberation'¹⁶ or 'new winds of change'.¹⁷

A common feature of these newly adopted constitutions was the introduction of the constitutional protection of human rights, for the first time in some states.¹⁸ In others states, there was an expansion of categories of human rights guaranteed under previous constitutions.¹⁹ One such right that found its way into constitutions during this period is the right of access to information. This inclusion signifies that 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 democratic governance by fostering a culture of transparent, participatory and accountable governance. Hence, access to information was increasingly included as a separate and distinct constitutional right, rather than by virtue of the equally-acceptable practice of reading in this right into freedom of expression provisions.

Since 2010, most newly-adopted constitutions in Africa have provided for the right of access to information as a human right.²⁰ Examples are Angola (2010);²¹ Kenya (2010);²² Morocco (2011);²³ Zimbabwe (2013);²⁴ and Egypt (2014).²⁵ Against this background, this chapter investigates the actual and potential avenues for the recognition of access to information as

14 Keith & Ogundele (n 4 above) 1066. See also B Dressel 'Strengthening governance through constitutional reform' <https://www.adb.org/publications/strengthening-governance-through-constitutional-reform> (accessed 9 February 2018).

15 C Legum 'The coming of Africa's second independence' (1990) 13 *Washington Quarterly* 129.

16 L Diamond & M Plattner (eds) *Democratisation in Africa: Progress and retreat* (1999) ix.

17 See J Ihonvbere & T Turner 'Africa's second revolution in the 1990s' (1993) *Security Dialogue* 349; S Riley 'Africa's "new wind of change"' (1992) 48 *The World Today* 116.

18 The independence constitutions of most former French colonies did not contain human rights provisions, although their Preambles often made reference to human rights in the context of the Universal Declaration of Human Rights. Today, it is only the Constitutions of Cameroon and Comoros that do not contain a 'Bill of Rights' but merely affirm commitment to the principles of the Universal Declaration of Human Rights, the United Nations Charter and the African Charter on Human and Peoples' Rights.

19 Eg, although the Independence Constitution of Ghana of 1957 had no constitutional provisions on human rights, the Constitution of 1969 did. A comparison of the Bill of Rights in the 1969 Constitution and that of 1992 (as amended in 1996) shows that the categories of human rights guaranteed were expanded.

20 See table below p 94 for provisions of the 13 stand-alone access to information provisions in Africa. 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 in constitutions.

21 Art 200(4) Constitution of Angola 2010.

22 Sec 35 Constitution of Kenya 2010.

23 Art 27 Constitution of Morocco 2011.

24 Sec 62 Constitution of Zimbabwe 2013.

25 Art 68 Constitution of Egypt 2014.

a constitutional right, the challenges to this constitutional recognition and what these challenges mean for the overall promotion and protection of the right of access to information on the continent.

2 Theoretical justifications for the adoption of access to information as a constitutional right in Africa

The end of the Cold War brought with it a progressive end to the blatant disregard for the normative and actual application of principles of democracy, constitutionalism and human rights in many African states, even though sometimes only superficial.²⁶ As the 'winds of change' blew across Africa, African leaders, including formerly unapologetic dictators who had metamorphosed into 'born-again' democrats,²⁷ embraced constitutionalism and human rights as an imperative for democracy and good governance.²⁸ The constitution, being the *grundnorm* or the supreme law of the land from which all other laws derive their validity,²⁹ and the alignment of constitutional provisions with democratic principles became a method of affirming 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, at the very least as a token sign of constitutional legitimacy.³⁰

Despite the perceived insincerity of this focus on human rights in African constitutions, the relationship between both concepts is clear. The promotion and protection of human rights are core elements of constitutionalism and have even come to be regarded as 'central to genuine

26 C Fombad '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.

27 C Fombad 'Constitutional reforms and constitutionalism in Africa: Some reflections on current challenges and future prospects' (2011) 59 *Buffalo Law Review* 1021.

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

29 The *grundnorm* or the 'basic norm' was developed by positivist philosopher, Hans Kelsen, to describe the basic rules that underlie any legal system. For Kelsen, 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 H Kelsen *General theory of law and state* (1961).

30 L Backer 'From constitution to constitutionalism: A global framework for legitimate public power systems' (2009) 113 *Pennsylvania State Law Review* 671.

constitutionalism',³¹ the 'overall purpose of constitutionalism',³² and the 'very essence of constitutional government'.³³ In essence, a constitution containing comprehensive human rights provisions is an indispensable first step towards engendering constitutionalism. However, beyond the interconnectedness between constitutionalism and human rights, constitutionalism shares a specific link to the right of access to information in particular. Access to information is a multi-faceted tool for combating the arbitrary exercise of government power, corruption and mismanagement of national resources and for ensuring that in all its dealings, governments act 'rationally and with due deliberation'.³⁴ At the same time, at the core of constitutionalism lies a progressive adherence to the foundational values of the constitution, through a combination of rules and mechanisms established by the constitution, in such a manner as to enable the governed to hold the government accountable and to limit arbitrary action.³⁵ In other words, both concepts are concerned with limiting the arbitrary exercise of government power. Thus, the constitutional guarantee of this right is essential for all states that genuinely aspire towards constitutionalism.

It is, therefore, no wonder that access to information activists persistently canvass for the inclusion of a stand-alone provision on access to information in constitutions, as a way of laying a strong foundation for the exercise of the right. In doing so, two main justifications are generally relied upon. First, and in true reflection of the concept of the interdependence and indivisibility of rights, is the important role that access to information plays in the realisation of other rights. This assertion, which has been proven severally, has led to the right being commonly referred to as an 'enabling right'.³⁶ The second justification is the role of access to information in fostering democracy, transparency and accountability, which, together with human rights protection, are all 'essential elements of constitutionalism'.³⁷ Thus, states – all of which theoretically aspire towards constitutionalism – ideally should include

31 Quoting Carl Friedrich in R Chandler et al *The constitutional law dictionary: Individual rights* (1987) 35.

32 P Sigmund 'Carl Friedrich's contribution to the theory of constitutionalism-comparative government' in J Pennock & J Chapman (eds) *Constitutionalism: Nomos XX* (1979) 39.

33 B Nwabueze *Constitutionalism in the emergent states* (1973).

34 I Currie & J de Waal *The Bill of Rights handbook* (2005) 684.

35 O Shyllon 'The contribution of legal frameworks on access to information to socio-economic progress in Africa: Case studies from Nigeria, South Africa and Uganda' LLD thesis, University of Pretoria, 2016.

36 See generally 'Access to information: An instrumental right of empowerment' <https://www.article19.org/data/files/pdfs/publications/ati-empowerment-right.pdf> (accessed 8 February 2018).

37 In identifying the nature and scope of the term 'constitutionalism', several authors have advanced what they have termed 'features', 'characteristics', 'components' or 'elements' of constitutionalism. Henkin, eg, lists nine 'essential elements' of constitutionalism as government according to the constitution; separation of powers; popular sovereignty and democratic government; constitutional review; independence

provisions facilitating the realisation of these objectives in the text of their national constitutions.³⁸

Support for the inclusion of access to information as a distinct constitutional right has been expressed even before Seychelles introduced the first stand-alone access to information provision on access to information in Africa into its 1993 Constitution. Shivji, for example, had called for access to information to be 'constitutionally entrenched'.³⁹ Bovens has reasoned that the constitutional protection of access to information makes the obligation for states to respect, fulfil, promote and protect the right more tangible, in line with international human rights law.⁴⁰ Bovens goes as far as suggesting that in addition to the traditionally-recognised civil, political, and social rights in constitutions, a fourth category of 'information rights' should be added.⁴¹

Bovens bases his insistence on the constitutional recognition of access to information on the important role information plays in the life of citizens – the 'element of citizenship' concept. This concept views access to information as important to citizens as subjects, as *citoyen* and as members of society.⁴² He explains that as subjects, citizens need to act with 'legal certainty, lawfulness and cognisance', and this is only possible if subjects are certain of being informed timeously and adequately about their rights and duties. As *citoyen*, citizens' contribution to democratic accountability and control of the executive and legislature through participation in the making of laws and policies is impossible without information from the state. Finally, as members of society, individuals need information to make rational decisions and plan their lives accordingly. He also sees a social justice element in that the constitutional guarantee of access to information to some extent could address the inequalities in accessing information between the wealthy, who have the means to do so, and the poor who do not.⁴³

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. See L Henkin 'Elements of constitutionalism' in International Commission of Jurists 'The evolving African constitutionalism' (1998) 60 *The Review* (Special Issue) 11-22. See also L Henkin 'A new birth of constitutionalism: Genetic influences and genetic defects' (1993) 14 *Cardozo Law Review* 533.

38 Currie & De Waal (n 34 above) 692.

39 I Shivji 'State and constitutionalism: A new democratic perspective' in I Shivji (ed) *State and constitutionalism: An African debate on democracy* (1991) 43.

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

41 As above.

42 As above.

43 As above. However, there is unease about the use of the term 'citizenship' to illustrate his point. This is because a fundamental principle of access to information is that the enjoyment of this right should not be restricted only to citizens but to 'everyone'. To do so would deprive this very 'meaningful existence' to all those who are not citizens but residents of a given country and are therefore subject to its legal system.

Peled and Rabin also posit a four-fold justification for access to information as a constitutional right, namely, political-democratic, instrumental, proprietary and oversight/transparency.⁴⁴ The political-democratic justification entails that the centrality of access to information for public participation makes its inclusion a condition for any constitutional democracy and also for the exercise of other rights, such as freedom of expression. Their instrumental justification of access to information lies in its instrumentality to the realisation of other rights. The proprietary justification means that information held by the state is the property of citizens and residents, as it is gathered by a public service funded for that purpose by tax payers. 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'.⁴⁵ Last is the oversight justification, which relates to the role of constitutions in ensuring good governance through the oversight of government to ensure transparency and to fight corruption.

Thus, the multi-functional, multi-dimensional and multi-rationale nature of the right of access to information,⁴⁶ the centrality of human rights to constitutionalism, and the aspirational and transformational role constitutions play in society, make the express constitutional protection of access to information an ideal for any democratic state.

3 Overview of the constitutional protection of access to information in Africa

The Republic of Seychelles was the first African country to incorporate the right of access to information as a stand-alone right in its Bill of Rights. This occurred with the coming into force of the 1993 Constitution of Seychelles, following its approval in the June 1993 constitutional referendum.⁴⁷ This pioneering constitutional recognition of access to information was replicated in quick succession by Malawi, Uganda and South Africa.⁴⁸ After South Africa's 1996 constitutional provision on access to information, which at the time was the most progressive on the

44 R Peled & Y Rabin 'The constitutional right to information' (2011) 42 *Columbia Human Rights Law Review* 357.

45 This view is shared by R Snell & P Sebina in 'Information flows: The real art of information management and freedom of information' (2007) 35 *Archives and Manuscripts* 54 65.

46 R Calland 'The right of access to information: The state of the art and the emerging theory of change' in F Diallo & R Calland *Access to information in Africa: Law, culture and practice* (2013) 21.

47 MC Twomey 'Seychelles country report, Oxford constitutions of the world' http://www.icla.up.ac.za/images/country_reports/seychelles_country_report.pdf (accessed 9 February 2018). For full details of all 13 constitutional provisions on access to information, see annexure 2.

48 Access to information was introduced into the newly-drafted Constitution of Malawi in 1994, the Constitution of Uganda in 1995 and the Constitution of South Africa in 1996. Note that sec 23 of the interim Constitution of South Africa 1993 did guarantee

continent,⁴⁹ it took almost another decade and a half for access to information to once again be constitutionally entrenched in another African constitution.⁵⁰ Between 2010 and 2014, the Constitutions of Angola, Guinea, Kenya, Niger, Morocco, South Sudan, Somalia, Zimbabwe and Egypt guaranteed access to information as a human right. In total, therefore, access to information has been constitutionally entrenched as a stand-alone human right in 13 countries across the continent.

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. In another category are those provisions that recognise a 'right to' or 'freedom of' information, usually as part of freedom of expression. However, the majority of African constitutions fall within the third category of constitutional provisions that make no reference to access to information in their protection of freedom of expression. These three categories are now discussed.

3.1 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.

3.1.1 Categories of persons who can access information

Ideally, the right of access to information should be granted to every person – citizens and non-citizens alike.⁵¹ 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.⁵² Six other provisions restrict this right only to its citizens. Section 62 of Zimbabwe's Constitution, however, is unique, in that it expressly guarantees the right of access to information to citizens, permanent

access to information on a much narrower basis than the subsequent Constitution of 1996.

- 49 The access to information provision in the interim Constitution of 1993 was substantially modified in the 1996 Constitution.
- 50 Although the 1997 Constitution of Eritrea adopted during this period includes the right of access to information, it has never entered into force. As a result, none of its provisions are of any effect, and are not considered.
- 51 Art 9 has been interpreted as guaranteeing the right to access information to 'everyone'. Thus, Principle IV(2) of the Declaration of Principles on Freedom of Expression in Africa refers to the right of 'everyone' to access information held by public and private bodies.
- 52 These are Angola, Malawi, Niger, Seychelles (the public), Somalia and South Africa.

residents and 'every person', as opposed to all others that 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'. In essence, 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 of access to information to non-citizens, and the reality that the failure to extend the right to residents or any other person on Zimbabwean territory could allow the violation of various other human rights. However, as will be shown below, the restriction on the categories of persons entitled to the right in many cases could defeat some of the very objectives the provision seeks to achieve, that is, transparency and accountability of public institutions.

The negative impact of restricting the application of this right only to citizens is illustrated by two decisions of Kenyan courts. In *Famy Care Ltd v Public Procurement Administrative Board*,⁵³ the High Court of Kenya held that section 35 of the Constitution of Kenya accords the right of access to information only to citizens. The Court went on to interpret the right as one that could be exercised neither by juristic persons nor natural persons who were not citizens of Kenya, as defined by the citizenship provisions in the Kenyan Constitution.⁵⁴ The plaintiff, a company registered in India, therefore 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, thus a matter of public interest.⁵⁵

In *Nairobi Law Monthly Co Ltd v Kenya Electricity Generating Company*,⁵⁶ 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 thus was incapable of

53 Petition 43 of 2012, 2012 Kenya Law Reports, <http://kenyalaw.org/caselaw/cases/view/88265> (accessed 8 February 2018).

54 Para 25.

55 Paras 29-30.

56 Petition 278 of 2011, http://kenyalaw.org/CaseSearch/view_preview1.php?link=32814989894189150344229 (accessed 8 February 2018).

relying on section 35(1) of the Constitution which was applicable only to natural persons with Kenyan citizenship.⁵⁷

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. The courts in both cases ought to have adopted a purposive and generous interpretation of the Kenyan Constitution, instead of a strict literal interpretation. This is particularly so given the fact 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'.⁵⁸

The adoption of the Access to Information Act of Kenya in 2016, however, has settled the issue in a positive manner. Section 2 of the Kenyan Access to Information Act defines 'citizen' to mean 'an individual who has Kenyan citizenship and a private entity that is controlled by one or more citizens'. As a result, a recent attempt to rely on the previous interpretation of 'citizen' based on section 35(1)(a) of the Constitution has been rejected by the High Court in *Katiba Institute v President's Delivery Unit*.⁵⁹ In this case it was held that the interpretation of section 35(1)(a) of the Constitution and of section 2 of the Access to Information Act was that 'a juristic person whose director(s) is a citizen, is considered a citizen for the purpose of exercising the right to access information' under the Constitution and the Access to Information Act.⁶⁰

3.1.2 Scope of application

A distinction is often made between the types of institutions that must make information available. Generally, the constitutional application of access to information tends to be only vertical, that is, against the state, and not horizontal, namely, against individuals or private entities. Thus, at the barest minimum, information held by all public institutions ought to be accessible. In this regard, the constitutions of all 13 countries guarantee a right of access to information held by the state⁶¹ or public authorities or administration.⁶² Some constitutions ensure that the scope of applicability is clear by expressly stating that the right applies to any information held

57 Paras 75-82.

58 See *Greenwatch Ltd v Attorney-General & Another Case* HCT-00-CV-MC-0139 of 2001, (2002) UGHHC, 28. Part of the reasoning of the judge in this case was that sec 237 of the Constitution provides 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.

59 Constitutional Petition 468 of 2017, <http://kenyalaw.org/caselaw/cases/view/144012/> (accessed 1 March 2018).

60 Constitutional Petition 468 of 2017 (n 59 above) para 43.

61 Egypt, Kenya, South Africa, Somalia, South Sudan, Malawi, Uganda and Zimbabwe.

62 Seychelles, Morocco and Niger.

by the state and any of its 'institutions', 'organs' 'agencies' and at 'every level'.⁶³ Although the Constitutions of 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 ordinarily be held by the state.

Some constitutional provisions go further by including in their definition of 'the state' bodies that perform 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 to perform 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 between states and private entities.

A final category of constitutional provisions are those allowing 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 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. With the exception of Kenya, this right is guaranteed to all persons in these countries and not only to citizens.

3.1.3 *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, only the Constitution of Kenya in section 35(3) provides 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 to provide open access to such specific information individuals may require from the state.⁶⁴ The utility of including the principle of proactive disclosure of information in constitutional provisions on access to information cannot be overemphasised. It sends a clear message to the state and all those required to provide access to information that there is a positive obligation to create systems for doing so and, to the public, that the need to request access to information should be the exception and not the rule.

63 South Sudan, Malawi, Uganda and Zimbabwe.

64 *Famy* case (n 53 above) para 34.

3.1.4 Exemptions

Access to information, like most other rights, is not an absolute right. There are a variety of instances in which access to information can be justifiably restricted, such as for purposes of national security 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 other constitutions 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 that subject exemptions to further tests and those that do not.

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';⁶⁵ 'security and defence matters, state secrecy, criminal investigation and personal privacy';⁶⁶ national security, prevention and detection of crime; compliance with an order of a court; legal privilege; protection of the privacy of others;⁶⁷ national defence; the internal and external security of the state; the private lives of persons; the protection of constitutionally-guaranteed rights; and the protection of sources and domains specified by law.⁶⁸

In the case of Seychelles and Zimbabwe, the wide exemptions are mitigated by the subjection of their application to objective tests which would determine, on a case-by-case basis, whether these exemptions should be applied or not. In Seychelles, the application of exemptions is subject to two conditions: It must be prescribed by law and must also be 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, however, is 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'.⁶⁹ A restrictive interpretation of the term 'public accountability' could lead to the application of the test in most cases becoming redundant.

65 Zimbabwe.

66 Angola.

67 Seychelles.

68 Morocco.

69 Sec 62(1).

Generally, most other constitutions have general limitation clauses containing a test to be applied to justify limitations to all or some of the rights guaranteed by the Constitution. Relevant examples are the Constitutions of Angola,⁷⁰ Egypt,⁷¹ Kenya,⁷² Malawi,⁷³ Niger,⁷⁴ Nigeria,⁷⁵ Seychelles,⁷⁶ Somalia,⁷⁷ South Africa,⁷⁸ Uganda⁷⁹ and Zimbabwe.⁸⁰ In essence, the exemptions contained in constitutional provisions on access to information as well as those contained in the provisions of the respective access to information laws, where these have also been adopted, are subject to the these general limitation clauses.

3.1.5 Requirements to adopt implementing legislation

Another feature of constitutional provisions on access to information in Africa is the imposition of an obligation to adopt a law to give effect to the constitutional 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.⁸¹ In the case of Somalia, non-compliance with the obligation to adopt access to information legislation is probably due to the fact that it is generally regarded as a failed state.⁸²

The case of Zimbabwe is somewhat unique in that, in spite of the existence of an access to information law since 2002, the new Constitution, when adopted in 2013, specified that 'legislation must be adopted to give effect to the right'.⁸³ Perhaps the inclusion of this provision is not unconnected with the widely-held perception that the Access to Information and Protection of Privacy Act (AIPPA) is a bad law the real aim of which is to restrict access to information, while at the same placing undue restrictions on the media and the practice of journalism in Zimbabwe. Thus, in 2015, the government established a 25-member

70 Art 57 Constitution of Angola 2010.

71 Art 92 Constitution of Egypt 2014.

72 See sec 24 Constitution of Kenya 2010.

73 See art 44 Constitution of Malawi 1995.

74 Art 45 Constitution of Niger 2010.

75 Sec 45(1) Constitution of Nigeria 1999.

76 Secs 47 & 48 Constitution of Seychelles 1993.

77 Art 38 Constitution of Somalia 2012.

78 Sec 36, Constitution of South Africa 1996.

79 See art 43 Constitution of Uganda 1995.

80 See sec 86 Constitution of Zimbabwe 2013.

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

82 From 2008 to 2012, the Foreign Policy and Global Policy for Peace's Failed States Index featured Somalia in the top position. Since 2014, Somalia has moved to second place below South Sudan, except for 2016, during which it briefly regained the top spot as the most fragile state in the world. Note that the index has since 2014 been renamed the 'Fragile States Index', <http://fundforpeace.org/fsi/country-data/> (accessed 9 February 2018).

83 See sec 62(1) Constitution of Zimbabwe 2013.

Information and Media Panel of Inquiry (IMPI) and tasked it with, amongst other things, inquiring into the policy and legal adequacy of the information sector.⁸⁴ The IMPI report concluded that AIPPA in fact did not provide for access to information, especially to the extent envisaged by the Constitution, and recommended as follows:⁸⁵

AIPPA should be repealed and replaced with a law that specifically provides for access to information with ample provision for protecting this right, including its expansion to information held by non-public bodies as envisaged in section 61 of the Constitution, while media regulation issues are provided for under a separate law.

The majority of the constitutional provisions on access to information, however, are silent on the issue of the adoption of laws to give effect to the right.⁸⁶ Of these, Angola, Guinea, Malawi, Morocco, Niger, Seychelles⁸⁷ and South Sudan have in fact adopted access to information laws.⁸⁸

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. As indicated above, seven countries in which no such obligation was imposed have gone ahead to enact the necessary legislation and three other countries are at advanced stages of doing so. 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 its speedy fulfilment. However, one thing is clear: The existence of a constitutional right of access to information provides much-needed impetus for the adoption of an access to information law. At the very least, it presents a potent tool to advocate for the adoption of an access to information law, making the question of adoption one of when the law will be adopted, rather than whether it will be adopted.

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 whether they will form the singular basis for the enforcement of the right of access to information or as a precursor to the

84 The terms of reference of the IMPI can be found in its report 'Report of the Official Inquiry into the State of the Media and Information Industry in Zimbabwe' of 2014 (on file with author).

85 Report (n 84 above) 441.

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

87 Seychelles is the latest country to adopt an ATI law in July 2018.

88 A Draft Law on the Right to Access Information was adopted by the Justice, Legislation and Human Rights Committee of the second house of Parliament on 2 January 2018. See <https://www.morocoworldnews.com/2018/01/237651/access-information-act/> (accessed 5 February 2018).

enactment of an 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, where necessary.

3.2 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, whether independently or as part of constitutional provisions on freedom of expression, and, finally through general constitutional provisions on freedom of expression. In all three instances, there is the option of reading-in the right of access to information into the relevant constitutional provision, as discussed below.

Domestic courts have since 1969 been reading-in access to information into constitutional provisions on freedom of expression, 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.⁸⁹ Similarly, the Supreme Court of India, in *SP Gupta v Union of India*,⁹⁰ held that the right to know was implicit in the right to freedom of speech and expression guaranteed by article 19 of the Constitution.⁹¹ In South Korea, the Constitutional Court in the *Forests Survey Inspection Request* case⁹² found that freedom of speech and of the press as guaranteed by article 21 of the Constitution could not be fulfilled without the right of 'access, collection and processing of information'.

The Israeli 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, which in turn imposes an obligation on the state to provide that information.⁹³ Also, in *Ontario (Public Safety and Security) v Criminal Lawyers Association*,⁹⁴ the Supreme Court of Canada held that access to information can be derived from freedom of expression provisions of the Constitution, if it is shown that 'access is necessary for the

89 *Kaneko v Japan*, Supreme Court 1969, 11. 26, Keishu 23-11-1490.

90 1982 AIR SC 149 234.

91 *Gupta* (n 90 above) para 66.

92 (1989) 1 KCCR 176, 88Hun-Ma22, delivered on 4 April 1989, http://www.right2info.org/resources/publications/case-pdfs/south-korea_forests-survey-inspection-request-case-petitioner-v-supervisor-of-county-of-ichon (accessed 8 February 2018).

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

94 2010 SCC 23, [2010] 1 SCR 815.

meaningful exercise of free expression on matters of public or political interest'.⁹⁵

Domestic courts have also relied on other human rights provisions in their constitutions to give effect to access to information. Thus, in *Reliance Petrochemicals Ltd v Proprietors of Indian Express Newspapers, Bombay Pvt Ltd*, 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.⁹⁶ 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.⁹⁷

In essence, the lack of a constitutional provision which is expressly worded as guaranteeing a right to access information held by the government (or private entities) is not necessarily a barrier to its enforcement as a constitutional right. There are alternative constitutional provisions that can be relied upon in reading in the right, as discussed below.

3.2.1 General information rights guaranteed by the Constitution

The constitutions of 12 African countries guarantee the 'right to information' or 'freedom of information' either as a component of freedom of expression, as is the case of Burkina Faso,⁹⁸ the Central African Republic,⁹⁹ Congo,¹⁰⁰ the Democratic Republic of the Congo (DRC),¹⁰¹ Mozambique¹⁰² and Rwanda,¹⁰³ or without necessarily a reference to freedom of expression, as in Côte d'Ivoire,¹⁰⁴ Ghana,¹⁰⁵ Guinea

95 Para 37.

96 1988 (004) SCC 0592 SC para 234.

97 9 Acordada de la Corte Suprema de Justicia de la Nación No 1/2004 Exp. 315/2004 Adm. Gral. See L Yagel (ed) 'Disclosing justice: A study on access to information in Latin America' Due Process of Law Foundation: USA 2007 7, <http://www.dplf.org/uploads/1196288246.pdf> (accessed 25 October 2014).

98 Art 8 of the Constitution of Burkina Faso guarantees the right to information.

99 Art 13 of the Constitution of Central African Republic guarantees 'freedom of information'.

100 Art 19 of the Constitution of Congo guarantees the 'right to information'.

101 Art 24 of the Constitution of the DRC guarantees the 'right to information'.

102 Art 48 of the Constitution of Mozambique guarantees the 'right to information'. However, the Right to Information Law of Mozambique in its Preamble refers to this provision as the basis for its enactment.

103 Art 19 of the Constitution of Rwanda guarantees 'freedom of information'.

104 Art 24 of the Constitution of Côte d'Ivoire guarantees the 'right to information'.

105 Art 21(1)(f) of the Constitution of Ghana guarantees the 'right to information'. In April 2015 (*Lolan Kow Sagoe-Moses v Minister for Transport and Attorney-General*, Suit HR 0027/2015), the Human Rights Division of the High Court of Ghana held that sec 21(1)(f) conferred the right to access information held by government, thus reading in this right.

Bissau,¹⁰⁶ Madagascar,¹⁰⁷ Senegal¹⁰⁸ and Tunisia.¹⁰⁹ Generally, these provisions are not formulated precisely in a manner which expressly imposes a positive obligation on states to allow access by the public to information it holds. However, the use of word 'information' has led many to conclude that these provisions guarantee a stand-alone right of access to information. However, it is submitted that these provisions at the time of their adoption did not envisage such interpretation. Nevertheless, it is reasonably acceptable to interpret these provisions in such a manner as to give effect to the right of access to information. Thus, in *Lolan Kow Sagoe-Moses v Minister for Transport and Attorney-General*,¹¹⁰ the Human Rights Division of the High Court of Ghana held that section 21(1)(f), which guarantees the right to information to all persons, 'subject to such qualifications and laws as are necessary in a democratic society' conferred a right to access information held by the government.

3.2.2 Information rights guaranteed as part of freedom of expression

Thirteen African countries have constitutional provisions on freedom of expression in similar words as in the Universal Declaration of Human Rights (Universal Declaration), the International Covenant on Civil and Political Rights (ICCPR), the African Charter on Human and Peoples' Rights (African Charter) and the European Convention on Human Rights, namely, '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 reasonably be expected that, in line with the corresponding provisions of the ICCPR, to which all but two African states are party,¹¹¹ the constitutional provisions on freedom of expression in Botswana,¹¹² Cape Verde,¹¹³ Ethiopia,¹¹⁴ Lesotho,¹¹⁵ Liberia,¹¹⁶

106 Art 34 of the Constitution of Guinea Bissau guarantees the 'right to information'.

107 Art 11 of the Constitution of Madagascar guarantees the 'right to information'.

108 Art 8 of the Constitution of Senegal guarantees the 'right to a variety of information'.

109 Art 18 of the Constitution of Tunisia guarantees the 'right to information'.

110 Suit HR 0027/2015.

111 Only Comoros and Sudan have not ratified the ICCPR.

112 Sec 12 of the Constitution of Botswana guarantees the 'freedom to receive ideas and information'.

113 Art 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'.

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

115 Sec 14(1) of the Constitution of Lesotho guarantees the 'freedom to receive ideas and information'.

116 Art 15 of the Constitution of Liberia guarantees the 'freedom to receive and impart knowledge and information'.

Mauritius,¹¹⁷ Nigeria,¹¹⁸ Sierra Leone,¹¹⁹ Sudan,¹²⁰ Swaziland,¹²¹ Tanzania,¹²² Togo¹²³ and Zambia¹²⁴ can be interpreted within the domestic legal domain as establishing a right of access to information.

However, the Constitution of Liberia 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'.

3.3 Constitutional provisions on freedom of expression

Another 16 African constitutions guarantee the right to freedom of expression, but make no specific reference to the word 'information' in guaranteeing this right. However, applying the broad interpretation that domestic courts in other parts of the world have given to freedom of expression as foundation of the right of access to information based on the interconnectedness of both rights, these constitutional provisions can be interpreted as conferring the right of access to information. These countries are Algeria,¹²⁵ Benin,¹²⁶ Burundi,¹²⁷ Chad,¹²⁸ Djibouti,¹²⁹ Equatorial

117 Art 12(1) of the Constitution of Mauritius guarantees the 'freedom to receive and impart ideas and information'.

118 Sec 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, art 9 of the Charter is directly applicable.

119 Sec 25(1) of the Constitution of Sierra Leone guarantees the 'freedom to receive and impart ideas and information'.

120 Sec 39 of the Constitution of Sudan guarantees the 'right to reception and dissemination of information'.

121 Sec 24 of the Constitution of Swaziland guarantees the 'freedom to receive ideas and information'.

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

123 Art 26 of the Constitution of Togo guarantees the 'freedom to express and disseminate information'.

124 Sec 20 of the Constitution of Zambia guarantees the 'freedom to receive ideas and information'.

125 Sec 41.

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

127 Art 31. Note that according to art 19 of the Constitution of Burundi, the Universal Declaration and the African Charter are an integral part of the Constitution. Thus, art 9 of the African Charter, interpreted by the African Commission as guaranteeing the right of access to information, is directly applicable.

128 Art 27.

129 Art 15.

Guinea,¹³⁰ Gabon,¹³¹ The Gambia,¹³² Libya,¹³³ Mali,¹³⁴ Mauritania,¹³⁵ Namibia,¹³⁶ São Tomé and Príncipe¹³⁷ and Western Sahara.¹³⁸

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 Cameroonian Constitution 'affirms attachment' to the rights contained in the Universal Declaration and the African Charter, and other ratified treaties based on certain principles which includes freedom of expression. In addition, both the Universal Declaration 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 Universal Declaration and the African Charter, including freedom of expression. Unlike Cameroon, the Constitution of Comoros explicitly declares that the Preamble 'is an integral part of the Constitution'.¹³⁹

4 Impact of constitutional recognition of access to information in Africa

There is no denying that the constitutional protection of access to information has contributed to the enjoyment of the right in Africa. The experience has been that by virtue of the supreme status of the constitution within the domestic system, the failure to adopt a law to give effect to a constitutional provision on access to information has not prevented the enjoyment of the right. Courts have proceeded to affirm the right irrespective of implementing legislation. Thus, in the *Lolan Kow Sagoe-Moses* case,¹⁴⁰ the Court held that failure to adopt a right to information law could not be relied upon by the Ghanaian government to justify non-compliance with a constitutional right.

Even where such a law exists, the constitution has still served as the basis for the interpretation and implementation of the law. In Uganda, where access to information was included in the 1995 Constitution, the right was given effect to in numerous instances by courts notwithstanding the 10-year delay in the adoption of an access to information Act and a

130 Art 13.

131 Art 1(2).

132 Sec 25(1).

133 Art 14.

134 Art 4.

135 Art 10.

136 Art 21.

137 Art 28(1).

138 Art 29.

139 See the final sentence of the Preamble to the Constitution of Comoros.

140 *Lolan Kow Sagoe-Moses* (n 110) above.

further delay in adopting regulations to bring that Act into force, which occurred only in 2011. Thus, on the basis of article 41 of the Constitution, the content of a Power Purchase Agreement between the government and a foreign power supply company was released for public scrutiny;¹⁴¹ an Act prohibiting employees and members of parliament from disclosing the content of documents considered in parliament without permission of the speaker or clerk of the assembly was declared unconstitutional;¹⁴² and provisions of the Evidence Act rendering documents relating to 'affairs of the state' inadmissible without the consent of the relevant head of department was also declared unconstitutional.¹⁴³

By contrast, in South Africa, the adoption of the Promotion of Access to Information Act (PAIA) has meant that PAIA and not the Constitution must be directly relied upon in enforcing the right. This inapplicability of the Constitution is based on the principle of constitutional avoidance, which requires that a court must avoid deciding a case as a constitutional issue if the relevant legislation can be interpreted in a manner consistent with the Bill of Rights.¹⁴⁴ The principle of subsidiarity also requires that redress must first be sought within the confines of legislation before recourse is had to direct constitutional remedies. Despite these restrictions, the Constitution can be directly relied upon where the argument is that the PAIA is inconsistent with the Constitution,¹⁴⁵ or where access to information has been breached but the PAIA does not adequately provide for redress.¹⁴⁶

Nevertheless, the implementation of the PAIA is inextricably linked to the origin of its formulation as a legislative imperative under the Constitution. As a result, 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. Effectively, the Constitution is an anchor for the PAIA. Thus, the Constitutional Court in *Stefan Brummer v Minister of Social Development* stated:¹⁴⁷

141 *Greenwatch v Attorney-General & Another* HCT-00-CV-MC-0139 of 2001.

142 As above.

143 *Zachary Olum v Attorney-General* Constitutional Petition 6 of 1999; (2000) UGCC, 3.

144 *Major General Tinyefuza v Attorney-General*, Constitutional Case 1 of 1996; (1997) UGHC, 3.

145 In *Stefan Brummer v Minister of Social Development* 2009 (6) SA 323 (CC), the argument before the Constitutional Court was whether the 30-day period within which PAIA required an appeal to courts after the refusal of access to a record was inconsistent with sec 32 of the Constitution. Thus, reference had to be made directly to the Constitution. See also *My Vote Counts v President of the Republic of South Africa* 2016 (6) SA 501 (WCC).

146 See *La Lucia Sands Share Block Ltd v Barkhan* 2010 (6) SA 421 (SCA), where PAIA was inapplicable as its wording expressly exempted the requested information from disclosure. Thus, the Constitutional Court relied on sec 32 in interpreting sec 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.

147 *Stefan Brummer* (n 145 above).

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'.

However, this is not to say that access to information laws do not offer any positive advantage other than clearly articulating the process for the implementation of the right. In Kenya, for example, the narrow limitation of the right of access to information to citizens, which was based on the interpretation of the constitutional provision on access to information, has been cured by the subsequent adoption of a definition of 'citizen' in the Access to Information Act, as discussed above.¹⁴⁸

5 Challenges to the constitutional protection of access to information

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 in the constitution; the interpretation of constitutional provisions on 'information whether as a component of freedom of expression or otherwise'; and the expansion of existing constitutional rights on freedom of expression to include access to information by reading-in the right.¹⁴⁹

However, a number of factors that affect the utility of these avenues, specifically in the African context, should be highlighted. First, the possibility of an express constitutional guarantee of access to information is often more apparent than real, considering that for most states, constitution-making is not a frequent occurrence. Furthermore, the alternative path of reviews or amendments of constitutions is often a complex process, and rightly so, since one of the features of constitutionalism is the existence of a rigorous process for the amendment of a constitution.¹⁵⁰ As a result, all African states that have incorporated specific stand-alone constitutional provisions on access to information

148 See sec 3.1.1 above.

149 This is an option in countries such as Comoros where the Universal Declaration and ICCPR are directly applicable, or in Benin where, by virtue of art 7 of the Constitution, the African Charter forms 'an integral part' of the Benin Constitution. This will not be a new phenomenon as the Constitutional Court of Benin in *Okpeitcha v Okpeitcha* relied on the African Charter in finding a violation of the duty to 'preserve the harmonious development of the family' in art 29(1). See *Okpeitcha v Okpeitcha* (2002) AHRLR 33 (BnCC 2001).

150 See generally C Fombad 'Some perspectives on durability and change under modern African constitutions' (2013) 11 *International Journal of Constitutional Law* 382.

from the state have done so not as amendments, but as part of the enactment of an entirely new constitution.

Furthermore, African constitutions have generally acquired the infamous label of ‘sham’,¹⁵¹ or ‘façade’,¹⁵² constitutions. This is so 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.

More importantly, 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 are 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 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 that 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.¹⁵³ To prevent this, scholars such as Ignatieff suggest that only ‘negative liberties’, such as life, liberty, property and security, should be protected.¹⁵⁴ Likewise, Cranston believes that only those rights that are capable of being translated into real positive rights have a universal character and amount to ‘fundamental freedoms’ or ‘primary social

151 See generally D Law & M Versteeg ‘Sham constitutions’ (2013) 101 *California Law Review* 863. The authors define a sham constitution as a constitution that ‘its provisions are not upheld in practice’. According to them, this lack of adherence may 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 more than window dressing; or fails to include core elements such as the rule of law.

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

153 See M Ignatieff *Human rights as politics and idolatry* (2001) 90, where he states that ‘[r]ights 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.’

154 Ignatieff (n 153 above) 67.

goods¹⁵⁵ should be recognised as human rights.¹⁵⁶ 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.¹⁵⁷

In any event, 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 such as 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. Thus, the impact of a constitution to a large extent is also dependent on the institutions implementing it.¹⁵⁸

6 Conclusion

Despite the intricacies connected with the constitution-making process in Africa and the sometimes apparent 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 by African constitutions. Doing so also establishes a firm foundation for the adoption, interpretation and implementation of access to information laws or other generic laws furthering the right of access to information.

By their nature, at least with regard to human rights provisions, constitutions contain general 'declaratory principles' that states undertake to abide by. These declarations 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 for

155 This concept was developed by John Rawls who described it as those 'that any rational person prefers more than less off, whatever her final aims'. See J Rawls *Theory of justice* (1971).

156 M Cranston 'Human rights, real and supposed' in DI Raphae (ed) *Political theory and the rights of man* (1967) 43. See also M Cranston 'Are there any human rights?' (1983) 112 *Daedalus* 1.

157 See generally C Beitz 'Human rights as a common concern' (2001) 95 *American Political Science Review* 269; G Dinsmore 'Debate: When less really is less – What's wrong with minimalist approaches to human rights?' (2007) 15 *Journal of Political Philosophy* 473; M Deveaux 'Normative liberal theory and the bifurcation of human rights' (2009) 2 *Ethics and Global Politics* 171.

158 See, generally, J Ihonvbere 'Politics of constitutional reforms and democratisation in Africa' in T Lumumba-Kasongo (ed) *Dynamics and policy implications of the global reforms at the end of the second millennium* (2000).

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.

Furthermore, constitutionally-protected rights require litigation for their enforcement where they have been or are likely to be violated by acts or omissions by the state or individuals. However, the reality is that in Africa, the fact remains that the vast majority of the population is poor, illiterate, generally lack awareness on constitutional rights and face substantial practical difficulties in accessing legal representation and accessing courts. Thus, navigating the complex world of constitutional litigation is left to civil society organisations with the expertise and financial resources to do so on their behalf. If successful, these organisations then must map out and implement the needed advocacy to translate judicial decisions upholding the right of access to information into tangible results. Herein lies the need for simple and inexpensive processes for exercising the right of access to information that is accessible to ordinary people and is established by law.

Therefore, access to information laws fill the necessary practical gaps that constitutional provisions are incapable of addressing. Specifically, they lay down in clear and detailed terms, the processes for the proactive disclosure of information, requesting information, the 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, all of which constitutional provisions do not provide. Overall, the combination of a constitutional guarantee of access to information and an access to information law creates a more formidable prospect for the effective enforcement of the right. However, this does not negate reliance on other generic laws within domestic legal systems giving effect to the right of access to information, although not specifically adopted for that purpose.¹⁵⁹

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 in 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(4) Constitution of Seychelles 1993 (as amended in 2011) 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 – (a) for the protection of national security; (b) for the prevention and detection of crime and the enforcement of law; (c) for the compliance with an order of a court or in accordance with a legal privilege; (d) for the protection of the privacy rights or freedoms of others.

Somalia	<p>Article 32 Provisional Constitution of the Federal Republic of Somalia, 2012</p> <p>(1) Every person has the right of access to information held by the state.</p> <p>(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.</p> <p>(3) Federal Parliament shall enact a law to ensure the right of access to information.</p>
South Africa	<p>Section 32 Constitution of the Republic of South Africa, 1996</p> <p>(1) Everyone has the right of access to –</p> <p>(a) any information held by the state; and</p> <p>(b) any information that is held by another person and that is required for the exercise or protection of any rights.</p> <p>(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.</p>
South Sudan	<p>Section 32 Transitional Constitution of South Sudan 2011</p> <p>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.</p>
Uganda	<p>Article 41 Constitution of Uganda 1995 (as amended in 2005)</p> <p>(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.</p> <p>(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.</p>
Zimbabwe	<p>Section 62(1) Constitution of Zimbabwe 2013</p> <p>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.</p> <p>Section 62(2)</p> <p>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.</p> <p>Section 62(4)</p> <p>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.</p>