CHAPTER FOUR

CONSTITUTIONAL DOMESTICATION OF THE RIGHT OF ACCESS TO INFORMATION IN AFRICA: RETROSPECT AND PROSPECTS

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ABSTRACT

The right of ATI, while a human right in itself, is most effective as a right used for the realization of other socio-economic rights. In discussing the nature and prospects of the right to information, this paper states that the right of ATI challenges African governments to see the right as a tool that enables its citizens in their pursuit of social, political, and economic equality, pursuits to which socio-economic rights are central. This point is illustrated in the section dealing with the usefulness of ATI in realizing socio-economic rights. The paper also focuses on South Africa and Kenya as specific case studies in discussing the domestication of the right to information in African constitutions. Both countries protect the right to information as a self-standing right in their respective constitutions, unlike in other jurisdictions where this right is implied by the freedom of expression right. The author explores how both constitutions, unlike those available internationally, extend the right not only to government-held information but also to private entities. He argues that the South African and Kenyan constitutional right presents a unique way to ensure accountability and transparency within the private sector.

INTRODUCTION

With the advent of constitutional democracy in the last two decades across most countries in Africa, the adoption of progressive constitutions in most countries promised to transform the continent and promote transparency in African governments. While the achievement of this promise has not been forthcoming, there are nevertheless gains to be recorded in the pursuit of transparency in Africa. To give effect to constitutional rights, constitutional democracy has to exist first because the judicial right to information is largely irrelevant as a solution to political problems in authoritarian or undemocratic states. Academic texts have
largely focused on freedom of information laws without consideration of the alternative: the constitutional aspects of the right (Darch & Underwood 2010; Calland & Tilley 2002). It is against this background that this paper focuses solely on the right to information as a constitutional right and evaluates how the right has been domesticated and the role and prospects of this right in achieving transparency in Africa.

**Nature and Relevance of ATI in Opening up Governments in Africa**

The right of ATI and the concept of freedom of information are universally accepted as human rights, but the question of what kind of human rights they are has been the subject of academic debate. Darch & Underwood (2010: 130) question whether the location of the right of ATI in a wider human rights' framework is because it is genuinely some kind of human right. They argue that the assertion that the right to information is indeed a human right has often been made without a well-developed theoretical argument to support this (ibid.). Traditionally, constitutional rights are usually classified as civil and political rights on the one hand and socio-economic rights on the other. Civil and political rights are perceived as imposing negative obligations of restraint and non-interference from government, while socio-economic rights impose positive duties that demand the duty to respect, protect, and fulfil the rights.1 The right to information is traditionally understood as a civil and political right, which has great implications for the enforcement of socio-economic rights. However, Klaaren has postulated that ATI is a socio-economic right. He argues that there is more to the right to information than just facilitating the realization of other rights. According to Klaaren, the socio-economic dimension of ATI is a right to access a mechanism to access information which then requires government to take reasonable steps to promote its realization through creating opportunities for access to information technology (Klaaren 2002).

There are four widely accepted interpretations of rights.2 These are rights as claims, liberties, powers, and immunities. The holder of a right as

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1 The duties to respect, protect, and fulfil socio-economic rights are well established under international law and will be discussed further below in this paper.

2 Wesley Hohfeld published the Fundamental Legal Conceptions as Applied in Judicial Reasoning, and other Legal Essays (New Haven, CT: Yale University Press, 1919). His work is regarded as the clearest exposition of the different forms that rights can take and the correlative duties or obligations that they generate.