

**Access to Information in Kenya: Statutory Enactment of Constitutional Rights**

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## **DEDICATION**

To God for His grace and my family and friends for their support.

## **ACKNOWLEDGMENTS**

I am greatly indebted to my supervisor Mr Humphrey Sipalla for his insight and guidance throughout this dissertation.

## **ABSTRACT**

Access to information in Kenya was not adequately catered for in law. It has taken too long to enact an access to information law thus leaving room for violation of the right of access to information. This study seeks to establish the need for statutory enactment of Access to Information Law.

The study was done through literature review on access to information and adopted a qualitative analysis. Thus establishing the scope of the right as being public and private bodies dealing with records of any form. A comparative analysis with South Africa brought out the grounds of refusal that are permissible without violating the right of access to information and role of a Commission as an oversight mechanism.

For the purpose of upholding and protecting the right of access to information in Kenya, the study recommends that legislators must formulate laws that can be easily implemented. It also proposes that instruments such as political will and open government partnership commitment must be incorporated during enactment as well as implementation.

In the end, the study concludes that enactment is necessary and will indeed uphold the right of access to information as guaranteed in Article 35 of the Constitution of Kenya 2010.

## **LIST OF ABBREVIATIONS**

ATI Access to Information

FOI Freedom of Information

PAIA Promotion of Access to Information Act

PAJA Promotion of Administrative Justice Act

PEUDA Promotion of Equality and Unfair Discrimination Act

PDA Protected Disclosures Act

## **LIST OF CASES**

*Famy Care Limited v Public Procurement Administrative Review Board and another* (Petition No 43 of 2012).

*Nairobi Law Monthly company limited v Kenya electricity generating company and 2 others,* petition No. 278 of 2012 (2013) eKLR.

*Institute for Democracy in South Africa v Africa National Congress* (2005), 9828/03, Constitutional court of South Africa.

*Guerra v Italy* (1998) 26 EHRR 357.

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## CHAPTER 1: RESEARCH PROPOSAL

### 1.0 Introduction

Kenya requires a statutory framework to realise the full promise of access to information as guaranteed by the Constitution. The right to information remains one of the most fundamental rights the world over. This owes largely to the central role it plays in realisation of other rights and democratic principles.<sup>1</sup>

The Universal Declaration of Human Rights stipulates that everyone has the right to seek, receive and impart information and ideas as part of the right of freedom of opinion and expression.<sup>2</sup>

This provision is further supplemented by Article 9(1) of the African Charter on Human and Peoples' Rights<sup>3</sup> which provides for this right and Kenya having ratified it, has obligations to adopt legislative frameworks to realise the enshrined rights and freedoms.

The Constitution of Kenya, in Article 35, recognizes the right of a citizen to demand public information held by another person and required for the exercise or protection of any right and fundamental freedom.<sup>4</sup>

This fundamental right plays a significant role in enabling citizens to hold the government accountable, exposing corruption and mismanagement.<sup>5</sup> It also reiterates the duty of the government to publish and publicise information.<sup>6</sup> There are provisions in other legislations such as the County Management Act<sup>7</sup> and the Officials Secrets Act<sup>8</sup> that have influence over the exercise of right to access information by either upholding this right or restricting it.<sup>9</sup>

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<sup>1</sup> Odote C, *Access to Information law in Kenya: Rationale and Policy Framework*, International Commission of Jurists, Nairobi, 2015 (vi).

<sup>2</sup> Article 19, *Universal Declaration of Human and Peoples' Rights* 1981. See also Mendel T, *The Public's Right to Know: Principles on Freedom of Information Legislation*, Article 19, London, 1999, 21.

<sup>3</sup> *African Charter on Human and Peoples' Rights*, entered into force 21 October 1986.

<sup>4</sup> *The Constitution of Kenya 2010*.

<sup>5</sup> Mendel T, *The Public's Right to Know: Principles on Freedom of Information Legislation*, Article 19, London, 1999, 21.

<sup>6</sup> *Axel Springer AG v Germany*, ECtHR Judgement of 10<sup>th</sup> July 2014. See also Banisar D, 'Freedom of information and access to government record laws around the world' *The Freedominfo.org Global Survey*, 2004, 14.

<sup>7</sup> Section 87, *The County Governments Act* 2012.

<sup>8</sup> *The Official Secrets Act Cap 187 Laws of Kenya*.

<sup>9</sup> Odote C, *Access to Information law in Kenya: Rationale and Policy Framework*, International Commission of Jurist, Nairobi, 2015, 4.

In South Africa the Promotion of Access to Information Act<sup>10</sup> is the legislative framework that gives effect to the constitutional right of access to information held by the state and private bodies in South Africa.<sup>11</sup> This law addresses issues such as restrictions and timely access to information.

The UN Special Rapporteur emphasizes Article 19<sup>12</sup> paragraph 3 of the ICCPR, remains pertinent in determining the types of restrictions that are in breach of states obligations to guarantee the right to freedom of expression.<sup>13</sup> The same Article 19 provides nine principles formulated to form a basis for the enactment of legislative framework. They are: maximum disclosure, obligation to publish, promotion of open government, limited scope of exceptions, processes to facilitate access, costs, open meetings; disclosure takes precedence and finally, protection for whistle blowers.<sup>14</sup> These are the basic guidelines for the enactment of access to information legislative framework to ensure the protection of the right by the state.

In the African context, cases by the African Commission on Human and Peoples' Rights<sup>15</sup> affirmed in their decisions on merits that every person shall have the right to receive information.<sup>16</sup> The African Commission also indicated that this fundamental human right is vital to an individual's personal development.<sup>17</sup>

### **1.1 Statement of problem**

The problem is that the right of access to information in Kenya is statutory enactment that has taken too long to be done, consequently, downplaying its central role in the realisation of other rights and democratic principles.

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<sup>10</sup> *Promotion of Access to Information Act* (NO.2 of 2000), Republic of South Africa.

<sup>11</sup> South African Human Rights Commission 'The Promotion of Access to Information Act (PAIA) Annual Report 2011/12' Report (2012).

<sup>12</sup> Article 19, *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171.

<sup>13</sup> Klaaren J, 'A Second Look at The South African Human Rights Commission, Access to Information and The Promotion of Socioeconomic Rights' 27 *Human Rights Quarterly*, (May 2005) 548 citing the Article 19 *International Covenant on Civil and Political Rights*, entered into force 23 March 1976..

<sup>14</sup> Article 19, 'The Public's Right to Know: Principles on Freedom of Information Legislation', June 1999.

<sup>15</sup> 284/03 *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe / Zimbabwe* (2009); 297/05 *Scanlen & Holderness / Zimbabwe* (2009); 228/99 *Law Offices of Ghazi Suleiman / Sudan* (2003); 224/98 *Media Rights Agenda / Nigeria* (2000); 225/98 *Huri - Laws / Nigeria* (2000); 232/99 *John D. Ouko / Kenya* (2000); 48/90-50/91-52/91-89/93 *Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa / Sudan* (1999); 102/93 *Constitutional Rights Project / Nigeria* (1998).

<sup>16</sup> <http://caselaw.ihrda.org/doc/search/?tp2=60724&o=60905&kw=98343&m=83&iv=63194&av=600> accessed 10<sup>th</sup> March 2016.

<sup>17</sup> Scanlen & Holderness/ Zimbabwe 297/05 ACmPHR (2009), 78.

## **1.2 Justification of study**

The issues regarding access to information have been widely documented in human rights as precedence. However, for efficacy purposes there is a need for specific legislation that governs and protects this fundamental right. There are legislations regarding access to information such as the Official Secrets Act, Defamation in the Penal Code, the Statistics Act (2006), the Public Archives and Documentation Act, and the National Assembly (Privileges and Immunities) Act. These laws act as restrictions to enjoyment of the right rather than upholding it. They ought to be amendment such as to accommodate the enactment of the access to information framework. The presence or lack thereof of its impact in the realm of human rights will inform the development of laws.

This proposal seeks to research whether our current legal framework can accommodate the enactment of legislations pertinent to the protection of the right of access to information.

## **1.3 Research objective**

The research aims to establish the need for statutory enactment of access to information law.

## **1.4 Questions for research**

The following questions will be posed:

1. Based on the comparative analysis on South Africa's ATI law, should Kenya pursue enactment of its own ATI law?
2. What are the necessary components of an access to information (ATI) law that is consistent with accepted human rights standards?

## **1.5 Methodology**

The study will use a qualitative approach to its study. It involves a study of ATI laws in other jurisdictions as well as Kenya laws that provide for the access to information.

This method will help frame and contextualise the situation at hand and as such will provide a ground for searching for answers.

## **1.6 Theoretical framework**

The social contract theory addresses the question of the origin of society and the legitimacy of the authority of the state over the individual.<sup>18</sup> The argument behind the social contract theory is that individuals have consented, explicitly or tacitly, to surrender some of their

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<sup>18</sup> <http://www.iep.utm.edu/soc-cont/> accessed 22 Feb 2017.

freedom and submit to the authority of the ruler in exchange for the protection of their rights.<sup>19</sup>

A state is formed to enforce the protection of the human rights guaranteed to an individual and restrain conflict that arise from a person's selfish nature. Accordingly, persons that enter into an agreement amongst themselves neither to inflict nor to suffer harm. Thus, the state and the law come into existence as a contract to facilitate cooperation among men.<sup>20</sup>

Collins Odote affirms that the theoretical arguments for the right of access to information are derived from the whole idea of representative democracy which is anchored on the social contract theory.<sup>21</sup> The representative democracy theory posits that the government exists to serve the people by virtue of the sovereignty of the people that is affirmed in Article 1 of the Constitution of Kenya 2010. Therefore, the information that is collected and stored by the government is held in trust for the people and should be accessible to them.

### **1.7 Literature review**

In the first session in 1946, the United Nations General Assembly adopted Resolution 59(1) expressing the hope and promise that freedom of information is a fundamental human right and is the touchstone of all the freedoms to which the United Nations is consecrated.<sup>22</sup> This launched a global commitment to government transparency which increasingly recognised the key role of information access for uncovering abuses and corruption, ensuring accountability, facilitating decision-making and allowing self-expression, among other goals.

The Inter-American Court of Human Rights was the first international human rights court to recognise access to (government) information as a human right in the *Claude Reyes* case.<sup>23</sup>

In Africa, the adoption of the Model Law on Access to Information for Africa provides guidance on the form and content of the legislation to be enacted to give effect to the state parties' obligations under the African Charter. This way the African Commission went beyond the prior intention of the Declaration of Principles on Freedom of Expression in Africa and left the specific form in which such laws are adopted to individual state parties.<sup>24</sup>

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<sup>19</sup> Okwudiba N, 'Introduction to Politics' 2ed, Longman, 2012, 19.

<sup>20</sup> Okwudiba N, 'Introduction to Politics' 2ed, Longman, 2012, 19.

<sup>21</sup> Odote, *Access to Information Law in Kenya*, 7.

<sup>22</sup> Resolution 59(1), United Nations General Assembly (UNGA), 14<sup>th</sup> December 1946.

<sup>23</sup> Amin A, 'Freedom of information and national security: a study of judicial review' Herbert Utz Verlag Munchen, 2014, 39. Amin discusses Freedom of Information within the Inter- American court including the case *Claude Reyes v Chile*, IACtHR Judgement of 19 September 2006, (merits, reparations and costs) 77.

<sup>24</sup> Model law on Access to Information for Africa available at [www.achpr.org/instruments/access-information/](http://www.achpr.org/instruments/access-information/) accessed: 14 February 2016.

As a result there are 9 countries that have successfully enacted access to information laws in Africa.<sup>25</sup> These are Angola, Ethiopia, Guinea, Liberia, Niger, Nigeria, South Africa, Uganda and Zimbabwe.

In 2015, research prepared for The Kenyan Section of the International Commission of Jurists (ICJ Kenya) by Collins Odote gave insight into the need for the access to information law in Kenya. South Africa was reflected in this research as among the best practice countries in the protection of this right by enactment and implementation of the Promotion of Access to Information Act.<sup>26</sup> The Act was enacted pursuant to South Africa's constitutional provisions in Article 32(2) "National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burdens on the state."<sup>27</sup>

The access to information law in South Africa included an important innovation of the law, the requirement for publications of manuals by public and private bodies with comprehensive details on how to access information held by them.<sup>28</sup> The Human Rights Commission was given the same obligation to publish a simple and detailed guide on how to use the Act. These provisions are potent in operationalising access to information because they simplify the law and enable the public to understand how to access such information.<sup>29</sup>

In the research, the author identifies the aspect of voluntary disclosure and automatic availability of information in both public and private bodies as a positive aspect in upholding the right of access to information. Section 15<sup>30</sup> of the Act does not require application for disclosure of information thus availing justice.<sup>31</sup>

Back in Kenya, access to information in the two public aspects: procurement processes and decisions on financial management are important for deterring, detecting and prosecuting corruption.<sup>32</sup> Nonetheless, the country aspires for positive information that enhances development through the content the Vision 2030, the main economic blueprint.<sup>33</sup>

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<sup>25</sup> <http://www.chr.up.ac.za/index.php/ati-resources.html> Accessed: 14 February 2016.

<sup>26</sup> *Promotion of Access to Information Act* (NO.2 of 2000), Republic of South Africa.

<sup>27</sup> *The Constitution of the Republic of South Africa* (1996).

<sup>28</sup> Odote C, *Access to Information law in Kenya: Rationale and Policy Framework*, 10.

<sup>29</sup> Odote C, *Access to Information law in Kenya: Rationale and Policy Framework*, 14.

<sup>30</sup> *Promotion of Access to Information Act* (NO.2 of 2000), Republic of South Africa.

<sup>31</sup> Section 15, *Promotion of Access to Information Act* (NO.2 of 2000), Republic of South Africa.

<sup>32</sup> Odote C, *Access to Information law in Kenya: Rationale and Policy Framework*, 25.

<sup>33</sup> Republic of Kenya, *Vision 2030* (Nairobi, 2008), Sessional paper No.10 of 2012 on Kenya vision 2030, pp.9.

Furthermore Odote also reiterates the important role of such law in the realisation of other human rights as was recognised by the United Nations General Assembly in its concluding remarks that “Freedom of Information is a fundamental human right and the touchstone for all freedoms to which the United Nations is consecrated.”<sup>34</sup> For instance the access to information law would play a major role in realizing the media freedom in Kenya which is reliant on information.

### **Limitations**

The study shall be limited by the following circumstances:

1. Time

Precision and clarity is necessary therefore the research requires adequate time for research.

### **Assumptions**

1. The information from resources obtained is up to date.
2. The study of the right of access to information is not redundant.

### **1.8 Chapter break down**

In Chapter 1, the content is basically introduction and the background of the information that the dissertation will deal with.

Chapter 2 the literature review will discuss the scope of the right of access to information and the function of the right with regards to other fundamental human rights. Whereas, Chapter 3 will discuss the process of realisation of the necessary legislation and framework for ATI; a study on the progress behind the enactment of the legislative framework in Kenya and finally identifying the necessary instruments that will be required to realise this framework.

Chapter 4 will focus on a comparative analysis of South Africa’s access to information law. It is a comprehensive study of the process of enacting the South African ATI law. From this study we identify the niche that is yet to be addressed in ATI law.

Lastly, Chapter 5 will summarize the findings of the study providing recommendations and a conclusion to the study.

### **Timeline/ duration**

Begins March 2016 to January 2017.

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<sup>34</sup> UN General Assembly (1946) Resolution 59(1), 65th Plenary Meeting.

## CHAPTER 2: ACCESS TO INFORMATION

### 2.0 Introduction

Following the adoption of Resolution 59(1) by the United Nations General Assembly in 1946, there has been an increased global commitment to government transparency as a means to enforce the right to information. However, research done on countries in Africa that have enacted an access to information law illustrate that the existence of such law does not guarantee transparency.<sup>35</sup>

This chapter will review the works of scholars and the AU Model Law on Access to Information highlighting the scope of application of the right and its function with regards to other fundamental human rights.

### 2.1 The scope of the right to access to information

The AU Model Law on Access to Information for Africa provides guidance on the form and content of the legislation to be enacted to give effect to the state parties' obligations under the African Charter. Part II of the Model Law provides the scope of the right to access information as limited to information held by public bodies, relevant private bodies and private bodies that are obliged to create, keep, organise and maintain information in a manner that facilitates this right.<sup>36</sup> From my perspective, scope can be put into two categories, first the bodies with the obligations to uphold this right and secondly the type of information or content. When establishing access to information law, it helps to have a wide scope of application that would be inclusive and leave little room for ambiguity.<sup>37</sup> Therefore the aspect of having broad definitions that are specific yet expound the necessary details, would aid in averting grey areas that would be subjected to one's discretion.

#### 2.1.1 The type of bodies with obligations to uphold the right of access to information

As earlier mentioned, Section 6(1) of the AU Model Law stipulates that public bodies, relevant private bodies and private bodies ought to adhere and uphold this right.

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<sup>35</sup> <https://www.idrc.ca/en/article/access-information-gains-ground-africa> accessed: 4 November 2016.

<sup>36</sup> Section 6(1), *Model Law on Access to Information for Africa*, Prepared by the African Commission on Human and Peoples' Rights.

<sup>37</sup> Janssen K and Eechoud M, 'Rights of access to public sector information' 6(3) *Masaryk Univesity Journal of Law and Technology*, 2012, 475.



A public body is defined as any body that is either established in the constitution, statute or which forms part of any branch of government.<sup>38</sup> A relevant private body means a body that would otherwise be a private body under this act that is: owned totally or partially or controlled or financed, directly or indirectly, public funds, but only to an extent of that financing or carrying out a statutory or public function or a statutory or public service but only to the extent of that statutory or public function or that statutory or public service.<sup>39</sup> Whereas a private body refers to a natural person who carries on or has carried on any trade, business or profession or activity, but only in such capacity; a partnership which carries on or has carried on any trade, business or profession or activity; or any former or existing juristic person or any successor in title; but excludes public bodies and relevant private bodies.<sup>40</sup> These three bodies ought to publish the relevant information so that it is availed to the public and those concerned.

### **2.1.2 The type of information**

The information held by either public body, relevant private bodies and the private bodies includes any original or copy of documentary material irrespective of its physical characteristics, such as records, correspondence, fact, opinion, advice, memorandum, data, statistic, book, drawing, plan, map, diagram, photograph, audio or visual record, and any other tangible or intangible material regardless of the form or medium in which it is held, in the possession or under the control of this information holder to whom a request has been made under the act.<sup>41</sup> Any information held by these bodies and falls within the described categories, should be accessible to the requester. Albeit, instances that the nature of the information would override public interest, the information holder may refuse a requester access to information if 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.<sup>42</sup> An information officer may refuse a request for information if its release would involve the unreasonable disclosure of personal information about a natural third party.<sup>43</sup>

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<sup>38</sup> Section 1, *Model Law on Access to Information for Africa*, Prepared by the African Commission on Human and Peoples' Rights.

<sup>39</sup> Section 1, *Model Law on Access to Information for Africa*.

<sup>40</sup> Section 1, *Model Law on Access to Information for Africa*.

<sup>41</sup> Section 1, *Model Law on Access to Information for Africa*.

<sup>42</sup> Section 25(1), *Model Law on Access to Information for Africa*.

<sup>43</sup> Section 27(1), *Model Law on Access to Information for Africa*.

Quintessentially, commercial and confidential information of an information holder or a third party may be exempted from accessible information. A refusal can be granted if the information contains trade secrets of the information holder or a third party that would substantially prejudice a legitimate commercial or financial interest of the information holder or a third party.<sup>44</sup> However the disclosure of such information would facilitate accountability and transparency of decisions taken by the information holder, relates to the expenditure of funds, reveals misconduct or deception, the third party consents to the disclosure or information is in the public domain. Whereas information that is likely to endanger the life, health or safety of an individual<sup>45</sup> or that which would cause substantial prejudice to the security or defence of the state<sup>46</sup> would be exempted from accessible information. This list is not exhaustive, there are other exempted information within the Model Law which give reasonable expectations for the requester and the extent to which the information holder can limit access to information. The Model Law expressly states that “classified information” a term used to deter requesters from accessing information, cannot be used as a basis for refusal of access by the information holder.<sup>47</sup> The legislation must then delineate the type of information that is accessible and clearly distinguish the nature of information held by these three bodies.

### **2.1.2.1 Distinction of the nature of information**

The Nigerian National Assembly passed the Freedom of Information Act in May 2011 whose main purpose was “To make public records and information more freely available, provide for public access to public records and information, to the extent consistent with the public interest and the protection of personal privacy...”<sup>48</sup> The purpose of any access to information law presents the issue of distinguishing the nature of information that could be availed to the public and what contributes to its classification.<sup>49</sup>

Scholars Ackerman and Sandoval-Ballesteros are of the opinion that the spread of liberal democratic practices alongside new challenges owing to technological change in the last decades account for contestations over what constitutes information, who owns it and why it

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<sup>44</sup> Section 28 (1) *Model Law on Access to Information for Africa*.

<sup>45</sup> Section 29, *Model Law on Access to Information for Africa*.

<sup>46</sup> Section 30, *Model Law on Access to Information for Africa*.

<sup>47</sup> Section 27, *Model Law on Access to Information for Africa*.

<sup>48</sup> Preface, *Freedom of Information Act 2011*, Laws of the Federation of Nigeria.

<sup>49</sup> Bouris A and Carter M, *Freedom of information, balancing the public interest*, 2ed London, 2006,2.

is important to nation-states, citizens and governing authorities.<sup>50</sup> With the evolution of the system largely contributed by the advancement of technology, there are emerging issues that ought to be addressed by the access to information laws.<sup>51</sup> The laws are bound to constantly evolve to accommodate and ensure there are clear demarcations on the types of information that is accessible to the public and those that are classified.<sup>52</sup>

The situation in Kenya prior to the passing on the Access to Information Act was a bit difficult to identify the scope of the right. One had to find the trails in precedent or different statutes with regard to access to information. There was no comprehensive legislation to consolidate the relevant laws in protection of this right. The Constitution of Kenya gives a scope of application of the right to access information in Article 35 which stipulates that every citizen has the right of access to information held by the State and by another person and required for the exercise or protection of any right or fundamental freedom.<sup>53</sup> Thus, adding on to the limitation in the constitution, the right to state-held information and any other persons. Such a scope is not as inclusive as the one given in Model Law. However the case *Famy Care Limited v Public Procurement Administrative Review Board and Another*, the Court held based on Article 35<sup>54</sup> that this right is only enjoyable by Kenyan citizens and not foreigners. It went on further to emphasise that the right is enjoyable by natural citizens of Kenya and not Kenyans juridical persons such as corporations or associations.<sup>55</sup> Thus limiting the scope not just to any persons, rather natural persons that are of Kenyan citizenship and excluding corporations which can be considered as private bodies according to the Model Law.

The distinction of the nature of information also helps in the formulation of the limitations of the right. For instance, information that is deemed to be a threat to national security would be categorised under the list of limitations because of the nature of the information and the effect it bears on the requester as well as the state.

In 2002, a treaty on access to official documents held by national government and non-governmental bodies were developed by the Committee of Ministers of the Council of

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<sup>50</sup> Ackerman J and Sandoval B, 'The global explosion of freedom of information laws' 58(1) *Administrative Law Review*, 2006, 95.

<sup>51</sup> Seyram A and Omolade A, 'Whose freedom? Whose information? Discourse on freedom of information policies' 5 *Journal of Information Policy*, 2015, 180.

<sup>52</sup> Bouris A and Carter M, *Freedom of information, balancing the public interest*, 2ed London, 2006,2.

<sup>53</sup> Article 35(1) (a) and (b) *The Constitution of Kenya*, 2010.

<sup>54</sup> Article 35, *The Constitution of Kenya*, 2010.

<sup>55</sup> *Famy Care Limited v Public Procurement Administrative Review Board and another* (Petition No 43 of 2012).

Europe for their member states. In the treaty, the key principle arose whereby the member states should guarantee everyone the right to access, on request, to official documents held by public authorities.<sup>56</sup> Moreover the applicant shall not be required to give reasons for his request. This provision is not to say that there should be no limitations rather that the limitations should be reasonable and proportionate.

The above principle that guarantees the right to access official documents in Europe is an illustration that the scope of the right should be enjoyed by all persons within the reasonable limitations provided in the law.

## **2.2 Function of the right with regard to other fundamental human rights**

### **2.2.1 Right to access information as leverage right**

Mukelani Dimba, maintains that it is when freedom of information is used as a leverage right for the protection or promotion of other socio-economic rights that it finds real meaning in the context of a developing country.<sup>62</sup> This is illustrated in South Africa's Promotion of Access to Information Act 2000 which stipulated that its intention was to promote a human rights culture and social justice, transparency, accountability and good governance of both public and private bodies.<sup>63</sup> Human rights culture is critical in a democratic society and a state that has a freedom of information law is essentially on the fast track to upholding social justice. In this case, the law can be considered a means to an end (human rights, justice and good governance), as a catalyst to the process to attaining these state goals.

### **2.2.2 Direct influence over the other fundamental rights**

In the case *Guerra and others v Italy*<sup>64</sup> where the applicant accused the Italian state of not disclosing the information pertaining to the explosive gaseous emissions by a chemical factory that was a kilometre away from his premises, the Court held that the state had violated a positive obligation inherent in Article 8 having given insufficient information about health risks and evacuation plans in case of an accident pertinent to the existence of a chemical factory in the vicinity where the plaintiff lived.<sup>65</sup> The European Commission of

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<sup>56</sup> Article 3, *Council of Europe Convention on Access to Official Documents*, Trosno, (18.vi.2009), Council of Europe Treaty series no.205.

<sup>62</sup> Mukelani D, *Access to information as a tool for socio-economic justice*, Paper presented at the International Conference on Right to Public Information, Atlanta, GA 2008, 4.

<sup>63</sup> Peekhaus W, 'South Africa's Promotion of Access to Information Act: An analysis of relevant jurisprudence' 4 *Journal of Information Policy*, 2014, 571.

<sup>64</sup> *Guerra v Italy* (1998) 26 EHRR 357 para 76.

<sup>65</sup> *Guerra v Italy* (1998) 26 EHRR 357 para 90.

Human Rights deduced that this was a violation of the Article 10<sup>66</sup> however the Court had a contrary opinion. The Article is perceived to only be applicable in theory and seems to reflect the character of a negative right<sup>67</sup> as extracted from the statement ‘without interference by public authority’.<sup>68</sup>

The right to access information is necessary as a fundamental right and it has been identified to be intertwined to other fundamental rights. There is a connection among most fundamental rights, right to information has a direct influence over the other fundamental rights to aid in the implementation of those rights.

The Committee of Ministers of the Council of Europe Recommendation on Access to Official State-held documents suggested the scope of the right should be limited to only public documents. Without imposing on the member states’ application of these recommendations, they ought to examine as per the state’s national law and practice the extent of application of recommendation to information held by the organs of the state.<sup>69</sup> The AU Model Law on Access to Information for Africa was created for the purpose of facilitating the adoption of national legislation.<sup>70</sup> However each state party must determine the nature and scope of the adjustments that may be required to the content of the Model Law based on the provisions of its constitutions and the structure of its own legal system.<sup>71</sup>

On that note, there is an assumption that most states have different regulations on the official documents that are of public nature.<sup>72</sup> Therefore, implementation of recommendations provided for the enactment of legislation to do with access to information may not be on similar grounds across the states. Limitations are expected in such cases but only to the extent permissible by law and expressly provided for in the law. These limitations must not impede the democratic rights of the people of Kenya and must be proportional to the aim of protecting a “legitimate interest”.

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<sup>66</sup> Article 10, *European Convention of Human Rights*.

<sup>67</sup> A negative right is defined as a right that is not subjected to an action of another person or group, such rights permit or oblige inaction.

<sup>68</sup> Banisar D, ‘Freedom of information around the World: A Global Survey of Access to Government Record Laws’, *Privacy International*, 2006, 78.

<sup>69</sup> Access to official documents guide, Council of Europe, 2004, 25.

<sup>70</sup> Introduction of *Model Law on Access to Information for Africa*, Prepared by the African Commission on Human and Peoples’ Rights, 8.

<sup>71</sup> Introduction of *Model Law on Access to Information for Africa*, prepared by the African Commission on Human and Peoples’ Rights, 8.

<sup>72</sup> Banisar D, Freedom of information around the world, 80.

There has been advocacy for a both a stand-alone legislation and inclusion of access provisions in other legislation.<sup>73</sup> In Kenya, the state relies on inclusion of access provisions in other legislation which does not suffice in the enforcement of the right to access information. The need for a stand-alone legislation is hinged on the fact that there is a prevalence of ‘grey areas’ that are not addressed in other legislations. The aspects of freedom of information laws found in adjacent legislations are tailored to fit their objectives for implementation rather than the general purpose of freedom of information.

The current regulations of access to information have been spread out across different areas of government institutions. An example is the Communications Authority of Kenya that is established in the Kenya Information and Communication Act by licensing and regulating the information and communication in the media and broadcasting stations.<sup>74</sup>

### **2.2.3 Public participation and the right to information**

The principle of public participation requires that the community or the people concerned are availed to the necessary information up to an extent that aids in their decision making process. The right to information is a key instrument that can enable this principle to be exercised. It involves the right to access and the right to receive information. This raises the issue of whether there is a mandatory duty that the public bodies, private bodies or the state bear to avail the information to the public.

The European Court of Human Rights did not endorse the opinion that the state bore the duty to provide the information by distinguishing the right to receive information without interference from independent media and the right to access state-held information.<sup>75</sup> However, the Court stated in the case *Leander v Sweden*<sup>76</sup> that “freedom to receive information basically prohibits the government from restricting a person from receiving information that others wish or may be willing to impart to him. That freedom can be construed as imposing on a state, in circumstances such as those of the present case, positive obligations to collect and disseminate information of its own motion.”<sup>77</sup> Wouter construed in 2007, “in circumstances such as those of the present case” suggested that there might be

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<sup>73</sup>Odote C, *Access to Information law in Kenya: Rationale and policy framework*, viii.

<sup>74</sup>*Kenya Information and Communication Act* CAP 411 A.

<sup>75</sup>Voorhoof D and Cannie H, ‘Freedom of expression and information in a democratic society that added but fragile value of the European Convention on Human Rights’, 72 (4-5), *International Communication Gazette*, 2010, 414.

<sup>76</sup>*Leander v Sweden* (1987) 9 EHRR 433 para 74.

<sup>77</sup> Also see *Guerra v Italy* (1998) 26 EHRR 357 Para 53. The commission had ruled that Article 10 imposed a duty to collect, process and disseminate certain environmental information, which by its nature could not otherwise come to the knowledge of the public.

situations in which a positive obligation for the state does exist but the Court never established it in any of its case law at the time.<sup>78</sup> This illustrates that there has to be an express provision in the access to information law that confers the duty of publishing and disseminating information to the state and the relevant bodies as stated in the legislation. Otherwise without such provision, the ambiguity of the provision would cripple implementation and may harbour public participation.

### **2.3 Conclusion**

The scope of the right to information as it stands is inclined towards the public offices and the relevant private bodies. However, a broader scope would be preferable to avoid the use of discretionary powers. The efficacy of the law is not determined by the content but by the practicality of implementation. Thus the goal is to make laws that are avail justice and uphold the rights and freedom of the people rather than laws that only appeal to the lawmakers hence limited to their preferences.

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<sup>78</sup>Wouter H and Dirk V, 'Access to state-held information as a fundamental right under the European Convention on Human Rights' 3 *EU Const* 2007, 119.

## **CHAPTER 3: THE REALISATION OF THE LEGISLATION AND FRAMEWORK FOR ACCESS TO INFORMATION**

### **3.0 Introduction**

The Access to Information Bill was signed into law on 31<sup>st</sup> August 2016. This marked the end of a very long arduous journey of draft bills being debated and rejected in Parliament. This chapter will discuss the study on the progress behind the enactment of legislative framework in Kenya and identify the necessary instruments used to realise such a framework. The progress shall be assessed by looking into the relevant reports submitted concerning the state of freedom of information in Kenya.<sup>79</sup>

### **3.1 A study on the progress of the enactment of the legislative framework in Kenya**

The process of enacting an access to information legislation that ought to uphold freedom of information in Kenya began in the year 2001. There have been five draft bills presented in Parliament in 2002, 2005, 2008, 2013 and most recently 2015. Efforts to pass access to information legislation in Kenya have either been initiated by civil society or the Government.<sup>80</sup> It is also indicative that most efforts to introduce these Bills in Parliament have been through private members.<sup>81</sup> Despite all those bills being shelved, Kenya's Access to Information Bill was published and tabled in Parliament in August 2015 as a private members bill.<sup>82</sup> Meanwhile, as we awaited the passing of the bill, other relevant regional treaties and the Model Law were operative.

#### **3.1.1 The role of the African Commission on Human and Peoples' Rights in ATI legislation enactment**

Kenya as a state party to the African Charter is required to periodically inform the African Commission on Human and Peoples' Rights about the state of the right to information in the country. This facilitates the requirements under Article 62 of the African Charter obliging every state party, "...to submit every two years...a report on the legislative or other measures

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<sup>79</sup> On 11 March 2015 the Government of Kenya submitted the initial and combined state report in line with Article 62 of the African Charter on Human and Peoples' Rights. [http://www.achpr.org/files/sessions/57th/state-reports/8th-11th-2008-2014/kenya\\_state\\_report\\_eng](http://www.achpr.org/files/sessions/57th/state-reports/8th-11th-2008-2014/kenya_state_report_eng) (Accessed 3 November 2016).

<sup>80</sup> ACHPR, *A Shadow report on freedom of information in Kenya*, prepared by The Africa Freedom of Information Centre in consultation with Article 19 East and Horn of Africa and the International Commission of Jurists- Kenya, Kampala Uganda, 2015, 4.

<sup>81</sup> [http://www.achpr.org/files/sessions/57th/state-reports/8th-11th-2008-2014/kenya\\_state\\_report\\_eng](http://www.achpr.org/files/sessions/57th/state-reports/8th-11th-2008-2014/kenya_state_report_eng) (Accessed on 3 November 2016).

<sup>82</sup> Kenya Parliament Order Papers Wednesday 19 August <http://www.parliament.go.ke/the-nationalassembly/house-business/order-papers?limitstart=0> (Accessed 2 November 2016).



taken, with a view to giving effect to the rights and freedoms recognized and guaranteed by the Charter.” However the Government of Kenya had consistently violated Article 62 of the Charter by not reporting to the ACHPR as required and as a result Kenya was overdue by four reports.<sup>83</sup> Consequently, Kenya combined all those four reports into one which limited its ability to address all the important issues that would have been addressed in each report.

Meanwhile, the Model law was operative as a guideline for the drafting process. This meant that Kenya could refer to it during formulation, adoption or for reviewing the access to information legislation such that the state could meet a minimum threshold of good practice and providing uniform benchmarks for effective implementation the right to information.<sup>84</sup>

### **3.1.2 Meeting the thresholds set by applicable access to information legal framework**

The uniform benchmarks can be equated to the standards set by the three major application frameworks: the African Charter itself, the African Commission’s Declaration of Principles on Freedom of Expression in Africa and lastly the African Commission is Model Law on Access to Information.<sup>85</sup> The African Charter in Article 9.1 sets the standard that every individual has the right to receive information. The African Commission on Human and Peoples’ Rights Declaration of Principles on Freedom of Expression in Africa enables a state to adhere to the Principles of freedom of expression in Africa and ensure that the law is in tandem with Article IV of the Declaration.<sup>86</sup> Lastly, the African Commission on Access to Information ensures that a state’s bill or law reflects the spirit of the Model law.<sup>87</sup> These three legal frameworks set the threshold for the enactment of a viable freedom of information law in Kenya.

From the recommendations spread out across the reports of the year 2008 to 2014 on the freedom of information in Kenya across the years we can decipher whether the above thresholds were met. The report on the freedom of information bill of 2015 which was the most recent report.<sup>88</sup>

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<sup>83</sup> A Shadow report on freedom of information in Kenya (Prepared by The Africa Freedom of Information Centre in Consultation with Article 19 East and Horn of Africa and the International Commission of Jurists-Kenya) 2015 ACHPR Observer reference number 434, Kampala Uganda.

<sup>84</sup> Preamble, African Commission Model Law on Access to Information 2013.

<sup>85</sup> Amour C, ‘Access to information Indaba’ 37(3) *Journal of Modern African Studies*, 1999, 552.

<sup>86</sup> Amour C, Access to information Indaba, 553.

<sup>87</sup> Amour C, Access to information Indaba, 553.

<sup>88</sup> The Report based on Kenya’s state of freedom of information combined 8<sup>th</sup>-11<sup>th</sup> Periodic report for the year 2008-2014. [http://www.achpr.org/files/sessions/57th/state-reports/8th-11th-2008-2014/kenya\\_state\\_report\\_eng](http://www.achpr.org/files/sessions/57th/state-reports/8th-11th-2008-2014/kenya_state_report_eng) Accessed on 3 November 2016.

A number of issues arose after assessment of the draft bills that were set aside for possible amendments.

First, contrary to the standard set in the African Charter on Human and Peoples' Rights, the Constitution of Kenya 2010, limited enjoyment of the right to only citizens of Kenya. The freedom of information is a universal right and should be reflected as so by letting every person including foreigners to access information. It would also seem that the scope of the right in the bill was limited to only natural persons and public bodies thus leaving out private bodies.<sup>89</sup>

Secondly, in chapter 1 of this paper, I briefly mentioned the nine principles formulated under Article 19 of the ICCPR as a basis for enactment of legislative framework. The African Commission Declaration of Principles on Freedom of Expression in Africa is heuristically applicable in this case.<sup>90</sup> The ATI law in Kenya has adhered to most of the principles, albeit two.

First, the principle of maximum disclosure is undermined by limitations on interpretations of constitutional provisions contained in Article 35 by way of developing jurisprudence that limits the scope and implementation of the right to information.<sup>91</sup>

Secondly, the principle of the obligation to publish key information and the principle to promote an open government is undermined by poor proactive disclosure methods, open data limitations and the lack of established proactive disclosure regimes. These principles had been undermined in the proposed Freedom of Information Bill 2015 and would have diluted the legitimacy of the law.

In light of the thresholds established by the regional treaty and the role of the African Commission during Kenya's process of enactment, the progress on statutory enactment of freedom of information law is already subjected to oversight mechanisms that ensure that the spirit of the law is in tandem with the Model Law.

## **3.2 Challenges facing implementation of Access to Information Law**

### **3.2.1 Culture of secrecy**

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<sup>89</sup> *Nairobi Law Monthly company limited v Kenya electricity generating company and 2 others*, petition No. 278 of 2012 (2013) eKLR para 34.

<sup>90</sup> 'The Johannesburg principles on national security, freedom of expression and access to information' 20(1) *Human Rights Quarterly*, 1998, 7.

<sup>91</sup> The Report based on Kenya's state of freedom of information combined 8<sup>th</sup>-11<sup>th</sup> Periodic report for the year 2008-2014. Available at [http://www.achpr.org/files/sessions/57th/state-reports/8th-11th-2008-2014/kenya\\_state\\_report\\_eng](http://www.achpr.org/files/sessions/57th/state-reports/8th-11th-2008-2014/kenya_state_report_eng) (Accessed on 3 November 2016).

In a society where corruption and other crooked methods are poignant in the Government, it is almost impossible to expect transparency or accountability.<sup>92</sup> Moreover, the perpetrators of such atrocities could also be the lawmakers in Parliament, thus jeopardizing the legitimacy of the law. There is a culture of secrecy that has been brewing over the years within the Government, private bodies and the public bodies. It has been disguised by the likes of classified information and laws that restrict the enjoyment of freedom of information to hide the atrocities committed within the society.<sup>93</sup> This culture has stifled the enactment process of the Access to Information Law in Kenya. As mentioned earlier, the Government can begin with repealing restrictive and contradictory provisions to freedom of information in legislations to slowly unearth this culture that is imbedded in our society.

### **3.2.2 Lack of information**

Public participation has been identified in this chapter as an instrument for realising the freedom of information legislation in Kenya. This means that the government should avail relevant information concerning policy making and enactment of laws to the public.<sup>94</sup> This will enable the public to weigh in the process by making contributions, suggesting amendments and protecting their interests. Also, public participation can be an oversight measure by assessing the data and checking for corruption.<sup>95</sup> As a result it would promote accountability on the part public officials since they know that their actions are subject to scrutiny.<sup>96</sup> Accordingly, in the absence of the requisite information it would be very difficult for any member of the public to participate meaningfully in the affairs of the Government.<sup>97</sup> Without information the citizens may not have an insight into the functioning of Government or participate in its decision-making processes.<sup>98</sup>

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<sup>92</sup> Roberts A, 'Less government, more secrecy: reinvention and the weakening of freedom of information law' 60(4) *Public Administration Review*, 2000, 312.

<sup>93</sup> Roberts A, 'Less government, more secrecy', 313.

<sup>94</sup> Reylea H, 'Access to government information in the information age' 46(6) *Public Administration Review*, 1986, 636.

<sup>95</sup> Bacio-Terracino J, 'Linking corruption and human rights' 104 *American Society of International Law*, 2010, 244.

<sup>96</sup> Abuya E, 'Towards promoting access to information in Kenya', for Access to Information of the African Network of Constitutional Lawyers, April 2011, 12. [https://spaa.newark.rutgers.edu/sites/default/files/files/Transparency\\_Research\\_Conference/Papers/Abuya\\_Edwin](https://spaa.newark.rutgers.edu/sites/default/files/files/Transparency_Research_Conference/Papers/Abuya_Edwin)

<sup>97</sup> Johnson S, 'The internet changes everything: revolutionizing public participation and access to government information through the internet' 50(2) *Administrative Law Review*, 1998, 295.

<sup>98</sup> Presentation by Charmaine Rodriguez 'Why Freedom of Information Legislation in Kenya? Strategies towards FOI Legislation in Kenya' in the Report on the consultative workshop to discuss the ICJ- Kenya draft Freedom of Information Bill 2000 held at Mt. Kenya Safari club on the 29 Sep to 2 Oct, 6. Available at [http://www.humanrightsinitiative.org/programs/ai/rti/international/laws\\_papers/kenya/foi\\_workshop\\_report](http://www.humanrightsinitiative.org/programs/ai/rti/international/laws_papers/kenya/foi_workshop_report)

### **3.2.3 Emerging issues in the Technology sector**

With the rapid advancement of technology which has been hailed for making the world a global village, there is an emergence of issues that are constantly evolving. Information dominance is shifting from the brick and mortar world into the digital sector. Thus making laws that were only applicable in the former regime almost obsolete. Also information in the digital regime is susceptible to hacking hence raising the sensitive issue of privacy in information.<sup>99</sup> This has changed the dynamics of the law, requiring it to be vigilant and aggressive to constantly keep up with the changes and enhancing its viability.<sup>100</sup>

### **3.3 Conclusion**

The road to a viable access to information law in Kenya is feasible. There have been setbacks from the onset of the journey but that did not undermine the process. Now that the Law has been passed, implementation is the key to realising and protecting freedom of information as a right for every individual.

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<sup>99</sup> Maveal G, 'Access to information held by the state and privacy' 38 *The American Journal of Comparative Law*, 1990, 503.

<sup>100</sup> Johnson, *The internet changes everything*, 291.

## CHAPTER 4: A COMPARATIVE ANALYSIS OF SOUTH AFRICA'S FREEDOM OF INFORMATION LAW

South Africa is on the frontline in the region in the enactment of a statutory legislation that uphold and protect the right of access to information. For the state to become a participatory democracy, it required an educated people and information to thrive. Information was deemed important because with background knowledge about issues and the government's manner of addressing those issues, it would be easier to determine the ability of the electorate to make informed and intelligent decisions regarding the state.<sup>101</sup>

### 4.0 Background and history of freedom of information

Freedom of information in South Africa is part and parcel of the post-apartheid overhaul of the anti-democratic system. The apartheid era was cloaked in secrecy. Legislations that existed prior to independence of South Africa permitted official secrecy that was otherwise known as statutory censorship and controlled majority of public life. Consequently, there were inhibitions when it came to comprehensive reporting of national affairs by the press. The restrictions on public access to official records were not exceptional but they were manipulated to secure an extra-ordinary degree of opacity in government, hence distorting the country's national information system.<sup>102</sup> The 1996 Constitution was hinged on the protection of human rights and the right of access to information was included in the robust bill of rights in the Constitution. This move was meant to avert the mistakes that occurred during the dark regime of apartheid where the control of information and enforced secrecy was at the heart of the anti-democratic character of the heinous system.<sup>103</sup>

Thus in the denouement of that era, the legal aspects of freedom of information in South Africa were explored in two major conferences.<sup>104</sup> The conferences consolidated the political will to make access to information a fundamental principle of new democratic dispensation

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<sup>101</sup> Harris V and Merret C, 'Toward a culture of transparency public rights to access to official records in South Africa' 57(4), *The American Archivist*, 1994, 681.

<sup>102</sup> Report prepared for the Centre for the study of violence and reconciliation, *The state of access to information in South Africa by McKinley D*, July 2003, 6.

<sup>103</sup> Report presented to President Nelson Mandela Volume 2, *Truth and Reconciliation Committee of South Africa*, 29 October 1998, para 15.

<sup>104</sup> One of the conferences was the Conference for a Democratic South Africa (CODESA) that was held prior to the independence of South Africa deliberated on the disappearance of official records that were destroyed to cover up the gross human rights violations during the apartheid era. See Harris Transformations 2000, 29 in a commentary on Klaaren, 'The right of access to information at age ten' in *Reflections of Democracy and Human Rights: A decade of the South African Constitution* 2006, Rembe Ed, 167.

and helped to define the scope and content of the right.<sup>105</sup> Furthermore they unravelled that the unrestricted access to information could be used as a cornerstone of transparent, participatory and accountable governance.<sup>106</sup> This was eventually actualized in the South Africa's Constitution under Section 32 which guarantees the freedom of information.

With the entry of a new political regime in 1994, there was a need to create a new democratic political order to match the anticipated spirit of equality of the people.<sup>107</sup> Alongside the introduction of the Constitution, South Africa required the creation of open and accountable political institutions and the election of a new government on the basis of universal suffrage.<sup>108</sup> The Constitution was intended to serve as an interim instrument, until such time as a democratic government with a popular mandate could draft a final document. This final draft ended up being the 1996 constitution. It was finalized two years after the independence took place. During these two years, the interim constitution was operational and it recognized the right of access to information too.

#### **4.1 The emergence of Freedom of Information Law in South Africa**

The right of access to information was critical as the country was at the precipice of apartheid regime. The Interim Constitution of the Republic of South Africa included Bill of Rights. It was designed to ensure the protection of human rights. The right of access to information was guaranteed by the Interim Constitution in Section 23 stating that “every person has the right of access to all information held by the state or any of its organs in any sphere of government in so far as that is required for the exercise or protection of any of their rights.” The significance of the right of access to information is underscored by the separation of this right from the right to freedom of expression.<sup>109</sup> Following the election in 1994, South Africa's Interim Constitution expanded the scope of this right to read, ‘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’.<sup>110</sup>

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<sup>105</sup> Report commissioned by and prepared for [www.freedominfo.org](http://www.freedominfo.org), *A country study on Freedom of Information law in South Africa by Dimba M and Calland R*, 5 November 2002, 8.

<sup>106</sup> Report commissioned by and prepared for [www.freedominfo.org](http://www.freedominfo.org), *A country study on Freedom of Information law in South Africa by Dimba M and Calland R*, 5 November 2002, 9.

<sup>107</sup> Peekhaus W, ‘South Africa's Promotion of Access to Information Act: an analysis of relevant jurisprudence’ *4 Journal of Information Policy*, 2014, 584.

<sup>108</sup> Klaaren J, ‘A second look at the South African Human Rights Commission, access to information and the promotion of socio-economic rights’ *27(2) Human Rights Quarterly*, 2005, 560.

<sup>109</sup> Darbshire H, ‘Ten challenges for the right to information in the era of mega-leaks’ in *the United Nations and Freedom of Expression and information critical perspectives*, Universiteit van Amsterdam, 2015, 27.

<sup>110</sup> Section 32(1) *The Constitution of the Republic of South Africa* (1996).

With the broadened scope of the right, access to information was no longer limited to publicly-held information. Rather, the protection of the right was established to include private bodies and individuals. The broadened scope empowers an individual to exercise his or her right when requesting information from private bodies that perform public function or that are funded by the public.<sup>111</sup> This goes to show that the private bodies are recognized and thus the Freedom of Information law is applicable to them too. The final constitution further included limitations to the general right as shall be discussed later in the chapter.

Early times of access to information laws in South Africa, the legislations were not as comprehensive and effective as they currently are. For instance, the Promotion of Access to Information Act 2000 and the convening of the Interdepartmental Classification and Declassification Review Committee in 2002 did not at the time represent a decisive shift towards a greater openness on apartheid-era history when it came to specific fields like the nuclear past.<sup>112</sup> The state's incentives for disclosure, controlled to avoid nuclear technology leakage, include the benefits of the lessons of the past to the global non-proliferation regime, contributing to South Africa's prestige and foreign policy agenda and enhancing the country's democratic transparency.<sup>113</sup>

Over the years, there have been various laws that contain aspects of the information system in the country such as the manner of dissemination, security or privacy, just to mention a few. Therefore, even though the PAIA is the major legislation that upholds the right of access to information there are other subsidiary statutes that also contribute to the protection of the right in a positive manner.

## **4.2 Sources of the access to information laws in South Africa**

The Freedom of Information Laws in South Africa can be found in various statutes. The primary sources being the Constitution and the Promotion of Access to Information Act. The other legislations are the Protected Disclosures Act, Promotion of Equality and Unfair Discriminations Act and the Promotion of Administrative Justice Act.

### **4.2.1 The Promotion of Access to Information Act**

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<sup>111</sup> Kotze LJ, 'The application of just administrative action in the South African environmental governance sphere: an analysis of some contemporary thoughts and recent jurisprudence' 7(2) PER/PELJ, 2004, 116.

<sup>112</sup> Harris V, Halang S and Liberman P, 'Unveiling South Africa's nuclear past' 30(3) *Journal of South African studies*, 2004, 472.

<sup>113</sup> Harris V, 'Unveiling South Africa's Nuclear past,' 472.

Pursuant to Section 32 of the Constitution of the Republic of South Africa, the Promotion of Access to Information Act 2 of 2000 was passed into law. This was meant to give effect to the right that is guaranteed in the Constitution.<sup>114</sup> Aside from the Constitution, this Act is a primary statutory instrument that upholds and protects the right of access to information. The Act recognises the link between the right of access to information and the need for transparency, accountability and an open government. It was a step to rid of the culture of secrecy that was etched in the apartheid regime which contributed to the violation of the human rights.<sup>115</sup> It embodies and reflects the spirit of the law as intended in the Constitution.

The scope of the right of access to information is broad. It applies to both the public and private bodies. Part 2 of the PAIA deals with the access to records of public bodies and it stipulates in Section 12 certain public bodies that are not subjected to the Act. Such public bodies include the records from the cabinet and its committee, records from certain courts and tribunals. Whereas the Part 3 deals with the access of records of private bodies.

It also sets priority over the subsidiary legislations that may obstruct the enjoyment of the right to access information by either prohibiting or restricting the disclosure of a record.<sup>116</sup> Nonetheless, there are grounds of refusal in the PAIA.

The Act sets precedence in the region by minimizing the technicalities that may hinder upholding the right.<sup>117</sup> From the provisions, the requester need not give a myriad of reasons for permission to access information because technicalities tend to be an obstacle in the protection of human rights.

Section 14 of the Act provides the list of duties and responsibilities of the information holders as primarily the bearers of the responsibility of publishing the manuals that detail how to access information for requesters. Furthermore they ought to provide the categories of the records that are already available.<sup>118</sup>

The enactment of this Act raised awareness of the importance of upholding the peoples' right of access to information alongside democracy and other human rights. Thus Section 83 and 84 indicates the liaison between the Government of South Africa and the Human Rights Commission by assigning it an oversight role of assessing, monitoring and implementing

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<sup>114</sup> Preamble, *Promotion of Access to Information Act* (Act 2 of 2000).

<sup>115</sup> Report prepared for the Centre for the study of violence and reconciliation, *The state of access to information in South Africa* by McKinley D, July 2003, 6.

<sup>116</sup> Roling S, 'Transparency and access to information in South Africa: An evaluation of the Promotion of Access to Information Act 2 of 2000' Unpublished LLM dissertation, University of Cape Town, 2007, 23.

<sup>117</sup> Roling S, Transparency and access to information in South Africa, 23.

<sup>118</sup> Section 15, *Promotion of Access to Information Act* (Act No. 2 of 2000).



various aspects of the legislation. The enactment of the legislation puts emphasis on delineating the scope and content of the right to access to information, establishing procedures for enforcement and stipulating the limitations.<sup>119</sup>

The Act is lauded for meeting the international legislative standards, albeit fairly radical because of the serious barriers to the full realisation of the right of access to information which are found in the grounds of refusal.<sup>120</sup> The limitations of access to information found in this part of the act are quite extensive compared to Kenya.

#### **4.2.1.1 Grounds for refusal**

These grounds for refusal permitted in the PAIA cover the various aspects of information held in different institutions. These grounds for refusal are also a basis for protection of privacy.

The list of grounds includes: mandatory protection of certain records of South African revenues services.<sup>121</sup> Mandatory protection of commercial information of third party.<sup>122</sup> Privacy of third party who is a natural person.<sup>123</sup> Certain confidential information and protection of certain other confidential information of the third party.<sup>124</sup> Safety of individuals and protection of property.<sup>125</sup> Protection of police dockets in bail proceedings and protection of law enforcement and legal proceedings.<sup>126</sup> Protection of records privileged from production in legal proceedings.<sup>127</sup> Defence, security and international relations of

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<sup>119</sup> Curie Lain, 'South Africa's Promotion to Access to Information Act' 9(1) *European Public Law*, 2003, 66.

<sup>120</sup> Harris V, Halang S and Liberman P, 'Unveiling South Africa's Nuclear past' 30(3) *Journal of South African studies*, 2004, 472.

<sup>121</sup> Report prepared for the Centre for the study of violence and reconciliation, *The state of access to information in South Africa by McKinley D*, July 2003, 6. See also Section 35(1), *Promotion of Access to Information Act* (Act 2 of 2000).

<sup>122</sup> Report prepared for the Centre for the study of violence and reconciliation, *The state of access to information in South Africa by McKinley D*, July 2003, 6. See also Section 36(1), *Promotion of Access to Information Act* (Act 2 of 2000).

<sup>123</sup> Report prepared for the Centre for the study of violence and reconciliation, *The state of access to information in South Africa by McKinley D*, July 2003, 6. See also Section 34(1), *Promotion of Access to Information Act* (Act 2 of 2000).

<sup>124</sup> Report prepared for the Centre for the study of violence and reconciliation, *The state of access to information in South Africa by McKinley D*, July 2003, 6. See also Section 37(1), *Promotion of Access to Information Act* (Act 2 of 2000).

<sup>125</sup> Report prepared for the Centre for the study of violence and reconciliation, *The state of access to information in South Africa by McKinley D*, July 2003, 6. See also Section 38(1), *Promotion of Access to Information Act* (Act 2 of 2000).

<sup>126</sup> Report prepared for the Centre for the study of violence and reconciliation, *The state of access to information in South Africa by McKinley D*, July 2003, 7. Section 39(1), *Promotion of Access to Information Act* (Act 2 of 2000).

<sup>127</sup> Report prepared for the Centre for the study of violence and reconciliation, *The state of access to information in South Africa by McKinley D*, July 2003, 7. See also Section 40(1), *Promotion of Access to Information Act* (Act 2 of 2000).

republic.<sup>128</sup> Jeopardize economic interests and financial welfare of republic and commercial activity of the public bodies.<sup>129</sup> Protection of research information of third party and that of public body.<sup>130</sup> Last but not least, manifestly frivolously and vexatious requests or substantial and unreasonable diversion of resources.<sup>131</sup>

### **4.3 Other legislations affecting the state of freedom of information**

The Constitution and the PAIA Act are the primary source of legislation regarding the access to information. However, there are legislations that address the right of access to information. There is the Protected Disclosures Act 26 of 2000 and the Promotion of Equality and Unfair Discrimination Act of 2000. Furthermore, there are amendments in the Protection of Personal Information Act 4 of 2013 and the Judicial Matters Amendment Act 66 of 2008 that were made to align the provisions with the ones in the PAIA.

#### **4.3.1 Protected Disclosures Act 26 of 2000**

Also known as the “whistle-blowers act”, the Protected Disclosures Act was installed as legal protection for employees in the public and private sectors who disclose information about their employers who may be engaging in unlawful or irregular conduct.<sup>132</sup> Unlawful or irregular conduct would be criminal offences, non-compliance, miscarriage of justice, any form of discrimination and endangering the health or safety of individuals. While the public interest override is narrowly applied in the PAIA leaving it to official interpretation, the Protected Disclosures Act tackles it from the point of grounds for disclosing information regarding irregular conduct. However, this Act can only aid in disclosure of internal affairs of the sectors and offer protection within these parameters. This then limits the legal protection of the whistle-blower to the ones provided under the Protected Disclosures Act but at no point does the protection transcend to the public disclosure under PAIA.<sup>133</sup>

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<sup>128</sup> Report prepared for the Centre for the study of violence and reconciliation, *The state of access to information in South Africa* by McKinley D, July 2003, 7. See also Section 41, *Promotion of Access to Information Act* (Act 2 of 2000).

<sup>129</sup> Report, *The state of access to information in South Africa* by McKinley D, July 2003, 7. See also Section 42, *Promotion of Access to Information Act* (Act 2 of 2000).

<sup>130</sup> Report, *The state of access to information in South Africa* by McKinley D, July 2003, 7. See also Section 43, *Promotion of Access to Information Act* (Act 2 of 2000).

<sup>131</sup> Report, *The state of access to information in South Africa* by McKinley D, July 2003, 7. See also Section 45, *Promotion of Access to Information Act* (Act 2 of 2000).

<sup>132</sup> Report prepared for the Centre for the study of violence and reconciliation, *The state of access to information in South Africa* by McKinley D, July 2003, 7.

<sup>133</sup> Centre for the study of violence and reconciliation, *The state of access to information in South Africa* by McKinley D, July 2003, 8.

The exceptions of disclosure by an employee that are provided in Section 9(3)(d) of the Public Disclosure Act are related to breach of duty of confidentiality of the employer towards any person. The rubric of confidentiality also allows the information holder to use it as grounds for refusal of access clause in PAIA. Commercial confidentiality is a quintessential ground for refusal in such cases. The reason behind such exceptions is that granting access to commercially sensitive information can be detrimental to the trade or bear negative implications.

#### **4.3.2 Promotion of Equality and Unfair Discrimination Act of 2000**

This Act was enacted pursuant to Section 9 of Bill of Rights to prohibit and prevent unfair discrimination whilst promoting equality. Examples of discriminatory practices that are affected by the Act are, hate speech and harassment. Section 12 of PEUDA prohibits the dissemination or publication of any information that could reasonably be understood to demonstrate clear intentions to unfairly discriminate against any person. However, contradictions arise where PEUDA considers dissemination of information such as research on discrimination an offence. This collides with the PAIA which advocates for disclosure of such information.<sup>134</sup>

Another direct conflict between the two Acts in Section 5 of PAIA and Section 5(2) PEUDA is general override. The PAIA has a general override clause in Section 5 which expressly states that ‘if any conflict relating to the matter dealt with in this Act arises between this Act and the provisions of any other laws, other than the Constitution or an Act of Parliament expressly amending this Act, the provisions of this Act must prevail.’ Therefore, instances where issues relate to both promotion of equality and the right of access to information, the latter prevails over equality.

#### **4.3.2 Promotion of Administrative Justice Act 3 of 2000**

Section 33 of the Bill of Rights which gives the right to administrative action that is lawful, reasonable and procedurally fair was given effect by the enactment of this Act. When a request is being processed, the grant or refusal thereof by information holders is considered an administrative action which is subject to the provisions of Promotion of Administrative Justice Act. There are exemptions to what is considered as administrative action under the

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<sup>134</sup> Freedom of Expression Institute, *Promotion of Access to Information Act Paper*, Paper presented at the Freedom of Expression Institute Workshop on PAIA, Johannesburg, 8-9 June 2001, 8.

PAJA in Section 1 which states ‘any decisions taken or failure to take a decision in terms of any provision of PAIA’.<sup>135</sup> Thus allowing an exemption from the provisions of PAJA of administrative decisions to grant or refuse a request for access to information under PAIA. Notably, the key aspects of determining the process and scope of exercising the right of access to information, is left to official interpretive privilege.<sup>136</sup>

### **4.3.3 Protection of Personal Information Act 4 of 2013**

The preamble of this Act recognizes that everyone has the right to privacy according to Section 14 of the Constitution of the Republic of South Africa. It continues to state that the right to privacy includes the right to protection against the unlawful collection, retention, dissemination and use of personal information which the state must respect, protect, promote and fulfil the rights in the Bill of Rights.

The framework of the information society requires the removal of unnecessary impediments to the free flow of information. This Act was enacted to regulate the processing of personal information by public and private bodies in a manner that gives effect to the right to privacy subject to justifiable limitations that are aimed at protecting other rights and important interests.<sup>137</sup>

The purpose of this Act is to safeguard personal information when processed by a responsible party, subject to justifiable limitations that are aimed at balancing the right to privacy against other rights but foremost, the right of access to information. Regulate the manner in which information may be processed as well as provide the remedies to protect personal information.<sup>138</sup>

The link between PAIA and PPIA is based on the personal information. Under the grounds of refusal Section 38 of the PAIA acknowledges that such information is subject to the right to privacy whilst this Act regulates how this information is accessed and disseminated if the information is required.

## **4.4 Implementation of access to information laws**

When the Constitution was passed in 1996 and the inclusion of the Bill of Rights of both socio-economic progressive and developmental human rights was just the beginning of

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<sup>135</sup> Section 1(i), *Promotion of Administrative Justice Act* (Act No. 3 of 2000).

<sup>136</sup> Report prepared for the Centre for the study of violence and reconciliation, *The state of access to information in South Africa by McKinley D*, July 2003, 8.

<sup>137</sup> Preamble, *Protection of Personal Information Act* (No. 4 of 2013).

<sup>138</sup> Section 52(a)(1) and (b), *Protection of Personal Information Act* (No. 4 of 2013).

fundamental changes in the management of public institutions. The key factors that directly relate to implementation of laws of freedom of information are awareness and education, human resource development, management records and decision making and accountability. These factors aid in the realisation of the laws put in place to uphold the right of access to information as guaranteed in the Constitution of South Africa. The direct application of Section 32 of the Constitution is limited hence the need for the supporting legislations that elucidate further the protection of this right.<sup>139</sup> This was illustrated in the case *Institute for Democracy in South Africa v African National Congress*<sup>140</sup> where the Court held that Section 32 cannot be relied on independently to serve as a cause of action; except where the constitutionality of an Act of Parliament is being challenged.<sup>141</sup>

PAIA has been quite revolutionary when it comes to realisation and implementation in South Africa. As the primary legislation dealing with the right to access information, it has managed to transform the information regime of the country from that of violation and oppressive nature that prevailed during the apartheid era.

Public bodies were obliged to publish a manual by September 2002 to provide contact details, the records held and procedures for accessing them. They are also required to report to the South African Human Rights Commission annually regarding the categories of records that it makes automatically available and how to access these records.<sup>142</sup>

#### **4.5 Access to information oversight mechanisms**

The common types of oversight bodies in Access to Information are the ombudsman and the information commissioner.<sup>143</sup> In South Africa, the Human Rights Commission has the duty under Section 83(3)(b) to monitor the implementation of the PAIA. Thereafter the Commission may give recommendations on how to improve aspects of the state of freedom of information.<sup>144</sup> This role of the Human Rights Commission serves as an oversight mechanism on access to information. The Commission is required to submit a report to the

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<sup>139</sup> Heerden V, Govindjee A and Holness D, 'The constitutionality of statutory limitation to the right of access to information held by the state in South Africa' 28(1) *SJ*, 2014, 27.

<sup>140</sup> *Institute for Democracy in South Africa v African National Congress* (2005), 9828/03, para 50 A-B.

<sup>141</sup> *IDASA v ANC* (2005), para 50 G The court drew on the judgement in *Naptosa v Minister of Education, Western Cape* in concluding that, should such a direct application be permissible, it would lead to the development of the two parallel systems, which would be singularly inappropriate. See also Heerden V, 'The constitutionality of statutory limitation to the right of access to information held by the state in South Africa' 28.

<sup>142</sup> Section 32, *Promotion of Access to Information Act* (Act No.2 of 2000).

<sup>143</sup> Holsen S and Pasquier M 'Insight on oversight: the role of information Commissioners in the implementation of access to information policies' 2 *Journal of information policy*, 215.

<sup>144</sup> Section 83(3)(a), *Promotion of Access to Information Act* (Act No.2 of 2000).

National Assembly detailing the specifics of the implementation of the Act and the areas of concern that should be scrutinised for amendments.

#### **4.6 South Africa Human Rights Commission and the right of access to information**

The SAHR Commission has put emphasis on the role of right of access to information in the achievement of socio-economic rights. In May 2003, the chairperson of SAHRC expressed that the right of access to information transcends the accountability aspect of the government actions, rather the decisions made that affect the daily lives of the citizens. The right of access to information can be used by the Human Rights Commission as a basis for alternative model of national monitoring of socio-economic rights as guaranteed in Section 184(1)(b) of the Constitution.<sup>145</sup>

With the weight of the Commission supporting the implementation of the Access to Information laws in South Africa, the laws have been constantly reviewed to ensure the protection of the right.

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<sup>145</sup> Klaaren J, 'A second look at the South African Human Rights Commission, access to information and the promotion of socio-economic rights' 27(2) *Human Rights Quarterly*, 2005, 541.

## CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

### 5.0 Introduction

This chapter shall deal with the findings of the research which will lead to the conclusions and recommendations.

### 5.1 Findings

#### 5.1.1 The enactment of Access to Information Law in Kenya was necessary.

The necessity of enactment of the Access to Information Law in Kenya was dire. There is a broad consensus that such law is important for the detection of corruption because when information is made available, transparency and accountability is enhanced in the government offices.<sup>146</sup>

#### 5.1.2 Improvement of services offered to the public

The existence of the access to information law tentatively improves the public services offered to the public thus allowing the people of Kenya to participate meaningfully in public life.

#### 5.1.3 Positive correlation between control of corruption and years of implementation of Access to Information law.

Over time, after the enactment of access to information law in a country, its application and implementation becomes widespread in most institutions. Thus causing the control of corruption to be manageable. The longer the Access to Information law has been operative in a country often translates to low levels of corruption.

#### 5.1.4 Enactment of Access to Information Law does not guarantee efficacy in implementation.

When access to information law is enacted it does not guarantee efficacy of implementation.<sup>147</sup> Poor implementation undermines the right to information and causes delay in the regulation of these laws.

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<sup>146</sup> Bacio-Terracino, 'Linking corruption and human rights', 245.

<sup>147</sup> Roberts A, 'Less government, more secrecy', 318.

### **5.1.5 Engagement of stakeholders.**

The enactment of the Access to Information law increases the engagement of the civil society, the media and other stakeholders.<sup>148</sup>

## **5.2 Identifying the instruments that will be required to realise this framework**

The instruments that are referred to in this case are either Arms of the Government, strategies or other laws that have a direct influence on the state of freedom of information in Kenya. Some of these instruments were deduced from recommendations after the review of the drafted bill 2015.

### **5.2.1 The Parliament of Kenya**

The Parliament is the legislative arm of the government. It is in charge of the formulation and drafting of the legal framework on access to information. Over the years Parliament shelved the Freedom of Information Bill which as a result delayed the process of getting an operative law. There is a need to uphold the constitutional promise on freedom of information by enacting a domestic law. This need placed the burden on Parliament to prioritize a legal framework that met the global standards as well as satisfied the needs of the people of Kenya. Members of Parliament have a responsibility to ensure that the recommendations and proposed amendments are assessed and relevant changes made to the legal framework to ensure its validity. Also Parliament should promulgate the internal guidelines which would give effect to provisions of domestic law.<sup>149</sup> These guidelines would articulate the intentions and function of the law for implementation. Also, it would inhibit the use of discretionary powers by the officials handling information.

Parliament could also review laws that are contradictory to the Freedom of Information law.<sup>150</sup> The review aims at repealing provisions of the law that are retrogressive in nature or restrict the enjoyment of freedom of information in Kenya. For instance, we identified in chapter 1 of this paper that there are provisions in legislations such as the County

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<sup>148</sup> Hayes M, 'Whatever happened to the "right to know"? Access to government controlled information since Richmond newspapers' 73(6) Virginia Law Review, 1133.

<sup>149</sup> ACHPR, *A Shadow report on freedom of information in Kenya*, Prepared by The Africa Freedom of Information Centre in Consultation with Article 19 East and Horn of Africa and the International Commission of Jurists- Kenya Kampala Uganda, 2015, 6.

<sup>150</sup> Odote C, *Access to Information law in Kenya: Rationale and policy Framework*, International Commission of Jurists, Nairobi, 2015, ix.



Governments Act<sup>151</sup> and the Official Secrets Act<sup>152</sup> that restrict the enjoyment of freedom of information. It is important to repeal laws that impede the enjoyment of the right to access information in Kenya.

### 5.2.2 Public participation

Public participation can be considered a right. It entails the engagement of stakeholders in a given project or undertaking that has a direct or indirect effect on them. This right ensures that every person involved in the process is included so that their interests are represented and protected. When enacting a legal framework dealing with freedom of information, it entails a constitutional right that is promised to an individual. Therefore, the public is a major stakeholder in the process. For the public to participate effectively in the management of the affairs of the country, they need to have accurate information. Thus, it is imperative for the public to be provided with requisite information that will enable them to take part in policy formulation and decision making processes.<sup>153</sup>

Such participation could also check corruption and promote accountability on the part public officials since they know that their actions are subject to scrutiny.<sup>154</sup> Accordingly, in the absence of the requisite information it would be very difficult for any member of the public to participate meaningfully in the affairs of his or her Government. Without information the citizens may not have an insight into the functioning of Government or participate in its decision-making processes. Key obstacles, could be removed all together from the statutes limiting access to information. Clauses in statutes such as, Preservation of Public Security Act<sup>155</sup>, Service Commissions Act<sup>156</sup>, The Evidence Act<sup>157</sup> and the Official Secrets Act<sup>158</sup> must be amended. Granted, the responsibility of altering laws, by amending or repealing, lies with Parliament. However, other stakeholders, namely, non-governmental agencies, media houses, faith based organizations and the general public as well as academics and experts in this area

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<sup>151</sup> *The County Governments Act* 2012.

<sup>152</sup> *The Official Secrets Act* Cap 187 Laws of Kenya.

<sup>153</sup> ACHPR Observer reference number 434, *A Shadow report on freedom of information in Kenya*, prepared by The Africa Freedom of Information Centre in consultation with Article 19 East and Horn of Africa and the International Commission of Jurists- Kenya, Kampala Uganda, 2015, 10.

<sup>154</sup> ACHPR Observer reference number 434, *A Shadow report on freedom of information in Kenya*, Prepared by The Africa Freedom of Information Centre in Consultation with Article 19 East and Horn of Africa and the International Commission of Jurists- Kenya) Kampala Uganda, 2015, 12.

<sup>155</sup> *Preservation of Public Security Act*, (Act No.2 of 1960) Cap 57, Revised Edition 2012.

<sup>156</sup> *Public Service Commission Act* Cap 185 (2012).

<sup>157</sup> *Evidence Act* Cap 80 (2014).

<sup>158</sup> *The Official Secrets Act* Cap 187, Laws of Kenya.

of study, would also have to be involved in order to ensure that Parliament discharges this obligation in keeping with due process standards.

### **5.2.3 Treaties regarding access to information**

There are treaties in the African region that directly correlate to the freedom of information in Kenya. The mere passing of the law does not guarantee that the law is fair or exhaustive. Although the Model Law exists and is functional alongside the African Charter and African Commission on Human and Peoples' Rights, Kenya needs to ratify the remaining Access to Information Treaties. This may avert instances when the Law in Kenya is silent concerning certain topics. One can refer to these treaties that are applicable in Kenya. However, the effectiveness of these regional mechanisms is dependent on the commitment of Governments to ratify, domesticate and effectively implement regional treaties. Therefore, Kenya should urgently ratify and domesticate pending African Union treaties including the African Charter on Democracy, Elections and Governance as well as the African Statistics Charter, that have crucial provisions related to the right to information.

### **5.2.4 Political will**

Political will is the driving force of the law. It acts as a catalyst for enforcement of laws in a state. Once the Freedom of Information law is passed in Kenya, the implementation process will determine the change that will be effected in the state. The Executive arm of the Government is responsible for this task. The President being at the forefront, will be required to take personal interest in ensuring that Kenya complies with reporting requirements to ACHPR in line with the Charter before and after passing of the law. For Access to Information law to be enacted by parliament, the commitment of the presidency is needed. It is also vital that ministers, parliamentarians and senior bureaucrats are encouraged to take up the issue of right to information proactively and consistently pledge their unequivocal support for a new openness regime that advocates for transparency and accountability.<sup>159</sup>

### **5.2.5 Open Government Partnership commitment**

The Open Government Partnership is an international organization promoting and seeking strong commitments from participating government institutions to promote transparency, empower citizens, fight corruption, and harness new technologies to strengthen

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<sup>159</sup> ACHPR, *A Shadow report on freedom of information in Kenya*, Prepared by The Africa Freedom of Information Centre in Consultation with Article 19 East and Horn of Africa and the International Commission of Jurists- Kenya) Kampala Uganda, 2015, 18.

governance.<sup>160</sup> Kenya began its process to join the partnership and is in its first cycle.<sup>161</sup> However to proceed into the second cycle Kenya needs to focus on improving anti-corruption, budget transparency, citizen participation, E-Government, political financing and public service delivery all of which can be achieved by improving the right to information.<sup>162</sup>

### 5.3 Recommendations

1. The Access to Information Act in Kenya need to specify procedures for acquiring information from the specific entities. There should be a section in the Act that details the exact procedures for a public body and another for a private body.
2. There is a need for an override clause that stipulates the prominence of the Access to Information Act over other legislations with provisions regarding the related matters to the right to information.
3. The Government of Kenya needs to focus on creating an archives system for managements of current and future generated information. This will ease the availing of information from all sectors.
4. There is need to use of the instruments that aid in the enactment of Access to Information laws, such as political will to enable a smooth implementation phase of the law.

### 5.4 Conclusion

The study has argued the research questions and responded to the statement of problem.

Based on the research questions, Kenya should pursue enactment of Access to Information law. This is evident after the comparative analysis depict the advantage that comes with such a law. Most importantly, the level of corruption will reduce whilst encouraging accountability and transparency. However, this also depends on the state of implementation of the Act.

Also the necessary components of an Access to Information law have been discussed in the chapters. Some of these components are: the scope of the right, the exemptions or grounds of

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<sup>160</sup> —< <http://www.opengovpartnership.org/about> > on 4 November 2016.

<sup>161</sup> ACHPR, *A Shadow report on freedom of information in Kenya*, Prepared by The Africa Freedom of Information Centre in Consultation with Article 19 East and Horn of Africa and the International Commission of Jurists- Kenya) Kampala Uganda, 2015, 18.

<sup>162</sup> ACHPR, *A Shadow report on freedom of information in Kenya*, Prepared by The Africa Freedom of Information Centre in Consultation with Article 19 East and Horn of Africa and the International Commission of Jurists- Kenya) Kampala Uganda, 2015, 31.

refusal and the oversight roles that should be assigned. Thus answering the second research question.

The objective of the research, which was to establish the need for statutory enactment of Access to Information laws in Kenya, was achieved through a comparative analysis with South Africa. The analysis showed how enactment and proper implementation can foster accountability and transparency in the public and private entities for the benefit of the people

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