



**THE KENYAN
SECTION OF THE
INTERNATIONAL
COMMISSION OF
JURISTS**

**REPORT ON THE CONSULTATIVE WORKSHOP TO DISCUSS THE
ICJ-KENYA DRAFT FREEDOM OF INFORMATION BILL OF 2000**

**HELD AT THE MT. KENYA SAFARI CLUB ON THE 29TH OF
SEPTEMBER TO THE 2ND OF OCTOBER**

Acknowledgement

The Consultative Forum to Discuss the ICJ-Kenya Draft Freedom of Information Bill 2000 was held on the 29th of September to the 2nd of October 2005 at the Mt. Kenya Safari Club, Nanyuki.

The purpose of the workshop was to analyse and critique the ICJ-Kenya draft. Participation was by members of various civil society organisations, media practitioners, academicians, ICJ-Kenya council members, government officials and Freedom of Information experts from the Commonwealth. Incisive presentations were made the importance of the right to information, the Constitutional foundations of the right to information, principles of Freedom of Information legislation, a critique on the ICJ-Kenya draft Freedom of Information laws and the amendment of laws that hinder the access to information.

We cordially thank the paper presenters; Ms. Charmaine Rodriguez, Mr. Lucas Wauna, Mr. Joseph Kihanya, Mr. Jeremiah Nyegenye, Mr. Kanyi Kimondo and Mr. Gitobu Imanyara. We would also like to thank the facilitators of the sessions Mr. George Okado, Mr. Albert Kamunde, Dr. Kithure Kindiki, Ms. Ann Muthoni and Ms. Priscilla Nyokabi for coordinating the workshop. We are grateful to all participants for their attendance and invaluable contributions. We recognise the efforts of the ICJ Secretariat who worked tirelessly to ensure the workshop was a success, in particular, Priscilla Nyokabi, Anne Muthoni, and the rapportuers Edwin Maitho and Nerida Nthamburi.

Finally, the meeting would not have taken place without facilitation from MS-KENYA and USAID to whom we are greatly indebted.

We hope to collaborate on these and other initiatives to further Freedom of information advocacy in Kenya.

ICJ-Kenya

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OF JURISTS**

**WORKSHOP ON THE ICJ-KENYA DRAFT FREEDOM OF
INFORMATION BILL, 29TH TO 2 OCTOBER 2005, MT. KENYA SAFARI
CLUB, NANYUKI**

WELCOME REMARKS

George Okado opened the forum by welcoming participants to the workshop and by thanking ICJ-Kenya for organization the workshop. He invited the Executive Director ICJ-Kenya to make opening remarks.

INTRODUCTORY REMARKS

The Executive Director ICJ-Kenya Mr. Samuel Mbithi welcomed the participants to the workshop. He affirmed that the purpose of the workshop was to critique the draft ICJ-Kenya Freedom of Information bill in a bid to improve it. He gave a brief history of the Bill and noted that the said Bill was drafted by a group of lawyers commissioned by ICJ-Kenya in 1999. The said Bill received Parliamentary approval in October 2000 when a Member of Parliament, Hon. Mukhisa Kituyi presented it to Parliament. However there was a shift in strategy from legislative advocacy, to having freedom and access to information included in the Draft Constitution. This was achieved, as the right is set out in Article 51 of the Proposed New Constitution under the Bill of Rights. He stated that despite the impasse in the review process, FOI advocacy is still required and does not have to wait for the new Constitution to come into force. He stated that the workshop presents the participants the opportunity to analysis and critique the Draft Freedom of Information Bill and hoped that once a comprehensive Bill is drafted the said bill will be presented to parliament.

He then embarked on the gains for having a good Freedom of Information law. He noted that democracy flourishes where there is institutionalization of openness and transparency in all government policies and practices. Indeed it has been said that democracies die behind closed doors. Transparency in government reduces corruption. In Kenya the current attitude prevailing in government and among civil service is that information generated by government is not for public consumption and do not make such information available. The current legislation does not also make this information publicly available. There is therefore need for legislation; legislation sets a clear framework for putting in place systems and creating cultures of openness that are uniform in government and across public bodies

It is noteworthy that the Government through the Ministry of Information and Communication has drafted a Freedom of Information Bill. During the Right to Know Day, the Minister of Information expressed his commitment to presenting the Draft FOI Bill to Parliament for debate. It is hoped that this commitment is kept. If therefore the Government Draft Bill is to be presented in Parliament the hope is that the ICJ-Kenya Bill will be used for reference when drafting the Government Bill.

In conclusion he wished the participants fruitful deliberations.

The facilitator invited participants to introduce themselves and what they and their organizations are doing in relation to access to information.

Remarks by Participants

Priscilla Nyokabi stated that ICJ-Kenya has a tripartite to promote and protect human rights, the rule of law and good governance. Towards this end ICJ-Kenya implemented the Freedom of information project. The aim of the said project is to have Freedom of Information legislation passed in the country. The project has undertaken several activities one such activity is a workshop held to critique the Government Draft Freedom of Information Bill. In this respect, ICJ Kenya has prepared a memorandum of views to be presented to the Attorney General chambers and the Minister for Information and Communication. The aim of the workshop is to also critique the ICJ-Kenya draft freedom of Information Bill to help the drafters improve it.

Lawrence Mute a Commissioner at the Kenya National Commission on Human Rights stated that the mandate of the Commission is promoting and protecting human rights. In this regard, the FOI project falls under this mandate. The Commission has been advocating for policy change in the Government and has created awareness of the need for right to information. One of the ways they have this is through policy and efforts to have access to information laws enacted. The commission also advocates for the same and educates the public on the need for these laws. He mentioned the Misc. Amendment Act in Parliament proposes to make amendments to the Public Officers Ethics Act to enable the public have access to public servants records. In this regard, it can be linked to the Freedom of Information project.

Peter Musyimi from the Kenya Law Reform Commission hoped that the Government Draft Freedom of Information Bill would be presented to the Kenya Law Reform Commission for review and further drafting.

Mr. Mukaya from the Public Service Commission stated that the Public Service Commission has the duty to appoint public officers. The Commission is trying to promote access to information through activities- newsletter, human resource audit department within the commission. The commission is in the process of documenting information for easy access by the public.

Anne Muthoni a Programme Officer at ICJ-Kenya pointed out that one of the interests in the organization is how the judiciary has treated freedom of expression over the years. ICJ-Kenya is in the process of compiling a case digest on cases that are related to Freedom of Information. The organization will try Public Interest litigation to enforce the freedom of expression and access to information rights.

Mr. Odhiambo Makoloo the Executive director of the Institute for Law and Environmental Governance stated that the organization's major emphasis is on matters of environmental governance and protection. The organization has been running a public awareness programme and has been training legal officers on the enforcement of rights. Additionally the organization runs two other programmes one on Public Interest Litigation and another

on Access to Justice. The programme on access to justice seeks to advocate for the strengthening of access to justice institutions. One fundamental aspect of access to justice is the right to access information. The organization has been working closely with ICJ-Kenya on the Freedom of Information project.

Michael Ombimbo from ECONews stated that the organization focuses on Freedom of Information from the grassroots level. The focus is on persons who suffer from communication barriers and who cannot afford access to information. The organization uses the media, that is, the community broadcasting stations to reach the people.

Rose Lukalo from AMWIK informed the participants that the organization works with women to enable them use information to change their lives. Two key programmes through which access to information is pertinent are the Radio/ recorded programmes to reach women and provide them information and Training Women on the use of media to reach and educate the masses.

Njeri Kangethe stated that the Legal Resource Foundation has played a pivotal role in making access to information for the indigent a reality. The organization works closely with rural women by trying to make information accessible, affordable to these women.

Nelly Matheka from the Standard Group stated that the group represents both print and broadcasting media. It comprises of Kenya Television Network and Standard newspaper. Its objective is to inform and educate the public on goings on in the country. Editorial policy is to disseminate news in a fair and accurate manner.

Esther Kamweru the Executive Director Media Council of Kenya noted that the Council has published code of conduct for journalists. Mandate of the Council is to promote media freedom and responsible journalism. It looks at issues of media regulation, access to information, laws restricting this access to information. Media Council of Kenya holds monthly debates bringing the public and media practitioners together, training workshops on responsible journalism, publishes quarterly newsletter, and has launched a website.

Jack Muriuki stated that the mandate of Transparency International Kenya is to fight corruption. Corruption thrives in darkness. Therefore a way of tackling corruption is through access to information laws and whistleblower protection laws. Transparency International Kenya is a member of the Freedom of Information Network and has been working closely with ICJ-Kenya to advocate for openness in the Government.

Albert Kamunde a Council member of ICJ-Kenya pointed out that it's the organizational interest to promote Freedom of Information in the country. Freedom of Information laws are important to the citizens to enable them make informed decisions. Access to information is crucial as it is the bedrock upon which all other freedoms lie. Information is powerful and that is why governments try to keep it away from the public as much as possible.

Waweru Mugo a freelance journalist voiced his support for the campaign and noted that other journalists support the campaign as it will enable them have access to information and will be a boost to the general population who'll also have access to this information.

Mr. Kinyanjui a media officer with the Public Service Commission stated that the Government is implementing the E-government policy, which is a policy aiming at making certain provisions and practices more accessible to the public. It has also launched a newsletter that seeks to provide the public with information on the Public Service Commission.

Mr. Matu Nguru from the Kenya Community Radio Network stated that the organization has been lobbying the government in terms of opening up space to enable Kenyans access information. Critical focus is having the ordinary people access structures of information. One of the ways is through community broadcasting. Citizens should also be part of those generating information and not only accessing the information. There should be more focus on technology and infrastructure as a tool of freedom of information. The role of media should also be on educating the public on government workings and structures and Freedom of Information laws will enable this.

John Mwaura from the Kenya News Agency declared that the agency is within Ministry of Information and Communication. The role of the department is news and information gathering and management.

Henry Maina from the Legal Resource Foundation stated that the mandate of LRF is rooting human rights within communities and advocacy for human rights. The organization in 2002 carried out a survey on impediments to media access to information in Kenya and published a report. The organization has been involved also with training correspondents on media laws and circumventing these laws in public interest. LRF is part of the Freedom of Information network. All information held by public authorities is held in trust for the society but draconian legislation and attitudes of the government officials make it difficult for people to access this information.

Joseph Kihanya a lecturer at Kenya School of Law stated that the school intends to run various programmes that would benefit from the passage of the Freedom of Information Bill. The school intends to provide training for government officials and civil servants in various programmes one of which is the right to information. This in essence will assist them be able to implement Freedom of Information legislation once it is enacted.

Charmaine Rodriguez from the Commonwealth Human Rights Initiative posited that her organization deals generally with human rights issues in the Commonwealth countries and the right to information is one of the major programmes under the organization based on the fact that the right underpins all other rights. The organization examines commonwealth laws on Freedom of Information. In addition to legislative work CHRI also does campaign and advocacy and implementation work.

Samuel Mbithi the Executive Director ICJ-Kenya affirmed that one of the strategies in discharging the mandate of the organization is to enable citizens access the information that will enable them make informed decisions.

George Okado a Senior Consultant to UNESCO stated that the organization is handling an Information project. The Project has three tier system; to try improve vertical access of information, improvement of responsible journalism and improving communication between government and citizens through the E-government initiative and to guarantee

access to information to all sectors of society- illiterate and literate, the indigent. There is a Pilot project in place in 10 districts that is working to disseminate information in a non-costly manner. Mr. Okado who is also the Executive Director of the ICT Policy Center noted that information is recognized as a resource for reducing poverty and the challenge is to use this information as a resource for development. He ended his remarks by questioning the implication of the new technologies that are breaking down some of the traditional boundaries such as the media ownership- is the discursive space being substantially reduced?

Presentation By Charmaine Rodriguez

Why Freedom of Information Legislation in Kenya? Strategies towards FOI Legislation in Kenya

Why is Right to Information important?

Ms. Charmaine Rodriguez began her presentation by outlining three principles embodying the importance of the right to information:

- *Transparency*
- *Accountability*
- *Participation*

In the last 10 years we have seen the Right to Information being used as a development right rather than an administrative measure mostly by Government ministers, the media and occasionally Non-Governmental organisations. The values of Right to information include:

- Development
- Democracy
- Anti-corruption
- Strengthen Media
- Reduce conflict

It is important to know what values to focus on when speaking to different groups about the right to information. For example when speaking to government officials' focus mostly on development issues rather than anti-corruption issues which makes them jittery. An information society will contribute meaningfully in the development of the country. In a country that has a substantial amount of people living under the poverty level information is an important tool for their development.

Anti-corruption is another key argument to use when advocating for right to information. This can be used as a tool to advocate for Freedom of Information in anti-corruption campaigns. Uncovering corruption issues becomes easier when there is a culture of openness. Affirm the importance of the Government publishing information on grounds that an open government receives less resistance from the public.

The right to information strengthens the media and equips them with information. Ms. Charmaine gave an example of jurisdictions in which the media had put FOI laws in effect. In England as soon as the FOI law came into effect, the media, the Guardian immediately accessed pertinent information with the legislation and are already using the legislation to strategically access information. In Australia, there have been amendments to narrow the FOI legislation and currently there are cases before the Federal Court barring media from

disclosing information. The media should stay vigilant on the fight for freedom of information.

Freedom of information would help reduce conflict. With access to information, this would contribute to national cohesion, as people would understand the decision-making in government and have access to information that would help avoid conflicts, rumours and perceptions of exclusion and misunderstandings. One of the functions of an open government is to reassure investors of the security of their investments. The publication of information on government policies restores the confidence of investors in the government. Information enables the public participate in the governance of the country. Access to information helps hold officials accountable for their actions. The actions of these officials are transparent where information is available.

In her final remarks she stated that even with the promulgation of the Freedom of Information legislation, the same would not solve all the challenges and problems such as illiteracy. Right to information is a tool not a cure. There is need to use the law to strengthen other processes. She referred participants to chapter 4 of a report done in 2003 by the Commonwealth Human Rights Initiative titled *Open Sesame*.

CHRI'S 2003 Report; Open Sesame

The chapter spells out the importance of the civil society in advocating for change and open government. This has been through working from the grassroots to support demands for economic justice, exposing scandals that save nations millions of development dollars, helping governments to craft open-door policies and laws.

Experiences have shown that a strong civil society that works together can achieve great goals. The chapter emphasises on the campaign on the right to information. A larger group working together brings in more experience and human and financial resources, reduces the duplication of work and enables all to benefit from specialised expertise within the group. The chapter gives examples of some jurisdictions where the civil society has advocated for the right to information. Public opinion matters, politicians who need to guarantee the right to access information are the ones who must rely on public support at election time. It is evident that a large mobilised group of citizens has proved to be an effective tool for pressuring those in power to take action and has acted as a counter-weight to bureaucratic resistance.

Even when governments commit to enacting a law, they often need to be reminded that the process of entrenching the right to information is as important as the outcome. Involving a broad cross-section of people in the law-making process helps ground the law in reality. In conclusion the existence of a law, without a change in mindsets and practical means for implementation, is like a seed cast upon stony ground. The law therefore it not the cure but the means to the end. The report is available at the ICJ-Kenya offices for any references.

Plenary Comments

Ms. Priscilla opened the session by querying why the law cannot be used to engineer social change? She was of the view that the law should be enacted first then the public is educated

on the use of the law for social change. Government came into power on a platform to eradicate corruption. What would be the best strategy in using the Freedom of Information law to ensure the Government maintains its ideals and keeping it in check?

Mr. Lawrence Mute from the Kenya National Commission on Human Rights advised the forum that when dealing with the government officials one should not dramatise the importance of the right too much as this is likely to bring some resistance. He was of the view that he would be reluctant to use the anti-corruption ideals when lobbying for the FOI law with government, as this would allow government to negotiate for very broad exemption clauses. He stated that emphasis should be placed on the importance of the right to access information on grounds that it enhances accountability.

Jack Muriuki was of the view that the Government has no interest in opening up and in terms of strategy it might not be wise to introduce the anti-corruption aspect. He was not optimistic that the Government wants to push for this law. He thought that it might be wise to re-strategise the mode of introducing the Bill in Parliament. He was of the opinion that the Network should garner support from MP's who have experience in introducing private members Bills in Parliament. Participants in response to this proposed Honourable Paul Muite.

Mr. Samuel Mbithi asked whether is it a good idea to incorporate whistleblower protection within the Freedom of Information Act or as a separate legislation? In response to the question Ms. Charmaine pointed out that most commonwealth countries have separate whistleblower protection but the most ideal option would be to have it incorporated. In South Africa in order to pass the right to access information legislation (Open Democracy Legislation) whistleblower protection was legislated as a right on its own. It could be a strategy to split the legislation.

Ms. Priscilla Nyokabi applauded the government for drafting Freedom of Information Bill and suggested that civil society organisations should work in conjunction with the government in realisation of the right to freedom of information in Kenya. The FOI culture would help in the democratisation of government. The citizen would thus be more involved in government rather than a passive recipient. The Democratisation value should include this aspect.

Mr. George Okado was of the view that ICJ should nurture processes that will eventually help in operationalisation of the Bill.

Key Principles of Freedom of information

Ms. Charmaine Rodriguez embarked on the second part of her presentation, which was on the key principles of Freedom of Information Bill. She pointed out that there are nine principles that can be summarised into six principles. They include:

Maximum Disclosure- public is entitled to access this information if they choose to. Recognises the person's natural right to access information. The concept of the request and the concept of proactive disclosure by government are two key concepts to be considered. Basic information should be released to the public for example in Mexico they disclose

public contracts proactively as they recognise that it reduces corruption. This is a way of increasing transparency. Areas of proactive disclosure need to be included in the Freedom of Information Bill. Ministries should be encouraged towards proactive disclosure even in the absence of legislation. This could be a strategy to use in advocating for freedom of information within government even before the enactment of the Freedom of Information law.

Minimum Exemptions- every exemption needs to be justified. Article 19 has developed a three-tier test. This is whether disclosure will cause harm to a legitimate interest. This needs to be made clear in the legislation. Should also emphasise that all non-disclosure needs to be in the public interest. Should consider what interests the exemption provisions shall protect and whether or not they can be abused.

Simple, cheap quick processes- What's the actual process of accessing information? These processes should ensure maximum accessibility by the public.

Independent Appeals- ICJ Bill includes a provision for an Information Commission. In South Africa there is no independent Appeal body- the option is internal and then through the courts. The use of the courts is not popular and not many applicants will appeal to the courts and therefore officials can deny disclosure with impunity knowing that there will be no recourse to the courts. The Information Commission is an ideal body but if it is not workable because of cost, an independent option such as an Ombudsman could be used.

Penalties- imposition of penalties for officials who refuse to disclose/ release information. This is not an ideal but sometimes in cultures of entrenched secrecy it's an additional mechanism of making information accessible

Monitoring and Promotion – Needed to draw attention to specific performance by government departments in terms of releasing information. The South African law includes a requirement for training and targeting of rural communities for promotion of the law. The Government should have a duty and allocate sufficient resources to do the promotion.

Plenary Comments

Ms. Anne Muthoni asked whether the exemptions in Freedom of Information legislation are subject to exemption for release of information found in other statutes or the common law? Is release of information devolved or is it centralised?

In response to the question Ms. Charmaine stated that the Freedom of Information Act should be the overriding Act that states what should and should not be exempted. The devolved release of information and who is mandated to the same will depend on the structure and machinery of government. The Government should develop regulations to govern the same. In India, public information officers have been appointed at all levels of government.

Mr. Henry Maina pointed out that there is need to take care when including the minimum exemptions and even when including the same in the Bill, we should also keep in mind the exemptions already found in the Bill of Rights. He noted that the Government tends to react more to institutions rather than individuals. The Bill should therefore state clearly the right

of individual Kenyans to access information and Government departments encouraged to effect the access.

Mr. Musyimi was of the view that Freedom of Information should not be dealt with alone it should be addressed together with the media. Media determines what is distributed to the public. Is there legislation that can ensure the governing of cross media legislation in cases where the government has substantial interest in the media or media owners have monopoly and would thus be biased in one way or another?

Ms. Charmaine noted that the regulation of media would require independent legislation.

Mr. Kamunde was of the view that the drafters of the Freedom of Information Bill should consider the economic situation in Kenya The drafters should explore the option of not setting application fees for access to information.

Ms Charmaine in her support for the no- fee option noted that most governments are hesitant to waive fees. If fees should be charged, then it should be for the actual cost of processing the information and waivers should be included. The fee regime should complement the poorest sector of the society.

Mr. Mukaya in response to the comment on providing for penalties to ensure enforcement noted that this would be undue pressure on the public officer. An ideal situation would be that of legislating of compensation to the aggrieved person and charged to the institution rather than the public officer. On the issue of maximum disclosure there is a need to think about disclosure to protect public interest as against non- disclosure to protect private interests. There is need for the applicant to state reasons for seeking the information as well as a need for legislation to sieve applicants as some of the threats could include espionage or busybody claims.

He asked whether private interests should be included within the domain of the legislation? On appeals, it might be important to consider existing laws e.g. laws that limit review on facts or procedures. This might be worth looking into when drafting the legislation. In legislation, a general provision on access to information should be included. Think about the numerous provisions giving parliament the right to legislate subsidiary legislation and whether or not the Bill should contain a provision that limits this right of subsidiary legislation insofar as the subsidiary legislation would limit the scope of the Right to information legislation.

Mr. Kihanya stated that it would be unlikely that private bodies would contribute to the Universal Access fund for purposes of funding access to information held by the government. The Government should be required to fund the Access fund. Additionally he noted that institutional responsibility in regards to penalties might not work. Public institutions would readily pay a fine for non-disclosure.

Ms. Njeri noted that there is need to internalise all the principles of access to information and the Kenyan culture with regards to access to information when thinking about strategies especially as we are using the law to engineer social change.

Mr. Mbithi noted that the principles presuppose that information is already there. There is need to include a principle to require government officials to maintain records. With regards to penalties, the culture in the public service is that officials hide behind official cover. He stated that there was a need to find a balance between the responsibility of individual officials and the Public institutions.

Strategies of promoting Right to Information.

Ms. Charmaine took the forum through a session on strategies. She stated that there was a need to constantly demonstrate the relevance of Right to information to all players both at policy level and grassroots level. Recognise potential partners from different sectors for example trade unions, business councils, the Law Society of Kenya and the judiciary among others.

Secondly there is a need to identify targets- who will champion the cause, that is, for example the Minister of Information and Communication and Members of Parliament.

Thirdly design targeted strategies for example using MP's to send submissions through parliament. Drawing letters to all key departments, Cabinet, Members of Parliament on the importance of the right to access information and legislation.

Finally allocate responsibilities. It is important to assign timelines and exploit opportunities so as not to lose the momentum. If for example the Minister of Information makes a comment on the right to access information the media should publish a response to the comments.

Challenges:

- Competing with Constitutional review process meaning that issues on Freedom of Information do not get enough publicity and efforts seem to have shifted to the draft.
- Existence of (poor) draft Government Bill. The Draft was copied almost entirely from the Australian one meaning it is a complicated law with massive flaws. If it is published, then there should be demands for public consultative debate. Is the strategy to publish the ICJ Bill or the Government one? In Uganda the Government took up a Bill prepared by the Civil Society.
- Lack of general Government commitment. How to force the government to see the importance of the issue.
- Raising profile of Freedom of Information as an issue through media awareness and raising public awareness
- Cohesion of civil society coalition - sustaining the campaign drive

Ms. Charmaine invited participants to identify different strategies to be used. Ms. Priscilla began by stating that ICJ-Kenya has done so far. This includes;

1. Prepared a Memorandum of views on the Government Bill and seek audience with the Minister on the same. Lobbying the Government to publish their Bill and start discussion on it.
2. Prepare private members bill and seek MP to take it up.

3. Review Process- if the proposed constitution is ratified, then there is the fear that the Government will adopt the its Bill one which has been seen to be flawed.

Plenary

In the plenary session Mr. Henry Maina was of the view that the call for the publication of the Government Draft Bill should be suspended and the network should concentrate on the drafting process. He stated that once the draft is published it would be very unlikely that the government would take peoples views and incorporate them.

Mr. Lawrence Mute gave a background of legislation that had been shelved in recent times due to controversy. He noted that the Press Bill and the Terrorism Bill were published but never passed. The network should lobby for the right to information in Kenya and for the ICJ-Kenya draft. We should think about balancing the human rights needs with security needs of the nation in regards to disclosure of information. Once the Government publishes their Bill, it'll be difficult to lobby for passage of the ICJ- Bill.

Ms. Rose Lukalo supported the multiple strategy approach ICJ has adopted. She stated that the network should not wait for government to publish their draft. It should proceed with lobbying and move forward with the ICJ private members draft.

Mr. Matu Ngure was of the view that it is important to map out critical areas and needs of our society and include this in our Bill. There is need to understand the intricate structure of Kenyan government and society. If we do these, then we'll include people in the process of creation of information. It is noteworthy that the Minister's personal performance contract indicates that he is to have delivered the Bill by next year. It is important that he delivers the right Bill.

SESSION TWO: CONSITUTIONAL FOUNDATIONS OF THE RIGHT TO INFORMATION. WAKO DRAFT AND THE FREEDOM OF INFORMATION BILL by Lucas Wauna

Mr. Albert Kamunde chaired the session and asked participants to give proposals on strategies to be used after the presentations were done.

Mr. Wauna started off with familiarising the participants with the Draft constitutional provisions on access to information. He reiterated the importance of Freedom of Information under international instruments and stated that the principles laid down in ICCPR Article 19 are important and should be captured within legislation. He stated that Kenya, despite ratification of several International Human Rights treaties had failed or delayed to domesticate the same. He underscored the fact that Kenya signing the Universal Declaration on Human Rights undertook to ensure the freedom of expression is promoted and protected and by extension the Right to information.

Section 77 of the current constitution provides the freedom of expression but fails to provide for the right to access and seek information. The section gives the government power to derogate from guaranteeing the right. The right to information is not enforceable

in Kenya. Other laws such as the Official Secrets Act, Penal Code, sedition laws also worked to take away that right to information. These laws still exist.

Under the constitutional review process, Kenyans recognising the importance of access to information, included this in the Bomas draft Constitution and the Wako Draft. The Draft lays a good foundation for Freedom of Information in Kenya. Article 3 of the Draft states that international customary and treaty law would be part of Kenyan law. This means that international human treaties inclusive of ICCPR can be applied through the judicial process and by extension, Kenya's obligations to ensure access to information.

The values, principles and goals under Article 13 require a robust right to information regime. If the draft is ratified, it becomes incumbent on the government to enact a freedom of information law to ensure that these values enshrined in the draft are realised. The Bill of Rights in Chapter 6 under the Proposed New Constitution states that the Bill of rights applies to all laws, binds all state organs and all persons. Under Article 33 (a) and (b) courts are mandated to interpret the laws in a manner that gives effect to the right of information as found under the Bill of Rights. Under the draft if the state claims it does not have resources to implement a legislative framework ensuring this right, the courts can place a burden of proof on the state to demonstrate this.

The issue of locus regarding enforcement of human rights is expanded under the Proposed New Constitution. A violation or threat of violation is eligible for remedying by the courts. The courts can pronounce any orders deemed necessary as a remedial measure to violation of human rights for example the courts through judicial review can compel a public body to disclose information.

Article 49 of the Proposed New Constitution provides for freedom of expression, which includes receiving, imparting information. There are limitations to the freedom where expression leads to propaganda of war. Article 50 guarantees of freedom of media and by extension media independence and the media is required to carry out duties impartially and under the constitutional provisions. Article 51 is on the right to access of information. State obliged to publicize any important information concerning the nation. Any legislation to be enacted on Freedom of information must comply with the requirements of Article 34 of the Proposed New Constitution. Rights should not be limited beyond what is provided for under the Proposed new Constitution. He noted that the safeguards found in the ICCPR are not found under Article 34. Parliament is given a sort of carte blanche to legislate exemptions to this right.

The provision under Article 51 gives the right to access to citizens. The question that arises is a legal personality a citizen for instance is a company covered under this Article? This section excludes foreigners from enjoying this right. International Convention on Civil and Political Rights requires that all rights thereunder should be available to all residents within a state without distinction as to race, sex, creed, gender to mention but a few. The constitution doesn't meet this standard.

The right to access is only applicable to information held by the state. This does not include a private company providing services of a public nature. Can this right then be applied horizontally? If the draft is passed which permits horizontal application, then this will contradict the draft.

He concluded by noting that there appeared to be goodwill from the government in enacting Freedom of Information legislation. The challenge he pointed out was to take advantage of this goodwill and ensure that Freedom of Information law is enacted. The government should be made aware of the importance of involving stakeholders so as to ensure that standards are incorporated in the law. Even without the Draft being promulgated, Freedom of Information law should still be enacted.

Plenary

Mr. Lawrence Mute opened the plenary session and posed the question whether the right to information should be limited to citizens only or should it be applicable to residents?

Ms. Charmaine responded to the question and pointed out that most constitutions limit rights to citizens but legislation goes further and can provide non-citizens with this right while not being inconsistent with the constitution. The legislative power is not narrowed down by not being provided under the Constitution.

Mr. Wauna noted that Article 16 permits acquisition of citizenship by registration and therefore by implication a company registered in Kenya would have that status.

Henry Maina sort to know what effect does the provision under Section 50(6) of the Proposed New Constitution have as concerns the limitations of rights by subsidiary legislation. What protection does the draft give whistleblowers?

Mr. Makoolo noted that unlike other provisions in the Bill of Rights, Article 51 limits this right to citizens as opposed to the words ‘ any person’. He asked what effect Article 30 (5) (c) has on judicial enforcing of human rights.

Mr. Wauna stated that the South African Constitution provides the courts with power to enforce and uphold rights. This is similar to Article 30 (5) (b) of the Proposed New Constitution under which Kenyan courts have the jurisdiction to order the state to enforce the bill of rights. The court must however be satisfied that the state has endeavoured to promote the rights and has exhausted its resources. Then and then only can the court wash its hands from compelling the state to promote a right as provided under Article 30(5)(c).

Mr. Samuel Mbithi noted that the current constitution sets out the rights of the individual. In his view, corporate rights would be covered under another regime. The Proposed New Constitution does not mention the applicability of the rights to individuals and/or legal persons.

Ms. Priscilla stated that the exclusion of non-citizens from enjoyment of access to justice may have to do with the perception that they do not enjoy absolute rights in a foreign country. Limitations are allowed even under international conventions as long as they meet the democratic test. Therefore there can never be absolute freedom.

Mr. Musyimi stated that the Government has no obligation to provide for non-citizens. The definition of a non-citizen can be included in legislation.

Mr. Wauna in response to the comments stated that the wording of the draft appears to refer to natural persons as opposed to natural and legal person. Rights are universal and therefore excluding non-citizens by the draft provision is a major weakness. Article 50 (6) in his view does not scuttle media freedom and the principles embodied therein do not act as a claw back on media rights.

RIGHT OF ACCESS TO INFORMATION UNDER THE ICJ DRAFT FOI BILL, 2000: A CRITIQUE by Joseph Kihanya

Mr. Kihanya began his presentation by noting that the right to access information has in the recent times occupied societies that were hitherto undemocratic. This has been so as most jurisdictions have realised that the right is pertinent to the exercise of other rights in a democratic society. This would therefore explain the necessity of Freedom of Information Law in the country.

He stated that he would examine the Bill as a whole based on a few selected criteria and not by a clause-to-clause analysis.

He affirmed that under the Model Freedom of Information law and in other authoritative texts that Freedom of Information legislation must meet certain minimum standards for them to provide a sound basis for the exercise of the right to access information. The practise that has found root in many jurisdictions is that Freedom of Information Bills should be drafted in plain language as easy as possible.

He then embarked on analysing the Bill as follows. On the objects clause he stated that the same should be read together with the preamble. The preamble is to him very long and tries to exhaustively provide for the purposes of the Bill. This may not be sufficient and the same can be done in the objects clause instead of the preamble. He was of the opinion that there should a statement to the effect that the main purpose of the Bill was to promote the presumption of openness.

He noted further that the Model Freedom of Information Law was drafted after the drafting of the ICJ-Kenya draft Freedom of Information Bill therefore that would explain the overly legislating of the draft. He then looked at the Bill clause by clause. He noted that Section 3 of the ICJ-Kenya draft is exhaustive on the purposes of the Bill. However he was sceptical about the statement that the right to access information shall be extended progressively. This brings out the question whether the Act shall be operationalised progressively as was done in the England where the Act took five years. Will MP's use this provision to postpone the coming into force?

In the definition clause the word Minister not defined. He stated that the restrictions in the Bill should be clarified and that a requestor should not be required to give reasons for seeking information. He pointed out that the drafters should ask themselves whom does the Act target, should private bodies be brought under the Act?

He stated that the ICJ Bill at Section 5 (1) introduces some concepts not easily understood by the *mwananchi*. Words like; "shall apply; notwithstanding any law restrictions" are to him

complex to the common man. Additionally the mention of the common law- a term that is rarely used outside legal circles in Kenya.

Section 6 of the Bill which is on Public interest exemptions does it meet the 3-part test? The restrictions must meet the tests necessary in a democratic society in that they must be directed at legitimate interests consistent with internationally acceptable standards. He noted that the Bill provides that restrictions to the right will only be allowed in the Bill, it follows therefore that any conflicting laws must give way to the contents of the Bill. This is provided for by saying that certain laws will be amended. This however may present a problem if the laws to be amended are not identified. He suggested that there should be a constitutional provision that should render these laws void.

On the issue of criminal and civil liability to whom are the penalties to, the individual or the public body? Should the protection of whistleblowers be included in the Bill? The provisions should provide for the protection of persons from civil, criminal and administrative liability who disclose information that would otherwise be restricted, if it was done in reasonably and in good faith and or towards the furtherance of the public interest. The press should also be protected where publication is done in good faith except where they are involved knowingly in an illegal act.

On the Administration of the Act ICJ draft mentions the Minister making regulations under the Act. These might take some years, as is the practise in the country. Do we want to subject the Act to a threat of postponement? We might want to annex necessary forms to the statute for instance a form for making requests.

The Act does not provide for the appointment of other officers it only provides for Information Officer. The Act should provide for the appointed of other officers by public bodies. It should also provide for the training of these officials. There are Provincial and Districts Information Officers currently set up under a presidential prerogative. Do the public use these offices to access information? Do we want to retain it under the auspices of the Freedom of Information legislation? Similarly he noted that the Government Spokesman's office is an office created by presidential prerogative. The same is under the Cabinet office and with time might gain permanence. The office is not designated to play any enforcement role on the right to access information, however he was of the view that the office is not desirable to play this role. He recommended that the said office should be made subject to Freedom of Information legislation. He concluded by stating that an in-depth analysis of the Bill clause to clause was to be done the next day by Ms. Charmaine Rodriguez.

Plenary

Ms. Priscilla declared that the country requires maximum disclosure principles embodied in the Freedom of Information legislation. Ms. Charmaine affirmed that the Indian Bill includes obligations of public authorities to disclose certain information. There is a list given and she was of the view that this is one way of achieving maximum disclosure, that is, through proactive disclosure.

Mr. Odhiambo Makoloo proposed as a way forward that we should start by conceptualising and agreeing on the title of Freedom of Information Bill we want. He was of the view that

the preamble should be shortened. The Bill should borrow heavily from the right to information principles. The principle of maximum disclosure, questions of affordability, the usability of the information should be reflected in the Bill. He was adamant that the Bill ought to state clearly whether obligation to provide and right to access is only to public or to public and private bodies. He concluded by saying that there was a need to examine the Bill from the influence of technology such as the Internet.

Strategies of promoting Right to Information.

The session on strategies was revisited at the end of the day. Mr. Kamunde began by posing the questions how the campaign should be promoted? Who should be the target? He invited participants to make suggestions.

Participants identified a list of partners to wit;

| | |
|--|----------------------------------|
| ICJ-Kenya – lead organisation | Legal Resource Foundation |
| Media Owners Association | Kenya Human Rights Commission |
| Media Practitioners | Transparency International-Kenya |
| Media Council of Kenya | Trade Unions |
| Kenya Union of Journalists | Maendeleo Ya Wanawake |
| Institute for Law and Environmental Governance | Academia |
| Correspondents Association | NGO Council |
| Kenya Law Reform Commission | |
| Kenya National Commission on Human Rights | |

The following sectors were listed as targets;

- The Executive
- The Judiciary
- The Legislature
- Civil Society Organisations
- The Media

It was noted that the right to information campaign has not found root in the country and therefore a lot of lobbying needs to be done. Participants suggested that the strategies should be revisited the next day and that the presentations should go on. The session was therefore deferred to the next day.

THE FREEDOM OF INFORMATION BILL- LEGISLATIVE DRAFTERS CRITIQUE by Jeremiah Nyegenye

Priscilla presented the paper on behalf of Mr. Nyegenye. She mentioned the fact that the paper delved into technical drafting aspects as well as the soundness and adequacy of the Bill.

The first issue Mr. Nyegenye discussed was the technical drafting aspects of the Bill. In this regards, he pointed out the inconsistency of the title of the Bill. He noted that the cover page

and the first two unnumbered pages refer to the Bill as the **Freedom of Information Bill, 2000** while page 1 refers to it as the **Access to Information Bill, 2000**. In his opinion, the long title of the Bill seemed to lean towards the latter title and Article 1 of the Bill also stated that it is to be cited as the Access to Information Act. In concluding his remarks on the technical drafting aspects, Mr. Nyegenye expressed the view that the drafting of the Bill required further work. He noted that the Bill combined both the commonwealth and the continental styles of drafting and his opinion was that one style should be adopted.

Concerning the substantive aspects of the Bill, he expressed the view that the Bill should be grounded on the Constitution. He posed the following questions: Does the Bill proceed on solid constitutional grounding? Is “a right to know” recognized under the Constitution of Kenya or will be only a statutory right? He noted that the significance of FOI legislation is such that its provisions are better vindicated as constitutional rather than as merely statutory rights. He stated that when an FOI law is merely a statute, it is inelastic and inflexible and the rights provided under it are dependent on the magnanimity of the legislator and only during the legislator’s pleasure. In this regard he emphasised the importance of anchoring FOI legislation on the Constitution. He commended Article 51 of the Proposed New Constitution for expressly providing the right to access information from the state.

He described the issues raised by Article 4 and 5 of the Bill as weighty. Article 4 declares that every Kenyan has the right of access to official records held by a public body while Article 5 provides that this right of access shall apply notwithstanding any statutory or prohibition on the disclosure of information. He raised the point that a statute cannot purport to superintend itself over another statute unless those statutes expressly or by necessary implication recognize the superintendence of this Act over them.

Commencement

Regarding the commencement of the legislation, he noted that when passage of an FOI law becomes imminent, there is a high possibility of public bodies destroying records prior to the commencement of the Act as happened in the United Kingdom prior to the commencement of the FOIA 2000. In order to deal with such a possibility, he suggested the inclusion of a provision within the Bill that would penalise any person who prior to the coming into effect of the legislation and in anticipation of it wilfully destroyed or concealed records. He stated that the definitions need to be aligned and made uniform.

Exemptions

Mr. Nyegenye while recognising the importance of exemption in FOI legislation warned against the excessive and broad use of exemptions. He stated that complex exemption provisions play into the hands of opaque Government by making it difficult for the ordinary person to know what kind of information is freely available and that which is not. He was of the view of exemptions should not be too broad or too use and should not be open to manipulation by governmental bodies. He proposed that exemptions should be clearly worded to avoid the possibility of manipulation. He noted that Article 6 (2) of the Bill was lengthy and convoluted and it suggested that the article should be redrafted. He raised a query about part- exemptions and part- allowance and suggested that part- exemptions may be provided for in the Bill. In his view the list of exemptions in the Bill are not exhaustive and he thought that the draft should be worded in such a way that allows flexibility. He was also of the thought that work-in-progress should be exempted from the access to

information regime and stated that bureaucrats find it vexing to be inundated with demands for information on work that is incomplete.

Public Interest: He stated that in considering FOI legislation, it is important to consider the manner in which the public interest rule is expressed. Is the exemption to apply if there is a likelihood of ‘prejudice’ or ‘substantial prejudice’? He noted that the Bill seemed to adopt the standard of mere prejudice however minimal. In his view this would make the efficacy of the Bill in realization of its objects minimal if this standard was adopted.

He also raised the question whether the public interest test is subjective or objective. He noted that the Bill does not make adequate effort to give any guidance about what constitutes public interest so as to enable a measure of objectivity. In his opinion, the public interest test in the Bill could be construed to a subjective test, one that is at the discretion of the public body from which information is sought.

Procedure for seeking information- Mr. Nyegenye noted that the procedure for seeking information under FOI legislation should be simple and well known. He particularly emphasized the fact that no unnecessary requirements to disclose a person’s identity or the purpose for seeking information should be required as a prerequisite for the information being availed. Under Section 6(2) of the Bill, which sets out the procedure for applying for information, he noted that it was unclear from the wording of the provision whether the applicant must be a Kenyan citizen and he queried whether non- citizens have a right to information under the Bill.

Concerning records, he stated that it might be important for some records to be kept of the people seeking information and the type of information being sought. He was of the view that this might help the public body to determine frequently sought information and make arrangements to make it easily available in practice disclosure. However as a qualification, he stated that this provision might serve to intimidate the public.

Extent of Mandate to Comply with Solicitation of Information

He proposed the establishment of an Information Tribunal instead of the Information Commissioner as set out in Article 11 and justified his proposal by stating that decisions are better placed in the hands of an expert panel rather than an individual and added that independence of is more likely to be achieved with the panel. Alternatively if the office of the Commissioner is retained, he proposed measures that protect the office from influence from the Executive be included in the Bill.

Concomitant Legislation: A Privacy Act should be pursued alongside this process. This Act would enable clear demarcation of what is in the public domain and accessible to the public and the protection available to private citizens in matters in which the public have no legitimate interest.

He also noted that other statutes might need to be repealed or amended with the coming into effect of the Bill. He noted that these Acts had been listed in the Bill. However he stated that this was an over simplified manner of dealing with this issue and stated that each of these Acts needed to be studied and the specific amendments identified and drafted

In his concluding remarks he commended ICJ for the project but stated that further work should be done to come up with better legislation.

Plenary

Mr. Makooloo was of the opinion that a statute can give itself a higher status than another despite the concerns raised by Mr. Nyengenyne over this. With respect to commencement dates, he stated that he would prefer to have a uniform commencement date rather than staggered commencement dates for different provisions. He expressed the view that the keeping of records would bring in some level of intimidation. He stated that each dept. should keep statistics of type of information sought for its internal administrative purposes and concluded by stating that the Bill ought to give a definition of private information. He asked for a clarification of the phrase “work in progress” as used by Mr. Nyengenyne.

A participant noted that unless a statute alleges to repeal another, it couldn't claim superiority over another. The participant also noted that in his opinion the title to be adopted should be the Freedom of Information Bill and said that there would be conceptual problems if the title Right to Information were used.

Mr. Kihanya noted the need to expressly repeal legislation within the draft and state the express provisions of other statutes to be repealed/amended. It was suggested that these provisions to be repealed or amended should be annexed to the Bill.

Regarding the commencement date, participants were of the view that a uniform commencement date was the preferred option. Ms Charmaine stated that even if a uniform date for commencement was chosen, there still exist different ways of implementing the provisions of the Act such as setting a general commencement date but with provisions for phased implementation of different provisions as was the case in Jamaica. Alternatively, the option of delaying the coming into force of the Act for a certain period like was the case in the UK that had a 5 –year progressive plan could also be pursued. However participants did not favour the latter option with fears being expressed that if adopted, there existed the threat of destruction of information before the coming into force of the Act.

To counter this, it was suggested that the penalty clause could come into force on the commencement date to avoid cases of destruction of records after the coming into force of the legislation.

A participant suggested that a provision on retrieval and maintenance of information should be included in the Bill. Records management provisions should be a requirement and perhaps a time limit put in place within the act. A penalty clause for non- compliance with this provision should be included.

Concerning the provisions on the Information Commissioner, a participant was of the opinion that the commissioner should in addition to the duties spelt out in the Bill, deal with regulation of information and management of records. The qualifications of the commissioner as provided in the draft should be re-looked. Participants didn't see the reason why the commissioner should have the same qualifications as a judge.

Instead of a single commissioner, a participant suggested a panel of five commissioners, as is the case in Mexico so as to protect the independence of the commissioner. A participant proposed that these functions be vested in the KNCHR.

In Kenya there is the Disposal of Records Act and National Archives Act and there is no law validating information stored in a number of technologically advanced means. There is thus a need to look at these statutes and the need for repeal or amendment of the same. There is no record keeping culture in Kenya and no central information centre for the collation of this information. Mr. Muriuki suggested that there is a need to conduct an information audit to inquire into record keeping in government.

A participant raised a comment on the autonomy of the Information Commissioner and noted that some jurisdictions have given their Information Commissions their own budget line independent of the Executive as well as control hiring of staff. This independence from the executive is important and could be considered being enshrined in the proposed Bill.

A participant was of the view that the enforcement policy under the Bill was insufficient as currently the commissioner is the complainant, the prosecutor and the judge. The Commissioner thus combines the roles of investigator and decision maker. She noted that the roles need to be vested in two separate bodies and a provision included in the Bill on filing an appeal against the decision of the Commissioner in the High Court.

DAY TWO

Session One: Facilitator: Dr. Kindiki

Joint Presentation: Overview of the ICJ Bill 2000- Kanyi Kimondo and Critique by Charmaine Rodriguez

Mr. Kanyi Kimondo introduced himself to the participants and begun to take participants through sections of the Draft. He began with a short background into the drafting of the Bill. In 1999 ICJ-K commissioned three people to study the state of freedom of information in Kenya culminating in the production of the report titled *The State of Freedom of Information in Kenya*. ICJ-Kenya subsequently commissioned him and Connie Ngondi Houghton to draft Freedom of Information Bill. After the drafting ICJ-Kenya approached MP's to try and push the draft through parliament. During this period 1999 the political climate was changing and there were plans for a change of regime. Thus the Bill reflects this and has some restrictive provisions. The Draft was also an attempt to broaden provisions found in Section 79 of the Constitution. The draft borrows some of its provisions from the Data Protection Act of England and that explains some of the references to data protection.

Mr. Kanyi delved into the analysis of the Bill and was of the view that the Preamble should be shortened. The Model Freedom of Information law has a shortened version- we might want to borrow from this. Section 3 contains the purposes of the Act, which has been lauded for being objective and stating clearly the objectives of the legislation. The preamble should reflect the objects of the Act.

Ms. Charmaine proposed that the preamble should include the concept of maximum disclosure. She affirmed the importance of the preamble and the objects clause and recommended that the two be harmonised.

Mr. Kanyi Kimondo suggested that the title, Freedom of Information rather than Access to Information. He stated that the conceptualisation behind the Bill was that requests by people to access private records should ordinarily be made under a Data Protection Law and information request for public records held by the state is ordinarily made under Freedom of Information legislation.

Mr. Ekitela proposed that the Bill should be titled Right to Information Act as a right creates a duty and as the Bill is intended to put a duty on the government to disclose information.

In response the presenters stated that it is important to harmonise the title of the bill with the Constitution. Ms. Charmaine proposed the forum should think of a less controversial title.

Conclusion on Preamble:

- **It was agreed that a short preamble that guarantees of maximum disclosure be adopted.**
- **Title: Freedom of Information Act.**

1. Section One

It was opined that not stating a commencement date could be fatal and could delay operationalisation of the Act indefinitely. Where a Minister in charge is not keen to have the Bill passed he is likely to abuse the *carte blanche*.

Ms. Charmaine made three prepositions that could be taken into consideration:

1. *That the Bill should come into force immediately.*
2. *Give a Time lag e.g. England took 5 years, Mexico took a year*
3. *Phased implementation- nominate Ministries to implement the Bill in phases starting from the most important sectors in Government*

Mr. Gitobu Imanyara was of the view that since the proposed Constitution specifies that the law should be passed within 6 months after the enactment of the constitution; the Bill should leave it to the Minister to set a commencement date. Suffice to note the Permanent Secretary of the ministry of Information and Communication is required by his contract to have the Freedom of Information legislation promulgated by June 2006.

Ms. Priscilla was of the view that the Act should come into force upon commencement as the emphasis of the Act is on maximum disclosure and proactive disclosure. Proactive disclosure does not require a time frame.

Mr. Lawrence Mute proposed the inclusion of a definite commencement date. He proposed further that some sections of the Act could come into operation later.

Mr. Kanyi Kimondo proposed that as a middle ground the Act should come into force 6 months from the date of assent.

Participants proposed that also a schedule should be included which set out the time frame at which the Bill shall come into operation.

Conclusion on Section One:

- **Commencement date 6 months from date of assent.**
- **Implementation of the Act in several departments be given a time frame however most crucial Government Departments which are required to disclosure information that is of public interest should implement the law immediately.**

2. Section Two

Mr. Kanyi stated that the section attempts to define certain phrases and words. Some of the definitions are borrowed from the European Data Protection Act and the UK Draft Freedom of Information Bill 1997.

Ms. Charmaine proposed words that would be identified as the analysis was done would require to be defined. She stated that there are four main words that need to be defined;

- ❖ She stated that the use of the terms ‘ official documents’, ‘official records’ and ‘official information’ should be capture in a single definition to avoid ambiguity. She also proposed the expunging of the use of the term official.
- ❖ Define access to information and broaden it to include some characteristics like taking of samples for example, as is the case in India.
- ❖ The definition of information needs to be broadened and the term information should be used instead of document or record. Mr. Kanyi pointed out that the proposed constitution defines document and suggested that the drafter might want to examine that definition.
- ❖ Definition of Public Authorities. The question that should be asked is what bodies should be covered in the Act. The noted that the South African Freedom of Information Act provides the broadest coverage of bodies. The country is still trying to come into terms with this provision. She proposed that the bodies should be listed in a schedule annexed to the Bill.

Mr. Kanyi proposed that the definition of the public authority be improved as follows. He proposed that paragraph (f) be struck out (paragraph (f) includes the words *a specific private body* in the definition of a public authority. He proposed the combination of paragraph (g) and (i);

- g) Any other body providing services, facilities or goods to the public authority (other than under a contract of employment) in relation to those services, facilities or goods;
- i) Any other body in relation to any function, which it exercises on behalf of the government.

Ms. Charmaine was of the opinion that paragraph (f) should not be deleted but could be improved by specifying that a specific private body will be that which is specified by the Minister under a Schedule.

The Section should have different definitions of public body and private bodies. Participant inquired whether international NGO's doing activities of a public nature or collaborating with government on this issue should be within the ambit of the Act. Ms. Charmaine was of the opinion that most international NGO's have a disclosure policy and that most documents that would be relevant to the public are copied to the Government. One participant sought to know whether the President should be defined in the Act.

It was the opinion of most participants that a broad definition is crucial begins into the ambit of the Act all bodies that would affect the rights of individuals in one way or another. Private entities doing activities that are public in nature should be included under this Section.

Conclusion on Section Two:

- **Drafters to look at this section and try to create a broader scope of definitions rather than a limiting one. Drafters should include general statements capturing all the intended parameters.**
- **Section should have two definitions one on private bodies and another on public bodies.**
- **Include also a third definition providing for bodies that do not fall under the former definitions but impact on people's rights, that is, public, private or such other bodies as may be prescribed in a schedule to fall under the ambit of the legislation.**
- **All ambiguities and repetitive definitions of public authority should be removed.**

3. Section Three- (the objects clause)

Mr. Kanyi Kimondo stated that the purpose of inclusion of this section was to capture the objects and purposes of the statute to assist in the interpretation of the Act.

Some participants were of the position that the clause was not needed as it was an 'emotional' statement. Additionally in Kenya's legislative drafting we never have an objects clause. The practise is that the a Bill has a Memorandum of the Objects at the back of the Bill which is meant to be used by the Members of Parliament to interpret the purpose of the Bill. On the other hand some participants though felt that the objects clause was necessary and described it as important and inline with modern legislative drafting. The section should facilitate rather than limit the scope of the Act. Mr. Kihanya was of the opinion that the objects clause is important to persons who were not involved in the drafting.

A question was raised on the use of the word ' progressively' in section 3. A concern was raised that the use of the word progressive is peculiar with Economic Social and Cultural rights and therefore the use of the word in Freedom of Information legislation was improper as the right to information falls under Civil and Political rights that duty bound.

Mr. Kanyi Kimondo stated that the term is ambiguous and could be interpreted to mean a number of things. He suggested that instead of the term, a time frame would be better used. Participants agreed to expunge the word progressively from this section.

Conclusion on Section Three:

- Retain the objects clause.
- Examine the clause and see whether it captures the areas the statute wants to cover.
- Delete the word progressive and amend the phrase ‘ This part of the Act’ and replace with ‘ This Act’.
- Delete the phrase ‘Kenyan Subjects’ and replace with ‘persons’.
- Include the object of maximum disclosure.

4. Section Four

The United Nations declaration binds all states to certain common standards. It was the opinion of one of the participants that the phrase Kenyan person should be replaced with ‘ Any persons (to include both natural and juristic)’.

Conclusion on Section four:

- Replace the word Kenyan person with the words ‘Any person’.
- Use these words throughout the Act.

5. Section Five

Ms. Charmaine took participants through this section and began with a general comment that all sections should have headings to make reading of the legislation easier. She Proposed the moving of section 5 (1) (b) for consideration under section 6 as it is about exemptions.

Sub sections 2,3,4,5 should have come under the heading *Procedure for making applications*. Under this we should consider the following concepts:

- Fees, waiver, search for information and access of the same.
- Form of application and who is eligible to make the application.
- Process for deciding applications including time, decision maker, form of response.

The process of application should take into account Kenya’s particular situation and should also take into account literacy levels, economic situation. Indian Freedom of Information law took this into account and attempted to make the processes more people friendly and took the process of application to the district level- closer to the rural majority.

Mr. Kanyi kimondo proposed that application for information should be left open to any form and could be as informal as possible, for example through a phone call. Ms. Charmaine proposed the designation of officials as public information officers in each department. She proposed further the decentralisation of access to information rather than centralisation. Mr. Lawrence stated that there is need to go beyond the culture of bureaucracy and establish information departments for each authority and department and facilitate the empowering of these offices with technical expertise.

A participant noted that the Minister recently announced the setting up of Information management offices within government departments. With this in mind he suggested that the setting up information officers could be done along the same lines. It was suggested that designation of information officers at different levels should be done and a provision

should be included providing that even in the absence of such a designated person, then an official with the information shall have the duty to disclose this information.

Mr. Lawrence Mute was concerned with the issue of designating officials who have no clout. His question was how the preposition to have public officials in the Bill would deal with the fact that some officials are not empowered to deal with certain information.

Dr. Kindiki agreed that the law should provide an obligation on a person in charge of a docket to disclose information. Mr. Imanyara raised the issue of the authenticity of the information provided and he stated that disclosure of information should be decentralised- at the District level- so as to beat bureaucracy. These structures should be devolved and public information officers designated at each level. A participant also noted that every request to the information officer at whatever level actually binds the whole government to provide this information.

Participants proposed that government should be left to identify internally the official dealing with disclosure of information but there should be an overriding duty on government to ensure that requests for information are dealt with.

Conclusion on Section Five:

- **Place a coercive duty on government to provide a framework for assigning information officers with the capacity and authority to disclose the information.**
- **Include a clause to determine the point at which information becomes conclusive.**
- **Form of request should be left open- telephone, mail, electronic mail etc.**
- **Time limit for processing information sought: The Model Freedom of Information law should be used as a guideline.**

Section 9 of The Model Freedom of Information Law Provides as follows;

Time Limits for Responding to Requests

Section 9. (1) Subject to sub-section (3), a public or private body must respond to a request for information pursuant to section 4 as soon as is reasonably possible and in any event within twenty working days of receipt of the request.

(2) Where a request for information relates to information, which reasonably appears to be necessary to safeguard the life or liberty of a person, a response must be provided within 48 hours.

(3) A public or private body may, by notice in writing within the initial twenty day period, extend the period in sub-section (1) to the extent strictly necessary, and in any case to not more than forty working days, where the request is for a large number of records or requires a search through a large number of records, and where compliance within twenty working days would unreasonably interfere with the activities of the body.

(4) Failure to comply with sub-section (1) is deemed to be a refusal of the request.

- **Reasons as to rejection of the request, name and designation of the official rejecting the request should be given.**

- **If there is no response within the time allocated for response, it shall be deemed a refusal for purposes of appeal.**
- **Severability: Partial disclosure of documents. Found in Section 3 (b)**
- **Fees:**
 - **Waiver for financial hardship to be included as well as a fee waiver if it is in the public interest.**
 - **Access fee should be nominal**
 - **No charge for application and nominal charge for providing the information.**
 - **No Search fee**
 - **Include the provision that if the government fails to provide information within a certain time limit, then all charges should be waived, as is the case in Trinidad & Tobago.**

6. Section Six

The Section deals with exemptions. Ms. Charmaine proposed that Section 5 (1) (b) be imported, as it appears to duplicate Section 6. Section 6(1) should provide a general definition of the words public interest. Public disclosure should impose the duty of accountability and transparency.

The following were proposals of how the section should be improved;

Subsection 2(a) the words ‘international relations’ should be deleted.

Subsections 2(b) and (c) should be retained.

Subsection 2(d) should include the concept of the privacy of public officials. Public officials may be treated slightly different in terms of privacy as compared to the private individuals.

Subsection 2(e) include the concept of trade secrets and copyright materials.

Subsection 2(e)(i) should be moved to the front of the section as a rider to all the exemptions

Mr. Gitobu Imanyara was of the opinion that the entire section is too broad it creates claw-backs clauses. The exemptions listed under Section 6 are adequately catered for under the proposed constitution’s bill of rights. It was his opinion that this section accepts censorship in certain areas such as national security and therefore this is compatible with the ideals of Freedom of Information legislation. He proposed that the language of the Section should be changed. He was of the view that the words public interest should be defined and that refusals should not be based on public interest.

Dr. Kithure Kindiki stated that human rights instruments have in the recent past provide for general limitations. Limitation should be reasonable and acceptable in a democratic society. The test for retaining these exemptions is whether they are justifiable in a democracy; the duty to prove these limitations rests on the authority withholding the information.

Mr. Kanyi Kimondo noted that the provision on limitation in the current constitution creates claw-backs due to the fact that it is too broad. He affirmed that legislation should have some restrictions however the restrictions should not be too broad.

Ms. Charmaine stated that the constitution provides a broad limitation; legislation should therefore provide a comprehensive list to give officials very clear provisions on limitations and at the same time does not create claw-backs clauses. The question that should be asked is the level of harm the disclosure of the information would cause. It is necessary to include

a public interest override in the section to limit the applicability of claw-back clauses. Public interest should override all exemptions even national security issues.

Dr. Kindiki stated that the drafters should reduce the ambiguity. The section might water down everything you intend to achieve by the enactment of the Act. The draft constitution addresses the issue of ambiguity of the limitations quite clearly.

Finally it was the opinion of one of the participants that the section should not extend limitations that are not allowable under international law.

Conclusion on Section Six:

- **Re-write Section 6 to ensure that the right to access information is not watered down and exemptions should not be given preference.**
- **Import and consolidate Section 5 (1) (b) to avoid duplication.**
- **The language of the section should be such that it brings in aspect of human rights, the limitations should be retained but looked at to remove the ambiguity.**
- **Narrow Section 6 (2) (i) as it is too broad.**
- **Drafter should align this section with the various drafts of the proposed new constitution provisions on access to information.**
- **The Section should provide who has the onus to prove the limitation of access to information.**
- **Delete Section 6 (1) and have a public interest override.**

7. Section Seven

The Section should be rephrased to include such words as 'facilitate' so as to enhance the promotion of the right to information. It should provide that public authorities have a duty to keep records. The Section should provide that records should be computerised for purposes of record management.

A Participant was concerned with the wording of Section 7(a); 'such records as are necessary.....who decides what is necessary?' it was proposed that the words 'as are necessary' should be deleted.

Mr. Kanyi Kimondo stated that we must give a leeway for the destruction of information. This however should be in accordance with the law.

Conclusion on Section Seven

- **The section should be reworked to provide that the public authority shall have a duty to facilitate the promotion of the right to information by way of maintaining good records.**
- **The words 'as are necessary' in Section 7(a) should be deleted.**

8. Section Eight

Participants proposed that the section should compel public officials to help the person seeking the information; Section 8(i). Additionally they should be required to take measures to ensure that records requested are indexed.

The Government Draft Freedom of Information bill was termed as is more explicit on issue of officials maintaining records. It was proposed that the drafter should refer to the Government Draft. It was also recommended that the provision be broadened and made more proactive.

Conclusion on Section Eight

- **Rework the section with reference to Section 4 of the Indian Act and also the Government Freedom of Information Bill.**

Section 4 of the Indian Act provides as follows;

(1) Every public authority shall--

(a) maintain all its records duly catalogued and indexed in a manner and the form which facilitates the right to information under this Act and ensure that all records that are appropriate to be computerized are, within a reasonable time and subject to availability of resources, computerised and connected through a network all over the country on different systems so that access to such records is facilitated;

(b) publish within one hundred and twenty days from the enactment of this Act,--

(i) the particulars of its organization, functions and duties;

(ii) the powers and duties of its officers and employees;

(iii) the procedure followed in the decision making process, including channels of supervision and accountability;

(iv) the norms set by it for the discharge of its functions;

(v) the rules, regulations, instructions, manuals and records, held by it or under its control or used by its employees for discharging its functions;

(vi) a statement of the categories of documents that are held by it or under its control;

(vii) the particulars of any arrangement that exists for consultation with, or representation by, the members of the public in relation to the formulation of its policy or implementation thereof;

(viii) a statement of the boards, councils, committees and other bodies consisting of two or more persons constituted as its part or for the purpose of its advise, and as to whether meetings of those

boards, councils, committees and other bodies are open to the public, or the minutes of such meetings are accessible for public;

(ix) a directory of its officers and employees;

(x) the monthly remuneration received by each of its officers and employees, including the system of compensation as provided in its regulations;

(xi) the budget allocated to each of its agency, indicating the particulars of all plans, proposed expenditures and reports on disbursements made;

(xii) the manner of execution of subsidy programmes, including the amounts allocated and the details of beneficiaries of such programmes;

(xiii) particulars of recipients of concessions, permits or authorizations granted by it;

(xiv) details in respect of the information, available to or held by it, reduced in an electronic form;

(xv) the particulars of facilities available to citizens for obtaining information, including the working hours of a library or reading room, if maintained for public use;

(xvi) the names, designations and other particulars of the Public Information Officers; .

(xvii) such other information as may be prescribed; and thereafter update these publications every year;

(c) publish all relevant facts while formulating important policies or announcing the decisions which affect public;

(d) provide reasons for its administrative or quasi judicial decisions to affected persons.

(2) It shall be a constant endeavor of every public authority to take steps in accordance with the requirements of clause (b) of sub-section (1) to provide as much information suo motu to the public at regular intervals through various means of communications, including internet, so that the public have minimum resort to the use of this Act to obtain information.

(3) For the purpose of sub-section (1), every information shall be disseminated widely and in such form and manner which is easily accessible to the public.

(4) All materials shall be disseminated taking into consideration the cost effectiveness, local language and the most effective method of communication in

that local area and the information should be easily accessible, to the extent possible in electronic format with the Central Public Information Officer or State Public Information Officer, as the case may be, available free or at such cost of the medium or the print cost price as may be prescribed.

Explanation.--For the purposes of sub-sections (3) and (4), "disseminated" means making known or communicated the information to the public through notice boards, newspapers, public announcements, media broadcasts, the internet or any other means, including inspection of offices of any public authority.

- **Propose that public authorities be given three months to record information and thereafter require them to maintain the records regularly.**

9. Section Nine

There was a suggest that we should probably work with the existing bodies such as Kenya National Commission on Human Rights as opposed to creating a new body. Mr. Kanyi Kimondo informed the participants that the idea was to create a strong office to be able to police persons who are required to provide information.

One participant was of the view that the Commissioner should sign a performance contract. However several participants raised their concerns on the issue of performance contracts. They were of the opinion that the commissioner should be independent and that the contracts would restrict the performance of the Commissioner.

The Act should provide for the office a commissioner who has the duty to assist the government meet this task of promoting access to information. In terms of implementation and the enforcement it was suggested that we should probably work with a body that has more powerful in terms of working as a tribunal for instance KNCHR

Mr. Lawrence Mute from KNCHR pointed out that there are certain administrative functions that the Commission would not undertake that an individual would be better placed to undertake. The Kenya National Human Rights Commission Act, 2000 provides for quasi-judicial powers that have not been implemented since the rules that are supposed to guide the Commission have not been finalised by the Attorney General. As for quasi-judicial powers the concern is whether you want the Commissioner to be an investigator and the judge?

Conclusion on Section Nine

- **It was agreed that the section should be retained and the qualifications of the Commissioner be reworked.**
- **As concerns the issue of the KNCHR being the body that is mandated to adjudicate matters in the Act it was left to the drafters to decide on an appropriate body after which stakeholders would revisit the issue when validating the Bill.**

10. Section 10

Retain the commissioner and improve on the qualifications of the Commissioner, by rephrasing paragraph 2(a) that provides the person should be a person qualified to be appointed as a judge of the High Court of Kenya.

11. Section 11

It was agreed that the Office of the commissioner should be independent and that the independence of the Commissioner should be defined. It was suggested that a provision should be included to promote budget autonomy to facilitate independence.

The Commissioner should be given some teeth by allowing prosecution powers not necessarily through the court but in way of a tribunal to make certain orders. The Act should specify the functions of the commission and the powers. Ms. Charmaine referred participants to Section 18 of the Indian Right to Information Act 2005, which provides as follows;

Section 18. Powers and functions of Commission -

(1) Subject to the provisions of this Act, it shall be the duty of the Central Information Commission or State Information Commission as the case may be to receive and inquire into a complaint from any person,--

(a) who has been unable to submit a request to a Central Public Information Officer, or State Public Information Officer as the case may be, either by reason that no such officer has been appointed under this Act, or because the Central Assistant Public Information Officer or State Assistant Public Information Officer, as the case may be, has refused to accept his or her application for information or appeal under this Act for forwarding the same to the Central Public Information Officer or State Public Information Officer or Senior Officer specified in sub-section (1) of section 19 or the Central Information Commission or the State Information Commission, as the case may be;

(b) who has been refused access to any information requested under this Act;

(c) who has not been given a response to a request for information or access to information within the time limits specified under this Act;

(d) who has been required to pay an amount of fee which he or she considers unreasonable;

(e) who believes that he or she has been given incomplete, misleading or false information under this Act; and

(f) in respect of any other matter relating to requesting or obtaining access to records under this Act.

(2) Where the Central Information Commission or State Information Commission, as the case may be, is satisfied that there are reasonable grounds to inquire into the matter, it may initiate an inquiry in respect thereof.

(3) The Central Information Commission or State Information Commission, as the case may be shall, while inquiring into any matter under this section, have the same powers as are vested in a civil court while trying a suit under the Code of Civil Procedure, 1908, in respect of the following matters, namely:--

(a) summoning and enforcing the attendance of persons and compel them to give oral or written evidence on oath and to produce the documents or things;

(b) requiring the discovery and inspection of documents;

(c) receiving evidence on affidavit;

(d) requisitioning any public record or copies thereof from any court or office;

(e) issuing summons for examination of witnesses or documents; and

(f) any other matter which may be prescribed.

(4) Notwithstanding anything inconsistent contained in any other Act of Parliament, or the State Legislature, as the case may be, the Central Information Commission or the State Information Commission may, during the inquiry of any complaint under this Act, examine any record to which this Act applies which is under the control of the public authority, and no such record may be withheld from it on any grounds.

There should be clarity on the appeals process. The Act should provide for a review process that should be undertaken internally before a complaint forwards his complaint to the Commissioner.

Mr. Kanyi Kimondo stated that Section 11 (4) is meant to provide for a local remedy before a complaint seeks recourse from the Commissioner. One participant was of the view that we should not assume that government departments have internal reviews systems since this are not in place.

Conclusion on Section Eleven:

- **An internal review process is set up in all government departments whose duty will be to review complaints before they are forwarded to the Commissioner.**
- **Define the power of the Commissioner with reference to Section 18 of the Indian Right to Information Act.**

12. Section 12

The section attempts to create penalties. It was suggested that the appeals process be in form of judicial review both on facts and procedure. One participant proposed that a clause should be included that the burden of proof lies on the person withholding the information.

The drafters should consider providing for penalties for unreasonable delay, falsifying documents, refusal to accept a document. However bonafide officials who give information

that might be classified should be protected to boost the moral of these officials to disclose information.

Ms. Charmaine Rodriguez proposed that the commissioner should be required to make annual reports. The reports should contain information that has been disclosed, reports on the decisions that he has made and also general information, which is in the interest of the general public. This plus other promotional activities such as training of officials should be provided for in the Act. The trainings should be subject to available resources.

Conclusion on Section Twelve:

- **In addition to fines the Act should provide for disciplinary sanctions.**
- **Refer to the Public Officer Ethics Act has provisions on the disciplinary actions taken against officials.**

13. Section 13

Ms. Charmaine Rodriguez referred participants to her critique on the Bill, which has been submitted to ICJ-Kenya and advised that the same guide the drafters. She also requested that the South African human rights initiative be consulted with reference to witness protection.

Participants suggested that the Witness Protection Bill be studied and some provisions be borrowed from it to improve the Section. The Following is a caption of Ms. Charmaine’s Critique of the Draft Bill on the section;

| Protection for Persons Making Public Interest Disclosures |
|--|
| <ol style="list-style-type: none">1. In order to support maximum information disclosure, it is positive that the draft Bill contains specific protection for “whistleblowers”, that is, individuals who disclose information in contravention of the law and/or their employment contracts because they believe that such disclosure is in the public interest. Whistleblower protection is based on the premise that Individuals should be protected from legal, administrative or employment-related sanctions for releasing information on wrongdoing. The inclusion of strong whistleblower protection is important in order to send a message to the public and officials that the government is serious about opening up to legitimate scrutiny.2. Notably however, the current provisions in the draft Bill are extremely tightly drafted and run the risk of being too restrictive in their application. This may reduce their ability to effectively protect whistleblowers. |
| <ul style="list-style-type: none">• Section 13(1) should include a catch-all in respect of types of discrimination by adding after “or the holding of any office” the phrase “or in any other way”.• Section 13(2)(b), while apparently trying to ensure false disclosures are not made in pursuit of monetary gain, could still have the practical effect of removing from the protection of the law legitimate whistleblowers. Although in an ideal situation, a whistleblower will be motivated purely by the public interest, they should not be disqualified from protection just because they also obtained person gain from the disclosure <i>so long as the disclosure was in the public interest</i>. This should be the fundamental test. |
| <ul style="list-style-type: none">• Section 13(2)(c) sets too high a test for whistleblowers in practice. Section 13(2)(c)(i) to take account of the fact that there are many cases where the very person to whom the whistleblower owes an obligation of confidence (ie. their Minister or department head) is complicit in the wrongdoing about which they are concerned. Similarly, Section 13(2)(c)(ii) does not account for |

the fact that whistleblowing may be retrospective, for example where a government employee leaks information about a bad policy decision; the wrongdoer can no longer rectify the harm, but it remains important to blow the whistle to ensure that they are held to account for their wrongdoing.

CHRI recommends that Part IV be reconsidered and redrafted to ensure that it does not impose unreasonable requirements on whistleblowers before protection is extended.

Insert new: Part V – General

3. Officials responsible for making decisions regarding disclosure of information may legitimately be concerned that wrong decisions on their parts, that is, decisions which result in the disclosure of information that their superiors believe should not have been released, could result in action being taken against them. Similar concerns could be harboured at an institutional level.

In order to encourage openness and guard against this possibility, CHRI recommends that a new provision be included to protect officials/bodies acting in good faith to discharge their duties under the law. Some model provisions are listed below:

- Section 89 of the South African *Promotion of Access to Information Act 2000*

No person is criminally or civilly liable for anything done in good faith in the exercise or performance or purported exercise or performance of any power or duty in terms of this Act.

- Section 38 of the *Trinidad and Tobago Freedom of Information Act 1999*

(1) Where access to a document has been given in accordance with the requirements of this Act or in good faith, in the belief that it was required to be given in accordance with this Act, unless malice is proved –

- (a) no action for defamation, breach of confidence or infringement of copyright may be brought against the public authority or against the responsible Minister, or an officer or employee of the public authority as a result of the giving of access;*
- (b) no action for defamation or breach of confidence may be brought, in respect of any publication involved in the giving of access by the public authority, against –*

- (I) any person who was the author of the document; or*
- (II) any person as a result of that person having supplied the document or the information contained in it to the public authority;*

- (c) no person shall be guilty of an offence by reason only of having authorised, or having been involved in the giving of the access.*

(2) The giving of access to a document, including an exempt document, in consequence of a request shall not be taken for the purposes of the law relating to defamation, breach of confidence or copyright, to constitute an authorisation or approval of the publication of the document or its contents by the person to whom access is given.

(3) Nothing in this Act affects any privilege, whether qualified or absolute, which may attach at common law to the publishing of a statement.

4. Section 14 should be redrafted taking into account the recommendations above.

Conclusion on Section Thirteen:

- **The words ‘Part II’ are replaced with ‘Part IV’.**
- **The drafters should refer to Ms. Charmaine’s critique of the ICJ-Kenya Draft Bill.**
- **Consult the South African Human Rights Initiative on witness protection.**
- **Study the Kenyan Witness Protection Bil.**

Section 14

Mr. Odhiambo Makoloo stated that the Minister should be required to make regulations in consultation with the commissioner. He referred participants to Section 147 of the Environmental Management and Coordination Act.

Section 15

The Section lists several laws which are ‘to be amended’, but fails to actually amend them or set a timetable for their amendment. In itself, this provision therefore appears to have little practical use. The section was to be dealt with by Mr. Gitobu Imanyara who was to present a paper on *Key Areas Hindering Access to Information*.

SESSION TWO:

Facilitator: Anne Muthoni

Ms Muthoni welcomed participants to the final session of the workshop and introduced the presenter Mr. Gitobu Imanyara to the participants.

Freedom of Information Law in Kenya: Key Areas Hindering Access to Information by Gitobu Imanyara

Mr. Imanyara began by laying emphasis on the need for a freedom of information law and stated his paper was more of an audit on the current legal regime in Kenya with the aim of harmonising these laws with a freedom of information law. He stated that his presentation sought to address the issues relating to access to information as a right in the context of the of the proposed new constitution and the current constitution. He recalled that when President Mwai Kibaki opened the International Press Institute’s (IPI) World Congress in Nairobi on 22nd may 2005, he promised a Freedom of Information Act so as to bring the legal framework inline with current realities.

He mentioned that the proposed new constitution had several provisions on the right of citizens to access information including Article 48, 49 and 51. Under Schedule 5 setting out legislation to be enacted by Parliament following the coming into force of the proposed new constitution, the Bill of Rights provisions are to become part of the enforceable law within three years. In particular Parliament will be expected to pass the legislation to facilitate freedom of the media within one year and access to information within six months. He however noted that the coming into force of this legislation may be delayed and under Article 287 of the proposed new constitution gives parliament leeway to extend the period by up to one year. Where Parliament fails to beat the deadline, the Bill published by the Attorney General and tabled in Parliament, “shall be deemed to have been enacted.” Mr. Imanyara stated that this was a fundamental departure from the principles of democracy. He opined that the new constitution sought to by-pass Parliament in its lawmaking duty by purporting to confer legislative powers to the Attorney General. He pointed out that the provisions under Article 287 could be restricted under Article 34, which sets out provisions on the limitation of the Bill of Rights.

The current constitution does not have express provisions relating to the separate head of opinions, expression, media and access to information. Freedom of expression in the

Constitution comprises three elements: the freedom to hold opinions, freedom to communicate ideas and information and the freedom from interference with correspondence. However the freedom to communicate ideas and information guaranteed under Section 79 has been held by the courts to be wide enough to embrace not only in the printed press, but also radio, television and other modes of communication.

The proposed new constitution has been lauded as being better than the current constitution due to its specific mention of freedom of expression, freedom of the media and access to information. However Mr. Imanyara argued that the courts have already recognised this freedom and quoted a Court of Appeal judge, Justice Omolo as stating that Section 79 of the Constitution merely recognises freedom of expression but it does not create it. The court also noted that the right to speak was granted by God himself.

In Mr. Imanyara's opinion, the proposed new constitution did nothing more than codify the judicial interpretation of the law. He added that the court recognises that even when a freedom is not specifically stated in the Constitution, it can be inferred, as the Constitution does not create human rights, it merely recognises them. In addition to this, he was of the view that the *Njoya* judgment was not progressive. Justice Ringera stated that the scheme of fundamental rights envisaged in the current constitution did not include community protection, only individual rights, in effect narrowing the scope of application of the Bill of Rights. He stated that Justice Ringera's assertion did not appear to have been aware of the definition of 'person' contained in the current constitution. This definition is as follows: "Persons include a body of persons corporate or unincorporated."

On Media Freedom, Mr. Imanyara stated that the proposed new constitution's provision on access to information does not include enough safeguards for the media. The proposed new constitution does not contain a constitutional prohibition against the promulgation of laws derogating from the essential character of freedom of the press. The current constitution does not adequately protect media freedom and access to information. He stated that this failure to adequately protect freedom of the press through constitutional means translates into lack of protection as the judiciary in the past has failed to guard against excesses of the executive and have often been tools of the government in curtailing rights and freedoms. He decried the fact that the supremacy of the Constitution over statutes has not been upheld by the judiciary. He cited a 1992 case filed by the Attorney General where the court granted the Attorney General a permanent injunction against the *Society* on grounds of defamation against the President. The *Society* magazine had published a picture of President Moi on its cover and the following words printed on the cover: "*The Cost of Killing Ouko*" and "*Kibaki Wants Moi Out*". The Attorney General filed the suit against the magazine claiming that the magazine was replete with falsehood and distortions intended to bring into hatred and contempt and to excite disaffection against the president and the government of Kenya. Mr. Imanyara stated that the court granted an unduly harsh remedy against the magazine and was of the opinion that the case represents extreme judicial deference to state authority and the elevation of the presidency to a position above any criticism or censure at the expense of guaranteed freedoms. He underscored the fact that media independence is dependent on judicial protection of fundamental rights and freedoms and the upholding of the principle of constitutionalism. He emphasized that giving the right to the media is not enough. The High court has been part of the executive control of the citizenry and has used judicial authority to trample on the rights of citizens. It is the recognition of this excessive authority that informed the struggle for a new constitutional order. He however said that the proposed new constitution fell short of addressing this problem. The current constitution states that

the executive authority 'shall vest in the President, and *subject to this constitution*. The proposed new constitution on the other hand expressly elevates the presidency to a level above the constitution. Article 141 (b) states that the 'Executive authority of the Republic is vested in the President'. The limitation '*subject to the constitution*' has been eliminated.

Mr. Imanyara then touched on Kenya's international treaty obligations. He referred to Article 19 of the International Convention on Civil and Political Rights (ICCPR) as recognising the right to seek and impart information. He noted that Kenya had ratified this Convention as well as the African Charter on Human and People's Rights and was thus bound to implement the provisions found therein. However unlike Article 19 of the ICCPR, Section 79 of the Kenyan Constitution failed to specifically protect 'information and ideas of all kinds'. He asserted that both the current constitution and the proposed new constitution fell short of the right to freedom of expression under the ICCPR and the Africa Charter. The language that refers to the media should reflect the language used in the international treaties. This is not so in the Proposed new constitution. The motive of the passage of the new constitution is unfavourable to the freedom of the media and access to information. The constitution purports that legislation shall be passed six months after the enactment of the constitution. He stated that with the current trend of the government to pass legislation there is no likelihood that this bill would be passed.

He dwelt briefly on the powers of search of newsroom as provided for under Kenyan legislation. These provisions have been abused. He looked at the issue of sedition the provisions with regard to sedition in the Penal Code are still in place and will continue to be in place after the enactment of the constitution. He took cognisance of the fact that with regard to criminal libel the provisions have not been repealed. The recent case of the arrest of the Kenya Times journalists shows that this provisions are still be abused by the current government. The detention laws are still in place and are contained in the current constitution. He was of the opinion that there was a need to analyse the laws have been used in the past to inhibit access to information with the objective of amending or repealing them.

Mr. Imanyara went on to discuss issues to be addressed in FOI legislation:

The Judiciary- He stated that implementation of FOI principles depended on the independence of the Judiciary as well as the judicial interpretation of laws that restrict access to information.

Security Issues: He mentioned that issues such as emergency powers, sedition laws severely curtail the culture of openness and the right to access information.

In concluding, Mr. Imanyara while lauding the efforts of the ICJ in drafting an FOI Bill was of the opinion that more work could be done on it. He felt that the ICJ Bill could be wider in scope and capture more effectively the freedom of expression as well as the right to information. The Bill does not facilitate the right to information. The Bill should not be pegged on the constitution. He suggested that a provision should be made in the FOI Bill for a schedule that recommends the repeal of the Acts that inhibit the right and provide the specific sections that need to be repealed. The schedule should also require that the Acts and sections identified should stand repealed once the Act comes into force. He pointed out that the need for an FOI law was greater than the need for a new constitution and stated that more effort should be focused on enacting the FOI law. In this regards, he asserted that the FOI law should capture the basic principles of freedom of information. He concluded by noting that in making a case for the justification of freedom of information the president

had acknowledged the need for the same. The right to information is recognised as underpinning all this rights in the United Nations charter.

Plenary Session

Following the above presentation, a number of comments and questions were raised. Mr. Mak'ooloo noted the need for intervention at two levels in order to ensure the enactment and implementation of the FOI Bill. These two levels are repeal and amendment of existing legislation that does not further the aims of FOI legislation.

A participant raised a query over how these amendments were to be done. Was each Act to be amended individually or was the use of a Miscellaneous Amendment Act preferred? In answer, Mr. Imanyara stated that he was in favour of a constitutional amendment provision stating that all laws contrary to FOI and right to information principles were void. However he doubted the possibility of this constitutional amendment being passed in the parliament as the ruling party does not enjoy a clear majority in the House and would find it difficult to garner enough support. In Mr. Imanyara's view, a better approach would be the appending of the Statutes to be amended or repealed to the FOI Bill and the passage of the entire Bill at one go. He proposed that consultation be made with the Parliamentary Committee on Administration of Justice before the introduction of the Bill to Parliament for deliberation.

Mr. Henry Maina noted the need to garner support for the RTI (right to information) campaign from the media. He stated that a major challenge would be to get the media to focus more on the RTI campaign rather than the new proposed new constitution. Ms Rose Lukalo in this respect stated that in addition to media support, support from organisations such as women groups, trade unions and the Bar association was needed.

Strategies for the Promotion of the Right to Information

The session on strategies was revisited. Ms. Rose Lukalo was of the view that we need to expand the campaign beyond media owners who she connoted as persons with the commercial interest and therefore might not been the best people to sell the idea to. We should be targeting the journalists would are the people who reach out to the society. The stronger the law and the people targeted will determine the success of the campaign for the right to information. She was of the opinion that Maendeleo ya Wanawake should be included as they represent a big chunk of the citizenry.

Mr. Gitobu Imanyara advised that Parliament is in session therefore if the Bill is presented within two weeks to Hon. Paul Muete the bill will be presented to Parliament, as this is the opportune time.

ICJ-Kenya should contract competent drafters to redraft the ICJ-Kenya after which the draft should be presented in a forum for validation.

Ms. Priscilla was called on to present the deliberations of a committee that was formed the previous evening to come with strategies that would guide the debate. Below is an outline of the presentation that was titled Swot Analysis.

SWOT ANALYSIS

S –Need partners/Bill/Goodwill in government/ Civil Society

W- Bad Bill (government)/Lack of strategic positions

O- Bad Bill (government)/Review process

T- Bad Bill (government)/Bad government representation

STRATEGIES

1. Find a champion in Parliament; Write a letter to the Minister calling upon him to present the Bill to parliament
2. Legislative Strategy: Pursue the option of tabling a Private Members Bill through Parliament.
3. Legislative Strategy II- Input into Government Bill
4. Publication of Government (amended) Bill; it was agreed that this would not be advisable as the draft is bad and we should not be pushing for the publishing of a bad Bill.
5. Media Participation
6. Public participation/ awareness
7. Law Reform Commission-request them to refer the Government Freedom of Information Bill when presented to them.

Participants suggested that as one of the strategies the Freedom of Information Network should use donors to pressure the Government since it has in the as witnessed scrummed to donor pressure.

It was the hope of all the participants that the legislative drafters at the Attorney General's will take into consideration the memorandum of views collated by ICJ-Kenya in a consultative workshop together with critiques from other sources. It was recommended that Civil Society organizations should also give their ideas at the Committee stage in Parliament.

Additionally it was suggested that the network should try to engage the Government to actually buy the ICJ-Kenya draft and own it. This would be achieved by having courtesy calls to the Minister or the Director of the Information and Communication to own the ICJ-Kenya Draft Freedom of Information Bill.

Mr. Odhiambo Makoloo proposed that other Parliamentary committees, other than the Committee on the Administration of Justice. He proposed the parliamentary Committee on Environment Policies. He stated that his organization works with the said committee and that he would be willing to sell the idea to them. He also requested other participants who work with different committees to lobby all these committees by tying the importance of the Bill to the sectors the Committees represent.

It was proposed that the ICJ-Kenya Draft Freedom of Information Bill tag be dropped and use the words Freedom of Information Network Bill and have the network own the Bill.

Mr. Kanyi Kimondo proposed that we should into the option of working with members of ICJ-Kenya who might have sympathizer of ICJ [Hon. Kiraitu Murungi, Hon. Mirugi Kariuki, Hon. Kibutha Kibwana].

Pressure should be built up from the grassroots by selling the concept to the society. This can be achieved by tying the concept to some practicable to the society for example the Constituency Development Fund. Have people demand for information on the Fund. Ms. Ann Muthoni stated that ICJ-Kenya through the judicial Programme intends to file test suits in court to put pressure and for the interpretation of the right. Challenge the retrogressive laws in the court.

One participant was of the view that a courtesy call to the president should be made since he has acknowledged the need to have the right to information. A letter should be drafted to that effect.

Finally it was agreed that a time frame should be set so as to ensure that the momentum to clamor for the right to access information does not die out. It was acknowledged that the opportune time is now. A Committee was formed that would be required review the strategies and come up with a way forward. Participants were urged to start grassroots lobbying and use their contacts to the sell the concept and make it a national agenda.

The Following is a list of the Committee members that were selected to review the strategies and come up with a way forward.

Committee Members

1. Priscilla Nyokabi-coordinator
2. Kanyi Kimondo
3. Gitobu Imanyara
4. Peter Musyimi
5. Odhiambo Makoloo
6. Henry O. Maina
7. Rose Lukalo
8. Ekitela Lokaale
9. Jack Muriuki
10. Esther Kamweru

The First committee meeting to be held Tuesday 11th October 2005 at the ICJ-Kenya at 2.00 p.m. Ms. Rose Lukalo was requested to start the un-official process. She was requested to find out on the status of the Government Freedom of Information Bill.

Closing Session

Mr. Elijah Ileri, ICJ Kenya Treasurer and council member, closed the workshop with a vote of thanks to all the participants for honouring ICJ Kenya's invitation to the workshop. He acknowledged their active participation, which he said, made the workshop a success. He in this respect hoped that participants benefited from the workshop and that they would endeavour to put into practice what they had learnt. He thanked the various presenters for their well researched papers and insightful discussions.

In his conclusion, he encouraged participants to continue partnering with each other in the promotion and respect of human rights and particularly the freedom of information.

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