

FUMBLING UNDER THE VEIL: ACCESS TO INFORMATION AND DEMOCRACY: THE ZAMBIAN CASE

Submitted in partial fulfillment of the requirements of the degree LLM (Human Rights and Democratisation in Africa) Faculty of Law, Centre for Human Rights, University of Pretoria

By

MWANANYANDA Muleya

Student No. S26511488

Prepared under the supervision of

Prof Frederick Juuko

At the Faculty of Law, Makerere University, Kampala, Uganda

31 October 2006

DECLARATION

I, MWANANYANDA Muleya, declare that the work presented in this dissertation is original. It has never been presented to any other University or institution. Where other people's works have been used, references have been provided, and in some cases, quotations made. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfilment of the requirements for the award of the LL.M Degree in Human Rights and Democratisation in Africa.

Signed.....

Date.....

Supervisor: Prof Frederick Juuko

Signature.....

Date.....

ACKNOWLEDGEMENTS

Finally, I get a chance to publicly thank all those who have graciously helped or stood by me during this exhilarating year! My thanks go to God almighty without whose fortitude I would not have come thus far. Professor Fred Juuko was the ever patient and extremely helpful supervisor. Thanks are due to the Dean of the Law Faculty at Makerere Dr Sylvia Tamale and members of staff, Rose Nakayi, Grace, Birungi and Mr K, for the lovely welcome and all the help rendered. Professor Joe Oloka-Onyango for the eye-opening excursion of Kampala.

I am indebted to the Centre for Human Rights, University of Pretoria, for facilitating my dream: To Prof Frans for his keen and intense attention. Jeremie for indulging my trifles even when he was busy. Waru and Prof Hansungule for their ceaseless efforts to assist me academically. John Wilson has a heart of gold and my work would be incomplete without his unreserved help.

I am beholden to Dr Patrick Matibini for sending me vital documents without which this work would not have been possible. Thanks are also due to Sipo Kapumba.

There are numerous people who supported me morally, my family and the LLM class of 2006.

Thank you.

DEDICATION

To my friends in the pursuit of simple but elusive truths; to the memory of my much missed dear friend Bright Chola Mwape whose gallantry in the quest for justice is unparalleled, and to all those in the struggle to lift the veil of secrecy in Zambia.

LIST OF ABBREVIATIONS

ACHR	American Convention of Human Rights
ACHPR	African Charter on Human and Peoples' Rights
AIPPA	Access to Information and Protection of Privacy Act
CCPR	International Covenant on Civil and Political Rights
CESCR	International Covenant on Economic, Social and Cultural Rights
CESR	(UN) Committee on Economic Social and Cultural Rights
CoE	Council of Europe
CRC	Constitutional Review Commission
ECHR	European Convention on the Protection of Human Rights
FOI	Freedom of Information
HRC	Human Rights Committee
MISA	Media Institute of Southern Africa
NGOs	Non-Governmental Organisations
ODAC	Open Democracy Advise Centre
PAZA	Press Association of Zambia
SADC	Southern African Development Community
SAHA	South African History Archive
TRC	Truth and Reconciliation Commission
UDHR	Universal Declaration of Human Rights
UN	United Nations (Organisation)
ZIMA	Zambia Independent Monitoring Association

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Chapter one

1. Introduction

1.1 Background to the study

Freedom of information is to democracy, what food is to the body. Just like a malnourished body cannot function optimally, democracy cannot take root in a closed society.¹ Birkinshaw states that the right to freedom of information and particularly the right to access information held by public authorities has attracted a great deal of attention in recent times.² The importance of this right has been recognised by the United Nations (UN) as early as 1946. At its first session the UN General Assembly adopted a resolution on access to information, which states:

“Freedom of information is a fundamental right and... the touchstone to all freedoms to which the United Nations is consecrated.”³

Almost 50 years to the resolution, Abid Hussein UN special rapporteur on Freedom of Opinion and Expression observed:

“Freedom will be bereft of all effectiveness if people have no access to information. Access to information is basic to a democratic way of life. The tendency to withhold information from the people at large should therefore be strongly checked.”⁴

National courts in a number of countries, particularly in Asia, have held that access to information held by public authorities is a fundamental human right.⁵ As early as 1969,

¹ C Boix “The roots of democracy” *Policy Review* (2006) 5

² P Birkinshaw, “Freedom of information and open government: The European Community/ Union dimension” (1997) *Government Information Quarterly* 14(1), 27-49.

³ UN Gen Ass Res 59(1) 1946. See also T Mendel “Freedom of information as an internationally protected right” Article 19 docs (2004). See also in this regard a set of principles published by Article 19 “The public’s right to know: Principles of freedom of information legislation” (1999) available at <www.article19.org>

⁴ UN Doc. E/CN.4/1995/32 para 35

⁵ Closer to home this right has been asserted in South Africa. The Open Democracy Advice Centre (ODAC) has litigated nine cases relating to access to information. In 2002 ODAC successfully filed an amicus curiae brief in the High Court of South Africa in the matter between *CCII Systems v Fakie* (2002). Currently ODAC is litigating before the Pretoria High Court in *Hlatswayo v Iscor* (2003) and in Uganda, see *Tinyefunza v Attorney General* (1999)

the Japanese Supreme Court established the principle, in two high-profile cases, that the guarantee of freedom of expression found in Article 21 of Japan's constitution included a "right to know".⁶

The African Union has affirmed the internationally held view that governments hold information "not for themselves but as custodians of the public good."⁷

The references above are illustrative of the fact that an effective right to information is significant to democracy and has an unequivocal basis in international and comparative human rights law. Although international jurisprudence in this area has been ambivalent, in this essay, a mounting body of evidence is produced in support of the proposition that Zambia, as part of the global village is under an obligation to guarantee citizens a right to access information.⁸

1.2 Statement of the research problem

The right to access information is being subverted and in Zambia, no where is the trend more evident than in the maltreatment of and threat to the personal integrity of individuals, particularly, journalists who one way or the other uncover certain pieces of information considered as "classified" information by the state.⁹ Although freedom of expression could be said to be a universal value encapsulated at international level by various international human rights instruments¹⁰ and at municipal level, in various constitutions, the Zambian government is incessantly in breach of its negative duty to

⁶ L Repeta "Local government disclosure systems in Japan" National Bureau of Asian Research, paper no. 16 (October 1999) 19

⁷ "Declaration of principles of freedom of expression in Africa" (Principle IV) Adopted by the African Commission on Human and Peoples' Rights sitting at its 32nd ordinary session in Banjul, The Gambia 17-23 October 2002

⁸ For more insights on the equivocal jurisprudence see the holding of the European Court of Human Rights in *Leander v Sweden* ECHR (1987) 4, *Gaskin v United Kingdom* ECHR (1989) 13 and *Guerra & Ors v Italy* ECHR (1998) 7

⁹ The State Security Act criminalizes communicating information considered classified. Classified information is defined in broad terms that each and anything can, depending on the whims of the public officer, be "classified"

¹⁰ Articles 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, and to a limited extent article 9 of the African Charter on Human and Peoples' Rights recognize this value as fundamental.

respect this freedom through laws that make it difficult for persons to access public information.¹¹

What is more worrying, is the never ending and widening divide between the government and the governed borne by the government's penchant for hiding information and thwarting any efforts at uncovering such information for fear of criticism.¹² It has instead introduced and in most cases strengthened austere protectionist policies to parry off any probe into questionable activities.¹³ The most effective tool against public scrutiny is to shut off access to public information thereby affecting the very freedom of expression enshrined as a constitutional value.¹⁴

John Stuart Mill aptly put the question of how citizens might be expected to "check or encourage what they are not permitted to see".¹⁵ Citizens obtain what is termed as "classified" information precariously and often with the real fear of imprisonment or fines or even death. Prime among the reasons for refusal to accede to demands for the right to access information is the question of national security. However, national security has fluid definitions and once the government controls the definitions of national security there is no limit to what information it may decide falls within this category.¹⁶

¹¹ All the constitutions in the Southern African Development Community at least make provisions for this right

¹² In a democracy, there is always a tension between what the government thinks ought to be kept confidential and what the people think they ought to know. But in old democracies such as the USA, courts have placed a heavy burden on public authorities to disclose and if not, show cause why release of information is detrimental to the public interest. See obiter per Douglas J in *New York Times v United States* (1971)

¹³ In Zambia the Preservation of Public Security Act has been used repeatedly to hamper anyone from commenting on information the state classifies as "secret".

¹⁴ For a bold account of one of the most significant legal struggles in American history: the Nixon administration's efforts to prohibit the New York Times and the Washington Post from publishing what the government was hiding, see M Shapiro(ed) *The Pentagon papers and the courts: A study in foreign policy making and freedom of the press* (1972); A Cox *The court and the constitution* (1987); SJ Ungar *The paper and the papers* (1972)

¹⁵ JS Mill *Considerations on Representative Government* (1991) 42

¹⁶ A Mathews *The darker reaches of government* (1978) 20

The right to access information is a relatively new concept and has not been effectively articulated in the African system¹⁷ while there is developing jurisprudence from the European¹⁸ and North American systems.¹⁹

1.3 Focus of the study

First this paper gives a general overview of the global trend towards encapsulating access to information as a developing fundamental right.²⁰ Second, the paper explores the legislative framework as it relates to access to information in South Africa, in greater detail and in Uganda.²¹ South Africa, is explored not because it has an exemplary or squeaky clean record on the right to access information, but because it has instituted legislative mechanisms that form a basis for a growing jurisprudence on this subject.²² The legislative measures are couched in terms that project a pioneering initiative that could be followed by other states in the region.²³ Uganda offers a perspective from East Africa on the growing nature of FOI regimes in the world today. Third, The study focuses on developments and problems in this area in Zambia in view of the global trends.

1.4 Significance of the study

That debate on access to information at global level is fledgling is reason to take a look at this issue in depth, in the context of national situations, particularly in Zambia. On 17 April 2003 Zambian President Levy Mwanawasa appointed the Constitutional Review

¹⁷ It is instructive that the ACHPR, in article 1 enjoins states to take legislative measures to implement rights enshrined there in.

¹⁸ Pursuant to guarantees contained in article 10 of the ECHR, the CoE has elaborated on this article. See the “Declaration on media in an independent society”, DH-MM (95) 4 7-8 December 1994, para 16

¹⁹ In 1985 in an advisory opinion the Inter American Court for Human rights recognized access to information as a fundamental right. See Advisory Opinion OC-5/85 13 November 1985

²⁰ Open Society’s, Justice and Peace Initiative has released a report “Transparency and silence” (2006) that shows this trend. The report is available at <www.justiceinitiative.org>

²¹ South Africa is a pioneer in access to information legislation. Other countries within the region are trying with varying degrees of commitment to institute FOI legislation. See also M Memeza “An analysis of access to information laws in SADC and developing countries” report prepared for access to information programme of the Freedom of Expression Institute (2003)

²² South African courts have already entertained a number of cases relating to access to information and the courts have taken the presumption that there must be maximum disclosure unless there is an overriding public interest not to do so. See *Minister for Provincial and Local Government v Unregistered Traditional Leaders of the Limpopo Province* 2005 1 All SA 559 (SCA)

²³ R Calland & M Dimba “Freedom of information law in South Africa” Human rights initiative study (2002) 47

Commission (CRC) to solicit people's views across the country and produce a draft constitution.²⁴ According to Mwanawasa, central to the constitutional review was the fact that his government was committed to an open and accountable government. Despite his pronouncements, his government rejected the CRC's proposal to provide a constitutional guarantee on access to information.²⁵ The CRC's proposal followed up on the abortive Freedom of Information Bill, which went through two readings in parliament and was withdrawn on 18 December 2002.²⁶ Currently, the closest the Zambian Constitution is to providing for access to information is the guarantee on freedom of expression.²⁷ This guarantee contains so many derogations thereby emasculating that right.²⁸ Matibini, a foremost commentator on media law reforms has decried the myriad laws constricting people, particularly journalists from accessing and disseminating public information.²⁹

1.5 Literature survey

Access to information is a growing subject and available literature testifies to this fact. In southern Africa, only South Africa has considerable literature regarding access to information. Authors have mainly addressed access to information in the context of freedom of expression. Freedom of expression is not however the precise issue raised by this dissertation. This work is looking at access to information twofold: in the general sense and in Zambia in particular. The contribution of the above authors however, cannot be overlooked.

²⁴ The CRC was appointed pursuant to powers conferred on the President under the Inquiries Act, Cap 41 under Statutory Instrument 40 of 2004

²⁵ Article 72 of the Constitutional draft proposes a specific provision on press freedom and a legislative framework to give effect to this right by freedom of access to public information.

²⁶ Proposed Constitution of Zambia

²⁷ Article 22 Constitution of the Republic of Zambia

²⁸ As above

²⁹ One forum at which Patrick Matibini made this observation was at a meeting convened by MISA and the SADC Parliamentary Forum under the theme "Colonial laws used to repress the SADC media" Lusaka (2002).

Currie and de Waal discuss access to information in *The Bill of Rights* mainly in relation to the general constitutional limitation clause.³⁰ Other authors such as Archibold,³¹ and Martin and Adam,³² have looked at European and American perspectives in the context of the right to freely express oneself rather than discussing the core content of the right to access information.

Yet others have focussed on national security. For example, Blanton discusses access to information in the context of national security being a condition that allows a nation to maintain its values.³³ Moreover it is in the context of the United States of America.³⁴

Mendel in his expose looks at a comparative study of access to information legislation in various countries mainly in Europe, Americas and Asia, with the exception of South Africa.³⁵ This book lacks an African slant.

1.1 Methodology

The preponderant method employed is library research, with an examination of documented facts on the issue. Specifically, some books, interviews, articles, legislations and reports have been used as a pool for analyses in the area of access to information.

1.2 Limitation of the study

The immediate hurdle to this study is the choice of only South Africa and Uganda for comparison. In a world moving towards the actualisation of access to information as a fundamental right, there are obviously varied levels of attainment and no uniform standard. However one cannot make an examination of each country with an FOI regime

³⁰ Chapter 16 on freedom of expression

³¹ *Freedom of Expression* (1981) p 3

³² *Freedom of Expression and the Canadian Constitution. A Sourcebook on Canadian media law* (1994)

³³ TS Blanton "National security and open government in the United States: beyond the balancing test" in *National security and open government: striking the right balance* Campbell Public affairs Institute (ed) (2003) 31

³⁴ See also in this context, Campbell Public Affairs Institute (n 33 above) J Wadham & K Modi "National security and open government in the United Kingdom"; F Gonzalez " Access to information and national security in Chile"; B Nugroho "National security and open government in Indonesia"

³⁵ T Mendel *Freedom of information. A comparative legal survey* (2003)

in a paper of this sort, hence the limitation to the two countries. Nevertheless, the two countries proffer a picture, which can give a general indication of the nascent global standards as well as indicate the extent of the problem in Zambia in particular.

1.3 Organisation of chapters

The work is divided into five chapters. The first Chapter introduces the subject and provides a general overview of the study. Chapter two addresses the theoretical framework and international standards in the area of access to information. Chapter three focuses on the South African context in detail and touches on the Ugandan FOI regime. The Fourth chapter focuses on the situation in Zambia looking at the obvious gaps in relation to global trends as well as what Zambia could borrow from the South African experience and avoid from the Ugandan regime. The practice in terms of accessibility of public information is discussed and Chapter five is the concluding chapter with a summary of the findings in the foregoing chapters as well as recommendations.

Chapter two

2. Theoretical framework and basic international and regional trends

2.1 Introduction

James Madison, the fourth president of the United States of America and one of the framers of the American Constitution in 1776 stated:

“ A popular government without popular information or the means of acquiring it is but a prologue to a farce or a tragedy; or perhaps both. Knowledge will forever govern ignorance. And a people who mean to be their own governors must arm themselves with the power which knowledge gives.”³⁶

Although this statement was made in the 18th century, the recognition of the importance of the right of access to information has come slowly to many democracies, with some notable exceptions – in Sweden for example, legislation on access to information was enacted as early as 1766.³⁷ This chapter sets out to lay the theoretical foundations underpinning the development of the right to access information, with a view to delimiting its terrain as a self-standing right, as well as its development on the international human rights plane.³⁸

2.2 Theories

Access to public information is supported by arguments, which generally have two different imperatives.³⁹ Quinton argues that there is the democratic imperative and the

³⁶ J Madison *The complete Madison*, Kraus (1973) 337

³⁷ Available at <<http://www.sweden.gov.se/sb/d/3926/a/27810>> (accessed 31 August, 2006)

³⁸ For a detailed discussion on developments in access to information see D Banisar *Freedom of information and access to government record laws around the world* (2004)

³⁹ CG Quinton ‘Access to European public sector information; reconciling the access needs of administrative transparency and information market’ in *Cardozo Law Bulletin* (1997) 1

market imperative.⁴⁰ The “democratic imperative” emphasises the importance of implementing policies aimed at promoting administrative transparency and encouraging active participation of the people in the democratic process.⁴¹

The “market imperative” emphasises the need for implementing legislation to fully exploit the economic values of the massive amount of information accumulated by the public sector in the everyday running of its affairs.⁴² Without downplaying its importance, the market imperative is not the major thrust of this paper and shall thus not be discussed in further detail. It is critical, though to address the democratic imperative.

2.2.1 The Democratic Imperative

Thomas Jefferson, a proponent of this imperative argued that citizens’ access to government information, (which he termed the “currency of democracy”) when effectively exercised, could help ensure legitimacy of the democratic process.⁴³ Political scientist Shalini Venturelli, has referred to open access policies as “mechanisms for fulfilling democracy’s constitutive commitment to citizens’ participatory rights.”⁴⁴

Thus from the democratic imperative, it is the right of every citizen to know exactly what their elected leaders do on the citizens’ behalf, and to have access to information about the process through which decisions are taken, as well as the decisions themselves. This is important, not only for ensuring that the public is informed about the society in which they live, but it also gives them the opportunity to partake in the process, ultimately through casting an informed vote. Second, this imperative emphasises the importance of knowledge in guarding against abuses, mismanagement and corruption, particularly by public authorities.⁴⁵ Pope argues that vices such as corruption flourish in

⁴⁰ As above

⁴¹ As above

⁴² As above

⁴³ Thomas Jefferson was the third US President and author of the “Declaration of Independence”

⁴⁴ S Venturelli “The political-competitive order of information liberalization in the European Union”. Paper presented at the National international Initiatives for information infrastructure symposium, 25-27 January, 1996, John F Kennedy School of Government, Harvard University.

⁴⁵ Banisar “Freedom of information and access to government record laws around the world” (2003) 3

darkness and any efforts to open up governments to public scrutiny is likely to advance anti corruption practices.⁴⁶

As will be seen below, the right to access information has seen a gradual evolution, and one could argue that this transition is not complete yet.

2.3 Historical background

2.3.1 The League of Nations

To the extent that information flow was discussed in certain territories such at the United States and Sweden, before the Second World War, it was not discussed in terms of international freedom of information.⁴⁷ Perhaps this could be attributed to the divergence of opinion and practice among states as to the acceptable scope of that freedom and so there was no rule on freedom of information in international law.⁴⁸ The League of Nations made an effort to produce the earliest attempt at a multilateral instrument on information – the International Convention Concerning the Use of Broadcasting in the Cause of Peace of 1936.⁴⁹ According to this Convention, states have a right to control and if necessary suppress information transmitted by radio broadcasting. Clearly, though it was dealing with information, it was more an effort at suppression rather than fostering of an open society. It was only after 1945 that freedom of expression and its related freedom of the press, made a debut on the international scene.⁵⁰

⁴⁶ J Pope “Access to information: whose right and whose information” UN global corruption report (2002) 6

⁴⁷ Osterdahl I “Freedom of information in international law” in *Freedom of information in question* (1992) 16

⁴⁸ See Ioannou K “The international debate relating to freedom of information”, Council of Europe proceedings of the sixth international colloquy about the ECHR, Seville 13-16 November 1985, 210

⁴⁹ The Convention was signed in Geneva on 23 September 1936 and came into force on 2 April 1938. For a full list of parties to the Convention see 186 LNTS 301. Interestingly, four African countries are party to this Convention including, Cameroon, Egypt, Mauritius and South Africa

⁵⁰ Ioannou (note 48 above)

2.3.2 The United Nations

After the Second World War and with the formation of the UN, there was general concern for individual human rights and this spilled over to the field of information and communication giving support to the demands for a human right to freedom of information.⁵¹ Ioannou gives a number of factors he considers as being the most important leading up to the birth of a universal freedom of information on the international scene.⁵² Among them he states the predominance of the western liberal attitudes within the newly established UN as well as the emergence of the American news agencies as strong competition to European news agencies, for the sharing of the international information market.⁵³ This suggests a strong American interest in the proclamation of freedom of information after the war.

The prominent position of freedom of information was to be confirmed in a UN General Assembly resolution at the very first Assembly in 1946.⁵⁴ The resolution gives a general statement of principle which reflects the crucial importance that the General Assembly attaches to the freedom of information.⁵⁵ According to the first preambular paragraph, freedom of information is a “fundamental human right and a touchstone of all freedoms to which the United Nations is consecrated.”⁵⁶ This could be read to mean that freedom of information is considered the necessary prerequisite of all other human rights and freedoms which the UN is striving to secure around the world. According to the resolution, this freedom implies the right to “gather, transmit and publish news anywhere and without fetters.” Further the resolution recognizes this freedom to be central to any serious effort to promote peace and progress around the world.⁵⁷

⁵¹ Osterdahl (note 47 above)

⁵² Ioannou (note 6 above) 212

⁵³ As above

⁵⁴ UN Gen Ass res 59(1) 14 December 1946

⁵⁵ As above

⁵⁶ As above (preamble)

⁵⁷ Second preambular paragraph of res 59(1)

The above proposition is significant in three ways: First, it places freedom of information at an international as well as national level by saying that it implies the right to gather, transmit and publish news anywhere and everywhere. Second, it defines what freedom of information is in broad terms and lastly, it gives a hint of the values which must permeate the international law and policy making in this field. In addition, the resolution serves as a first point of call in attaining cooperation among nations in that it promotes a world opinion, which is dependent on freedom of information.

The centrality of this freedom is reflected in later resolutions of the General Assembly which have called on states to remove barriers, which deny peoples the free exchange of information, as this is central to peace.⁵⁸ The Soviet bloc, reflecting its restrictive approach to openness, voted against this resolution on the “Essentials of Peace”.⁵⁹ Another one in 1959 followed the 1949 resolution on the “Question of the freedom of information and the press in times of emergency” and it called on states to refrain from taking measures restricting the freedom of the press when compelled to declare a state of emergency unless the situation strictly required such measures.⁶⁰

Further strong evidence of the great significance attached to freedom of information at the beginning of the UN was the summoning by the UN of an international conference on freedom of information in Geneva in 1948.⁶¹ These overtures, and others, set the stage for an international legal regime recognizing the right to access information.

⁵⁸ UN Gen Ass res 290(IV) 1 December, 1949 voted against by the Soviet bloc

⁵⁹ As above

⁶⁰ UN Gen Ass Res 425(V) 14 December, 1950. This one was also voted against by the Soviet Bloc

⁶¹ For a detailed analysis of the proceedings and outcome of the Conference see JB Whitton “The United Nations conference on the freedom of information and the movement against international propaganda” 43 *American Journal of International Law* (1949) 73-87

2.4 International legal standards

2.4.1 Universal Declaration of Human Rights

The adoption of the UDHR was a major milestone in global human rights discourse.⁶² The UDHR lays down the contemporary human right to access information:

“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”⁶³

This is a profound provision in that it recognises the right to seek, receive and impart information and ideas through any media, and crucially, regardless of frontiers. There is however a suggestion in article 19 that this freedom is not as absolute as, for example, the freedom of opinion. In regard to freedom of opinion, it is proclaimed that this freedom is exercised “without interference” but no similar guarantee is given to the freedom of information. It appears the drafters envisaged the possibility and even the necessity of some restriction on the freedom of information.⁶⁴ As will be seen later, this freedom is subject to certain restrictions, but which should not be nugatory of the right itself.⁶⁵

It is submitted that article 19 is binding on all states as a matter of customary international law.⁶⁶ Crucially this provision demolishes the walls of secrecy by advocating openness in the gathering, receipt, and imparting of information by recognizing that this provides fertile ground in which divergent opinions emerge. Diversity is a necessary ingredient for social development.

⁶² UN Gen Ass res 217 A (III) 10 December, 1948

⁶³ Article 19 UDHR

⁶⁴ All FOI regimes impose certain restrictions on the exercise of the right to access information

⁶⁵ Banisar (n 45 above) discusses the common restrictions in 57 countries

⁶⁶ Article 19 of the UDHR has been drafted into a legally binding Treaty, the CCPR with 152 states parties.

2.4.2 International Covenant on Civil and Political Rights

So fundamental was article 19 of the UDHR that the foremost instrument on civil and political rights, the International Covenant on Civil and Political Rights (CCPR) provides a corresponding provision in article 19.⁶⁷ Article 19 (2) states:

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

The CCPR tightens the language and expands on the provisions of the UDHR. It also recognises the restrictions that may be imposed on the exercise of this right but that such restrictions must be lawful and necessary for “respect of the rights or reputation of others” and for “the protection of national security or public order, or of public health or morals”. These exceptions are critical in assessing the efficacy of this freedom particularly in the Zambian context: To what extent has the government relied on this exception to deny access to information? This will be discussed in chapter four.

But even with such provisions, the growth of the right to access information has been gradual and in a sense is still developing. For example, it was only in 1993, forty-five years after the UDHR, that the UN Commission on Human Rights (CHR) established the office of the Special Rapporteur on Freedom of Opinion and Expression.⁶⁸ The Special Rapporteur is mandated to clarify the specific content of the right to freedom of opinion and expression.⁶⁹ In his 1998 Annual Report, the Special Rapporteur stated that freedom of expression includes the right to access information. He stated:

⁶⁷ Gen Ass res. 2200 A (XXI) 16 December, 1966, entered into force on 23 march, 1976

⁶⁸ The CHR was established in 1946 and has since transformed into the Human Rights Council. See Gen Ass Res A/Res/60/251 of 3 April, 2006

⁶⁹ Res 1993/45 of 5 March, 1993

“The right to seek, receive and impart information imposes a positive obligation on states to ensure access to information, particularly with regard to information held by the government in all types of storage and retrieval systems.”⁷⁰

Initiatives by the UN have set the stage for other actors at regional level to elaborate further on this right.

2.5 Regional mechanisms

2.5.1 Council of Europe

The European Convention on Human Rights is a reflection of the nascence and evolving nature of the right to access information.⁷¹ Although it guarantees freedom of expression in article 10, this provision differs materially from similar guarantees in the American Convention in that it protects the right to “receive and impart” but not the right to “seek” information.⁷² The omission by the ECHR can perhaps be ascribed to be a product of its time and a reflection of euro-conservatism. In a bid to redress this, the Committee of Ministers, the highest political decision making body of the CoE adopted a recommendation on access to information.⁷³ Again the CoE has been very cautious in its wording by setting limits to allow the provisions contained in the recommendation to apply only to persons within the CoE member states.

However, it can be argued that the above restriction is merely a superficial one because the fourth European Ministerial Conference on Mass Media Policy adopted a declaration recommending that the Committee of Ministers consider preparing a “binding legal instrument or other measures” embodying basic principles on the right to access information held by public authorities.⁷⁴

⁷⁰ Report of the Special Rapporteur, UN Doc. E/CN.4/1998/40, 28 January, 1998 para 14

⁷¹ The European Convention was adopted on 4 November 1950 and entered into force on 3 September 1953.

⁷² T Mendel *Freedom of information. A comparative legal survey* (2004) 33

⁷³ R (81) 19 on access of information held by public authorities, 25 November, 1981

⁷⁴ Declaration on media in a democratic society, DH-MM (95) 4, 7-8 December, 1994

The Committee of Ministers responded by adopting a recommendation on access to official documents providing a general rather than restrictive right to access information.⁷⁵ The recommendation calls on member states to guarantee the right of everyone to have access on request to official documents and that this principle should apply “without discrimination”.

2.5.2 Organisation of American States

The American Convention on Human Rights (ACHR) guarantees the freedom of expression in even stronger terms than the UN instruments. In addition to the general provisions contained in both the CCPR and the UDHR, Article 13 (3) of the ACHR provides:

“ The right of expression may not be restricted by indirect methods or means such as the abuse of government or private control... or by any other means tending to impede the communication and circulation of ideas and opinions.”

This is an important addition for two reasons: First, it emasculates covert methods which governments can and have used to deny persons access to information and secondly, it places a burden on non-state actors to act in the public interest by not fettering the right to access information.

The strength of this provision is reflected in the jurisprudence of the American Court, which has given a generous interpretation of article 13 by expressly recognizing access to information as an indivisible right.⁷⁶ The court held:

“ Freedom of expression requires on one hand that no one be arbitrarily limited or impeded in expressing his own thoughts. In that sense, it is a right that belongs to each individual. Its second aspect on the other hand, implies a collective right to receive any information whatsoever and to have access to the thoughts expressed by others.”⁷⁷

⁷⁵ R (2002) 2, 21 February 2002

⁷⁶ See Advisory Opinion on compulsory membership in an association prescribed by law for the practice of journalism OC-5/85, 13 November 1985

⁷⁷ As above (para 30)

The importance attached to this right has been embraced by civil society. For example, the Inter American Association, a non-governmental organisation has adopted the Chapultepec Declaration whose principles explicitly recognise access to information as a fundamental right.⁷⁸

2.5.3 African Union

The African Charter on Human and Peoples Rights is the most conservative of the three regional systems in terms of the right to access information. While, it protects the right to freedom of information, it does so in a more rudimentary fashion than the European and American Conventions.⁷⁹ According to article 9 of the Charter:

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

Judging from the wording of this article, the protection afforded under the ACHPR is not as strong as under the European or American Conventions or indeed under the CCPR. Though all are offshoots of the UDHR, article 9 of the ACHPR, indeed the Charter as a whole, seems to be founded on partly different ideals than the liberal ones which inspired the other Conventions. This assertion is confirmed by the attitude of most African governments, including the two under review here, Uganda and Zambia with the exception of South Africa. As Gittleman writes, freedom of information has been a very sensitive issue in Africa.⁸⁰

African leaders seem to be jittery and hypersensitive to criticism and therefore rights like access to information are not so well received even though commitments have been made under the CCPR.

⁷⁸ Adopted by the Hemisphere Conference on Free Speech, New Mexico, 11 March, 1994

⁷⁹ For a general comparison of the ACHPR with both the European and American Conventions, see BO Okere "The protection of human rights in Africa and the African Charter on Human and Peoples' Rights: A comparative analysis with the European and American systems" 6 *Human Rights Quarterly* (1984) 141

⁸⁰ R Gittleman, "the African Charter on Human and peoples' rights: A legal analysis" 22 *Virginia Journal of International Law* (1982) 667

Nothing in the ACHPR is said about opinions, nor that rights are exercised “regardless of frontiers”. This is reflected in the downgrading of individual human rights in favour of collective or peoples’ rights -and individual duties- thereby weakening the effect on the freedom of information. The closest the African system has come to recognizing the right to access information is a declaration adopted by the African Commission on Human and Peoples’ Rights on Principles on Freedom of Expression in Africa.⁸¹ The Declaration endorses the right to access information held by public bodies. It is progressive in that not only does it call on the negative duty by states to provide information on request, but also imposes a positive obligation on them to publish important information even in the absence of a request.⁸² It goes further to call on states to align their secrecy laws to conform to the requirements of the right to access information.⁸³ In addition, it states that persons who release information in good faith on wrongdoing shall not be sanctioned for doing so.⁸⁴

The difficulty with such declarations or recommendations by the Commission is that they are not of a binding nature and the cavalier attitude of governments towards such recommendations is well documented.

2.6 International and regional jurisprudence

Claims on access to information are still few and far between. At the level of the CCPR, no case has been filed before the forerunner of the Human Rights Council, the CHR. At regional level, even though, courts have dealt with issues of freedom of the press and expression, only the European Courts have had specific claims on the right to access information. The finding of the Court in cases brought before it underscores the limits to the right to access information not only in the European system but in the African system as well.

⁸¹ 32nd Session, ACHPR, 17-23 October, 2002, Banjul, The Gambia

⁸² Principle IV (2)

⁸³ As above

⁸⁴ Principle XV

2.6.1 The European Court

The European Court has considered the right to access information in at least four cases, *Leander v Sweden*,⁸⁵ *Gaskin v United Kingdom*,⁸⁶ *Guerra and Ors v Italy*,⁸⁷ and *McGinley and Egan v United Kingdom*.⁸⁸

In the first three cases the Court found that the guarantee of freedom of expression in article 10 of the European Convention did not include a right to access the information sought. But this finding was limited to the “circumstances of the cases”. By using the above wording, the Court did not rule out the possibility of the right to access information under article 10. However, given the specific nature of the requests, which were refused in the three cases, it would be a very limited right indeed.

In *Leander*, the applicant was dismissed from his employment by the Swedish government on national security grounds but was refused access to information about his private life held in a secret police register, which had provided the basis for his dismissal.

In *McGinley*, while holding that the applicants did have a right to access the information in question, the applicants had not used a government established process by which access could be obtained.

These cases, important as they may be in recognizing the right to access information are problematic because the Court has proceeded cautiously making it clear that its rulings were restricted to the facts of each case and should not be taken as establishing a general rule. Be that as it may, it is still instructive that the right to access information is one that is recognized by the European Court and reflects the international trend set by international instruments.

⁸⁵ ECHR (1987) 4

⁸⁶ ECHR (1989) 13

⁸⁷ ECHR (1998) 7

⁸⁸ Application nos. 21825/93 and 23414.94, 9 June, 1998

In the African context, therefore, the right to access information should be understood against the backdrop of these developments. This is not to dilute its significance, but to just provide evidence of the evolutionary nature of this right. It is also against this background that this paper discusses the status of the right to access information in South Africa, Uganda and Zambia. What are the developments and impediments to the realization of this right and how can these be addressed?

James Madison's observation above, serves as a constant and unshirkable reminder that an open society is catalytic to development at various levels.

Chapter three

3. Country situations

3.1 Introduction

As stated earlier Freedom of Information regimes are a fairly new phenomenon globally.⁸⁹ In southern Africa, there are only two countries with FOI regimes: South Africa and Zimbabwe. Zimbabwe's Access to Information and Protection of Privacy Act (AIPPA) has been criticized as a misnomer as it gives the government extensive powers to deny people access to information rather than provide it.⁹⁰ In East Africa, Uganda is the only other country, apart from Kenya with an FOI regime⁹¹ This Chapter addresses the FOI legislation in South Africa and Uganda, highlighting their strengths and weaknesses.

3.2 South Africa

The right of access to information is firmly placed in the South African constitutional structure. According to O'Regan, South African constitutional history is such that a constitutional guarantee to access information was indispensable.⁹² She posits that a "culture of justification cannot root in a society where government is clandestine and closed".⁹³ This was made in reference to the apartheid regime, which was steeped in secrecy and passed laws through a minority white parliament without a need to justify even to those governed by the law.⁹⁴

⁸⁹ Banisar (n 65 above)

⁹⁰ Memeza (n 21 above) 5

⁹¹ The Access to Information Act came into effect in July 2005

⁹² Kate O'Regan is a judge of the Constitutional Court of South Africa

⁹³ K Oregan "Democracy and access to information in the South African Constitution: Some reflections" in Seminar report, the constitutional right of access to information (2001) 11

⁹⁴ The extent of legal restrictions on information in the apartheid era is charted in K Stuart *The newspaperman's guide to the law* (1977). See also A Mathews *The darker reaches of government: Access to information about public administration in three societies* (1978) & C Merret *A culture of censorship: Secrecy and intellectual repression in South Africa* (1994)

Thus the leadership ruled without any questions and the apartheid regime held power firmly in control of every apparatus.⁹⁵ After the end of apartheid, there was a collective conscience to rid the government of the vestiges of apartheid and the promulgation of the Interim Constitution was the starting point.⁹⁶

3.2.1 Background

The entrenchment of a constitutional right of access to information should be seen against the historical backdrop of the apartheid state's obsession with official secrecy.⁹⁷ In the Interim Constitution of South Africa, section 23 provided that:

“Every person shall have the right to access all information held by the state or any of its organs at any level of government in so far as such information is required for the exercise of any of his or her rights.”

More importantly constitutional principle IX provided that:

“Provisions shall be made for freedom of information so that there can be open and accountable administration at all levels of government”.⁹⁸

This principle set the stage for the inclusion in the Final Constitution of the right to access information. Thus, section 32 of the 1996 Constitution provides:

“ (1) Everyone has the right of access to –

- (a) any information held by the state; and
- (b) any information that is held by another person and is required for the exercise or protection of any rights.”

(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.”⁹⁹

⁹⁵ For an account on the effects of apartheid on transparency see E Mureinik “A bridge to where? Introducing the interim bill of rights” 10 *South African Journal of Human Rights Law* (1994) 31

⁹⁶ Oregon (n 5 above) 13

⁹⁷ I Currie & J Klaaren , *The Promotion of Access to Information Act Commentary*, [2003] 2

⁹⁸ Interim Constitution of South Africa

⁹⁹ This is subject to the general limitation clause contained in sec 36 of the Constitution

Schedule 6 of the Constitution under item 23(2) provides that the legislation envisaged in sub section 2 of section 32 should be enacted within three years of the constitution's coming into force.¹⁰⁰ The Final Constitution was promulgated on 18 December 1996 and entered into force on 4 February 1997.¹⁰¹ Going by the pronouncements of Schedule 6, the legislation on access to information had to therefore be enacted by 3 February 2000. In order to make this provision watertight in the absence of enabling legislation, Item 23(2) of Schedule 6 provides that section 32(1) would be deemed to read as section 23 of the Interim Constitution until enabling legislation was enacted.¹⁰²

The Constitutional Court found this requirement acceptable and noted:

"What is envisaged is not access to information merely for the exercise or protection of a right, but for a wider purpose, namely to ensure that there is open and accountable administration at all levels of government."¹⁰³

Jones J, acknowledges the historical significance of the above requirement:

" The purpose of section 23 is to exclude the perpetuation of the old system of administration, a system in which it was possible for government to escape accountability by refusing to disclose information even if it had a bearing upon the exercise or protection of rights of the individual. This is the mischief it is designed to prevent...Demonstrable fairness and openness promotes public confidence in the administration of public affairs generally. This confidence is one of the characteristics of the democratically governed society for which the constitution strives."¹⁰⁴

A characteristic of authoritarian states is their desire to control information and obsession with secrecy. So pervasive was this obsession by the apartheid regime that the Truth and Reconciliation Commission (TRC) was moved to address the

¹⁰⁰ Constitution of the Republic of South Africa, Act 108 of 1996 Schedule 6: Transitional arrangements

¹⁰¹ See Constitution of the republic of South Africa

¹⁰² As above

¹⁰³ In *Re Certification of the Constitution of the Republic of South Africa* 1996 (10) BCLR 1253 (CC) para 83

¹⁰⁴ *Phato v Ag, Eastern Cape* 1995 (1) SA 799 (E) 815; see also *Jeeva v Receiver of Revenue*, PE 1995 (2) SA 433 (SE)

widespread and massive destruction of documents by the government between 1990 and 1994.¹⁰⁵ The TRC noted that:

“ While governments are to a greater or lesser extent uncomfortable with the notion of transparency, preferring to operate beyond the glare of public scrutiny; in South Africa apartheid was a way of life”.¹⁰⁶

It is with this background in mind that the enactment of the Promotion of Access to Information Act was enacted in 2000.

3.2.2 Promotion of Access to Information Act

The Promotion of Access to Information Act (PAIA) is thus a creature of South Africa’s constitutional history.¹⁰⁷ The drafting history, long title, preamble and section 9 of the PAIA make it clear that the Act is intended to give effect to section 32 of the Constitution. The Act has a constitutional status. It is a legislation mandated by the Constitution to ‘give effect’ to a constitutional right.¹⁰⁸ The PAIA applies to both public and private sectors by providing a statutory access to information on request to any record held by the state, with the exception of records held by cabinet, court records and records held by members of parliament.¹⁰⁹

3.2.2.1 Definitions

A public body is defined as:

” (a) Any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government or,

¹⁰⁵ TRC report 1 (1998)

¹⁰⁶ (n 17 above) chapter 8 para 1

¹⁰⁷ Act 2 of 2000

¹⁰⁸ Currie I & de Waal J *The bill of rights handbook* fifth edition (2005) 687

¹⁰⁹ See the PAIA generally

(b) Any other functionary or institution when – (i) exercising power or performing a duty in terms of the constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation.”¹¹⁰

The definition above seems to exclude private bodies, which are to a large extent publicly funded in the absence of any legislation. It is difficult to know where such bodies would fit, but perhaps they could be subsumed under private bodies if the effect of their information is such that it hinges on the exercise of a constitutional right.

The definition of a public body has been considered in two decisions by Griesel J, in *IDASA v ANC & Others*¹¹¹ and Van der Westhuizen J in *Hlatswayo v Iscor*.¹¹² In *IDASA*, the applicants sought records of donations made to political parties and the question was whether the respondents were public or private bodies in terms of the definition provided in the Act read together with section 8(1) of the PAIA, which provides that:

A public body or a private body as defined in section 1 of the Act – (a) may either be public or private in relation to a record of that body; and (b) may in one instance be a public body or in another instance be a private body depending on whether that record relates to the exercise or a power or performance of a function as a public body or a private body.

The distinction is important because although the Act provides for access to both public and private bodies, the extent of the obligation on public bodies is greater than that placed on private bodies. Griesel J found that the records sought by *IDASA* related to private fundraising activities and thus the respondents could not be said to be exercising any powers or performing any functions as a public body.

In *Hlatswayo*, the applicant was denied access to minutes of meetings at *Iscor* as part of his research for his dissertation on labor relations between 1965 and 1973 when *Iscor* was still a public body. *Iscor* argued that it was not a public body and that the

¹¹⁰ sec 1 PAIA

¹¹¹ 20 April 2005 (unreported)

¹¹² 26 January 2005 (unreported)

records sought related to the exercise of a power as a private body. Van der Westhuizen directed Iscor to release the records as government had major shareholding in Iscor during the times stipulated in the request.

The Act defines a private body as a natural person who carries on any trade, business or profession, but only in that capacity as well as juristic persons.¹¹³ It thus excludes private non-commercial activities of natural persons.

The record for a public or private body is defined as:

“Any recorded information, regardless of the form or medium, which is in the possession or under control of that public or private body, whether or not it was created by that body.”¹¹⁴

There have been few cases that have proceeded to the courts relating to access of records of a private body.¹¹⁵ In *Clutchco (Pty) Ltd v Davies*, the Supreme Court of Appeal sadly entrenched the narrow interpretation of one’s right to access records of a private body.¹¹⁶ Comrie AJA has interpreted the proviso of “requires for the protection of any rights” to mean reasonably required.

3.2.3 Exercise of the right of access

South Africa is enjoying freedom of expression (explicitly guaranteed in article 16(1) of the Constitution) and access to information more than it has done for many decades, even centuries.¹¹⁷ It provides clearly detailed procedures for accessing a very broad range of both public and private information. It is noteworthy that the Act also places an obligation on a public body to provide information without being requested.¹¹⁸ The Act does not list which records a public body must publish, but requires public bodies

¹¹³ as above

¹¹⁴ as above

¹¹⁵ “5 years on...The right to Know” (ODAC)

¹¹⁶ 2005 93) SA 486 (SCA)

¹¹⁷ Memeza (n 90 above) 11

¹¹⁸ n 112 above (sec 15)

to report annually to the minister responsible indicating which categories of information are automatically available. The minister must then publish this information in the Gazette.

Under the Act, a requester must be given access to a record if that person complies with the procedural requirements stipulated in the Act and the sought record does not belong to a class of records to which this Act does not apply, such as cabinet records, provisional legislations and those records held by members of parliament. The Act directs all public bodies to appoint an information officer and as many deputy information officers as are required to render the public body as accessible as possible.¹¹⁹ Requests to the information officer must be made in a prescribed form and must at the very least, contain the requester's personal identification details, the records sought and the language in which such access is sought.¹²⁰ This is a very vital provision in that it allows requesters to be availed information in a language that they are familiar with rather than the country's official languages.¹²¹

The Act also envisages persons who may not be literate or those who, for various reasons, are unable to make a written request. In this case, the requester may make an oral request and the information officer is under obligation to reduce such request into writing and provide the requester with a copy.¹²² In addition to this, a person other than the person who requires that particular information may make a request for access to information.¹²³

This means that third parties can obtain information on behalf of the actual requester as long as they submit proof of the capacity in which such parties are making the request to the reasonable satisfaction of the information officer. There is no definition of what would be deemed to be reasonable and this provision rather gives the

¹¹⁹ as above (sec 17)

¹²⁰ as above (sec 18)

¹²¹ There are presently eleven official languages in South Africa including English, Afrikaans, Zulu, Xhosa, Swazi, Ndebele, northern Sotho, southern Sotho, Tsonga, Tswana and Venda

¹²² n 116 above (sec 18(3))

¹²³ as above (sec 18(2)(f))

information officer wide discretion, which could be problematic. For example, a person could be denied vital information if the information officer is not satisfied and conversely, the information officer could provide private information about a person which the third party could use to that person's detriment.

Information officers are required to provide reasonable assistance free of charge as is necessary to enable requesters to make requests.¹²⁴ A request may not be rejected without first offering the requester this assistance. Further in terms of section 20, information officers are required to transfer requests made to them to relevant departments if such a request does not fall within that particular information officer's possession. In addition section 21 stipulates that information officers are required to preserve any record which is the subject of a request until that request has been finally determined.

Time is of the essence and there is an obligation to notify a requester within 30 days of the status of his or her request.¹²⁵ This period may be extended for a further 30 days where the request is for a large number of records and to comply within 30 days would unreasonably interfere with the activities of the body. For example where the information sought is in another city or where inter-agency consultation is required that cannot reasonable be completed within the 30 days stipulated. The requester must however be informed of this fact.¹²⁶ If an information officer fails to notify the requester within the stipulated time then that is deemed to be a refusal.¹²⁷ In such a case the requester may resort to the appeal processes stipulated in the Act.¹²⁸

¹²⁴ as above (sec 19(1))

¹²⁵ It is quite conceivable that such notification of some information, especially that which is readily available can even be availed immediately.

¹²⁶ n 120 above (sec 26)

¹²⁷ as above (sec 27)

¹²⁸ as above (sec 74-76)

3.2.4 Notification of grant or refusal

If the request is granted, the requester will be notified of the fees to be paid, the form in which access will be given and the right to appeal the fee. Where the request is refused, in whole or in part, the notice must include reasons for the refusal and the provisions of the Act relied upon to refuse the request.

3.2.5 Exemptions

As with most rights, the right to access information has limitations.¹²⁹ The exceptions contained in the Act do not detract from the fundamental right to access information. One of the declared objects of the PAIA in section 9 is to limit this right in order to ensure a “reasonable protection of privacy, commercial confidentiality and effective, efficient and good governance.” In a sense, there is a public interest override.¹³⁰ Significantly, however, section 5 of the Act applies to the exclusion of any other legislation that prohibits or restricts disclosure of information and which is essentially inconsistent with the objects or a specific provision of the act. Thus is *CCII Systems (Pty) Ltd v Fakie and others NNO* (ODAC as amicus curiae), the court ordered the Auditor-general to provide all the records the applicant had requested in the selection of a tender beneficiary.¹³¹ The Auditor-general had refused to grant him relying on numerous exemptions including that the disclosure would involve a substantial and unreasonable diversion of resources, confidentiality and the defense and security needs.

3.2.5.1 Grounds for refusal

Requests which are “manifestly frivolous or vexatious” or the processing of which would “substantially and unreasonably divert resources of the public body may be refused.”¹³²

¹²⁹ See Baniser (n 89 above)

¹³⁰ However the wording of the Act is such that it requires that a ‘harm test’ be done to ascertain if the public benefit in knowing outweighs the harm that may be caused by disclosure.

¹³¹ 2003(2) SA 325 (T)

¹³² (as above) sec 45

The Act uniquely provides for *secrecy* as well as *access* in that the language of the Act in some cases directs the public body to refuse access by the use of the word ‘must’. However, it should be noted that the exceptions are detailed and very narrow, in many cases, limiting the exceptions themselves in their scope of non-disclosure.¹³³

For example section 34 sets out an exception where granting access to a record would involve the “unreasonable disclosure of personal information about a third party”. But this exception does not apply in instances where the individual was informed upon providing the information that it belonged to a class of information that might be disclosed, where the individual has consented, or where the information is already publicly available.

There is a mandatory refusal for records held by the South African Revenue Service: This was made in response to pervasive tax collection problems in South Africa.¹³⁴ Various other grounds for refusal exist to protect commercial interests¹³⁵, where disclosure would constitute an actionable breach of confidence as well as information supplied in confidence where disclosure would be likely to prejudice future supply of such information and it is in the public interest that such information continue to be supplied.¹³⁶ Section 38 prohibits disclosure where it would be likely to endanger life and physical integrity, the security of a building, system, other property, means of transport or systems for protecting individuals.

Other exceptions include, law enforcement and legal proceedings¹³⁷, information related to international relations the disclosure of which would cause prejudice to defence, security and international relations.¹³⁸

¹³³ The PAIA generally emphasises the need for a harm test.

¹³⁴ n 127 above (sec 35)

¹³⁵ as above (sec 36)

¹³⁶ as above (sec 37)

¹³⁷ as above (sec 40) See for example *S v Safatsa* 1988 1 SA 868 A , which is supportive of the principle that in all exceptions, it must be shown that there is a public interest override which shows that the harm of disclosure clearly outweighs the protected public interest.

¹³⁸ n 37 above (sec 41) Even here, the public interest override provided for in section 46 and section 70 of the PAIA is applicable. Section 41(1)(a) excepts information the disclosure of which could *reasonably* be expected to cause prejudice to defence and security...(emphasis added). This wording is

Section 44 contains exceptions, which are very broad. It excepts records which contain an opinion, advice, recommendation, or account of a consultation or discussion for the purpose of assisting to formulate a policy.

Finally the Act includes a severability clause, which requires any part of a record not containing exempt information to be made accessible.¹³⁹

3.2.6 Problems

Despite its seemingly impeccable architecture, the PAIA is not without problems. There have been problems of implementation and its use has been limited.¹⁴⁰ For example the requirement that contact details of all information officers be placed in the general telephone directory has only been implemented by, ironically, the South African National Defense Forces six years after the Act came into force.¹⁴¹ In 2002 and 2003 ODAC conducted a survey in which it was found that the PAIA has not been properly or consistently implemented, not only because of the newness of the Act but because of the low levels of awareness and information of the requirements set out in the Act.¹⁴² Appeals lie with the courts although it would have been preferable to have an independent body that is easily accessible to the public without the niceties that go with court processes.¹⁴³

subject to a public interest override in that it requires the public body to show disclosure would reasonably cause harm to the specified interest.

¹³⁹ (As above) Section 28

¹⁴⁰ This fact has been noted by ODAC and SAHA the foremost civil society organisations in monitoring the implementation of the PAIA

¹⁴¹ V Harris "Using the PAIA: The case of the South African History Archive"(2003) 3 <www.wits.ac.za/saha/publication/FOIP_update_jan2003.pdf> accessed on 1 October 2006

¹⁴² as above

¹⁴³ Ireland said to have one of the most effective appeals processes has an office of the Commissioner who makes binding decisions on appeals. Banisar (n 125 above) 42

3.2.7 Conclusion

By and large the provisions of the PAIA contain far-reaching provisions towards access to information. It has clearly spelt out limits and has no amorphous provisions, which create a large margin of discretion upon those with an obligation to provide requested information. This remains the model for which other countries in the region can follow when they decide to enact access to information legislation. South Africa has shown that a government, which governs openly, affords citizen the opportunity to participate effectively.¹⁴⁴ The discussion on Uganda below will therefore be an attempt to show what Zambia should avoid if it enacts access to information legislation, as Uganda's AIA, though not totally fatal has blanket exemptions.

3.3 Uganda

Uganda's constitutional history is different from that of South Africa but the underlying principles for the enactment of the freedom of information legislation in Uganda are similar to those of South Africa and indeed other regimes.¹⁴⁵ Uganda has had a checkered political history, moving from a one party state, to a military dictatorship, to a civil war and now the enactment of the 1995 Constitution.¹⁴⁶ The right to access information enjoys constitutional status, a result of the public's sentiments during the constitutional review process.¹⁴⁷ Article 41 of the Constitution provides that:

"1. Every citizen has a right of access to information in the possession of the state or any other organ and agency of the state except where the release of the information is likely to prejudice the security or sovereignty of the state or interfere with the right to privacy of any other person.

¹⁴⁴ A 2005 global survey by Gallup entitled "Who runs your world" indicated South African citizens had the most faith in their democracy and Scandinavia was second. Available at: <http://www.bbc.co.uk/pressoffice/pressreleases/stories/2005/09_september/15/world.shtml>

¹⁴⁵ For details of Uganda's constitutional history see, J Oloka-Onyango "Constitutional transition in Museveni's Uganda: new horizons or another false start," in 2 *Journal of African Law*, 39 (1995) 156

¹⁴⁶ It took five years for a government appointed constitutional review commission, from 1988 to 1993 to conclude its work. See B Odoki *The search for a national consensus* (1995)

¹⁴⁷ The Uganda Constitutional Commission noted in its report " the right of every citizen to information is vitally important, at the centre if the struggle for the defense of human rights and democracy" See Constitutional Commission Report of 28 May 1993 (169)

2. parliament shall make laws prescribing the classes of information referred to in clause (1) of this article and the procedure for obtaining access to that information.”

The right to access information has been watered down significantly in Uganda not only because of the exemptions but also by the exclusion of everyone else who is not a citizen.¹⁴⁸ The use of the words “likely to prejudice” in clause (1) of article 41 is problematical as it leaves room for wide exceptions to be made in the Act giving effect to this constitutional right.

Although the Act follows the classical format of freedom of information laws in other jurisdictions generally, juxtaposed against South Africa specifically, it is clearly limited in its scope.

3.3.1 Access to Information Act, 2005

Pursuant to article 41 of Uganda’s 1995 constitution, the Parliament of Uganda enacted the Access to Information Act (AIA) on 19 July 2005.¹⁴⁹ Although the AIA has constitutional basis, the government was unwilling to enact the AIA. It took civil society organisations to draft a private members’ bill to jolt the government into hijacking the AIA process by introducing its own bill.¹⁵⁰ As stated in the short title and preamble, this Act is meant to give effect to the right of access to information. The process leading to the enactment of the Act is testimony to the pervasive veil of secrecy that shrouds most African governments. Before arriving at the final draft of the bill there were a number of provisions, which came under attack particularly from local, and international civil society organisations.¹⁵¹ For example the wholesale exclusion of certain public entities and persons from the proposed law’s application was seen as

¹⁴⁸ Other jurisdictions have tried to widen the scope of their FOI legislations by including permanent residents as beneficiaries.

¹⁴⁹ Act 6

¹⁵⁰ The AIA was promulgated 10 years after the Constitution came into effect after much lobbying from human rights groups notably Article XIX and HURINET

¹⁵¹ See a memorandum prepared by Article XIX “Uganda access to information bill 2004(bill no.7) – Global campaign for free expression” (2004). See also “An analysis of the Ugandan draft access to information bill” Commonwealth Human Rights Initiative & Uganda Human Rights Network (2004)

inappropriate.¹⁵² The AIA contains 48 sections detailing the scope of the Act. Unlike the PAIA, the AIA does not apply to private bodies. The AIA applies to:

“ All information and records of government ministries, department, local government, statutory corporations and bodies, commissions and other government organs and agencies unless specifically exempted..”¹⁵³

The Ugandan Act seems to go a step further by including the word ‘information’ but restricts application to certain government organs. This is unlike the PAIA, which rather than restrict access to information from certain government organs, just restricts specified classes of information from access.¹⁵⁴

3.3.2 Definitions

A ‘public body’ is defined as a “government ministry, department, statutory corporation authority or corporation”.¹⁵⁵

‘Information’ includes “written, visual, aural and electronic information.”¹⁵⁶

A record is defined as:

“any recorded information, in any format, including and electronic format in the possession or control of a public body, whether or not that body created it.”

The definition of information is wide.

¹⁵² As above

¹⁵³ Section 2 AIA

¹⁵⁴ For example information which would prejudice national security is excluded, but from the reading of the PAIA there is no restriction on any government entity

¹⁵⁵ sec 4

¹⁵⁶ as above

3.3.3 Exercise of the right

The AIA contains procedures for the exercise of this right, which is not as elaborate as the South African legislation. The procedure for requesters is similar to the PAIA: It must be in writing in the prescribed form and for those who for various reasons are unable to write, the request can be made orally with a duty upon the information officer to reduce that request in writing.¹⁵⁷ The information officer has a mandatory duty to assist a requester.¹⁵⁸

The AIA has a number of limitations placed on requesters, and a ‘harm test’ is not employed in a number of instances. There may be legitimate government interests but these need to be justified and one does not get the sense that this is so in the Act. For example, section 5 provides for the right of every citizen to access information and records in the possession of the state or any body, “except where the release of the information is likely to prejudice the security of the state or interfere with the right to privacy of any other person.”

This provision has the unfortunate effect of giving bureaucrats in public bodies wide discretion to withhold a wide array of information to protect “official secrets”. The overwhelming culture of bureaucracy remains one of secrecy, distance and mystification, and the Official Secrets Act, which makes disclosure of an amorphous array of government information a criminal offence, legitimises this preponderance of bureaucratic secrecy.¹⁵⁹

In a country where there is no formal system of classification nor limits on what can be termed “secret”, section 5 does not offer a general presumption to disclose.¹⁶⁰ The Oaths Act swears government officials to secrecy without providing parameters for

¹⁵⁷ as above (sec 11) The information officer is the CEO. There is no provision for as many information officers leaving it to the discretion of one person. If the CEO is not around, there is no procedure setting out what requesters may do in that instance, but one could presume that the request would have to go through the internal channels of a given public body in the absence of the CEO

¹⁵⁸ as above (sec 12)

¹⁵⁹ See Uganda’s Official Secrets Act chapter 302 Laws of Uganda

¹⁶⁰ See the First Schedule of The Oaths Act Cap 19 (1963) Laws of Uganda

such secrecy.¹⁶¹ This is fertile ground for denials to access. It actually places limits on access and to illustrate this point, in *Tinyefunza v Attorney General*, the lower Court held that “hansards” could only be received upon approval of parliament.¹⁶² The court reinforced the pervasive secret nature of government by not addressing itself to the constitutional right contained in article 41. Further it failed to assert that parliament was under an obligation to furnish reasons for its refusal in order to show that the protected interest outweighed the applicant’s right to access. The Supreme Court on appeal made a correct interpretation of article 41. The Court held that article 41 of the Constitution gives the right of access to information in possession of the state or its organs, “except where release of the information is likely to prejudice the security of the state”.¹⁶³ The onus lies on the state to show such prejudice to national security, which it failed to do in this case.

The Act also provides for the automatic availability and disclosure of certain records, including those available for inspection under any other written law, for purchase or photocopying from the public body and those that can be obtained from the public body for free.¹⁶⁴ Like the PAIA, the AIA is still not specific on what this information is. Further, automatic disclosure by the information officer is to be made every two years.¹⁶⁵ Details of information officers for public bodies are to be published in a general directory.¹⁶⁶ Except for cases in which requests have been transferred to a different body other than the one to which the requester made the request, the Act does not stipulate the time limits for notification of requesters on the status of their requests.¹⁶⁷

This is a serious omission because requesters can be made to wait indefinitely for their requests to be processed. In cases where there is a transfer, notice of the status of the

¹⁶¹ As above

¹⁶² Supreme Court Constitutional Appeal 1 (1999)

¹⁶³ As above

¹⁶⁴ n 152 above (sec 8)

¹⁶⁵ Contrast this with the one year period in the South African case

¹⁶⁶ n 158 above (sec 9)

¹⁶⁷ as above (sec16)

request is to be made within 21 days. But even then, there is no guarantee that the information will be granted within a specified time period such as the stipulation in the PAIA. Further, in situations where a request has been deferred, the Act requires a requester to give reasons for his or her request thereby overriding the right of access stipulated in section 6.¹⁶⁸

Where an internal appeal or court application is made against the granting of a requested record, access to that record may only be given when the decision to grant the request is finally confirmed.¹⁶⁹ This is nugatory.

3.3.4 Exemptions

The exemptions found in the Act include the protection of national security and international relations, personal privacy, law enforcement and public order, commercial confidentiality, information received in confidence, cabinet minutes and those of its committees, safety of persons and property, records of legal proceedings and the operations of public bodies if disclosure of such information would frustrate the deliberative process of that body.¹⁷⁰ Most of the exemptions are found in other regimes and are narrowly drawn.¹⁷¹ But in Uganda's situation, unlike in South Africa there is no requirement that harm must be shown before the information can be withheld for at least some provisions. For example, national security would require a high level of protection, but other things such as 'operations of private bodies', ought to be balanced against disclosure in the public interest. This is to say that the benefit of knowing the information outweighs the harm that may be caused by the disclosure.

¹⁶⁸ as above (sec15)

¹⁶⁹ as above (sec 20(10))

¹⁷⁰ as above (secs 24-34)

¹⁷¹ For a comparison with South Africa see *Minister for Provincial and Local Government v Unregistered Traditional Leaders of the Limpopo Province* 2005 1 All SA 559 (SCA) para 16

3.3.5 Appeals

Cases in which a person has been denied access or is aggrieved by the decision of an information officer must be made to the Chief Magistrate in terms of section 37. If not satisfied by the decision of the chief magistrate then that person can appeal to the High Court.¹⁷²

3.4 Conclusion

The constitutional history of South Africa is such that people said ‘never again’ to the oppressive apartheid system and collectively agreed to chart a new course in which transparency would be the order of the day. It is fair to say that South Africans today, by and large have faith in their constitutional democracy and are confident that where their rights to access information are infringed or limited in any way, the courts will give an interpretation that expands rather than contracts those rights.¹⁷³

In Uganda, *Tinyenfunza* is important as it shows the lengths to which the government can go in trying to shield information. It points to an entrenched culture of secrecy and enacting of the AIA is a positive step only if it can have real meaning.¹⁷⁴ The bottom line with FOI legislation is that there must be considerable political will to ensure that these documents are couched in ways that gives effect to the right to access information.

¹⁷² n 164 above (sec 38)

¹⁷³ The efficacy of the PAIA is still being tested. Others have argued that the PAIA has not been used by the public to a greater extent because people are not aware of its existence. See A Tilley & V Mayer “Access to information law and the challenge of effective implementation in *The right to know, the right to live: access to information and socio economic justice* (2003)

¹⁷⁴ The fact that the AIA was promulgated a decade after the Constitutional pronouncement raises skepticism as to its efficacy, at least in the short term.

Chapter four

4 Access to Information law reform: genuine or sham?

4.1 Introduction

This section looks at the transition process leading to the proposed Freedom of Information Act, its strengths and weaknesses, and the practical realities that make it imperative for an FOI regime in Zambia. The concern therefore is not only the legal instruments critical to the achievement of this right, but also the events that make it inevitable to agitate for an access to information regime which will reflect the government's stated objective in Zambia.¹⁷⁵

4.2 Background

Zambia has the dubious distinction of having four constitutions since gaining independence from Britain in 1964.¹⁷⁶ Four constitutions in 42 years hardly represent a settled state of affairs, not least because another Constitution is on the horizon.¹⁷⁷ From 1973 to 1991 Zambia was a one party state. After the return to multi-party politics that ushered a new Government led by the Movement for Multi Party Democracy (MMD) in 1992, Zambia was hailed as a model for democracy.¹⁷⁸ There appeared to be a resurgence of energy lost over the years of single party rule and a determination by the government to rid the country of the vestiges of the second republic, which had

¹⁷⁵ The government's objective remains that of "transparency, accountability and good governance".

¹⁷⁶ The 1964 constitution provided for in Schedule 2 to the Zambia Independence order under the Foreign Jurisdiction Act (1890); Constitution of Zambia Act 1973; Constitution of Zambia Act 1991; Constitution of Zambia (Amendment) Act 1996.

¹⁷⁷ M Ndulo & RB Kent "Constitutionalism in Zambia: past present and future" 40 *Journal of African Law* 2 (1996) 256

¹⁷⁸ AFRONET *Zambia Human Rights Report (1999)*; Human Rights Watch "The human rights benchmarks: A Human rights Watch and Afronet memorandum" released at the World Bank consultative group meeting 16-18 July 1999

emasculated, and in some cases obliterated the rights of the people.¹⁷⁹ The MMD led by the charismatic trade union leader Frederick Chiluba was voted in on the plank of weighty public reforms to increase transparency, accountability and good governance.¹⁸⁰

Critical to these reforms was the need to make information accessible to the public: this assertion was based on the fact that access to information allows citizens to hold public authorities to account for all actions taken for and on behalf of the people.¹⁸¹

4.3 Uncovering the veil of secrecy

Official secrecy has been central to both pre and post-colonial governments in Zambia.¹⁸² The colonial overlords used secrecy to maintain their imperialist interests. The objective of colonialisation was mainly resource extraction as opposed to the founding of an open society as no participatory institutions emerged.¹⁸³ Therefore it is not strange that leaders in post-colonial Zambia inherited the colonial state and to maintain their hegemony, use colonial laws to deny the masses information, which should generally be accessible.¹⁸⁴ Secrecy was equated to national security and national security was and still is a plea to immunity preventing access by individuals.¹⁸⁵ Although such legislation is of general application, certain sections of the society, notably journalists have felt the full weight of secrecy laws and some have paid with their liberty while others have suffered attacks on

¹⁷⁹ At independence Kenneth Kaunda was installed as the prime minister of a teetering multiparty state. In 1972, Kaunda orchestrated a move to a one party system, which he called “one party participatory democracy”. A constitutional amendment recognising this fact was promulgated on 25 August 1973 and for 27 years he was the only presidential candidate in five-yearly periodic elections.

¹⁸⁰ Promises were made at public rallies preceding the elections and shortly after the coming into office on how open the MMD would be to reflect the “new culture of Zambia’s third republic”

¹⁸¹ Osterdahl (n 51 above)

¹⁸² The State Security Act (1969) is a relic from the Colonial era and a powerful tool in concealing information

¹⁸³ S Du Plessis “Institutions and Institutional Change in Zambia” paper presented at the international economic history congress in Helsinki, Finland 21-25 August, 2006

¹⁸⁴ The Emergency Powers Act, Official Secrets Act (repealed), State Security Act, Preservation of Public Security, Zambia Intelligence Service Act, in conjunction with the penal code have been used to achieve maximum secrecy.

¹⁸⁵ For a detailed account on information and national security see P Birkinshaw “Information and national security” in *Freedom of Information, the law, the practice and ideal*, third ed.(2002) 30

their physical integrity.¹⁸⁶ It was therefore not surprising that journalists led by the Zambian Independent Media Association (ZIMA) spearheaded media law reforms, which included as a central feature access to information legislation.¹⁸⁷

4.3.1 Lobbying, ducking and diving

Amid calls to fulfill promises for media reform, Information Minister Dipak Patel and an enthusiastic champion of reform convened a meeting under the theme, “National seminar on democracy and the media in Zambia – the way forward in October 1992.”¹⁸⁸ This birthed a Media Reform Committee (MRC) tasked with elaborating best ways in which media reforms could be achieved and how this would impact on the democratic process.¹⁸⁹ The MRC recommended among others removal of laws that impede the media from fully and freely functioning.¹⁹⁰

But the initial enthusiasm dissipated, as important people within the cabinet were not happy, about opening up government now that they were in power. Six years after the MRC released its report none of its recommendations had been addressed and in a cavalier approach another Committee was set up in 1999 with the same mandate as its predecessor.¹⁹¹ The 1999 MRC recommended that a Freedom of Information Act be enacted among others.¹⁹² The lack of commitment by the government was a typical 180-degree turn, which the public had come to associate with the Chiluba “new culture” government. Notable among those uneasy with reforms were Vernon Mwaanga, two-

¹⁸⁶ For a detailed year by year account of individuals who have been assaulted by state agents for trying to or obtaining information see annual reports of the International Press Institute at <www.freemedia.at/cms/ipi/freedom_detail.html>

¹⁸⁷ ZIMA is the Zambian Chapter of the Media Institute of Southern Africa (MISA) based in Windhoek, Namibia

¹⁸⁸ ZIMA Annual report (2004)

¹⁸⁹ The lack of editorial independence of state owned and government controlled also gave impetus to the need for media reform

¹⁹⁰ MRC Report (1993).

¹⁹¹ ZIMA (n 182 above) 1998

¹⁹² According to L Muletambo in a ZIMA research paper “Advocating medial law reform: the case of Zambia” (2005) unpublished, other recommendations were the repeal of sec 69 of the Penal Code on criminal defamation and the enactment of an independent broadcasting authority.

time Information Minister who has used arguments of national security to thwart efforts of enacting access to information legislation.¹⁹³

However, this reticence only gave agitators the resolve to put paid to government's lip service and in March 2002 a civil society media law reform process was initiated by ZIMA.¹⁹⁴ The conglomerate of media associations prepared a document, which set forth arguments, and demands for enactment of a freedom of information Act.¹⁹⁵ The government was still ducking and diving and on 2 May 2002 information minister Newsteadimba displayed his government's lack of commitment in a vague statement suggesting that it was up to the media to demonstrate how it could regulate itself.¹⁹⁶ He then 'helpfully' pointed out that reform as was suggested by civil society "takes decades of careful, painstaking and extensive consultation."¹⁹⁷

Nonetheless, ZIMA went ahead and prepared draft legislation which it presented to opposition members of parliament in hopes that it could be presented as a private members' bill.¹⁹⁸ On 1 August 2002 a Freedom of Information Bill was presented to the clerk of the National Assembly for consideration as a private members' motion.¹⁹⁹ Embarrassed by this apparent upstaging,imba now wrote to ZIMA advising it to abort its private members' approach and copied the letter to the Leader of Government Business ostensibly to provoke non-consideration of the private members bill.²⁰⁰ The government then tried to persuade the private members to withdraw the bill but having

¹⁹³ Mwaanga is a relic from the past and has served in all three republics in Zambia including as a security chief in Kenneth Kaunda's government. He is famous for marshalling government information policy and has perfected the art of spin.

¹⁹⁴ This culminated in the drafting of a private members' FOI bill

¹⁹⁵ The document entitled "Broadcasting and information flow in Zambia: a policy document initiated by ZIMA and PAZA under the medial law review committee" is available from ZIMA. ZIMA can be accessed on www.zima.co.zm

¹⁹⁶ There has been a succession of six information ministers since the start of the media reforms and none has pushed the Access to Information Bill through Parliament

¹⁹⁷ ZIMA (n 185 above) 6

¹⁹⁸ Government was invited to stakeholder meetings during the drafting stage but did not attend a single meeting. The private members' bill was authored by legal scholar Patrick Matibini

¹⁹⁹ NAB 14 (2002) The bill appeared in government gazette 5134 of 18 October 2002

²⁰⁰ The government was led by Vice President Enoch Kavindele and announced that it had assembled a team of experts to prepare a draft access to information Act.

invested time and money private members were not willing to let it go without a fight and a stalemate ensued.

Just like in the Ugandan case the government hijacked the private members' process and presented its own bill with diluted provisions of the private members' bill.²⁰¹ On 18 December 2002, the government-sponsored bill was withdrawn with dubious explanations. The information Minister Mutale Nalumango without stating what was wrong with what had so far been presented before parliament merely said the bill would be tabled at Parliament's next session.²⁰² The then Vice President revealed in an interview that not enough research had been done so more research was needed.²⁰³

Nalumango again stressed that there was no need to "rush" the bill.²⁰⁴ Vice President Lupando Mwape informed the National Assembly that the bill would not be reintroduced soon as freedom of information could breed chaos if it was not handled properly. That such freedom was dangerous!²⁰⁵ And then of course the man with the last word was Mwaanga who said his government had no intention to table the bill until extensive consultations at home and abroad were carried out. He asserted the United States where the law was in place was having problems administering it.²⁰⁶

Mr Mwaanga is so concerned about secrecy that in an interview with Voice of America, he stated that "there are a lot of problems that such bills have created, not only in Zambia but also in other countries such as the United Kingdom "which only managed to introduce it last year...As a government we don't want to walk into a situation blindfolded otherwise we risk injuring ourselves"²⁰⁷ This is a dismal record for a government that has

²⁰¹ NAB 22 (2002)

²⁰² "Freedom of information bill to be tabled in parliament soon" *Zambia Daily Mail* 30 December 2003

²⁰³ "More research needed on FOI-Kavindele" *Times of Zambia* 2 January 2003

²⁰⁴ Quoted in Matibini P "Freedom of information as a basic human right" 18 March 2006 Post newspaper archives. Available at <www.post.co.zm/archives> She made the comments on 22 March 2005

²⁰⁵ As above

²⁰⁶ As above; see also *The Post* "Freedom of information bill will be tabled soon" Tuesday 16 February 2006

²⁰⁷ Matibini P (above); see also Mwaanga's interview with Peter Clotney "Controversy over Zambia's Freedom of Information Bill rises" on Voice of America 6 July 2006 available on <<http://www.voanews.com/english/portal.cfm>>

been talking about transparency, accountability and commitment to democratization in Zambia.

4.3.2 Constitutional Review Commission

With government's machinations above, there was a growing need to secure a lasting solution to this problem and an opportunity to redress this came in the form of the Constitutional Review Commission (CRC). On 17 April 2003 President Mwanawasa appointed the CRC to solicit people's views across the country and produce a draft constitution.²⁰⁸ The Commission submitted its report on 29 December 2005 and reported that the right to access information should be enshrined in the Constitution.²⁰⁹ Article 72 of the draft Constitution provides for the right to access information. It provides:

1. Every citizen has the right of access to :
 - (a) information held by the state: and
 - (b) any information that is held by another person and that is required for the exercise or protection of any right or freedom
3. The state has the obligation to publicise any important information affecting the welfare of the nation
- (4) Parliament shall enact legislation to provide for access to information.²¹⁰

As the reader might guess, the government rejected this article alleging that it would compromise national security.²¹¹ No explanations were offered as to how this feat against national security could be achieved by the inclusion of such a benign provision in the constitution. There are enough safeguards as it is to national security, but such actions demonstrate the government's hegemonic attitude. This is why much activism is

²⁰⁸ The CRC was appointed pursuant to powers conferred on the President under the Inquiries Act, under Statutory Instrument 40 of 2004

²⁰⁹ Interim report of the CRC 29 June 2005, available on <www.crc.org.zm>

²¹⁰ Constitution of Zambia bill

²¹¹ See Article 19's letter to the chairperson of the CRC Willa Mung'omba at <www.article19.org/pdfs/letters/zambia-constitution-letter>

required in this area and it is important for the public to keep applying necessary pressure particularly that this provision stays in the proposed constitution.²¹²

4.4 The Freedom of Information Bill

The aim of the bill as stated in the memorandum is to:

“provide for the right to access information, set out the scope of public information under the control of public authorities to be made available to the public in order to facilitate more effective participation and good governance of Zambia; and to promote transparency and accountability of public officers.”²¹³

The types of information covered are generally those found in other FOI regimes.²¹⁴ The bill applies to a “public authority”.²¹⁵ A public authority is:

“any person holding office, or any one specified in the second schedule.”²¹⁶

The bill does not apply to private bodies but on closer scrutiny, there is a suggestion in section 10 (1) that the bill in fact applies to a specified category of private bodies. A private body is defined as:

“ any private body carrying out public functions and persons in their service.”²¹⁷

The basic right of access contained in section 10 is then made subject to a series of exemptions.²¹⁸ The categories of information are not in themselves remarkable as most of the exemptions found are ones which one would expect to find in any FOI legislation.

²¹² Adoption of the Constitution was shelved ahead of the national elections because there was a stalemate regarding the mode of adoption. Civil society wants a constituent assembly while the government wants a parliamentary adoption. The fear is that government's proposed mode would compromise good provisions as has happened in the past by rubber stamp parliamentarians.

²¹³ For a commentary on this see Matibini P “Freedom of information as a basic human right” 18 March 2006 *The Post* newspaper archives < www.post.co.zm/archives >

²¹⁴ Mendel (n 72 above) generally

²¹⁵ s 3 (1) NAB 22 of 2002

²¹⁶ NAB above s 2; Schedule 2 lists 11 categories to which the bill applies

²¹⁷ As above

²¹⁸ as above s 3(2)

What is remarkable is the manner in which the exemptions are couched. Although the bill is a watershed considering its troubled history and its now uncertain future, several provisions deserve scrutiny.

Under the proposed legislation, public officials can claim exemption on the grounds that information sought is “reasonably expected to cause substantial harm to the legitimate interests of Zambia in areas of foreign policy, defense, security, public safety and monetary policy”.²¹⁹ This is a sure way of encouraging arbitrary denials. A public official could plausibly claim that a certain piece of information would be “reasonably expected to cause substantial harm” to a specified interest even though the likely harm is extremely small. This blanket exemption based on actual or potential prejudice would give public officials the power in the first place to treat as exempt practically any kind of information one can possibly imagine.

Section 10(2) requires a requester to show justification for the request. This is inconsistent with international standards.

There is a 30-day waiting period after the filing of a request, which if one looks at other functional FOI regimes, though long for one pressed for information, is still benign in terms of its adverse effects on the requester.²²⁰ It is argued that in the Zambian context the 30-day requirement is problematical and one need not look far but at the South African situation. South Africa is the most infrastructurally and otherwise developed country in Southern Africa yet it too has problems meeting the 30-day period requirement.²²¹

It is submitted that given the entrenched laissez faire attitude of public officials, prescribing 30 days would encourage procrastination till right before the expiry date.²²² A

²¹⁹ As above s 8

²²⁰ For a general idea of waiting times in different FOI regimes see Banisar (n 138 above) 57

²²¹ Sorensen R, “The impact of South Africa’s Promotion of Access to Information Act after three and a half years: a perspective” 22 *ESARBICA Journal* (2003) 58. The average response time in 2003 was 150 days

²²² This attitude has been decried by the President Levy Mwanawasa on several occasions but only in as far as he was dissatisfied with the poor performance of the civil service

shorter response time would exert pressure on public officials to act swiftly particularly in cases where a persons' social-economic rights are at stake. A very ill person will not wait 30 days to receive information that will help such a person get immediate relief!

There is a suggestion that section 5 allowing access to documents held by public authorities should extend to include public participation in meetings of public authorities.²²³ This suggestion deserves some analysis. While it is the public's right to know what public authorities are doing, care must be taken not to overly involve the public in all government deliberations, as this would slow down government processes and therefore be counterproductive. A middle of the road approach that would compel public authorities to make public its deliberations if the results of such deliberations have an overarching public interest dimension is advisable.

All in all the provisions of the FOI bill are similar to what one would expect in any FOI regime but for the shortcomings enumerated above.

4.5 Government's incentive for secrecy and the price paid

The government maintains its ambivalent position on the right to access information because of vested interests of those in power. Prime among the reasons for this is the high level graft and corruption that has left the country on its knees. In 1994 when Zambia was going through a severe drought, the government lost \$4.9 million of maize for distribution to drought stricken areas because of a botched deal between the ministry of Agriculture under its Food Reserve Agency and a United Kingdom based company Carlington, which was to supply the maize.²²⁴ Information leaked that top government officials had diverted the money to personal offshore accounts.²²⁵

²²³ Memeza (n 211above) 17

²²⁴ When he was elected president in 2001, Levy Mwanawasa anxious to flex his anti-corruption muscle set up a task force to investigate, among others, this matter. The task force is comprised of members from the Anti Corruption Commission, Drug Enforcement Commission, Zambia Police, Office of the President and it is chaired by the Director of Public Prosecution

²²⁵ " FRA crooks divert maize money" *The Post* 3 September 1994

With a policy shrouded in official secrecy journalists who tried to break this story were met with obstacles in accessing public records on the deal because the information was “classified”.²²⁶ Classified matter is defined by the State Security Act in broad terms as “any information or things declared to be classified by an authorized officer”.²²⁷ But what makes information affecting the lives of millions of Zambians who were going hungry as a result of this failed deal “classified”? This was not a national security matter but a clear case of government’s failed duty to fulfill its obligation to provide food to citizens. Eventually, a journalist who obtained information from ministry officials on this deal was arrested and charged under the State Security Act.²²⁸

Under article 21 of the present Constitution, freedom of expression is guaranteed, but there is no express provision on access to information.²²⁹ This has given the government a loophole to restrict the right to access information. The government has exercised considerable influence over government owned media including reviewing articles prior to publication and censoring individuals responsible for published articles which are not favourable to the government.²³⁰ As a result, journalists in government media are very intimidated and will not seek information which if published will expose the establishment.²³¹

Especially targeted are privately owned media who have been critical of President Mwanawasa’s government and its failure to respond to the escalating poverty and general economic malaise in the country.²³² On 14 June 2005, Anthony Mukwita, an international news correspondent, and Talk Show host on *Radio Phoenix* was arrested

²²⁶ The broad definition of classified information under the State Security Act allows government officials to designate anything and everything “classified”.

²²⁷ Sec 2 State Security Act Cap 111 Laws of Zambia

²²⁸ Mukwita was arrested and charged with sedition in terms of s 57 of the Penal Code for obtaining and publishing information likely to compromise state security contrary to the State Security Act.

²²⁹ Article 52 of the proposed Constitution currently awaiting adoption provides for freedom of the press and a journalist’s right not to disclose the source of information

²³⁰ Government officials have also restricted entry to press conferences only to government-controlled media. On 19 January 2000 Brighton Phiri a reporter from the Post was asked to leave a press conference convened by the director of civil aviation Eustace Mambwe as his department had been instructed not to release any information to the Post. *The Post* 20 January 2000

²³¹ ‘PAZA Chief Censures the Mwanawasa’ *The Post* 23 November 2005

²³² ZIMA *Annual Report* 2005

and charged with sedition because he read a fax sent in by an anonymous person on “Let the People Talk”, a popular phone-in programme.²³³ The fax accused the government of condoning corruption and warning that the country might slip into anarchy as a result. If convicted, Mukwita faces a seven-year prison sentence.²³⁴ The management of *Radio Phoenix* swiftly terminated Mukwita’s contract ostensibly for fear of reprisals from the government.

From the above it can be seen that there is a real incentive for the government to keep its operations under wraps because of the perverse belief that if its actions are exposed there will be a rebellion.

4.6 Conclusion

There is a curious dichotomy with the proposed FOI Act. Its strength lies in the purposes as set out in the information minister’s memorandum while its restrictiveness lies in the detail as well as the basic architecture of the system it proposes.²³⁵ Not only does it furnish public authorities with loopholes and scope for evasiveness in matters important to any FOI regime, it negates the right whose exercise it ought to be protecting. The zealotry exhibited in hijacking the private members’ bill and the current stalemate shows a lack of commitment. The same pretentious attitude can be read in the Ugandan AIA-making process. The South African approach to FOI is both innovative and in terms of its comprehensive coverage of private information, revolutionary. In this respect it represents an important case study from which others could learn a great deal.²³⁶ In the words of Etienne Mureinik:

“ A culture in which every exercise of power is expected to be justified in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command. The new order must be a community built on persuasion.”²³⁷

²³³ Action alert MISA – Zambia 16 June 2005

²³⁴ As above

²³⁵ Wide discretions of public officers is a case in point.

²³⁶ Calland & Dimba (n 23 above)

²³⁷ Mureinik (n 95 above)

To be effective, an FOI regime must do more than simply create a right to information in principle: it must oblige public authorities to structure their operations so as to make transparency and disclosure the norm. The process of enacting FOI legislation in Zambia is a sham rather than genuine.

Chapter five

5. Conclusions and Recommendations

5.1 Introduction

This work has traced the origins of the right to access information and argued for the institution of an FOI regime so that it has more meaning for ordinary Zambians.²³⁸ Specifically, the South African situation has been discussed mainly as a reference point for the institution of such legislation in Zambia while the Ugandan case has provided a comparative context. The study showed that though the PAIA has its own limitations as highlighted, it still offers to a large extent a model to which Zambia can aspire. The study also indicated the more obvious gaps in Uganda's FOI regime. Most importantly it exposed the glaring problems wrought by a lack of an FOI regime and the need to institute one as a matter of urgency.

5.2 Conclusions

The growing importance of information in human societies is one of the main defining features of our present day world and arguably, the metaphor of an orderly society.²³⁹ From its recognition as a fundamental right in the 20th century to its continued transition it is undisputed that access to information empowers societies. Over fifty countries around the world have now enacted comprehensive freedom of information legislation to facilitate access to records and over thirty more have pending efforts.²⁴⁰ This fact brings out the paradox that in spite of the global trend towards open societies, there is still resistance to letting go of institutional secrecy.²⁴¹

²³⁸ This debate will be of particular pertinence in Zambia because the country has just emerged from a general election and the government is under an obligation to rekindle the constitutional debate. The debate was put on hold until after the election because there was disagreement on the mode of its adoption

²³⁹ See R Smolla "The right to know: Transparency in government institutions" *Democracy Papers* G Clarke & M Urofsky (eds) (2005) 5

²⁴⁰ Banisar (n 212 above) 3

²⁴¹ Blanton (n 33 above) 33

This opening up of the business of the government is a complex issue requiring a balance of competing interests.²⁴² As discussed above, on the side of open government are the values of democratic participation and accountability. Yet this openness may at times sacrifice legitimate interests within government and may jeopardize other laudable social values such as individual privacy, national security and law enforcement. However democratic governments should be largely open and accountable governments.²⁴³

Access to information is still a minefield across the world as the concept is problematic enough in so called developed countries but it is particularly challenging where countries have been under forms of colonial rule.²⁴⁴ Colonialism was marked with an unparalleled level of secrecy which was then passed on to the colonies as in Zambia and Uganda.²⁴⁵ South Africa was a different type of oppressive rule under apartheid, secrecy was interwoven in the very fabric of the state in order to maintain the binary system of 'otherness' – "them" and "us".²⁴⁶

As can be deduced from this study, it is an incontrovertible fact that information is power.²⁴⁷ It empowers people in at least three ways. First the very fact that anyone can demand information as of right gives a sense of power. The obvious discomfort of government officials at sharing information, their fear of being exposed and the extra – ordinary lengths they go to prevent the information from being made public or to

²⁴² As above

²⁴³ The US House of Representatives noted "The power to withhold the facts of government is the power to destroy that government" Committee report on freedom of information (1976)

²⁴⁴ Pope (n 46 above)

²⁴⁵ Evidence of this is the myriad of secrecy laws still on the statute books in Zambia

²⁴⁶ "Apartheid in the Holy Land" *Mail & Guardian*, 29 April 2002 Nobel Prize winner Desmond Tutu discusses the negative impact of the secrecy laws on South Africa while advising Israel to take a leaf from South Africa. Few risked challenging secrecy as they were immobilised by fear. For a detailed analysis on the impact of apartheid secrecy laws see B Lyons "Between Nuremberg and amnesia: The Truth and Reconciliation Commission in South Africa", 49 *Monthly Review* 4 (1997); See also J Naidoo and D Rajab *The Dynamics of oppression: A Psychosocial political analysis of the traumatic experiences of minority Asian Indians in South African* (2005)

²⁴⁷ Smolla (n 231 above) 5

persuade people not to ask for this information further strengthens the sense of power the common person feels over bureaucracy.

Second, information empowers because of the outrage that people feel once the truth is revealed.²⁴⁸ When the Carlington maize scandal came to light, peasants in the hinterland had an awakening, for they now had a tangible and reachable villain.²⁴⁹ Their fatalistic sense of helplessness and resignation was replaced with renewed vigor to get a proper explanation from the government.²⁵⁰

Finally, information empowers because communities across nations start seeing official evidence of the duplicity of governments. They start to realize that the excuses they have been told in the past for the need to withhold information are all an alibi, a diversion to allow the rich and powerful to appropriate a disproportionate share of society's resources.²⁵¹ Information forges a new solidarity among the oppressed, which, in its togetherness significantly empowers them.

Zambian democracy is multi-party and progressive in its stated position.²⁵² The problem however is in the implementation of the progressive policies and laws that this so called democracy has showcased. The government says one thing but does another, or to put it more charitably, the government is unable to transform its good intentions into reality because of the very powerful vested interests within and outside government.²⁵³ It is in this context that the political space provided by the right to access information becomes significant.

²⁴⁸ "Hungry villagers protest over Carlton maize deal" *The Chronicle* 1 May 1995

²⁴⁹ "Government's Maize deal cover blown" *The Sun* 26 April 1995

²⁵⁰ An inquiry was instituted into the botched deal only after President Mwanawasa came into office and after much grumbling from civil society. His predecessor, Frederick Chiluba's government refused to acknowledge public authorities complicity in this deal asking for evidence of corruption before the government could react "Give me evidence of corruption- Chiluba" *The Post* 19 June 1995

²⁵¹ The secrecy surrounding the Carlton maize deal and the harassment of journalists who sought to bring this issue to light is a case in point

²⁵² Preamble Constitution of Zambia (1996)

²⁵³ The Carlton maize deal is a case in point

The Zambian government, like other governments across the world is geared to function with institutional duplicity, to promise one thing and to deliver another, or nothing at all. It has mastered the art of discrediting all dissenting voices, questioning their “facts” and sources, suspecting their motives and accusing them of misleading people, of seeking publicity by sensationalizing isolated incidents, of being self serving and even of being in cahoots with anti-national sources.²⁵⁴ All this is an effort to mask the government’s obligation to provide information to its citizens.

The question of exactly how much and what kind of information can safely be provided to government bodies and the general public is without a doubt a difficult and complex one but citizens too have a right to make a final decision through exercising their right to access information.²⁵⁵ The preceding conclusions on the right to access information, particularly in the Zambian context call for an imperative that at the very least meets the global standards as discussed in chapter two of this dissertation.

5.3 Recommendations

First of all Zambia is a party to all major human rights instruments touching on freedom of information including the CCPR, UDHR and the ACHPR. It therefore behooves the government to recognize the legitimacy of these instruments both in word and deed.

Zambia is part of the international community, which has embraced the concept of the right of citizens to access information. At a nuclear level, it is a part of SADC, whose principles embrace democratization, transparency and open government.²⁵⁶ The government has to live up to its regional commitments under the SADC treaty and instituting a FOI law is a tangible step towards that commitment.

²⁵⁴ Information Minister Vernon Mwaanga is on record making this observation at various for a see for example his interview with the Voice of America (n 200 above)

²⁵⁵ Mathews (n 16 above) 21

²⁵⁶ See article 5 of the SADC Treaty. See B Chinsinga ‘The Challenges of globalization and regional integration: The case of the Southern African Development Community’ in *Democracy, human rights and regional cooperation in Southern Africa* (2002) D Milanzi etal (eds) 15.

Instituting an FOI law is not the be-all and end-all to the quandary but only the beginning of the struggle.²⁵⁷ There is a need to evolve new methods of demystifying information to ensure that people at large easily understand it.²⁵⁸ The next important step is to ensure that if at all there are any misdeeds discovered in the process of accessing information, they are effectively and speedily investigated.

The government as a matter of urgency needs to reopen debate on access to information in Parliament. This debate should be creative and should address the legitimate limits to transparency, rather than leave it to the fancies of a few political figures within the government to decide what is in the national interest and what is not.

There is a mistaken but common belief that access to information only touches on the media. It is important that Zambian civil society as a whole galvanizes around this issue and press the government to not only have an Act on the right to access information, but that this act should have a constitutional basis

The government must not be allowed to convince everyone, as Mr Mwaanga has done, that governance essentially revolves around secrecy. The notion that national and individual security can only be insured if the right to information is suspended, or substantially inhibited must be opposed. There is no good evidence to support these assertions. Public access to information is the bedrock of progressive democracy.

²⁵⁷ See Smolla (n 239 above) 6

²⁵⁸ S Singh "Social mobilization and transparency; the Indian experience" (2006). Paper produced for the International Transparency Task Force

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