

# BUILDING A BRIDGE IN KENYA: THE IMPORTANCE AND VALUE OF THE RIGHT TO INFORMATION

by Katherine Hayes

*In a government ... where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people... have a right to know every public act, everything that is done in a public way, by their public functionaries... The responsibility of officials to explain or to justify their acts is the chief safeguard against oppression and corruption.*

The right to information is the bedrock of all other human rights. The United Nations recognised this in 1946 when the General Assembly resolved: “Freedom of Information is a fundamental human right and the touchstone for all freedom to which the United Nations in consecrated.”<sup>1</sup> In its most basic form, a right to information ensures the people of a democracy: they have the right to demand and receive information from their government and places an additional obligation on the government to pro-actively disclose key information to the public. More progressive freedom of information legislation allows people to secure information from private bodies as well, where it is necessary for the protection or exercise of their rights.

## Kenya’s International Commitments to the Right to Information

As a member of the United Nations, Kenya has a commitment to the *UN Principles on Freedom of Information*, enacted in 2000. In support of these principles, the United Nations Special Rapporteur has clarified that freedom of information under Article 19 of the *International Covenant on Civil and Political Rights* imposes “a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems.”<sup>2</sup>

In addition to its UN obligations, Kenya has other international and regional commitments to freedom of information legislation. Kenya’s membership in the

Commonwealth requires a practical commitment to democratic principles, including transparency and accountability in government. Notably, in 1999, the Commonwealth Law Ministers specifically recognized the importance of access to information and set out the *Commonwealth Freedom of Information*

- Justice K K Mathew, Supreme Court of India

*Principles*, which serve as minimum guidelines to Commonwealth countries for enacting legislation. The Principles recognize that “there should be a presumption in favour of disclosure and governments should promote a culture of openness.”<sup>3</sup>

Kenya also has regional commitments to entrenching the right to information regime through its membership in the African Union. In 2002, the African Commission on Human and Peoples’ Rights adopted the *Declaration of Principles on Freedom of Expression in Africa* which recognises that ‘public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information.’<sup>4</sup> This is a welcome statement as it sets the tone that governments may not hoard information in secret – they have a duty to the people who elected them to justify their decisions and provide adequate information so that the citizenry may draw their own conclusions.

The *African Charter on Human and People’s Rights* went one step further and explicitly recognized the necessity of a right to information as a cornerstone of another human right i.e. freedom of expression. The Charter recognises that: “Every individual shall have the right to receive information. Every individual will have the right to express and disseminate his opinions within the law.”<sup>5</sup> This statement not only demonstrates a commitment to a right to information but also recognizes the value of the right in ensuring good governance by aiding media scrutiny and allowing people the freedom to express their views.

## The Practical Value of the Right to Information

Kenya should not only take action to legally entrench the right to information because of its international commitments, but also because of its inherent value and importance. The right has the potential to be of enormous benefit to the people of Kenya. It is a strong tool in the fight against corruption and provides a mechanism for deepening the public’s engagement in development activities and strengthening democracy.

## Taking ownership of development

Access to information ensures that people can participate more effectively in national development activities. The right to information can be used to ensure that people know what development projects are planned for their area, can review plans and proposals, check contracts to find out specifically what work is to be done and how much it will cost and can assess whether work is done incorrectly or worse, never completed, and take action accordingly.

### Access to Information: Ensuring Development Funds Reaches Beneficiaries

In Uganda, the right to information translated into ensuring grants intended for primary schools did not line bureaucrat’s pockets. After an expenditure tracking survey found corruption was keeping funds from reaching primary schools, the Ugandan government began advertising grant disbursements, while on the other end, schools were required to post notices on the receipt of funds. With these inexpensive changes and access to information, parents were able to ensure accountability at the local level. In five years, corruption dropped from 80% to 20% and enrolment more than doubled.<sup>1</sup>



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Without access to information, development projects are too often planned, implemented and completed without those most affected being active participants.

As rapidly developing nations like Kenya are aware, development is rarely only a domestic project. Too often, activities are designed and managed by international organisations which are thousands of miles away from the country, let alone the people. These international organizations themselves should be active in ensuring access to information so that people in-country are involved in all processes affecting their development. While some international bodies such as the United Nations Development Programme have strong disclosure policies, others like the World Bank and International Monetary Fund lag behind. These bodies need to improve their own information disclosure policies in the interests of the public who are so often affected by the decisions and policies they develop behind closed doors.

#### Combating Corruption

The right to information provides an excellent tool to fight corruption, a battle many African countries are struggling to win. Transparency International estimated in 2000 that over US\$30 billion in aid to Africa found its way to foreign bank accounts.<sup>6</sup> Kenya itself is far from being immune to this phenomenon. In Transparency International's Corruption Perceptions Index 2003, Kenya's rank was one of the worst in the world. On a scale of one to ten with ten being very clean, Kenya received a score of 1.9 and was ranked 122 out of the 133 nations surveyed.<sup>7</sup>

Recognizing the rampant corruption problems in Africa, African nations developed the *OAU/AU Convention on Combating Corruption*, which was ratified in 2003. The

Convention recognizes the need to "establish the necessary conditions to foster transparency and accountability in the management of public affairs."<sup>8</sup> This objective requires public input and involvement. The most practical, least expensive and most empowering tool for realising that objective is an effective access to information regime.

The Convention goes on in Article 10 to state that nations should "allow and encourage the full participation of the media and civil society."<sup>9</sup> The right to information also supports this objective, by forcing secretive governments to open up inquiries from civil society and the media. In particular, with an entrenched legal right to access to information, the media can serve as a policing body, analysing governmental decisions, exposing mismanagement and generally keeping the public aware. This becomes a self-perpetuating cycle ensuring honest governance- those in power know their decisions will be scrutinized and made public, making them more likely to make good, honest decisions in the first place.

#### Reclaiming Democratic Institutions

Access to information enables voters to meaningfully participate in democracy. Only with information can citizens meaningfully exercise one of the most fundamental of their democratic rights, that of the vote. Unfortunately, the 'secret society' brand of rule- a hold-over from colonial days when foreign governments would contain a people and ensure their own political power by withholding information – is still in evidence in many countries. Kenya provided one of the most obvious examples of this approach: "During the Moi era, fear of the consequences of asking for or giving information culminated in power being consolidated around the presidency to the extent that serikali (the Kiswahili word for government) became synonymous with siri kali (top secret)."<sup>10</sup> Without

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information, citizens cast their votes based on what little they know about candidates - tribal affiliations, place of residence, or perhaps a family history of governance. This type of system is a far cry from informed citizens exercising their democratic rights.

### Right to Information and International Financial Institutions

Greenwatch Limited, an environmental NGO, successfully used the open government clause in the Ugandan constitution to obtain the release of a key document about a controversial dam project that the Ugandan government and the World Bank had previously declined to release. The Ugandan High Court ordered the release of the document, whose very existence the Ugandan government had denied during the court proceedings. A subsequent analysis of the document, commissioned by the International Rivers Network assessed that "Ugandans will pay hundreds of millions of dollars in excessive power payments if the World-Bank-financed Bujagali Dam proceeds according to plan." The funding for the dam was later suspended.<sup>6</sup>

Only when citizens have a right to information can they regain the participatory power that should be rightfully theirs in a democracy. Elections alone do not make a society democratic. Rather, substantive democracy requires informed participation by the people. In this case, the old adage "knowledge is power" is all too true. An open government with an access

to information regime allows the people to be participants in their own governance, not just bystanders who cast their ballot every few years. In fact, in 2002 the Commonwealth Law Ministers recognised that 'the right to access information was an important aspect of democratic accountability and promoted transparency and encouraged participation of citizens in the democratic process.'<sup>11</sup>

Currently, a divide exists between the Kenyan government and the people it should serve. The right to information can help build a bridge between the two. Access to information can keep the government honest, allowing the people to act as their own best watchdog. It can also foster participatory development, allowing literal bridges to be built with input from those most affected throughout the process. Finally, it will encourage participation in governance from an informed public who can hold their leaders accountable for their decision-making failures more than once every few years.

While a constitutional provision is an encouraging beginning, well-drafted legislation is important to ensure the right is effectively operationalised. Kenyans must then remain vigilant to ensure proper implementation. Although the bridge to a meaningful access regime will be a long one, it is one well worth building. As Kofi Annan, Secretary General of the United Nations has recognised: "*The great democratising power of information has given us all the chance to effect change and alleviate poverty in ways we cannot even imagine today. Our task... is to make that change real for those in need, wherever they may be. With information on our side, with knowledge a potential for all, the path to poverty can be reversed.*"

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## BENCHMARKS FOR EFFECTIVE FREEDOM OF INFORMATION LAWS

by Grace Wakio

Many democratic countries have embraced government openness and transparency in public affairs as a core value. They have realised that the culture of secrecy is no longer feasible and that to be more effective and responsive, they must provide information and be open to public scrutiny.

Over fifty countries in the world have constitutional provisions guaranteeing their citizens access to information held by the government and laws to facilitate this access. About thirty more countries are in the process of enacting freedom of information laws<sup>1</sup>. There are certain benchmarks that these laws have adhered, or should adhere to for maximum effectiveness.

### Maximum disclosure

Freedom of information (FOI) laws have the principle of maximum disclosure as their basic rationale and objective. This principle establishes a presumption that all information

held by public bodies is subject to disclosure, save for limited exemptions. Public bodies have an obligation to disclose information and every member of the public has a corresponding right to receive information. The exercise of this right does not require individuals to demonstrate a specific interest in the information. The onus of justifying refusal to disclose information is on the public authority, which must show that the information it wishes to withhold comes within the scope of the exemptions.

A good FOI law should have broad definitions of 'information' and 'public bodies' to ensure that a variety of records kept by a wide scope of public bodies can be accessible. The law should define public bodies to include all branches and levels of government i.e. local government, elected bodies, bodies which operate under a statutory mandate, public corporations, judicial bodies and private bodies which carry out public functions. There is a trend towards bringing private bodies

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